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PROCEEDINGS ON 16 SEPTEMBER 2026

CHAIRPERSON: Good morning, Mr Chaskalson, and good morning, Ms Pop. Thank you.

ADV CHASKALSON SC: Morning, Chair. Morning, Commissioners. Morning, Ms Pop.

MS POP: Good morning.

ADV CHASKALSON SC: Ms Pop, you should have in front of you a file which has your statement and some Annexures to it and maybe if we can start by ...[intervenes].

CHAIRPERSON: The oath.

ADV CHASKALSON SC: Okay.

CHAIRPERSON: Will you be swearing or affirming?

MS POP: Affirming.

CHAIRPERSON: Oh. Do you affirm that the evidence you are going to give is the truth, the whole truth, nothing but the truth. If so, please say, I do.

MS POP: I do.

LAURA POP (affirms)

CHAIRPERSON: Thank you.

ADV KHUMALO SC: Mr Chaskalson, I am going to impose on you. As you know, we have students that watch the Commission and we have the public that watches the Commission. In terms of the stream, just very briefly tell them where we are, because yesterday we said we are starting with JMPD, so that they are not lost and they think

this is another JMPD witness. Thank you, sir.

ADV CHASKALSON SC: Ms Pop, what can you tell us about the Johannesburg Municipal Police Department? [Laughing] No, unfortunately, we are jumping around a little bit to accommodate the availability of Evidence Leaders and also witnesses. But Ms Pop is not going to speak about the JMPD at all. She is going to speak about international experiences of extraordinary, I do not want to say extraordinary vetting, extraordinary integrity evaluation of existing officials within criminal justice institutions in, for want of a better description, moments of crisis of legitimacy of those criminal justice institutions and she has a broad range of experience of what other countries have done in cases where institutions of their criminal justice system have been compromised.

There has been a crisis of popular legitimacy and they wanted to move forward with a new start on the basis of almost a cleansing of the system. I hope I have not butchered what you are planning to speak to, but you will have the opportunity to frame it more precisely in due course.

And we will be jumping around. Tomorrow we will be dealing with Correctional Services. On Friday, the Chair of the Public Service Commission is going to be coming to talk about more longer term issues of institutional reform

and correction as opposed to Ms Pop's area of expertise which is a once off extraordinary process. But after that, Ms Pop, maybe if we can just start by going to page 35 of your statement and can you confirm that that is your signature at the foot of page 35?

MS POP: Yes, it is.

ADV CHASKALSON SC: And can you confirm that the statement represents your *bona fide* opinions on the matters that it addresses and whether issues of fact that you address there are to the best of your knowledge, true and correct?

MS POP: They are true.

ADV CHASKALSON SC: And then maybe if we can just discuss, explain the structure of this file. Your statement ends at page 35, but then there are several Annexures. If you can start just describing what Annexure 1 is from page 36, because we will be moving between the statement and the Annexures once we get into your evidence, so just briefly describe what Annexure 1 at page, from page 36 is.

MS POP: Yes, so in Annexure 1, I describe in detail the background and experience with extraordinary integrity evaluation measures in several countries, some in more detail than others. So they include Kenya, Albania, Moldova, Ukraine, Bosnia and Herzegovina, Kosovo, Poland, Serbia and Slovakia. In Annexure 2 ...[intervenes].

ADV CHASKALSON SC: Sorry, Annexure 2 just for the Commissioners' convenience is from page 74.

MS POP: In Annexure 2, I look at general themes in relation to the challenges experienced in the implementation of extraordinary evaluation measures that are covered in Annexure 1 and I point to lessons learned from these country experiences.

ADV CHASKALSON SC: And then Annexure 3 at page 101.

MS POP: In Annexure 3, I look at the, at important international law opinions and judgments of the European court on human rights in relation to these extraordinary evaluation processes as well as judgments of the European court of human rights and opinions of the Venice Commission.

ADV CHASKALSON SC: And can you just explain to the Commissioners what the Venice Commission is?

MS POP: Ja, the Venice Commission, its official title is the European Commission for Integrity through Law and it is a Council of Europe advisory body on constitutional law. So, I can maybe provide more details. So, countries that are members of the Council of Europe, so these are mainly Western and Eastern European countries, can seek the opinion of this body of distinguished constitutional experts when they deal with issues of reform of the judiciary, for

example, or electoral law.

ADV CHASKALSON SC: And this is a bit of a fly, but do you know what South Africa's status is in relation to the Council of, in relation to the Venice Commission?

MS POP: It is not a member of the Venice Commission.

ADV CHASKALSON SC: But does it have a form of observer status?

MS POP: I do not know.

ADV CHASKALSON SC: I am told it does.

CHAIRPERSON: What I do know, though, is that they also, that is the Venice Commission, they also collect what they consider to be judgments of particular importance from various countries all over the world and I do know that they have taken some of the Constitutional Court, some judgments of the South African Constitutional Court. And what courts from all over the world also do, including the South African Constitutional Court, is to contact them when there is a novel issue on constitutional matters to find out what they have in their database.

ADV CHASKALSON SC: Chair, at the risk of becoming a witness, South Africa is one of two non-European countries that has a form of observer status at the Venice Commission. But the other piece of information that I was tickled to learn about was that, and I think most South African lawyers will be interested to learn about, is that the

Venice Commission funded the setting up of SAFLII, which is the electronic database of all South African reported judgments. So we have the Venice Commission to thank for that.

ADV KHUMALO SC: The other African country, you said South Africa is one of two that have observer status.

ADV CHASKALSON SC: I think the other is the Palestinian Authority.

ADV KHUMALO SC: Okay ...[indistinct] [cross-talking].

ADV CHASKALSON SC: Not an African country, two non-European countries. I think the United States was at one stage. South Africa is not a member. It has some form of observer status. I think the United States also at one stage had that, but it no longer does. Then from page 104, there is Annexure 4 and can you briefly describe what is in Annexure 4?

MS POP: The Annexure 4 contains a list of references of links to legislation on extraordinary evaluations, articles, judgments that are referenced in the written statement.

ADV CHASKALSON SC: Now I realize, do you have a white file there? If you can go to page 117, because the laws that you sent us through late yesterday have been put into that file as annexures. So if you go to page 117 of that file, and if you can just identify what Annexure 5 is.

MS POP: Yes, the Annexure 5 contains the vetting of

Judges and Magistrates Act from Kenya, so the legislation on extraordinary evaluation from Kenya.

ADV CHASKALSON SC: And Annexure 6 is at 134.

MS POP: It includes the Moldovan law on external evaluation of judges and prosecutors.

ADV CHASKALSON SC: And what was that law?

MS POP: So this is one of the laws underpinning the extraordinary evaluation mechanism in Moldova.

ADV CHASKALSON SC: And then 150 is Annexure 7.

MS POP: Yes, this is a translation of the legislation of the law on the establishment of the High Anti-Corruption Court of Ukraine that deals with the selection process that includes integrity evaluation and professional ethics for specialized anti-corruption judges in Ukraine.

ADV CHASKALSON SC: Thank you. If we can now go back to your statement and you begin your statement by essentially setting out who you are and what your credentials are. Can I ask you to take the Commission through paragraphs 1 to 9.

MS POP: Yes.

> "I am a Senior Financial Sector Specialist with the World Bank and I am also a member of the Stolen Asset Recovery Initiative. The Stolen Asset Recovery Initiative is a partnership between the

World Bank and the United Nations Office on Drugs and Crime. I lead anti-corruption, anti-money laundering, and asset recovery programs at the moment in Southern Africa, South Asia, and Eastern Europe and lead research projects on anti-corruption issues, in particular financial disclosure systems or asset declaration systems for public officials. I hold a Bachelor of Arts from Princeton University and a Master of Arts from Harvard University. I have worked as an anti-corruption expert at the World Bank for 17 years. I led or have been a member of World Bank anti-corruption, anti-money laundering, and asset recovery programs in a number of countries, including Burkina Faso, Cambodia, Georgia, Guinea, Indonesia, Kazakhstan, Kuwait, Kyrgyz Republic, Laos, PDR, Liberia, Moldova, Mongolia, Philippines, Romania, Sierra Leone, South Africa, Sri Lanka, Uganda, Ukraine, Uzbekistan, Turkmenistan, and Zambia."

ADV BALOYI SC: Can I just ask, with these countries, these anti-corruption initiatives or programs that you run, do you do that with governments?

MS POP: Yes, so these engagements are based on requests from different parts of the government related to, so it can, in some countries I have worked on anti-corruption and anti-money laundering, in some other countries just on anti-money laundering. So it depends also on the topic, who makes the request. Sometimes the request comes from independent bodies, investigative bodies, or prosecutorial bodies, but in the majority it is governmental entities like the Ministry of Justice, for example.

ADV BALOYI SC: Maybe more specifically, with South Africa, does it work with government, and if it is government, which agencies or departments?

MS POP: So, in South Africa, I also had a colleague who presented a little bit about, from the World Bank, who presented on our work here. We have worked with institutions that deal with prevention framework, so like DPSA, also with the Department of Justice on legislative reforms.

ADV CHASKALSON SC: If you can pick up at paragraph 4.

MS POP: Thank you.

"I provided advice on legislative reforms

to strengthen financial disclosure systems, criminalisation of money laundering, criminal and civil confiscation regimes, reform of institutions responsible for preventing, investigating, prosecuting, and adjudicating corruption and institutions responsible for investigating economic crimes and customs, so the customs services. I have led programs delivering capacity building to financial disclosure practitioners and to investigators, prosecutors, and judges on good practices in international cooperation, domestic cooperation, and strategically approaching complex money laundering and corruption cases in order to ensure asset recovery from foreign jurisdictions. I have also supported global asset recovery initiatives, including the Global Forum on Asset Recovery and Global Forum on Asset Recovery Action Series and I am the co-author of several publications on financial disclosures."

I will not read all the names, but these are

publications that focus on different aspects of the financial disclosure system, from electronic filing to verification to public access and sanctions.

ADV CHASKALSON SC: Maybe if we can just emphasise paragraph 9. Sorry, if you can go to paragraph 9.

MS POP: Yes.

> "So, this statement is furnished in my personal capacity and reflects my expert opinions in relation to implementation of extraordinary integrity evaluation measure as a method of cleansing and resetting law enforcement institutions that have been compromised to the extent that they no longer carry public trust."

ADV CHASKALSON SC: Now, in paragraphs 10 to 12, you set out in some ways the problem that extraordinary integrity evaluations are designed to address and maybe if you could just describe that problem. You know, if you want to do it in your wording in paragraphs 10 to 12, that is fine. If you want to just add lip, that is also fine. What is the issue? Why do countries need extraordinary integrity evaluations?

MS POP: So what we have seen in our work in several of the countries that I mentioned earlier is that the issue of

capture, infiltration of criminal justice institutions is not an isolated one, unfortunately and this is an issue that happens, you know, across different countries, different regions. And when these situations happen, I think the, you know, you see that the first reaction, also because it is the easier reaction, is to start with minor tweaks, so, to go to criminal investigations or disciplinary investigations using some of the bodies that are already there.

And what happens is that, you know, in some countries, either they tried this or, you know, sort of they saw this before it even happened, that these measures would not be sufficient, because sometimes the bodies that are responsible for ensuring disciplinary measures can be captured themselves, or their approach and their practice does not really match the challenge.

Other issues is that in many countries, the issues of capture are also coupled with issues around the length of time, the delay it takes to investigate and prosecute and adjudicate corruption cases or other type of, you know, money laundering cases and so on. So, those are not the right tools to deal with an issue that does not cover just one, two or three, maybe even 40 people, but an issue that needs to be solved at scale.

So, in, you know, I mean, you know, speaking about the challenges is always easy and you know, you also have

the issue in a number of jurisdictions that you do not even have the legal instruments to deal with the issue of variations of wealth that is not justified when you have, when there is no link with a criminal act or, you know, conviction for a criminal act. So, in these circumstances, several countries have, you know, reached the conclusion that they need to adopt a different approach and they started looking at these more sort of extraordinary mechanisms that are a little bit of a medicine of last resort to deal with these challenges.

And the objective of these mechanisms is to, first of all, restore trust in these institutions, but also make them effective and to be able to weed out or to dismiss the individuals who have integrity issues, and then but also confirm criminal justice officers who have integrity, because, I mean, this is, you know, it is also perhaps something very obvious that in many countries, you have a lot of honest and hard-working criminal justice officers, but they are sort of pulled in the same group with people without integrity.

ADV CHASKALSON SC: Thank you. From paragraphs 13 to 15, you essentially give an outline of what your statement addresses. We have anticipated some of that with a description of the annexures and we will, you know, we are going to get your statement, so I do not need you to repeat

that, unless there is anything that you want to highlight in those paragraphs.

MS POP: I do not. There is not anything in the introductory part that I think requires more explanations. There is, with your permission, I would just like to add one point from the introductory part, which I should have added earlier since we are talking about the Venice Commission, but I think the importance in these mechanisms to have, to really protect also the rights of the people who undergo these mechanisms, to really have a fair balance between the public interest, to have, you know, these institutions clean and effective, but also to protect the rights of the individuals that undergo through these processes as well. And I think that is the element that distinguishes this experience that we are going to talk about from just the very cursory process in which you just dismiss everyone and then ask everyone to get reappointed. Thank you.

ADV CHASKALSON SC: Then, you then move to the case studies and it may be useful for the case study discussion of your statement to be based on the annexures where there is a bit more detail. So I am going to ask you to turn to page 36 where you start addressing the Kenyan example in some detail, and your first paragraph is to situate it in a historical context, and so maybe if you can just address what you set out in paragraph 1 on page 36, how did this

issue arise in Kenya?

MS POP: Before speaking about Kenya, just as a matter of perhaps background, and I should have taken the opportunity you gave me earlier to explain this. The research that I will, you know, present today is research that was compiled as far as I know for the first time even for the benefit of this process, because a lot of this, some of these mechanisms are happening now, so they are live events to a certain extent.

So this is, you know, a first effort to bring these different experiences that even happened at different times, even different countries, to bring them together and really try to filter the lessons learned, because as these mechanisms have evolved in the past, they were even designed with very little experience from other countries. So it was, you know, a little bit more intuitive about which could be the challenges and the problems, but I think now we are in a better situation because we have some more information. And then I, you know, so starting with Kenya, which is ...[intervenes].

ADV CHASKALSON SC: So, maybe before we start with Kenya, if one looks at the annexures, Moldova and Ukraine are much heavier than the others and I understand that has got to do with your own personal experience. So can you maybe explain that?

MS POP: Sure. The experiences of Moldova and Ukraine are experiences in which I think myself personally and, you know, my colleagues at the World Bank have had sort of, you know, have been closer to. I mean, one of the reasons is because I have been working on this anti-corruption reforms in these countries for at least 10 years and then we have also provided in some cases comments and advice on some of the legislation, but also sharing between countries, for example, from Ukraine to Moldova, some of the lessons learned from the processes in the other country.

So in the, you know, in the presentation of these experiences, in some cases, there is also the element of having the personal experience of talking with the members of these Commissions and just watching more closely how they operated. In the case of Kenya and Albania, it is based more on, let us put it, more of a desk review of the experience.

So this is, this also explains sort of even the size of the country examples. And I think it is also, and we can, this is something to discuss later, even the design affected why, you know, there is a lot of Ukrainian examples for, you know, because the evaluations were designed in a completely different way.

ADV CHASKALSON SC: Thank you. With that, can we then begin on Kenya and the history that gave rise to

Kenya.

MS POP: Yes. So the Kenyan extraordinary evaluation system, which in the Kenyan context was called a vetting system, emerged out of the 2010 Constitution, and the origin of the Constitution was also the post-election violence of 2007/2008. The first step in this process was the adoption of the Constitution and then the adoption of the Act that specified the details of the vetting for judges and magistrates. The, sort of the earlier context for this and why there was this focus on, you know, the vetting of judges and magistrates was the, I think, concerns from the legal community, civil society.

I think prior to this period, there had been a delegation of commonwealth judges who looked at the challenges in the Kenyan judicial system. So it did not come out of the blue. There had also been processes earlier on related to so-called radical surgery where a lot of judges and magistrates were forced to resign after a Commission collected a lot of information about alleged integrity violations.

So that, with that origin, in 2011, the law on the vetting of judges and magistrates was adopted, which created the judges and magistrates vetting board and this board included nine members, six Kenyans, three lawyers and three non-lawyers, and three foreign judges from

commonwealth jurisdictions. And among the, so the commonwealth judges included either serving or retired judges. There were superior court judges. Some of them were former or retired chief justices. So, and the representatives in this sort of group of three over the years were serving or retired judges from South Africa, Zambia, Ghana, Uganda, Tanzania and Sri Lanka. There is ...[intervenes].

CHAIRPERSON: So does it mean the commonwealth judges served successively, perhaps, because you have more than three countries there?

MS POP: Exactly.

CHAIRPERSON: All right.

MS POP: So some of them, my understanding is, you know, some of, not all of them stayed for the whole duration of the panel's work.

CHAIRPERSON: Okay.

MS POP: So, and there was a South African retired Constitutional Court judge who was a member of this vetting board, Judge Albie Sachs. So, in these panels, the full board was 9, and they worked in panels with each category being represented in the panel.

I had recently sort of watched sort of a very insightful lecture that Judge Albie Sachs gave on this topic maybe 13 years ago and he sort of also gives a good

explanation about how, in the beginning, the whole board worked together so that they would be able to form the practice of the vetting board and also deal with the most sensitive or, I mean, not the first decisions that they had to make. And one of the, in the law, there is, the law prescribes even the order of the judges that would be vetted, and they started with the highest judge, so the Court of Appeals judges. So their decision was to, you know, starting with the Court of Appeals judges and their vetting to sit all together and make those decisions.

ADV CHASKALSON SC: Sorry, you speak about that lecture. You have actually given me the link. Can you just put it on record so that everyone, it is not in any of the documents. I do not know if you have the link to hand.

MS POP: It is in the references. I added it in.

ADV CHASKALSON SC: If we can then just quickly go to Annexure 4 and find it. Oh, it is the last one. It says "Albie Sachs Judging the Judges". It is at page 104. Sorry about that.

MS POP: What I will say about even listening, so it is very helpful to have this sort of hearing the way members of these boards, so in Kenya and in other countries, have dealt, you know, with their role, because it speaks, you know, both about the more technical aspects and procedural aspects about, and even administrative, about how do you

organize this type of work. And I think he mentions at some point that this was probably one of the most challenging things that he has ever done because you are, you know, making a judgment on another judge's integrity.

But I think it speaks about, you know, how do you apply some of these standards as well, because when, you know, the Kenyan law speaks about the different aspects that the board would look at, so both sort of financial property, financial integrity, but also other issues related to diligence, temperament, looking at past conduct, past judgments, and how do you go from those general terms to the practice of actually vetting the activity of these justice officers.

Then, so these were the criteria that were used to look at the, you know, so they are both the financial criteria, the Commission looked at financial disclosures of judges and magistrates. If I can, you know, there is one element I did not mention, meaning that the vetting, and, you know, I have, I tried to use more extraordinary evaluations so that it is not confused with other processes that are called vetting, but they are, you know, they are different from this process.

In this case, the legislation covered High Court and Court of Appeals judges and magistrates, with the, sort of starting with the superior judges and then having a process

for the magistrates. The hearings were judges and magistrates who were vetted could choose whether they would, the hearing would be public or confidential. The final determinations were reasoned and published, so the final decisions were published. There was no, the only course of appeal for the judges and magistrates was to another, a different panel of the board.

The Supreme Court, there were several judges that appealed to the High Court and the Supreme Court, and the final, the decision of the Supreme Court was that, indeed, it had no jurisdiction to consider appeals. Their only jurisdiction was to look at issues around constitutional issues related to how the board was formed, or rather issues that had more to do with the institutional elements.

ADV KHUMALO SC: Ms Pop, the format of the vetting process, was it done on paper or was there physical interviews where the judges and magistrates were able to answer questions or clarify any issue that the board was uncomfortable with? What process did they follow?

MS POP: Yes, so, all the judges and magistrates received notice, including around the concerns that had been raised. Earlier in the process, the board also invited or spoke broadly about the mandate of the board and invited complaints and sort of also about the judges that were being vetted. So, all of the judges and magistrates had an

oral hearing.

ADV CHASKALSON SC: You then deal with the statistics in paragraph 4. I am not sure if there is anything you want to highlight there, or add, but if there is, do so now. If not, we will take it as read.

MS POP: I think the only issue that I will flag, and we can have a discussion about this later, is that I think the percentage of magistrates or judges who were found unsuitable is lower than in the, sort of the other cases and, you know, I have not, I would argue that this is, this also happened because of the earlier radical surgery.

So, I think that, you know, just to also think about these, to understand the impact and outcome of these processes, I think that is sort of important to keep in mind. And I think what is also important is that a lot of the judges that, you know, that this is also both a mix of sort of superior judges and also magistrates that, you know, sort of the problem ran from, you know, the top to the, you know, lower down.

And then, I also wanted to mention, because this example is really only about judges, and also highlighting the fact that the examples are focusing more on the instrument and the method, not on, you know, which are the categories that should be the focus of these mechanisms. In some countries, very unfortunate countries, the issue of

integrity in the judiciary is very, very serious and, you know, at that time, it looks that, you know, Kenya was one of these. But that does not mean that, you know, all countries need to go through the evaluation of all of the criminal justice officers.

ADV CHASKALSON SC: And do I understand, I mean, I inferred from what you were saying that Kenya may have been the first country to experiment with this sort of a mechanism. Is that correct?

MS POP: Based on the research, I think it is the first example in which there is a process which is, that keeps this balance of the public interest and the rights of the individuals being undergoing evaluation, it keeps it in balance, and I think from that perspective, it is very important to, you know, to look at it.

I will also say that listening to Justice Albie Sachs, it was very reminiscent to me with, you know, how members of subsequent Commissions who worked in Moldova or Ukraine talked about the process and about the objectives and how you handle these very thorny issues, trying to filter who is suitable and not suitable to operate in the criminal justice system.

CHAIRPERSON: Besides the balancing exercise, was it the first country to engage in such a wide-ranging, extensive vetting exercise?

MS POP: So, in, you know, there is a lot of history in Eastern Europe, for example, of trying to clean up or reset the different parts of the public sector or criminal justice sector after sort of authoritarian regimes, for example. So, they had these processes called lustration, where, you know, you are trying to, you know, trying to push out of the system individuals who worked very closely, for example, with the security apparatus of these systems.

So, I think those were, you know, some of perhaps somehow similar in mechanics, you know, programmes. But, you know, I think that the Kenyan experience is the one where we are starting to see the, like a more developed framework of, you know, balancing these, with these two, because in the other, like, for example, with the lustration mechanisms, for example, the European Court of Human Rights had, you know, some, a few question marks about how these processes evolved.

ADV CHASKALSON SC: Maybe if I can just pick up on that point. You deal with some of the more, some of the earlier and more extreme versions, for instance, Bosnia and Herzegovina, that is at page 71, and Poland at page 72. And would it be fair to say that both of those cases were not providing for a procedure that allowed for an individualised determination, and that they were essentially just generalised attempts to get rid of incumbents from a

previous regime?

MS POP: Exactly. I mean, I, you know, I have not studied these in sort of a lot of detail to understand, like, what were the motivations, and I mean, it might have been the case that the motivation, or the, well, not motivation, the motives were, you know, sort of the intentions were good. But I think in these cases, how you proceed and what procedures you put in place are important.

So, I think these are, and I, you know, included these on purpose so that to show not the already sort of more developed processes, but also, you know, even for contrast, which are the processes that, you know, more or less, I think, try to do the same thing, but did not go about it in a way that really protected the, you know, the rights of the people, you know, getting evaluated.

ADV CHASKALSON SC: If we can then move to Albania, which you described from page 39.

ADV KHUMALO SC: Before we move to Albania. So, the process in Kenya starts in 2012, ends in 2016, but the most important thing is the outcome, not the process, because the whole point of embarking on this exercise was to clean up the judiciary, and your introduction says because there was lack of trust, there was criticism of judicial corruption and capture. What was the perception of the Kenyan population after the process? Did they think it achieved the

outcome or it was just, you know, an exercise for the sake of doing the exercise? But at the end of the day, the perception the Kenyans had of their judiciary in 2021 was the same as it was in 2011.

MS POP: So, my understanding, and you know, is that that was the process, at least with regards to the judiciary, it had a positive effect. I do think, and that this whole process needs to be put into even further context, because, you know, many times the, even if you have a well-performing judiciary, but you have issues, you know, in other parts of the criminal justice system, it is very hard for the population to see results.

But from, you know, the enquiries that I have done into this, it seems that the process was definitely positive and it was also positive because it allowed, and that is a very important point, to afterwards have a different way also of selecting, you know, judges who, you know, vacated their positions, to have a, you know, more open process to have people who would not have joined the judiciary before. So, I think that this issue of the outcome in the Kenyan case definitely needs to be studied more and to sort of unpack all of the other elements that contribute to the, you know, public perception.

ADV CHASKALSON SC: I do want to emphasize the point that you just made that after the extraordinary process, a

new system of appointment was put in place. It is the point that you make on page 38, paragraph 5, that going forward, you try to sort out integrity at entry, or at least you try to sort out integrity partially at entry. And would it be fair to say that you need, that an extraordinary process has to be coupled with other processes that will deal with, other longer term processes that will deal with protecting integrity in the institution going forward?

MS POP: Absolutely. This, the extraordinary vetting processes are about giving the system a good foundation. And then, there is a lot of work to be done in terms of rebuilding some of the institutions that had integrity challenges. And that also needs to be done through the process of, you know, making sure that not only there is integrity considered when these new appointments are done, but also making sure that the bodies that select these people have some, you know, perhaps more independence, and so, to sort of look more holistically at, you know, what were the reasons for, you know, getting that capture.

Because some of, you know, maybe a lot of these people, when they started in the system, they were, you know, they were people with integrity. But that, and I think we see in more detail later that in some system they even started the vetting process with institution responsible for appointing prosecutors, judges. and I think it goes to this

idea that, you know, this is part of a much, much bigger process that, you know, one has to focus on.

ADV CHASKALSON SC: If you can move then to Albania, which you start addressing at page 39, and again, your first paragraph is essentially a historical introduction. Is there anything you would highlight there?

MS POP: What I would highlight here is that there was a basis, sort of a documentary or research basis for the diagnostic of the issue in Albania that then led to this extraordinary evaluation process. And this *ad hoc* parliamentary committee documented the issues of corruption among judges and prosecutors, political interference over the judiciary, and, you know, levels of, sort of issues with the accountability mechanisms which should have prevented a lot of these issues in these institutions and the issues around professionalism.

ADV CHASKALSON SC: And then from paragraphs 8 onwards you deal with what the package, what the extraordinary integrity evaluation package entailed. Can you take the Commission through that? Again, I do not need you to read everything, but maybe just to highlight what you see as the critical features of the Albanian approach.

MS POP: Yes. So, in the Albanian approach there was this initial phase of documenting the, you know, where the

problems are. So, having an *ad hoc* parliamentary committee, having an assessment report, having a reform strategy, so, sort of going, you know, going step by step in documenting the issue and the measures that need to be introduced. That also included the, you know, improvement to the system for disclosure and verification of assets for judges and prosecutors.

And that was the foundation for the drafting of the constitutional amendments. And then these consultations with the Venice Commission about which we have talked earlier at different stages. And here, you know, like in the case of Kenya, there is this, you know, the fact that these amendments are happening through constitutional amendments show how, one, how serious the crisis was and I think also how seriously it was taken. And then the constitutional amendments were followed by the legislation that further detailed the process.

ADV CHASKALSON SC: And then you deal with some of the details in paragraph 10 of who was subjected to the process and what the process tested, as it were. Can you address that?

MS POP: Yes. So, the scope of the Albanian process included judges at all levels, including the Constitutional Court, the High Court, and all prosecutors, including the senior management, as well as certain legal advisors who

were working in the Supreme Court, in the highest court, and this included, it was around 800 people.

ADV CHASKALSON SC: And what was investigated?

MS POP: So the focus was on submitting an asset declaration, which was verified by the asset declaration agency. So in Albania, they have a specialized agency that just deals with asset declaration and conflict of interest, both submission and verification, in order to look at whether, you know, assets were disclosed and also if there are, you know, assets that, you know that are hidden, and also if the assets disclosed are covered by sufficient legal assets.

And then there was the background assessment related to contacts with organized crime. I think the part I should have mentioned earlier is also that in one of the challenges in the criminal justice system at the time in Albania was also infiltration from organized crime. So this is why this aspect was including a very direct sort of, as a matter of focus and then also they looked at the sort of issues around competence and professionalism, looking at a sample of the people who were evaluated, of the individuals who were evaluated and their decisions, if they were judges or case files.

ADV CHASKALSON SC: And how was the process structured? Who conducted the evaluation?

MS POP: The evaluation, there were sort of several bodies involved. The first, so the first instance body, the Independent Qualification Commission composed 12 Commissioners working in panels of 3. Decision of this Commission were appealed to the special appeal chamber that of 7 judges attached to Constitutional Court. Two public Commissioners could appeal confirmations in the public interest. And then there was also a mechanism that was set up called the international monitoring operation that was responsible for the evaluation of the individuals who were, ultimately became members of the Qualification Commission and the other, the Special Appeal Chamber and also later monitored the proceedings.

ADV CHASKALSON SC: Paragraph 12 you talk about the length that this process took. Can you explain or not explain?

MS POP: Ja, so the Independent Qualification Commission started issuing decisions in 2018, again starting with the highest levels and the last appeal decision was issued in this year. So it was over a period of now almost 8 years that this, you know, procedure was ongoing.

ADV CHASKALSON SC: And again you give statistics in paragraph 14. Is there anything you would emphasize there?

MS POP: Yes, I think that an important number is the

number of resignations and I think that that is very, the credibility of the process is very important because, you know, in many cases the people who probably need to be filtered, you know, who will, who know that they will not be able to successfully undergo such an evaluation, just resign, and that actually is a very good outcome for the system because then there are, you know, there are not these criminal justice officers in the systems who are just appealing procedures and so on. And the other part is sort of the numbers in terms of the individuals who are dismissed.

Out of 800 criminal justice officers, both judges and prosecutors who have undergone the process, 283 were dismissed, which is I would argue a very large number. And then there is also I think that sort of the positive number, the confirmations, that, you know, as I was mentioning in the introduction, I mean this is also a way for, you know, making sure that the people who have integrity are recognised as such and they are not just all seen as part of this sort of like grey mass of individuals with integrity issues.

ADV CHASKALSON SC: Then in paragraph 44, you highlight several features that distinguish the Albanian experience. Do you want to address those now?

ADV KHUMALO SC: Page 44, paragraph ...[intervenes].

ADV CHASKALSON SC: Sorry, it is the bottom of page 43, paragraph 16 going over to 44.

MS POP: Yes, so the important features are the asset declaration, the background declaration and the professional self-appraisal. One issue that is also important is that a lot of the dismissals, so a lot of the findings in terms of unsatisfactory integrity or unsuitability were related to financial integrity issues. So even though there are all of these mechanisms for, you know, getting information from the sort of intelligence services about association with organised crime, the most used instrument or the most helpful one in terms of the Commission determining this unsuitability was the financial integrity part and probably, I mean this is just, you know, probably it might have even indicated without really going into the association with organised crime but the effects of that association which were, you know, also easier, also much straightforward to document.

The other element was that when these Commissions looked at the unjustified variations of wealth between the assets, the expenditures, the liabilities of a certain individual and their lawful income, the threshold that was considered as leading to sort of this finding of unsuitability was sort of twice, sort of having assets that are, unjustified assets that are twice as high as the lawful

income.

And the other interesting part was that lawful income was considered only income for which the people who had undergone this process had paid taxes. So, and I think this is also something, you know, that other systems have looked at in terms of, you know, also the tax compliance of the persons assessed. And then the magistrates, this is sort of a choice that was done in Albania, the prosecutors or judges who chose to resign rather than undergo re-evaluation were barred from judicial office for 15 years and decisions of the external evaluation bodies could not be reviewed by ordinary or superior or any courts in Albania. The only external remedy lay with the European Court of Human Rights.

ADV CHASKALSON SC: And then you address the European court's judgment. I am not going to try and pronounce in Albanian, the applicants, but there is a judgment that, well, maybe if you can address what that judgment, the context for the judgment and what it decided.

MS POP: So, I should disclose that I also could not pronounce this name. So, I, you know, have the benefit of having an Albanian colleague, so I asked her, so, this name is pronounced and I hope I do it justice, Xhoxhaj. And in this first judgment, the court examined the dismissal of a Constitutional Court judge through this process. And the

articles that it looked at from the European Convention were Article 6, right to fair trial, and Article 8, right to respect for private life and family life. And it accepted the composition and independence of the external evaluation bodies. Very important for procedural purposes and the work of not only this Commission, but also future Commissions, was accepting the shifted burden of proof in the asset analysis, and also that the severity of the sanction was acceptable and did not violate any of, well, any of the, any of the articles in the convention in light of the systemic sort of nature of the problem and of the violation. In future, so because, you know, some of the other countries that we are going to talk about are members of the Council of Europe and, you know, have to follow the judgments of the European Court of Human Rights. That judgment was very important because it already sort of gave legitimacy for this type of process.

ADV CHASKALSON SC: And then again, in paragraphs 18 and 19, you deal with the interrelationship between the extraordinary process and the regular processes going forward of filling posts and the like. Is there anything you would highlight there in relation to what happened in Albania?

MS POP: One of the lessons from Albania is that it is very important to think beyond the process, not only in terms of

how people are selected and that, you know, now it is much, you know, there is, it is also very important to look at the integrity and both financial and professional integrity of individuals who come into the system, both in the self-governance bodies. So these are bodies that are responsible for the selection, promotion, disciplining of judges and prosecutors, but also it is important to think of the numbers game, I mean, the shock to the system when you are, I mean, this is a fairly small country.

I mean, when you have half of your judiciary leaving, you really have to think about how, you know, even, you know, increasing the number of, you know, of positions you have available in the school for magistrates, and I think the lessons here is that you need, it is not, I mean, when someone is designing such a system, you have to sort of think of the day after or what happens during this process, because some of the, and this is an issue that Albania face, is that, you know, there are also going to be, you know, institutions that do not have a quorum and so it requires a lot of, I think, planning and it would say now we have the benefit of, you know, the countries that have gone through this and knowing what their challenges have been.

And then the other part is that, and I do not know if it is covered in this paragraph, is about having a robust asset declaration system so that, you know, some of the,

sort of some of the violations that had to be identified by this very special body can be then identified routinely by either the asset declaration agencies and then you have these also bodies that are sort of monitoring the sort of the professional life of these officials also, you know, looking into these aspects.

ADV CHASKALSON SC: You do speak in paragraph 20 not only of the, you know, the vacancies that this created, but also of the public response. Can you maybe address those issues?

MS POP: Ja, so I think this response to Commissioner Khumalo's earlier question in terms of what was the public impact on the, of these reforms and there, in terms of public perception, as of this year, there is a more positive view of, you know, the prosecution service, of the judiciary. I mean, you know, as you are seeing, it is, you know, in some cases, I think for the broader public, it is a smaller increase in perception, but then, you know, for, it seems for the private sector, it made more of a, made more of a difference.

And, you know, I mean, here, this also went with these numbers. I think it is a preliminary indicator as, you know, there might, it might also have to do with even the, you know, if it is people who have their personal experience engaging with the justice sector, and it might have been

that, you know, the companies, you know, might have been even more willing to go to court if they had more confidence in the integrity as well.

And also, I think this is an important issue, is that the High Court reduced its backlog, and I think that is also very important for sort of the delivery of justice, and it is both of an indicator that things are sort of the shock to the system is sort of the system is getting over it, but also that, you know, by dealing with these issues of integrity and, you know, professionalism, you know, now you have people who are more focused on just, you know, the effectiveness of what they are doing as opposed to other issues.

And the one, I mean, the one thing is that there is, it is very important, and it is noted here, that when the system, when there is this transition to the system, and this is also something that requires probably a lot more thought, how do you make the transition, because it is, in a sense, very easy to have a more or less uniform practice when you are a body of people sitting together every, well, every day or very frequently and looking at these issues sort of in, at large scale.

But I think that when this process gets decentralized, like maintaining the same level of depth, and that is sort of the, I think, the challenge that, you know, countries will, you know, are facing and have to think about.

ADV CHASKALSON SC: Your next detailed case study is Moldova, and maybe if you can just speak again to the background here.

MS POP: So, Moldova is, you know, another quite, you know, small country in Eastern Europe that it tried to, it adopted various reform strategies. It sort of, I think, on paper it, the institutional framework looked pretty good. You know, it had a lot of, like Albania, self-governance bodies, you know, laws that, you know, probably, I mean, laws were mostly in line with, you know, European and international standards.

But in practice, there was a lot of capture of different parts of the criminal justice system. And this, I think the most stark manifestation of that was the involvement of judges in facilitating probably one of the largest money laundering schemes in history in sort of the 2010, 2012 period, where like billions of dollars illicit funds were laundered, you know, using the decisions of Moldovan judges.

There was also a very high number of criminal investigations into criminal justice officers. So, in this context, after a change of government in 2021, a new justice strategy was implemented and sort of a new focus on sort of the integrity of the sector was triggered and Moldova requested the opinion of the Venice Commission,

looking at, you know, sort of presenting their, I guess, draft ideas in terms of the evaluation process and sort of how they would go about it. The Venice Commission acknowledged the rationale for the extraordinary evaluation, given the extreme or extraordinary situation within the judiciary and the prosecution.

ADV CHASKALSON SC: You make the point in paragraph 22 that Albania did not amend its Constitution, it just enacted an ordinary law. It set up different Commissions. How were they structured? What was the structure that was used in Moldova?

CHAIRPERSON: Oh, I guess your last sentence corrected you. You said this was in Albania. It says unlike in Albania.

ADV CHASKALSON SC: Sorry, yes.

MS POP: So, in Moldova, the framework for establishing these Commissions was a law, not an amendment to the Constitution. There were three Commissions that were set up. The first Commission was set up to deal with self-governance bodies. So, in Moldova, they, you know, they have these bodies responsible for the appointment, disciplining, and promotion of judges and prosecutors to different bodies.

So, these bodies, which are constitutional bodies, they play a very, you know, important role in any type of

reform or change that has to do with these groups of people. So, the decision was made to start with this institution so that afterwards, you can have them involved in the subsequent evaluation of the actual members of these professions. So, that was the first Commission.

And then the second Commission dealt with the extraordinary evaluation of judges and the third one with extraordinary evaluation of prosecutors. And one important feature, and from the point of view of the Venice Commission, the decisions about the appointment of the members of all of these Commissions was not, was taken by parliament with a two thirds majority and I think that gave the confidence that it was not just sort of a regular law or that, or a regular appointment that, you know, has to do just with political orientation of the current government. So, that satisfied the Venice Commission that, you know, this was done through a, sort of regular law, not a constitutional amendment.

ADV CHASKALSON SC: And so, the pre-vetting procedure, which dealt with the independent bodies, what did it examine?

MS POP: Excuse me, what was the last part?

ADV CHASKALSON SC: What categories of vetting ...[indistinct] of the integrity evaluation did that pre-vetting Commission conduct?

MS POP: So, the Commission looked at financial integrity, so meaning the correspondence between the assets, expenditures, and gifts of the candidate and close person and lawful income over an extended period of time. It looked at tax compliance and ethical integrity. I will, you know, conduct compatible with ethical standards of the profession. And then the, in order to look at the financial integrity, it collected a special asset declaration that was sort of compiled by the Commission for this particular purpose to collecting information not only, and I think this is a very important point, collecting information not only about the assets registered in the official's, the judge or the prosecutor's name, but also assets that are beneficially owned by the person undergoing evaluation and their family members, so, you know, assets that might be registered under the spouse's name or minor children or, well, registered under their name and even assets beneficially owned by these individuals.

Also, keeping in mind that the, Moldova had had an asset declaration system that had been operational for quite a long time, and then, what it tried to do through this special asset declaration is to more or less make sure that there are not gaps in the, in sort of this capturing of the financial situation, because, like in, you know, other countries, sort of part of the, say, let us say in the past 10

years, for a number of these years, the main asset declaration system captured assets owned beneficially by the official, but earlier asset declarations did not capture that aspect. So, in order to have, you know, clarity that there are not basically assets that are unjustified, that are hidden under someone else's name, this decision was made. And then there was also an ethics questionnaire that was compiled, I mean, that was requested from the person evaluated.

ADV CHASKALSON SC: And how did they investigate and verify what came back on these questionnaires?

MS POP: The Commission had, and the Secretariat, had access, could request information from financial institutions, from registries, private sector entities. They, I mean, they could, you know, even get some information from, well, they could get information from the tax service. So, they received a large amount of information. So, they had information, I think, for the previous 15 years in terms of all of the bank transactions, all the credit card transactions of the individual under evaluation.

ADV CHASKALSON SC: And in paragraph 25, you deal with the outcomes of these evaluations. Very briefly, to take us through those numbers and anything that needs emphasizing.

MS POP: So, this Commission had, I think, the lowest

passing rate. So, 38% of the candidates passed. And I think what is also important to keep in mind is that the consequences for this vetting were not, you know, were not particularly serious when compared to the Albanian case, because these were candidates for these self-governance bodies. So, for example, you would have a prosecutor who, you know, tried to be a member of these bodies, but, you know, they failed the vetting and then, at this point, they could just go back to, you know, their old positions, knowing that, and we will talk about it later, they would be vetted by a different Commission as prosecutors.

So, this is just for the people who will then be responsible for also the decisions around the vetting of other people, and it is important, I think, for sequencing purposes. And then the other part is that the appeals went to the Supreme Court, special panel of the Supreme Court, so the highest cassation court. And, you know, the vetting of the Supreme Court, you know, also had to start because initially there were, the Supreme Court was making decisions about the activity of this Commission without being reformed. So, that is, you know, sort of this architecture of who makes decisions is very important because you can have one unreformed institution that can just destroy the whole architecture.

ADV CHASKALSON SC: We have reached the ordinary

time for a tea break. Chair, I am not sure, we have probably got a few more minutes to go before we reach the end of Moldova. Should we take the tea adjournment now and then come back after tea?

CHAIRPERSON: Perhaps let us do that and let us come back at 11:35. Let us adjourn.

ADV CHASKALSON SC: Thanks.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes, Mr Chaskalson.

ADV CHASKALSON SC: Thanks, Chair. Ms Pop, we have reached the end of the pre-vetting commission stage of the Moldovan process. From page 50, you deal with the Judicial Vetting Commission and the Prosecutor Vetting Commission on the following page. Is there anything you would highlight in the processes of those two commissions?

MS POP: The Judicial Vetting Commission covered sitting judges of the Supreme Court, all candidates for appointment to it, also all Court of Appeal judges and heads of courts and deputy heads of courts. That commission has not finished its work. The extraordinary evaluation is ongoing. As of June of this year, 69 judges passed, the judges are candidates, 40 failed the, 69 sitting judges passed, 40 failed the integrity criteria, 51 sitting judges resigned, and 19 candidates withdrew from the process.

The one aspect that is important to sort of keep in mind is this element of resignation. In Moldova, almost the entire Supreme Court was reformed because the vast majority of sitting Supreme Court judges did not pass the vetting. They resigned before that. Immediately, this commission looked at the candidates. There was also, I think, half of the Appeal Court judges in the main Court of Appeal in the country also resigned without undergoing vetting.

ADV KHUMALO SC: They resigned in protest or they resigned because they were avoiding having to be subjected to a vetting process? Because people can resign as a matter of principle and say, I am a judge, I cannot be part of a process like this for whatever reason. Or I am trying to understand if their reason for their resignation was because they feared that the outcome of the process might be unfavourable to them. Do you know? And if you do not know, I will accept that answer.

MS POP: I mean this is when these resignations happened, I think for the most part there were not explanations. I think having talked with judges and prosecutors who have been through the process and who passed the process, even those who passed the process were not happy with it. I think that it is, and I think we should not sugar coat it, it is not a pleasant process, even

for the people with integrity.

And I think that is a little bit the price to pay for this because it is a very invasive. Now, the motivations of the people who decided not to go through the process, I do not know. But I think the reality is that you do have people in the system who decided to go through the, I mean, not everyone who was a sitting judge decided to leave. The ones who stayed and also passed the process.

And, you know, I mean, I have had this discussion doing other work in Moldova. And, you know, you have to give information about your financial situation. There is, you know, you are receiving a lot of written questions. You have to go through the oral process, which is public. So it is quite an arduous process. But, yes. So the short answer is we do not know.

And in the vetting commissions, they are looking, you know, just like the pre-vetting commission, both at the unjustified variations of wealth. So the way they approach this in Moldova is that the commissions look at the past 12 years of, like, the financial situation and determine if there are unjustified variations that are above a certain monetary threshold. And the monetary threshold, I did the calculation, is around $14,000.

So it is not sort of a huge amount of money necessarily, I think, compared to, you know, what you see

in terms of illicit proceeds made in other countries. And, you know, that is ...[intervenes]

ADV CHASKALSON SC: Can I just ask you to contextualise that?

MS POP: Yes.

ADV CHASKALSON SC: What would $14,000 represent in terms of average professional incomes in Moldova? If you are able to answer that.

MS POP: Yes. So I am actually, the only reason why I am able to answer this is because in the law, it is not a number in dollars that is provided, but it is the quantum of the equivalent of 20 average medium salaries of the country, as of 2023, when the law was adopted. So they measure it in, like, you know, the average salaries in the country. So it is 20 times.

So they are looking at that and they are looking at issues of professional ethics. The majority, the large majority of the decisions are about, like in Albania, are about unjustified wealth. So financial integrity. There is a small minority of decisions, and I am talking about sort of the ones that find issues with integrity, that have to do with professional ethics. I mean, I am talking now both about the judges and the prosecutors, because that is going to be the same, you know, the same issues.

And I think in terms of the professional ethics, they

are looking really for judges, you know, decisions that no judge, you know, no reasonable judge would make. So really the, I mean, I use this term, I do not know if it is the correct term to kind of put it on an umbrella, but it is almost like judicial malpractice, right? So those are the elements that the commission looks at. Those are the, you know, the conclusions.

So a lot of resignations, a lot of, you know, a lot of, I mean, there is a good number of judges who passed and who failed. But the other element of the institutional architecture is that there is sort of a special evaluation commission that includes both Moldovan and, like in the case of Kenya, experts from other countries. And that decision, so this vetting body sends this decision to the now-reformed, after the previous commission's work, self-governance bodies for the judges and the prosecutors and they make the decision.

And sometimes they do not agree with the evaluation commission. And finally, the evaluation commission, the judicial self-governance body can send back to the commission the case, basically, for them to do another review. And then they, you know, they make the final decision. If the evaluation commission still disagrees with that decision, it can make an appeal to the Supreme Court.

ADV CHASKALSON SC: How were the commissions resourced?

MS POP: So, the, I mean in addition to the members, and the members, you know, they are, part of them received a salary from the government. The external ones are supported by international partners. There is also a fairly large secretariat that supports the work of the commission. Because they, the Moldovan model is quite, I think, resource intensive, because they have to do this review of the, you know, 12 years of financial situation and then they also have access to a lot of information.

And so, they have to, I think... and they have legal experts and also analysts who can do the financial analysis and find their way through transactions and that type of thing.

ADV CHASKALSON SC: And what are the consequences of disqualification at the vetting stage?

MS POP: So, in, there are two scenarios. The first scenario is someone resigns before the start of the vetting process. And there is no negative, I mean, consequences in the sense that, you know, you can leave with a full pension or some other type of payments that sometimes are given at separation. There is, I mean, there is not a ban, like in Albania, when you resign. At the same time, in order to re-enter these institutions, you also have to pass a type

of evaluation. External evaluation.

So, you cannot really get out of it. And then, if you are dismissed, you have a ban of five to seven years to work in the, either as a prosecutor or a judge in the sector. And they introduced this proportionality aspect, I think also because of the decisions of the European Court of Human Rights, which asked that there is a way to make the distinction between more serious or less serious violations.

ADV CHASKALSON SC: And then you talk about a Venice Commission opinion in paragraph 37, page 54, when there was an attempt to extend the process in the guise of a performance review for judges who were not covered by the original laws. Can you briefly address that?

ADV KHUMALO SC: Sorry, did we deal with the Prosecutor Vetting Commission?

ADV CHASKALSON SC: Is there anything that you would want to add specifically in relation to the Prosecutor Vetting Commission? I understood your answer to address both, but I may have misunderstood it.

MS POP: I think, the one thing I will say, just compared, and I do not know what, I mean, that process is still ongoing, it is a little bit behind. So, both of the vetting of the judges and the prosecutors is not over yet. I think in the case of prosecutors, there have been fewer resignations. I do not know, I have no explanation for that.

So that also increased the number of people who need to undergo the process.

ADV KHUMALO SC: And what does that one seek to achieve? I know it targets prosecutors.

MS POP: Yes.

ADV KHUMALO SC: Is it to check their integrity, to check whether they have made financial declarations and that they do not receive income from unknown sources? Is that the whole point of it?

MS POP: Yes, so it is the same focus as for the judges. It is the financial integrity, which is what you mentioned. And the professional integrity, so if there had not been abuses in the way they led the criminal investigations. I think on the, maybe one point to mention, both from, I mean, more the practice. So, there is, the information that the commission has are all of the asset declarations that the prosecutors have filed over the years with the asset declaration agency and then this special, comprehensive asset declaration, all of their financial transactions.

And what happens in practice, the issue is, I think, not so much undisclosed assets, but how the assets are justified. And, you know, many times there would be this typology of the loan from a very, you know, a family member or a friend. And then what, and this is why it is important for these commissions to also be able to look at the

financial situation of very, a narrow subset of third parties, because sometimes the people who gave the loans are not subject to asset declarations. They were not included in the asset declaration of the official. They are just as the source.

So, the commission needs to be able to go to the tax authority or, you know, to get records to see if this person could even afford to provide this loan. In addition to, you know, checking, I mean, under which conditions these loans were given. So, I think one of the big, well, one of the, you know, issue that has referred. emerged many times is this issue of, you know, sources. Like, of, of the assets. But, ja, so, it is the same logic as for the judges and it is also the same logic why it was applied to these.

So, in terms of the prosecutors, the prosecutors that are covered are the high level prosecutors, prosecutor general, deputy prosecutor general. And then, for now, it is only the specialised prosecutors. The organised crime prosecutors and the specialised anti-corruption prosecutors. The rest of the prosecutors, for now, are unvetted.

ADV KHUMALO SC: Thank you.

ADV CHASKALSON SC: Back to my question about the attempt to extend the process in the guise of performance review, which you deal with at page 54. Can you briefly describe what happened there?

MS POP: The, this was, I think, the Ministry of Justice, I think, was looking at, you know, ways in which this process could be, could also be applied to other categories that are not now, categories of prosecutors or judges that are not now covered by the other mechanisms. And the, as I read the opinion of the Venice Commission, is that the same rigour, if the ultimate consequence of the process is dismissal based on sort of integrity challenges, the same type of procedural safeguards should be maintained. That, you know, you have to be careful about not cutting corners, so to speak.

ADV CHASKALSON SC: And then lastly, in relation to Moldova, how did the process going forward take place? Filling vacancies, screening applicants for new positions?

MS POP: So now, I think the, there are bodies that are completely sort of reformed and, you know, sort of ready to work again. The Supreme Court has not only new staff, but was also reduced in number. There was sort of a very high standard also in terms of integrity and professionalism that was applied to the selection process. Integrity being ensured by the vetting commissions.

And then also the self-governance bodies are now up and running. They have the full membership. So that is also very important because, and, I mean, we cannot really see the effects of that, but now, you know, now they can

also start sort of regular appointments. You know, because these bodies were not functional, they could not really appoint even prosecutors for a while. And now, and I know that these bodies are very worried and very focused on how they will apply, you know, how they are going to deal with disciplinary matters going forward.

I think they do have the standards of the vetting or the evaluation commissions. But I think they definitely have concerns about if they have the, you know, the capacity, if they have the, you know, sufficient resources. So I think this is, you know, again, thinking about the day after these processes is so important. And they are, you know, also now looking at how these processes were done in the past, what are, you know, what these vet sort of evaluation commissions have done. And I think this is where the bulk of the work is going to be.

But I would say in terms of effectiveness, we already see, I mean, the most clear impact, you see it in the Supreme Court, because it was the first institution that was. And, you know, it definitely, there is sort of a different, as you can see, there is a different approach to even, to cases. They reduced the backlog, I think. And, you know, you also see even changes in terms of the more, I guess, looking more at substantive issues or then just formulaic sort of approaches to judgments.

ADV CHASKALSON SC: We are going to move to Ukraine. And I think that there are two issues I would like to start with. One is the history. But the second is that Ukraine is a patchwork of a whole range of different measures. It is less coherent than the other examples we have discussed. So I think maybe if you first deal with the history, and then I think say something about the patchwork. If you could say something about the patchwork.

MS POP: Okay, the patchwork. Okay, so even as, you know, we, you know, I was preparing this. You know, I had failed to mention this earlier. All of this work also came together, you know, with help from, you know, colleagues who, you know, have done a lot of research. In particular, the co-author of, you know, other publications I worked on, Dimitra Kotliar, who is a global expert on anti-corruption. So as, you know, we are thinking about sort of bringing all of these experiences and synthesising them somehow, I mean, both him and I had worked on Ukraine for, you know, since he had worked for longer, but I had worked for 10 years, well, more now on Ukraine.

And the challenge is, you know, in the case of Albania and Kenya and Moldova, there is this, you know, very neat laws where everything is in one law and you can print it and everything is clear. In Ukraine, you do have a patchwork. And one of the reasons why, you know, we, you

know, like I also decided that it is still helpful to see the trajectory and the history. And also some of the approaches that did not work. Because then I think we have a better idea of what works and that is very, very important.

So these processes related to integrity and some type of resetting, cleansing of the criminal justice system, started in Ukraine after there was a mass movement in 2014, sort of moving away from state capture, you know, of the previous regime. And then that state capture, like in other countries, also included state capture of various criminal justice institutions.

So the first stage was, you know, trying to do this sort of massive dismissal and reappointment of people in other cases. So this was, you know, the case of the police where, you know, they said, okay, the old police does not exist. Now they have the new police and everyone needs to reapply for their jobs. And that approach, you know, encountered obvious issues in Courts and, you know, no one could really be fired and the state also had to pay their back salaries.

And also, you know, they initially used this lens of lustration which they had in other countries where, you know, if there are people associated who had had high-level positions in the previous administration or during sort of

links to the security apparatus during sort of previous regimes, they would, you know, would not be able to occupy positions in the criminal justice sector or even other positions.

And all of these approaches did not work both because of the decisions of national Courts but also decisions of the European Court of Human Rights which had a problem with just sort of not having individual decisions and looking at someone's individual records as opposed to like a certain category they, you know, they are a part of. So that was the first generation.

And then the second, you know, there was also this effort to do a re-attestation which is that started in 2016 that is still ongoing, re-attestation of judges, of sitting judges, going through all of the judges in the system. And that process started in 2016 was stopped in 2019 because there was an understanding that the self-governance body which had a decision-making power in the process needed to be reformed. And, you know, so that also happened, you know, in the middle of the process.

So in, while in the other countries they decided to reform everything at the same time, the self-governance bodies, the, you know, the prosecutors. In Ukraine they, you know, I think the approach was we are going to focus on this institution. And then once it was done, they

realised, no, but we also have problems in the other institutions. And by the way, these other institutions are involved in the cleansing of, you know, these other people that we want to focus on.

So it was a little bit of a, you know, I mean, messier project. Then one important, in terms of the lessons learned, I mean, there is this, you know, lesson learned about, you know, you do have, you need to have procedural safeguards. And you need to have individual decisions and notice and all of these, all of these aspects are important. So some of these experiences are clear why, you know, they could not really sort of be resilient from a legal standpoint.

Later, another approach that was tried was to create new bodies. And then by creating a, you know, specialised investigative body, anti-corruption investigative body, prosecution and Court. And in these bodies, then at the selection process, they were basically doing the type of, you know, integrity evaluation, extraordinary evaluation, but for candidates. And so this is where, for the first time in Ukraine, this approach of having the full procedural safeguards, you know, was put into place.

But I think it is important, this creation of the new bodies, and I think I wrote it somewhere, that it is sometimes the easiest thing to do because you do not have

to worry about how you get rid of the people who already occupy the positions. But then, and you can get results, but ultimately, you still somehow end up, you know, having to deal with the integrity issues in other criminal justice bodies. So, the lesson learned from, you know, both these selection processes where you had, again, this look at the financial integrity.

And I think what is interesting is that there is a line that you can draw from, I mean, just looking in more details from Albania, Moldova, Ukraine, about, you know, sort of the fact that the financial integrity is always the biggest issue when you are looking at these evaluations. That is, you know, again, the source of income, you know, again, people trying to justify these issues in sort of very imaginative ways, and then the commission having to check on them.

So, there is the first phase, which is this, like, mass processes, you know, getting to the realisation that self-governance bodies need to be reformed, creating new bodies, and then having, starting to develop, I think, the methodological approach to how you look at integrity. And then, a number of, and we are now at the point where there are sort of selection processes that happen for heads of, for example, the economic investigative body, or customs, and then realising, I think, at the point of drafting of these laws,

that just having a new head does not solve the problem.

Even if you have a very well-intentioned head with a lot of energy and integrity and professionalism, they need to work with someone. So, they need to work with someone who is professional and has integrity. And so, now we are at the point where, I think, this year have the external evaluations of all of the investigators, economic crime investigators, and all customs officers is starting. And I see that, I mean, the way I look at this patchwork, which is, I think, almost hard to put together, is that this evolution of, you know, what is the right approach, and to do this evaluation, you know, what are the aspects that you look at.

And in all of this sort of commissions, evaluation processes, there is also a commission and what, you know, in the case of Ukraine, they have a mix of, like in Kenya, sort of domestic experts, international experts. And there was a lot of struggle throughout the years in Ukraine to find a solution in order to ensure independence for these decision makers. And I think that is, in this patchwork, I think it is a very important, I mean, it is a struggle, in a sense, also to find a model where you have, you know, good people doing the evaluation, but also, not only professionals, but also people with independence.

ADV CHASKALSON SC: You have sketched out the various stages of the patchwork. I am not sure we need to

spell them all out here. I would like us to get to almost the synthetical lessons that we learn from all of these case studies. But before we do that, you have dealt very briefly with a series of other countries from page 71 onwards. Is there anything in there that you would emphasise? I mean, it is really just something that you feel bears emphasis as opposed to what is stated in your discussions of these countries.

MS POP: I think the most important point, and, you know, I already spoke a lot about it, but I think it is really an essential part of this process is the procedural safeguards. And I think that is the common thread in the examples from Bosnia-Herzegovina, Poland, Serbia, and Slovakia. You need to have an individual process in which you look at the facts for each individual. You have a reasoned decision as opposed to just taking whole institutions and filtering them as a kind of group, not as individuals and people. And that is one sort of aspect.

And then there is also the aspect of, and it is related to the procedural safeguards when it comes, in the case of Poland, sort of, you know, having access to information that can be classified. So all of this sort of information that cannot be open and how you use that in decisions against individuals.

ADV CHASKALSON SC: If we can then get to the lessons

learned, and for that we need to go back to the statement itself. And maybe the first big question is the choice of model, which you address from the top of page 15. Can you speak to that? If you can speak to what the range of models are and what the issues to consider in relation to them are.

MS POP: So in terms of the model is, I think what has withstood sort of both domestically in these countries and also if we are looking at the international level, judicial review is the approach in which officials stay in their positions until there are particular violations that are being identified as opposed to just dismissing everyone in one sweep.

ADV CHASKALSON SC: Part of the model is your scope. And what are the ranges of options that you have seen?

MS POP: So here it is the, you know, in Albania, everyone in the judiciary and the prosecution was evaluated. In Kenya, there was a focus only on one narrow category. Moldova sort of looked at the process in stages and Ukraine is sort of the patchwork that we discussed. And I think, I mean, ultimately even just synthesising even more, it really depends, I mean, one, sort of where the problem is.

And two, you know, it needs to be a number that is sort of manageable. Because I think in theory, you know, in every country, and I was there for some of the discussions

in terms of design, you know, in theory you would like to evaluate everyone, right? But, you know, you have to be very mindful of what the numbers are.

ADV CHASKALSON SC: The next place where there was variation was on criteria of evaluation. And you addressed that at the foot of page 15 on to 16. Again, anything you would highlight there?

MS POP: I think the most used criteria has been the analysis of the financial assets. And there it is important to have, when this is done, it is important to have a comprehensive financial disclosure. So in Ukraine, for example, they did not have a special financial disclosure that they requested in these processes because they have a very comprehensive asset declaration system where people have been filing, you know, these comprehensive declarations that also include family members and beneficial ownership every year since 2016.

But in other cases, you need to have something more comprehensive. And the other part is the access to information. So it is important to have access to, you know, all the registers, to be able to access financial information and tax information, and other records, which some of them might be linked to third parties that are not even family members.

ADV CHASKALSON SC: Again, at the foot of page 16,

paragraph 37, you talk about the depth of the asset and income analysis and the range of options explored in different places. Can you elaborate on that?

MS POP: Yes. So in Moldova, for example, they have the, when looking at the financial situation, there is a quantitative test in which the commission needs to look over 12, determine that over 12 years there is a certain discrepancy. And that in other countries, so for example, in Ukraine, they look much, they look just at, they do not need to look at a specific period of time. They can just identify a violation, some assets that are not justified. They do not have to go all, you know, look at 12 years of data.

And that, if looking at the workload of commissions, that has made it easier when you do not have a mandate to look very deeply at the sort of the financial situation. I mean, the other thing, you know, that I would say in this also has to do with design. And, you know, some of these conclusions, I am, you know, I think I am also drawing also because, you know, this is the first time that we are putting all of this together.

So, that in, I would argue that in smaller countries, you know, it might be necessary to do this more sophisticated work, just also the size of the illicit proceeds is not as big. But I think that what we have seen just from the practice of these commissions in Ukraine, which is a

much bigger country where, you know, you have the proceeds, I mean, even to put it in more lay terms, I mean, the size of the bribes is larger.

It is actually much easier to detect these unjustified variations of wealth because it is just, it is much easier to justify smaller differences through like, you know, relatives and so on because it has become, it is more plausible. But when you have really large sums of money, it is, you know, it is much harder to find justifications that have to do with, you know, family members or third parties when you are talking about tens of thousands of dollars or even more.

ADV CHASKALSON SC: And I presume you would regard us as a country more analogous to Ukraine than to Moldova.

MS POP: In terms of size, you know, South Africa would definitely be a more better competitor for Ukraine than for Moldova. I mean, Moldova is a few million people, Albania is the same.

ADV BALOYI SC: So that we do not misunderstand, when you say size, you are just speaking the population, maybe geographic as well. You are not talking about the extent of these failures.

MS POP: In this particular, for this particular issue, I am talking about the population, size of the economy, so not the individual sectors in the criminal justice.

ADV CHASKALSON SC: The next big issue that you look

at is institutional design, which you look at from paragraph 40. And maybe if you can take the Commission through what you have in mind there.

MS POP: The whole process, I mean, you know, it is a short paragraph, but it is probably one of the most important aspects, is the credibility of the evaluation body. So, you know, you can have the best methodology and, you know, you can apply and read, you know, hundreds of pages about how these different commissions have worked. But if the commission is, the body that does this work is not viewed as having independence, I think it is very hard to have the credibility to impose, you know, and to have these criminal justice officers and these whole sectors pass through this really gruelling process.

So I think how these individuals are selected and, you know, what is their standing is very important. And, you know, this is one of the, you know, and I was saying that this has been definitely a struggle in a number of countries. And I would argue that, you know, there is, I mean, they resorted to, you know, including international experts. And I think that is not because they necessarily love foreigners more than other people. But I think it has more to do with, like, how do we ensure that the people making these decisions do not have conflicts of interest.

They do not represent the will of, you know, the

executive or the, you know, or at least that there is a majority of those people with independence that have the decisive role in making, you know, in making these important decisions.

ADV CHASKALSON SC: You then talk about four decision-making models that you see across the system. Again, if you could run through them.

MS POP: So in what we have seen in Albania, Kenya and Moldova's preventing, the assessment body itself decides who passes or who fails. It filters candidates in competitive selections. So this is, for example, in Ukraine, when the special bodies looking at integrity issues, one of them was even called Ethics Council. Ethics Council, they were just filtering a pool of applicants that then was sent to someone else for appointment, whether it was candidates for Constitutional Court or candidates for this, the highest kind of self-governance body in the judiciary.

Then it is, as in the case of Moldova's vetting of judges and prosecutors, there is one commission that sort of issues a report, but the final decision is with the self-governance bodies. And, you know, I think in Moldova they also made this decision because these bodies could not be bypassed since they are constitutional bodies. And then there is sort of this variation in which, in the selection, so this is an example of specialised anti-corruption Court

judges in Ukraine, where you have the standing body that deals with the selection of all judges.

And then you have a special body of independent experts that just looks at the issue of professional integrity and financial integrity, and they more or less have the veto power in terms of who moves forward. And, yes, I think that some of them are slower than others. Of course, if you have one body, it is the fastest. But then I think also to understand it in some countries, like you have this more complicated architecture because some of these bodies are in the Constitution, so it is kind of you have no way to bypass them.

ADV CHASKALSON SC: Your next point deals with procedural safeguards. It is something that we have discussed at length, so I do not think we need to go back to it. But I do think that the issue of consequences and the day after, which again is something we have discussed, but I think it is very important to emphasise because you make a number of points from paragraph 45. And these are obviously points that need to be borne in mind if a system like this is to be adopted. Can you maybe address those points from paragraph 45?

MS POP: So the most important part, and I think in some of the countries this was also a challenge, is giving the incumbents the possibility to resign without having any

consequences, so to speak. And I think that can be very hard because it can be perceived as deeply unfair that people who have integrity issues are just leaving with their full pension.

But I think that if you are thinking from a systemic perspective, ultimately the goal is for this whole criminal justice system to work effectively and have accountability and serve the citizens. So it might be just one sacrifice in the bigger scheme of things. And I think that there is also a lot of discussions in the different systems about even how harsh the consequences of a negative finding from this process might be.

ADV CHASKALSON SC: What about the vacancy shock?

MS POP: So that is, you know, and I am very glad that we have the experiences of these countries to think about it because that is one part where there is not enough preparation ahead. Because if a system is credible, I mean from what we have seen, if there is a commission that is credible, if there is this possibility to resign and still, you know, receive benefits, then a lot of people will take advantage of it. There will be a vacancy shock.

And it is important also to think of how until these new positions are filled through a rigorous process, how, you know, even the acting positions, like what are the arrangements so that, you know, I think the worst part is

when you are going through this process with the intention to, you know, clean the system and then the system just grinds to a halt. And I think that is the part that, you know, now we know that this is an absolutely essential part of the design.

ADV CHASKALSON SC: And flagging it as an essential part of the design is one thing. Can you point to successful models? I mean, has it been addressed successfully elsewhere?

MS POP: So, one, I think one aspect was, you know, the example of Albania where they increased the number of available seats in their school for magistrates. In preparation for this, they have in Moldova, they have, and I do not know if this is sort of, if they had done it kind of especially for this, but they moved sort of temporarily a lot of judges sort of to higher Courts until, you know, the issue was solved.

I think also increasing the incentives for people to occupy this position. So, in Moldova, when a person passes the evaluation for prosecutor, for example, or judge, they get an immediate salary increase. So, then it is, you know, it is also more attractive for people to both go through the vetting but also for people who are in other positions to try to come into the system.

ADV BALOYI SC: And still on that topic, how did Ukraine

deal with this in relation of the police officers category, this vacancy? In that period when there are vacancies, what was happening?

MS POP: So, this is one process that I am not as, you know, I can come back to you on what they did temporarily in the, you know, in those months, right, where they were selecting new people and I can come back with a written sort of note on this.

ADV CHASKALSON SC: You then make the point in paragraph 47 that these processes, just like this Commission, run longer than initially anticipated. We were initially appointed for three months. But is there a way, I mean, this is an extraordinary process. It is designed to reset and to allow a new process to go forward. Is there a way of minimising the delays, of limiting the delays?

MS POP: I think there is. I also think that inevitably delays will happen. But I think just to minimise them, one, you know, I was mentioning earlier about one decision about how to conduct the financial analysis, looking at assets. So, in that case, it is important, you know, important not to look in some commissions because of the law. They look at sort of the entire financial picture of an individual as opposed to just looking for individual violations.

The, you know, also organising, you know, how you

organise the, you know, you need to, you can do the most, the easiest checks first and then, you know, go into more sophisticated, more sophisticated analysis. So, I think there is, you know, and you see that even within one country, you know, first, like, for example, the pre-vetting commission initially did not work in panels. So, then they learned that it is impossible to do the work if you are not working in panels.

So, a lot of it is just about, you know, I think now, like I said, there is also the benefit of more experiences, looking at these experiences and, you know, looking at the most streamlined and efficient way of doing it, you know, it makes it, you know, it makes a difference. Or if you are having, for example, when, if you are collecting this asset declarations from officials, a lot of it, I mean, if you are putting it in electronic form, you know, you can also have a system in which you either do the cross-checks automatically or you are looking for the red flags in the declaration in a more automatic way.

So, I think that, you know, I think we have, for example, now instruments that the commission in, you know, Kenya probably could not have, you know, could not have benefited from because it was a while back.

ADV CHASKALSON SC: Paragraph 48, you deal with the framework that you see emerging in terms of international

legal standards. Can you just elaborate on that?

MS POP: Yes. So, looking at the opinions of the Venice Commission in these different, in these different countries, the important thing is that, you know, these mechanisms address a systemic failure. They are temporary with defined end dates, which means not necessarily a date, but, you know, it can say, well, when you are done doing the evaluation of a certain group of people. Assess each person individually against criteria fixed in advance. Entrust the assessment to independent bodies whose members undergo comparable scrutiny, and carry full procedural guarantees, including notice, access to the file, oral hearing, reasoned decisions, and judicial appeal.

ADV BALOYI SC: Can I just ask this? On the face of it, it seems it is a straightforward question, or understanding, but let me check, because you speak to it. Where you speak about documented systemic failures, can you just elaborate on what is documented in this context?

MS POP: I think, I mean, I am interpreting more from the context in which these decisions were given from the Venice Commission. And I think what they are, in each of this country, it sort of came, it was either some analysis that came out, or, which was sort of like a more, what do you call it, let us say, almost like a research exercise. Or, you know, in other cases, there were, like, so many individual

events put together, so, you know, that were so egregious that would, you know, so, for example, in, you know, in the case of, like, Moldova, I do not think, I mean, as much as I know about the system, they did not have, like, a very nice document that they could refer to.

But there were enough sort of instances that were not really challenged or domestically, where, you know, there were different, that proved the foundation. And just taking it further, I think what they are trying to avoid is that someone, you know, just on a partisan basis, just decides one day, oh, we have to vet all these judges because we do not like them. So, I think that is, I think the documented does not necessarily mean, like, a very nicely bound report necessarily.

I mean, I think it helps when there is something very sort of, like, well-organised. But I think that they are, you know, they are looking at this evidence of, like, this is something really, really systemic and really serious that needs to be tackled, and there is no other way out.

ADV BALOYI SC: That takes me to the second part of what constitutes a systemic failure. What is that when we speak of a systemic failure?

MS POP: So, on, you know, I think the, in the, so, I mean, these opinions are also very contextual because they, the Venice Commission, when they give these opinions, they

both, you know, do a more or less desk review of the draft legislation, and then they travel to the countries, and they speak with, they speak with, like, judges and prosecutors and civil society. And I think that that sort of putting all of that information together for them, it sort of, like, leads to this, sort of, what is the definition of systemic failures? Where? Because if you are, you know, all of the, you know, there is, I think, you know, either reports that are written by expert bodies about the situation in terms of, like, integrity. So, you have enough evidence from credible sources, I mean, documented, not only oral, about the situation, I think, for the Venice Commission that gets to the level of systemic.

So, it is not really a formula or, but I think it is, and, you know, it might even be that you see, you know, even a judgment from, and I would say, like, you have a Venice Commission and probably you have someone from or a state body or civil society or, like, lawyers that bring to the commission, you know, a few, you know, judgments from the Supreme Court or and they see that these are, you know, judgments that, you know, like, neither of the people on the Venice Commission would take.

So, it is, ja, this is, I think that would be my interpretation of how they would make that, you know, that decision about systemic things.

CHAIRPERSON: What must that body of evidence show for one to say systemic?

ADV CHASKALSON SC: In the, so now I am, you know, the, you know, I, it is hard to sort of know exactly what is in, you know, sort of the, you know, how exactly the members of the Venice Commission looked at this, but, you know, for example, in one, in, to take one example of a law that they reviewed in the case of, you know, putting in place, which was in the case of Ukraine, this special mechanism for selecting specialised anti-corruption judges with the involvement of, you know, these independent experts who are completely outside of the system, right, who are retired judges from this, you know, different countries, for example.

And the Venice Commission, you know, also looked and, you know, at what were sort of even what was the, why creating this new body and why having this sort of process that was different from the rest of the judiciary at the time was necessary, because, for example, at the time, all cases that were prosecuted by the specialised prosecutor's office body were just languishing in Courts. So, you know, they are saying, like, obviously these Courts form the normal way, somehow something happens there, and it is a systemic issue because now you have more or less no accountability for corruption.

So I think that would be, you know, I do not think you would need to be something completely comprehensive at looking at all of the ways in which, you know, things are wrong, but I think this accumulation of evidence would be, you know, would be sufficient. And in other countries, for example, you know, they, you know, they did not, I mean, in the case of Albania, they have sort of like an inquiry commission, and they did not have this, for example, even these types of, you know, commissions that looked at these issues sort of more systematically. They did not have these mechanisms.

ADV CHASKALSON SC: Can I just raise an issue in this regard? It seems to me that the, that systemic failure has to be read in the context of what is stated there, which is systemic failure beyond the reach of ordinary accountability mechanisms, and it is a question of, I mean, as I read it, and correct me if I am wrong, it is a question of whether the ordinary accountability measures, ordinary criminal justice processes, ordinary disciplinary processes are doing their jobs, or are being seen not to do their jobs. Is that, does that sound right to you?

ADV CHASKALSON SC: Yes, yes, I think it is, I think it is correct where, you know, I mean, for example, looking at, you know, like you almost have no disciplinary sanctions for prosecutors and judges, while at the same time, you have,

you know, a lot of cases at the European Court of Human Rights, you know, related to, like, this particular country, right? So, I think that, you know, that is the question of, like, you are looking at the different points of the system where you should have, you know, there is this either lack of results or, you know, more or less all of the stakeholders are pointing to a problem and then you are, I guess, checking as a specialised body where this issue should be solved by the self-governance bodies, you should see certain type of judgments that are emerging, but nothing is happening.

There is just things on, and I think it is the difference between, and I was mentioning earlier, in a lot of these countries, things on paper look great, but the problem is that when you are looking at the outcome, and not only at, you know, public perceptions, but you should see, you know, that there is some sanctions imposed, like, you know, this discrepancy between, you know, sort of, like, lack of results and perception, and then nothing is happening through these oversight mechanisms. I think that is a sign of, you know, these types of systemic failures.

ADV CHASKALSON SC: If we move to design decisions, which you address from page 21, maybe if you can take us through the key issues that these design decisions have to address.

MS POP: Excuse me, which paragraph? Oh, 57.

ADV CHASKALSON SC: Maybe start with paragraph 57.

MS POP: So, this is applying the, you know, lessons learned from all of these examples, and how, you know, thinking about how another country could implement this. So, the main principles are exceptional and time-bound, which is sort of what we have just discussed, the systemic failure that ordinary mechanism cannot correct. Individualised, so every justice officer is assessed individually, and independent.

Assessing bodies outside the leadership of the particular criminal justice institution under scrutiny, and I think just more broadly, even beyond not being under the leadership, but it is seen as being independent even from other bodies that might have an interest in how the criminal justice institution is assessed with, yes, with strong built-in safeguards against improper external interference.

ADV CHASKALSON SC: The next two points you make about fairness and a review, not a reappointment, we have discussed, but the personnel scope seems to me a very important issue to decide on. That you address at paragraph 58.

MS POP: Yes. So, that is, I think that is, again, one of the, after the independence of the body, that is one of the key issues, the scope, because it needs to be filtered and

adjusted correctly. So, one, you want to start always with a senior management post. So, it could be in some countries, criminal justice officers already subject to the existing annual financial disclosure regime, but in some countries, that could be everyone. So, you know, that might even, you know, not be sufficiently narrow.

And then high-risk positions and functions, such as official in control over financial resources, but also in functions that are particularly vulnerable to corruption. And in the criminal justice system, that is, you know, people who have responsibility for starting criminal cases, transferring them, terminating them, those are going to be sort of special, kind of special knots in the system. And then candidates for appointment, promotion, or transfer into the above positions.

And this is sort of the experience from the other countries where, I mean, you do not want to go through all of this work of cleaning up the system to then appoint just the same type of individuals. And then, you know, everyone else can go through the regular sort of disciplinary mechanisms, but of course, those also need to be revamped and use some of the principles and the methodology and approach from these more specialised commissions to have an impact.

ADV CHASKALSON SC: Then in paragraph 60, you deal

with issues of legal design. What law addressing this issue must contain and must address, can you take each of those requirements one by one?

MS POP: So, first of all, it is important to have a legal instrument. I am not sort of aware of a system with procedural safeguards that was done without a piece of legislation. So, there, the legislation, the legal instrument must introduce a ground on which the individual evaluated may be removed from the employee of the relevant criminal justice institution following an adverse integrity finding.

It must have the power to compel the production of financial and other necessary records from third party repositories without relying on the evaluated individual to produce them voluntarily. It must provide a power of extending verification to assets and income of the evaluated person's family member and third parties within limits required to establish unjustified wealth of the evaluated person.

It must vest authority in the evaluation body to commission a verification of assets and interest and to receive its results. And it must create an independent evaluation body with secure tenure.

ADV KHUMALO SC: So, in terms of the legal instrument, just looking at 60.2, who is the power given to? I mean, if you take our police, for example, or our prosecutors. Who

would have that power to compel production of financial and other records from third parties? Would that be the employer as in SAPS or would it be this body that evaluates the incumbents?

MS POP: It would be the body.

ADV KHUMALO SC: It would not be the employer?

MS POP: No, it would be the body that actually needs to do this analysis.

ADV KHUMALO SC: Analysis, okay. And that would be a one-off or would it be continuous?

MS POP: For as long as the body is working, is functioning, you would need to have this power because otherwise it might be hard to cross-check the information that is provided by the official evaluated.

ADV CHASKALSON SC: But picking up on Commissioner Khumalo's point, if we are looking at ongoing systems going forward, in the jurisdictions that you looked at, were the independent self-governing bodies that deal with asset declarations and verifications going forward, did they get that power going forward, powers of compelling production of financial information?

MS POP: So for the, it is very hard to be an effective financial disclosure agency if you do not have this power. So there are agencies that do not have this power, but they are not effective. And agencies that do have that power,

you know, they can then check more information. So I would say that it is very hard for me to imagine how you can be effective without having access to financial information and tax information for those purposes.

ADV CHASKALSON SC: I mean, one possibility that occurred to me is that it might be possible simply to, I mean, we have a Financial Intelligence Centre here which gathers most of this sort of information and often has it readily available, and if you did not want necessarily to give the power to the employer, you could give the employer the power to essentially requisition that information from the Financial Intelligence Centre. I do not know why you would not want to give it to the employer or to a body like the Public Service Commission, but there may be reasons. But you could use the Financial Intelligence Centre as a source of that information if the Financial Intelligence Centre was legally authorised to release it for these purposes.

MS POP: I think that it is also, you know, just being even mindful of the mandate of the financial intelligence units in general, I think that in the context of a special, you know, sort of a specialised body that deals, you know, as we are discussing with this evaluation of a particular group of criminal justice officers, it is justified for, you know, some of this work, you know, to be, to more or less get the help of other bodies to process that information because it is, I

think it is just a matter of also making it easier to do.

I think in the long term, you know, there it is, you know, I think more thinking also needs to be done in terms of the resources and how, you know, even what is the methodology of the agency that does electronic verification, so that the financial intelligence unit does not end up just working on asset declarations so that, you know, you do not have, I mean, you would also need a very responsible asset declaration agency that also does a risk-based approach and does not just ask, you know, for the financial records of like everyone who is filing asset declarations.

So I think that there it needs, I would, you know, I think when you have this type of process, you know, I think there is, you know, even more interest from the commission to end this work as opposed to when you have a permanent body. I think then you have to kind of think sort of more, like, look at the details more of how this work is organised.

ADV KHUMALO SC: Mr Chaskalson, I am thinking, say, in the context of SAPS or the NPA where employees or senior employees are required to file, you know, submissions every year, financial declarations. So banks could tell you that, yes, this person, the balance in the bank account is X, but as we know, people, especially the corrupt ones, tend to purchase cars or properties. So those bodies or institutions that register new vehicles or properties, your deeds,

offices, if SAPS could go to them and say, I have this declaration, can you just confirm for me that what is in the declaration matches your records, something like that. So not just limited to the Financial Intelligence Centre, because they would deal only with bank accounts and other aspects of it. I am not sure that they would deal with transactions such as motor vehicle purchases and other things.

ADV CHASKALSON SC: I think that they have the power to requisition that, if you ask them. They certainly have the power to requisition that, if you ask them. But again, they will not have it readily to hand, and it may be necessary, I mean, we are moving away from extraordinary evaluation to recurrent annual evaluation. It may be necessary to vest that body with similar powers, or whether it is the employer or elsewhere. Again, I do not know if you have comments on that.

MS POP: I think here, it is also a different issue whether different bodies should have the power to request that information. I think it is also about how to organise the regular sort of verification of financial disclosures. Because it is very, I mean, this is also, to a certain extent, a specialised process and I think my colleague a few months ago here in front of the Commission was talking about sort of this idea of a specialised body that deals with financial

disclosure.

So I think that that is more of the question where you need to have individual, each body kind of verifying its own asset declarations, or if you should have just one specialised body that verifies everyone's asset declarations. And I think in that context, this issue of accessing financial information can be organised on a risk-based approach. Because if you have, for example, the entire database, and that happens in countries, entire database of financial disclosures, then you can do some automatic cross-checks with registries that does not require work.

But then when you go into this more invasive information, you are only asking that information when you hit some red flag, or you have in your methodology that you are verifying certain categories of high-risk positions, and you are only requesting information for those positions. And I think in that context, also you can rationalise how you request, I mean, I think even for the banks, either whether you do it through the banks or through the Financial Intelligence Unit. I mean, here it would be the Financial Intelligence Centre.

ADV CHASKALSON SC: Chair, we have reached one o'clock. We are talking now about the crux of this evidence. So I think I'd rather not rush it, even though it may only take 45 minutes. I would rather that we have time to do it

properly, and maybe we could take the lunch break now.

CHAIRPERSON: Let us come back at 2 p.m. Let us adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes, Mr Chaskalson.

ADV CHASKALSON SC: Thanks, Chair. So, we were dealing with design choices, and we were at the foot of page 23 when you were talking about the credibility of the evaluation, where you talk about the credibility of the evaluation body. And maybe if you can just emphasise that point, it is one we have made on again?

MS POP: Can you remind me the paragraph where we are?

ADV CHASKALSON SC: 61.

MS POP: Thank you.

ADV CHASKALSON SC: It is essentially the point about independence.

MS POP: Yes, just one second. Okay.

ADV KHUMALO SC: I think maybe 60.5, because I interrupted her at 60.2, because I was not sure whether the body to which the power is given, whether it is the employer or if it is that independent body mentioned in 60.5. She then clarified that she meant the power is to be given to the independent body, and I think that is where we stopped.

MS POP: Yes. So, we were talking earlier about the legal

instrument. So, the last point I emphasised is the creation of an independent evaluation body with secure tenure, and this is for evaluation purposes and for the extraordinary evaluation purposes. And then the point about the body, which is, you know, I have made earlier, the importance of the composition of this body to be members of recognised standing and for, I would say, if not the whole body and all the members, but at least have the majority or the number of people who can make decisions who are independent. Because, you know, it might be hard to have literally every member independent. Yes, and that will sort of affect a lot of other design characteristics.

ADV CHASKALSON SC: Now, when you were discussing the individual examples, you talked about how other jurisdictions use people from outside the country to guarantee independence. I like to think that in this country we are not at the point where we would need to use people from outside the country to get independence. The key issue is essentially independence. If you have the resources and the human resources inside the country, presumably you stay in country.

MS POP: Absolutely. I think that, just going back to the examples, these are countries where there was some type of capture or integrity issues starting from the top down. So, you know, if you are having, for example, in Kenya or in

Moldova or in Albania, if you are having capture in your Constitutional Court and the Supreme Court, then it is almost, I mean, starting there, and I would argue that the situation does not get better as you go sort of further, you know, down in the system.

That is also probably what led to these choices because you have no other independent category of people from which you can, you know, you can select members of these commissions. I mean, also keeping in mind that you need, you know, you can have a combination of expertise, but you also need, you know, in many, and you can see also in terms of the composition of these bodies in other countries that, you know, they include retired judges from other countries because, you know, they cannot have, you know, their own judges on this commission.

So, I think it is also an illustration of, you know, the specific situation and really the need to find those individuals who are not. And I think that is also the other part, it is not only someone who, you know, because you can find independent individuals in other countries, but also independent individuals who can have the expertise and the professional standing to be able to make reasoned decisions that will withstand, you know, appeals and can go all the way to the European Court of Human Rights. So, you still need to ensure a certain professional competence,

not only, you know, independence.

ADV CHASKALSON SC: Then the secretariat. What are the issues in relation to a secretariat of a body like this?

MS POP: The main issue is that you need the relevant expertise. So, if the focus is, you know, on financial investigation, on financial analysis of assets and of wealth, you will need to have individuals in the secretariat who have the capacity to do that type of analysis.

In some, I know that this has happened in Moldova, they also seconded practitioners from other institutions. So, for example, the investigative, anti-corruption investigative bodies. So, they had a mix of outsiders and, you know, seconded staff. And then in Albania, they even sent some of their analysis to, you know, the asset declaration agency. So, there are, and then in Ukraine, all the secretariats were completely with – like there was no one seconded from other institutions.

So, it really, I think, you know, there is definitely options there and I think it really depends on the context because you can have seconded professionals if there are certain institutions that are, you know, more or less trusted and it would not really affect the perception of the independence of the body.

ADV CHASKALSON SC: Then you have got criteria for review. The first one is financial integrity, which we have

discussed a lot.

MS POP: Yes.

ADV CHASKALSON SC: And it seems that there are two separate bases for assessment. The first is, have you disclosed everything that you ought to disclose? And your failure to do so is an independent ground of removal. And the second is, do your disclosures show an asset profile that can reasonably be reconciled with your legitimate income? Have I got it right there?

MS POP: Yes.

ADV CHASKALSON SC: Now, in your discussion of the specific cases, you were saying that this is ultimately the most prevalent ground of failure of the screening process. What are the – you deal with two more potential criteria and maybe say something about them and then we will get back to a kind of cost-benefit analysis of whether they should be included. The first is associations and conflicts. Can you elaborate on that?

MS POP: Yes. So, in this case it is conflicts of interest and improper relationships with persons or entities, including organised crime. And this analysis can be based on the reports of asset and interest for conflicts of interest and also for other sort of background checks or intelligence material that might be available about the associations of criminal justice officers and records of the criminal justice

institution itself, where the officer works.

And then also complaints and open sources. There are in many countries, there is public information available about certain cases, how they are prosecuted and investigated, that might be relevant for the analysis of the Commission.

ADV CHASKALSON SC: I will come back to that on the cost-benefit analysis in a minute, but you talk also about past conduct.

MS POP: Yes. So, that includes interference in investigations, protection of syndicates, misuse of intelligence or of official registers, and the giving or following of manifestly unlawful instructions. And if you are looking, for example, at the Kenya experience, they looked also at behaviour outside of public office and ethics breaches that are severe, that have, you know, nothing to do with opening and closing investigations, but they are still not a good reflection on the institution and the trust that the public puts in the institution and its officers.

ADV CHASKALSON SC: What sort of examples? I mean, do you have examples from Kenya?

MS POP: From Kenya, yes. Right now, I do not have anything that, you know, sort of sticks out, but I think here this is a category that was expressly included in the law. But right now, I cannot give you an example. I think when

to think about it is when it comes – are you asking about the first part of the question, the interference in investigations?

ADV CHASKALSON SC: No, the behaviour outside of public office.

MS POP: So I think behaviour outside of public office, I think this has sort of emerged in other countries just in terms of, you know, you have driving under the influence and sort of, you know, other issues that are not happening, sort of on the behaviour that is not on the job necessarily.

ADV KHUMALO SC: Failure to submit tax returns?

MS POP: Well, yes, exactly. So those issues definitely were covered, you know, directly by, you know, in Moldova. And they even looked at, actually, even for this failure to sort of correctly file taxes. Even for that, they had a threshold, like an actual threshold for it. It was lower than the unjustified, so...

ADV CHASKALSON SC: Okay. Do you have a sense, in quantitative terms, how much of the total body of people removed were removed under financial integrity issues and what proportion were removed under the other categories? Because let me put my concern to you. The other categories involve – the financial analysis can be almost automated at first stage, at any rate, and then you get to, there will be a range of utterly clear-cut cases, but the

cases that demand time-consuming investigation, there will be some, but they will be relatively narrow.

These other categories involve individualised investigation. There are also categories which will invite a series of complaints from members of the public, some of which may be justified, some of which may not be justified, but all of which will have to be investigated. And if the experience shows that not much is gained by these categories, it does seem to me that one has to think about the cost of including those categories if you want a speedy process.

MS POP: It is a good question. I would say, and this is also a question that I asked the other day, a member of the Prosecutor Commission in another country, because looking at these issues among prosecutors, it is sort of a little bit more complex than if you are looking at the judge, for example.

And so if you are looking both at, you know, if you are looking at the practice, the past one and even sort of in the commissions that are still working, it is the minority of the cases are about professional ethics. So the majority is about financial, unjustified variations of wealth.

I think the issue with the professional ethics is that, and that is a challenge if you are thinking about it is the balance between accountability and sort of speed of

process because there are cases of abuse of office to a certain extent. I mean, the abuse in criminal procedure in terms of, you know, sort of making arrests without justification.

I mean, you are interfering, you know, basically into people's lives or taking certain steps as investigators or a prosecutor that cannot really be, you know, justified, kind of going back to this idea of a kind of a judicial malpractice. So I think that, I think it also depends on how the commission would organise its work in terms of, you know – I mean, if there is, if it would really investigate every complaint or if, you know, it would need a complaint and then just, you know, also do a little bit of work and then reach the conclusion that it might be one of these situations where it is very hard to tell without really being an investigator and reinvestigating the case if this is a matter of abuse or just someone who is not very diligent or someone who is very competent.

So I think that is – but I think what can be lost when this is not taken into consideration is like having this really, you know, obvious fringe cases of abuse that are somehow now left without accountability. So it is, I think in my view is, you know, can also be the members of the commission can also sort of at the more organisational stage of the work can also manage this without

overwhelming the commission. But I think if you are looking for the easiest, fastest way, it is the, you know, just looking at the financials.

ADV CHASKALSON SC: You then deal from page 26 with some of the mechanics in relation to financial analysis. Most of this we have gone through before. Do you have a view on whether it is advisable to set up a skilled staff complement for the institution or to depend on financial investigative capacity that is seconded from elsewhere?

MS POP: I think it really depends about the quality and credibility of the seconded help that you would get. If that, you know, that help is there, then it is, you know, it is easier for the, you know, it would be easier for a commission to do this, you know, with staff that is more or less already working in the system, you know, knows how to even at the basic level get access to records and, you know, analyse it.

I mean, a little bit how this would work in a, let us say, governmental or public sector context, but it has been done both ways. I think the advantage of having seconded help is the cost because, you know, I mean, it depends how, because that manpower, so to speak, is already in the public sector. So from that perspective, it can be easier or at least having some part of the analysis that is done by different institutions.

So let us say, you know, the institution, or the

seconded, I mean, depends how it is formulated, but, you know, either the commission sends to this other institution sort of a request to do this analysis without seconding the staff to the body. And that is the first step, but then the, you know, commission still has some analysts that work just for the commission to do the second part of the analysis if it is needed or even just to sort of help explain certain aspects to the commission. I think it can be done. I think it can be done both ways.

ADV CHASKALSON SC: Then from the foot of page 27, paragraph 67, you talk about the period which is subject to financial examination.

MS POP: Yes.

ADV CHASKALSON SC: What points would you emphasise there?

MS POP: Yes. So one, the first point is really one of caution about sort of how far back the process looks at financial records or records about assets. I mean, I think we all know that even in our own lives, the farther you go in the past, things get, you know, a little bit murkier in terms of finding documents. And this should be, you know, it should be reasonable, you know, in terms of how long, you know, people even keep records.

And then there should be ideally clarity in the legislation about how far back the evaluation of assets and

of professional conduct or professional ethics is being done. And, you know, what I have seen in, you know, the examples is there is sort of a longer time span for the assets and the income. Also because this is how I think many times when people evaluated, tried to justify assets, they always tried to sort of push it really sort of farther in the past.

For conduct, a shorter period. And I think also on the issue of conduct, you know, here an example of five years, I think also for the issue of conduct is, you know, thinking again even about what are the trade-offs is we had discussed earlier that in these types of processes, you would want them to be, I mean, as a priority looking at people in management level or high-risk positions.

So, you know, many times you are looking at people who are not just rookies. So who is not that they just started their work in the criminal justice system. And if you are saying that it is someone who has a certain level of seniority and you are looking at more like the professional record in the past five years and then you are seeing these issues around, you know, abuses of power, I think the line is probably sort of it is harder to justify these types of behaviours when you are more experienced than, you know, in a situation where, you know, people might just make more, quote-unquote, honest mistakes because they are not

experienced and they have not, you know, this is like their first, second, third prosecution or investigation.

So I think that is also a little bit even the logic with not going back 20 years. Although, you know, in the Kenya case, they actually went, you know, more in the past than, you know, five years. But again, it might be justified if you are looking at a smaller pool of people being evaluated. And then, you know, there is this issue of the review being targeted.

That is, you know, also thinking about how to streamline the process. That it is really about adopting a risk-based approach, first of all. So not trying to find all the red flags in the, you know, in the declaration, just focussing over, you know, looking only at a few issues before going into a full-blown sort of review of each element in the declaration.

I mean, also keeping in mind that, you know, with this process, you have the reverse. I mean, you have the reversal of the burden of proof once you find serious doubts. So, you know, it is not, you have to document these serious doubts. You know, you do not have to sort of put together a criminal case about, you know, illicit enrichment or anything else.

And then the second part is, it is important that the review is not seen as a forensic reconstruction of every

transaction over a certain period of time because that will just make it unnecessarily complex and add cost to the process.

ADV CHASKALSON SC: And if I recall correctly, that was a problem with Moldova?

MS POP: Well, yes. They were, I mean, because of the design of the system, they do have to kind of understand the full financial picture because they have to determine if that threshold is hit or not.

ADV BALOYI SC: Look, I mean, to avoid or to exclude arbitrariness when you decide assets, it is a longer period, and the other thing is conduct. You say the preference has been for shorter periods when it comes to conduct. There must be a rationale for either choice of why you go back so many years. What have you found to be the considerations that have informed those choices?

MS POP: You have to, I think when it comes to unjustified variations of wealth, you have to go many times back because the sources that, you know, someone accumulates assets over time. So you have, by the time you evaluate it, you have a certain asset situation. And then when you are trying to justify it, you are going to inevitably go back in time and say that, you know, eight years ago I sold this house, and with that money I bought this other asset, or I have been receiving every year, every six months, this

money from my mother who lives in the village, and she grows bees and she has been selling all this honey in the market, and over all these years she accumulated this money and gave it to me.

So I think that you need to have this larger period of time to understand the whole story and to be able to justify the assets, because I think it is very rare that all of these transactions happen in a short period of time. I think especially if you are, you know, trying to justify something you do not have. I mean, you cannot justify. I think you will have to look back.

And with regards to the conduct, I think it is thinking even more about streamlining, why there you have a shorter period of time, because you are looking at an event at a certain point in time as opposed to sort of something that has these interactions with the past where you are using the past to justify the present and so on.

And I think I said, I mean, you know, it looks from the practice in Kenya that they looked, you know, further back into the past, but I think then you have the issue of if you have a lot of people, what does that mean in terms of workload? I mean, I think it might be good to do, but hard to do. I hope that answers that question.

ADV BALOYI SC: Well, maybe just to explain further what I am trying to process in my head, it is with a shorter

period, for example, of conduct, I can conceive of a consideration that, you know, people do rehabilitate over time, so there is an unfairness in looking at 20 years, maybe five years of conduct is sufficient to tell us about this person. I am having that kind of debate in my head about perhaps that is a justification for a shorter period.

And then assets, I am not quite sure, I am not there yet where I have an idea, but it is that kind of debate that I would want to be more enlightened about, you know, that if we were to consider a period, what would inform a selection of a particular period in a way that is not arbitrary, we could have picked any number, you know, that it has to be reasoned, as you said. All right, thank you.

MS POP: So I think just, Commissioner Baloyi, maybe to, you know, if this helps, you know, in the case of Moldova, if my memory is correct, they actually went back 12 years for assets. And the way I understand it is that you are looking, you are setting out that period of time, I think, both to keep it reasonable because then you can go 20 years and then you are asking for documents also in a lot of countries, you know, like even how land is.

I think that, you know, it is really what is reasonable in that context and what is practical. Because beyond a certain point, you know, people do not really have records or they do not have the parents' records and so on,

but you also want to be able to look back, you know, for a very sort of solid period of time, also so that there is not sort of some justifications that go back, you know, a long time and then you are not able to sort of get the records or look into that because it is sort of this long period of time.

So, I think it is really about, and this is why here it is an example, it is sort of what really fits in that particular jurisdiction to be able to get the full picture of, you know, someone being in, you know, in the position in the, you know, sort of like a public sector criminal justice position and having a period of time where, you know, there is enough space to look at the different transactions that they might have done because, you know, if you just have a short period of time, you might not have, you know, enough visibility even of how much the assets have, like the assets have increased over time.

Like where did they start? Basically what you want to see is where did they start and where did they end up? And I think probably also if you have someone in a, let us say, like mid-career, right, like not at the beginning of the career, that would give you the amount of time that they were, you know, more or less in that, you know, a certain position.

So I think that is the logic when it is used in different countries. And also to limit the scope of the work

so that you do not have commissions just looking into, you know, the person's assets since they were 22.

ADV CHASKALSON SC: Can I ask a related question? This whole discussion has been on the assumption that there will be the same time period for everyone. Do any of the jurisdictions say this is the category of incumbents who we are looking at and we will go back either five years or a lesser period to the point at which you were appointed into this category of incumbents?

So in other words, you do not, if you are looking at, you know, senior management, you do not go and look at someone's track record before they enter senior management. You never start before they enter the category that you want to look at.

MS POP: I think that just from a practical consideration, in the case of some of the Ukrainian processes, there is not that specificity about the reach. And I think that specificity did not appear also because the commissions were very streamlined and I would say practical about, you know, they did not request assets like 30 years.

So I think it just depends on, you know, how much, and it is even an issue of sort of legal sort of tradition and like how much do you, like how much do you need to really ringfence the type of work of the commission? Or is it, you can just leave it, you know, you can just leave it to broader?

And I think that, you know, I mean, when you are saying 10 years, it is sort of like looking at an average that would be reasonable.

But you would not have to also, would not have to look at the, you know, reconstruct all the transactions in 10 years. It might be the case that you find, if you are looking, and this is a little bit of risk-based approach in verification, you might find enough information in the past three years to see the unjustified variations of wealth and then you are not going to go back all the way to 10 years.

But, you know, in certain cases you might, you know, need to do that. So I think that, you know, asking that question makes perfect sense because, you know, sometimes it might be necessary, other times it is not. So I think it also comes, it is just, I do not know if it is so much, it is more about, it is not necessarily a question of time, but it is how, if, to what extent the commission needs that fencing in terms of scope and mandate, or if this is something that can be left more at the discretion of the commission.

ADV CHASKALSON SC: You see, it does seem to me that it is important to have an outer limit, beyond which it would be unfair to impose obligations on people to justify their asset profiles or whatever. But it is, you know, within that outer limit there may be scope for discretion, but one

should not ask anyone to justify their finances in respect to a period in which they could not reasonably be expected to keep financial records.

MS POP: And I actually also think having a limit, I mean, now we are discussing it in more depth, having a limit is also helpful when people are looking at the process and deciding what to do. Because if they, you know, they might even decide for personal reasons that they are, you know, like they need to know what to expect of the process even in terms of what records they need to make available so that they are not blindsided in the middle of the process that they have to produce all these documents that they have no idea how they could possibly get.

So I think it manages, I mean, it manages expectations also to a certain degree and you have this sense of, you know, certainty and predictability about what the process is going to look like because now you know that I need to be ready to explain my finances for the past 10 years and my conduct for the past five years. So then you do this mental calculation and then you will, you know, understand where you are standing with regards to the process.

ADV CHASKALSON SC: The next topic that you address is procedural and related safeguards, and if I were to turn this into South African legal language, essentially what you

are saying, I mean, you may not be aware of it because you are not a South African lawyer, but the process needs to meet the established standards of administrative justice in South Africa.

I do not think there is anything that you say here that is not ordinarily captured by our requirements of administrative justice. So you speak of undefined or vague criteria. Absence or inadequate reasoning in evaluation decisions. Absence of an individual hearing or absence of procedural fairness in the form of effective access to the case file or sufficient time to respond. So these are all categories that we are very familiar with. I think from 71 you make points which are not as obvious to us. So maybe if you could elaborate on 71 and 72 and 73?

MS POP: Yes. So 71 is the burden should sift to the person evaluated to explain certain discrepancies only once the panel has identified them. So the panel, the evaluation commission, collects sort of information about, let us say, unjustified variations of wealth is the easiest. And then all of these discrepancies, these doubts about the source, I mean, the justification of these variations of assets are presented to the officials who then needs to explain how this variation can be explained.

And I think also in terms of process afterwards, I mean, in several of the countries where I know the process

better, so in Ukraine and Moldova, this happens. Like first there are written questions that are sent to the, sometimes several waves of written questions where, you know, the doubts are presented about sort of this variations of assets and then the evaluated person sends written sort of explanations and then it all culminates with the oral hearing where it sort of, it should all be clarified. So that is 71.

Consequences must be proportional to the finding, so that a minor inexplicable discrepancy is not treated as concealed wealth. So here is the, I mean, I think the issue of not certain, I think in terms of variations and in terms of I think even looking at sort of tax issues. I mean, there are certain issues in the sort of asset situation that might be, that are minor and others that are more serious.

And I would say also in terms of, I mean, first there is sort of this requirement even from the European Court of Human Rights jurisprudence that there is a range of sanctions that are imposed, but I think it is also important more for the credibility of the process and also for even the extraordinary status of this process that this is really not done to just find some minor unintentional errors in the profile of the person. I mean, the idea here is to solve some type of momentous crisis, and I think that needs to be kept in mind.

And then 73 is the importance of having a defined

avenue for judicial review. I think that especially if this happens into a situation that is not like Kenya's where this is somebody set up a constitutional body that does not need to have these avenues for legal review ...[intervenes].

ADV KHUMALO SC: So what you are proposing in 72 is a materiality threshold basically. You are saying above a certain threshold that should be regarded as material, but minor discrepancies or minor mismatches between legitimate sources of your wealth and your assets, those can be overlooked.

MS POP: Yes.

ADV KHUMALO SC: But if they are material enough to justify further enquiries, then...

MS POP: And I think it is also, you know, you do not even need to go as far as, you know, they went in Moldova where they actually have a statutory threshold. That it can be, you know, it can also sort of be left at the discretion of the commission in terms of what is, you know, what is sort of a minor discrepancy.

I think that because also when you have minor discrepancies, when you have unjustified variations of wealth, I think it is much easier to come up with a justification for it that is reasonable. When it is a small sum of money, it can be a gift from a friend and it can be I think the – it becomes more of a judgement call I think even on

substance. Even if you go beyond what is even the objective of this exercise.

ADV CHASKALSON SC: I understand that this issue is actually debated extensively in the Metalla, I think it is M-e-t-a-l-l-a case, which is referenced at 117, and it – I say 117, it is not 117. Sorry, 115. It is the European court case in *Metalla v Albania*.

MS POP: Yes.

ADV CHASKALSON SC: And it is essentially a proportionality test, which is something that our courts are very familiar with here. It does leave some discretion, but the ultimate issue is the sanction proportionate to what the undisclosed problem reveals. Sorry, having gone to find *Metalla*, I have now lost my place. Resignation and consequences. And again, this seems to me a very important topic. So maybe if you can take the Commission through paragraph 74, footer 29, page 29?

MS POP: Resignation before the evaluation process begins should be permitted and regulated. In every foreign system studied, resignation rather than assessment was a common outcome, and in some a majority one. It is a deliberate bargain. The state is spared the cost and uncertainty of proving its case, and the most exposed officers remove themselves, which achieves the primary objective of cleaning up the institution quickly.

The cost that those officers leave with their benefits intact and no adverse finding on record, which may be perceived as impunity, and that they may resurface in other positions.

ADV CHASKALSON SC: Your paragraph 75, I think, raises a very – 75 and 76 deal with this issue of people resurfacing in other positions. Can you take the Commission through those paragraphs?

MS POP: Yes. So the important issue here is, one, that the personnel covered by the evaluation does not wait until one day before the final appeal decision is made whether to retire or not, because then, you know, there are all of these resources that have already been spent just trying to deal with that.

Ideally, the window for resigning with less severe consequences happens before, you know, the commission spends a lot of time and effort looking into the integrity situation. And there should be, you know, it is important that there are some consequences in terms of re-employment, because you do not want the person to leave with their full pension from one institution and re-emerge unvetted in a different institution.

And, yes, so then once a person does not resign or retire, the refusal to undergo the evaluation or failure to submit, for example, documents ad hoc as a declaration or

other declarations that are part of this evaluation triggers the officer's dismissal and a resignation tendered after this small window has closed should be deemed equivalent to an adverse finding and carry the same consequences.

Yes, without this rule, an officer will wait until the last moment to leave the system. And I think here is also what is important to keep in mind is that once you have this rule, you also have to keep in mind that the system cannot take years, because there were situations during these evaluation processes where people just wanted to change jobs and, you know, sort of leave in the middle of the evaluation.

And more or less they knew that they had to more or less stay almost in a type of forced labour situation because they had to wait for the end of their evaluation. So this also is something that needs to be thought through and either, you know, legislated so that people are not prisoners to their jobs until this evaluation ends, or to, you know, think of whether they can in the process, apply for other positions or, you know, so that the impact over the person who is evaluated is also managed.

ADV CHASKALSON SC: So essentially, I mean, what you are looking at is a mechanism that would address that, would be a mechanism in terms of which the person being evaluated gives notice that they would want to move jobs

and then the commission has a fixed period, be it three months, six months, in which to finish failing, which you can move without consequence.

MS POP: Absolutely, it is something that, and this is something that even I, you know, I mean, even being familiar with some of these processes, you know, when this emerged in Moldova, like I also, it was something I did not think about, but a lot of prosecutors were in these situations and there were cases where, you know, prosecutors left and now they have this, you know, finding in the record, and the commission in these cases, because they did not complete the evaluation because, well, the person left. So, ja, so it is these types of situations need to be thought through so that there is, you know, they are properly managed.

ADV BALOYI SC: There is an adverse finding in that situation contemplated in 76.2. Has it been tested and upheld by a court that you leave mid-evaluation and automatically, because that is how I understand 76.2, the commission does not, or the body does not do any further work and maybe find, you know, everything is properly explained and so there should be no adverse finding. But 76.2 suggests that the commission does not do any further work. You have left, automatically an adverse finding is made. Has that been tested before a court, whether it can be sustained?

MS POP: It has not been tested as of yet. I know that this situation appeared where there was a prosecutor who was national of two countries and then decided to move from country A back to country B. So it was not, I mean, the consequences, you know – but I think it was even reputationally wise, you do not want to have that sort of on your record just because you changed jobs.

But other people, you know, even decide, I mean, decided to stay in their jobs for more time than they would have liked just because they did not want that negative finding to be on their personal record. So they stayed in their position until the moment when they passed this vetting and then they just left.

So, but it kind of put people in this position where you are just staying in the job because you are waiting for the vetting to be completed, But that can also be managed. I mean, you know, you want to think about the situation, but I think it also speaks about the importance of speed in this process because you would not get into these situations even if the process moves quickly.

So that, you know, you do not have, you know, someone is not in this position for a year where the, you know, where the process starts, you are sent, you know, you are sending the asset declaration, then like more time passes, then you are being asked the first set of questions,

then you are being asked the second set of questions.

I mean, this process can – so I think it is also about how, you know, the organisation of the process, even in terms of how you deal with, you know, if you deal with, you know, one person and you finish it right away or you are doing, you know, evaluations in parallel. So there is, I mean, some of it is just about the administration of the administration of the commission's work, but these have been some of the unintended consequences in the middle of the process.

ADV CHASKALSON SC: Again, it seems to me that that is an issue that could be addressed by putting it, as it were, a time limit on the commission to reach a decision after which the adverse consequences of resignation would not attach. So the commission, you know, has six months from start to finish to make a finding in respect of any person from the moment that they submit their declaration, their first declaration.

If it has not done so, then no consequences attached to resignation. It does, of course, mean that the system will only work if it is efficient, but one would hope that this sort of a process, if it does, if it is implemented, would be implemented efficiently.

The big consequence and the important consequence in relation to resignation you deal with in 77,

which is the time bar on re-employment within the same institution or other institutions of the criminal justice system, because there is no point in having a system that is designed to cleanse the criminal justice system if the parties who get pushed out in that process can just simply take up jobs in another part of the criminal justice system. Is there anything that you would add to what you say in 77?

MS POP: No, I think just emphasising this point of you do not want to move the problem around. I think that is the point of that paragraph because there have been these situations where, you know, without this sort of interdiction to move to a different institution in the system where people have just been dismissed from one institution, you know, because the criminal justice system is large.

So then they went from, you know, one, they went from like persecutorial body to like an investigative body and now, you know, you have – I mean, the people did not disappear and I think that is, you know, you still and I think you have to have to be mindful and you still want to not remove the ability of the people to work for a living.

But, you know, you should not sort of interfere with their ability to work in the private sector, for example, which I think is, you know, with legal professions, it can be sort of also complicated because sort of having these moving from sort of the public sector to the private sector, if you have in

some countries, if you have some this sort of this as part of your sort of professional record can be complicated.

But I think it is important, I mean, to be mindful of at least having visibility, you know, having this bar, but I think also having the ability to enforce it so that you know that person X, you know, is not able, you know, has received this restriction but that when someone makes, you know, you are being employed in another investigative body or sectoral body, they have the ability to see if you have been, you know, barred from, you receive this restriction.

ADV CHASKALSON SC: In 79 you make a point which is self-evident but which needs to be made because one might take it for granted otherwise, which is that if this system is going to work, then the enabling statute needs to provide the necessary grounds, statutory grounds for removal and the two that you flag are a failure to pass the integrity evaluation and a refusal to comply with the integrity disclosure obligation, because those grounds would not necessarily constitute dismissible misconduct under ordinary employment law.

The next point and we have touched on it already but again, I would like you to amplify is there will be personnel attrition through the process and it needs to be managed. What would you say, I mean, is there anything beyond what you say in paragraph 81 that you would want

to emphasise here? Well, maybe make the point that you do make in paragraph 81, which is the scale of the problem.

MS POP: Yes. So, there is one point about the, you know, acting appointees where, because you do not want to have a situation where, you know, someone is removed from a position but then is replaced by someone who is, you know, acting for a really long period of time, so they are *de facto*, you know, almost have a tenure, or as a way to avoid even if you put in place a system in which the new people who are selected for the positions have to also go through some integrity evaluation.

And I think it is really, I mean, the point here is like thinking through all the loopholes that people will try to find to fill these positions. You know, is the issue of passing evaluation should carry benefits whether through priority promotion, improvement in conditions of service. I was mentioning earlier that in some cases this was used also as a carrot to, you know, have, you know, people get even increases in pay after passing the evaluation.

And this is, you know, I think this is also important because I know that, you know, we are in a different country, we are having this – there was this discussion about sort of integrity in certain positions and for, I think both the government and other institutions it was very hard for them to support such measures because they said, well,

these institutions have no public trust. Like, how are we going to, you know, why should we give them higher salaries, basically?

And this is also, I think, thinking about sort of the bigger picture because sometimes personnel attrition for certain positions might be even a good thing. I mean, sometimes you do have these completely big institutions where, you know, not everyone is performing.

So, I think it also gives an opportunity to rethink the institution a little bit. You know, I have seen these examples in other countries where you would have this institution that is an investigative body and their salaries were not very high. They went through, you know, even changing in management and, you know, with the sort of changing management with, for example, changes the opportunities for engaging in corruption, then, you know, before with corruption plus your salary it was a comfortable situation.

But once you do not have those opportunities and on top of that, there is vetting coming, it is an opportunity to renew the institution. And then, if people are leaving and, you know, I have had this discussion in other countries, the first instinct of, you know, leadership of any institution is we need people, we need body, we want to hire the exact same amount of people plus even a few 100 more.

But I think this, the attrition, you know, in certain cases like when you have, you know, a Supreme Court or a court, you know, where, you know, you need to have a certain, I mean, you do not have hundreds of people or thousands of people. But other institutions, you do have much bigger when you are looking at some prosecution bodies, some investigative bodies that are really big.

And there, when you are doing this cleanup is also a little bit of an opportunity to, you know, rethink how many people do we need, what skills do we need, you know, what type of, like, you know, when we are selecting people, yes, we are selecting them from an integrity perspective. But, you know, this is also an opportunity to look at, you know, what type of specialists we need or professional.

So, I think that it is not only about you had 10 people who left and you are hiring 10 people and how do you manage in the – I think it is sort of, it is a broader discussion that opens also possibility. If you have fewer people, then you can pay them more. So, that becomes a different, and I think can be a very helpful discussion for an institution.

ADV BALOYI SC: Saying in 81.2 that you reward to incentivise people to participate. That is how I have read it.

MS POP: Yes.

ADV BALOYI SC: But from your explanation, you seem to

be saying that you would offer those rewards there as part of institutional change, less about trying to encourage people to participate, because I am not sure I understand the justification for rewarding people to participate.

MS POP: So, I think that it is a part of your rewarding people because they have successfully passed the evaluation, one way to think about it.

ADV BALOYI SC: Is why? Why? In the first place, we should not even have to do this because the assumption would have been that everybody that is in that position meets the integrity requirements. So, I should not have to reward you once I have proven that you do.

MS POP: And it is a very good point and I think the, for example, if I understand the situation correctly, in Moldova where they decided to increase salaries, was there had been discussions earlier about how the salaries were, you know, had not been increased for a number of years. But because the reputation of these bodies in terms of integrity was so problematic, there was no motivation to actually increase the salaries for a certain period of time because the perception was we are giving higher salaries to corrupt people.

So, I think that is the – it is not really, I mean, it is, I do not know if I would put it as sort of necessarily a reward, but I think that from a systemic perspective it

seemed that, well, now you have – we know that these are people with integrity, therefore we are comfortable with giving them higher salaries.

I mean, so you are right, I mean, these people should have integrity because that is their professional responsibility. But sort of, and I think it is also about one of the challenges, so, you know, for example, in Moldova, right now there are only certain, for example, in the prosecution services, only specialised prosecutors that have to go through this evaluation process, but not regular prosecutors.

So, let us say prosecutors in region, like just the prosecutors who deal with organised crime and high-level corruption have to go through this. So, then in the process of, you know, people have resigned or are going through this evaluation process, they need to be replaced by other people in order to fill this position.

Now, there is this requirement of people having to pass through vetting, and for their own sort of historical and structural reasons, the path of the prosecution is very sort of narrow. So, in practice, it is mostly other prosecutors who are not specialised who can now become specialised. So, then you also have to somehow incentivise people who are not going through any type of vetting to put themselves through the vetting.

So, I think that is a little bit, because after, you know, after this process, I think sort of people who are comfortably in their position are thinking once or twice about, you know, whether they should put themselves through the process as candidates. So, I think that, you know, maybe my formulation of this was not very fortunate because you are right. I mean, this should be the basic requirement. You should not receive a prize for having integrity.

CHAIRPERSON: Sorry. Did I not see somewhere in your statement that you make the point that there may have to be salary increases so as to attract expertise into the system? I think that is a better justification than appearing to be, ja, giving a benefit to those that were there already. I am not sure where I saw it, but I think I did see that somewhere here.

MS POP: Absolutely, Chair.

ADV CHASKALSON SC: I do want to express a dissenting view here. That is not my job, but it does seem to me, I mean, it depends on the extent to which an institution has been compromised, but I think it takes extraordinary moral courage to be the sort of single person in a group who does not take the bribes, who does not collude with organised crime and the like, who actually keeps standards within an environment where standards have fallen.

And if the assessment, and I am not saying that the assessment is, is that there are parts of the justice system that have reached that point, then I certainly would think it would be appropriate to remunerate the people who stood up to the rotten institution, but that is not a question you do not need to respond to.

ADV BALOYI SC: Can I just say though that I can understand an argument or justification that says, that looks at why people had been corruptible. I mean, we have those kinds of explanations where the justification is people receive, take bribes, are easily corruptible because they are not sufficiently remunerated. And if you are going to improve having completed this process, then the ones that remain, you say we will increase their salaries, we will give them better benefits.

I can see how that can be justified as a means to avoid them being, basically to be addressing the reason why others faltered in the way that they did. And so the ones that have passed, it is less about rewarding them for being straight and narrow, but about preventative measures. I can see that argument and that justification, but I reward you for keeping the line I have difficulty with.

ADV KHUMALO SC: Maybe if you call it a motivation and not a reward, it sounds better because at the end of the day, you want to reward people who are doing their job.

Even if it is your job, you still want to be rewarded. That is the reason we give people bonuses and other things. I think speaking for myself, one of the things that we often overlook is people losing motivation, losing the sense of why I joined this institution in the first place. I wanted to fight crime, I wanted to serve the interest of justice, whatever.

And then you go into an institution where a majority of people are taking bribes or are doing wrong things, and you say you throw your hands in the air. So many people are doing it. What is the point? I came here thinking I can change the system. The system cannot change, and then you start becoming part of that.

And going to your point, Mr Chaskalson, those who continue to do their job diligently in those circumstances should be commended. I do not know if reward is the right word, but they should be commended, they should be motivated, they should be encouraged.

ADV CHASKALSON SC: If we move on to the foot of 33, there are a range of almost miscellaneous points that strike me as kind of random lessons that have been learned through the comparative experience, apart from the systematised points that we have already discussed. Can you take us through those and what you have in mind there?

MS POP: Yes, and I think that as I was mentioning earlier,

this is the first time that we are putting these experiences together, so this is why maybe there is a more systematised way to make these points, but, you know, we wanted to raise them.

The one point is about the evaluation not being suspended pending the outcome of any civil recovery process or criminal prosecution that may be pending concerning the officer, because the purposes, standards of proof, and consequences of the evaluation differ. And I will maybe just make a note, I think it also, these types of issues might be depending on the legal practice or, you know, in some systems, you need to spell these issues out, maybe in others you do not.

But we just wanted to make, I mean, these practical points. The evaluation body should be able to use materials of the pending criminal investigation if they are material for the evaluation criteria. For example, if the criminal investigation clearly implicates the officer in misconduct or integrity breach under the evaluation criteria, the evaluation body should be able to base its findings on that material without waiting for the criminal investigation outcome.

Any prior finding concerning the officer in other proceedings should not prejudice the extraordinary evaluation, and the evaluation body should not be limited by

such findings. For example, and this is a classical example, a prior review of the officer's financial disclosures or decision to grant security clearance should not determine or prevent the integrity evaluation.

So, the issue of the review of officer's financial disclosures, because in a lot of systems you have, you know, the review of financial disclosures. So, this was an issue, for example, with disciplinary bodies in, you know, Ukraine, many times, where the position of the, like, judicial disciplinary bodies or prosecutorial disciplinary bodies was that as long as the specialised agency dealing with financial disclosure did not find any issues, then we should not consider any violations or, you know, even look at it because this issue has already been settled.

So, the point is to make that clear that this is a completely different process, and the findings of that, for example, the disclosure body has nothing to do or will not influence the decision of the evaluation body. I mean, they can, you know, many times these bodies actually have in, you know, the countries in Eastern Europe, they will even have their public decisions about why they started verification and why they stopped and the fact that they did not find anything. So, you can review that, but it should not be binding.

The time allowed to an officer to answer should be

reasonable, stated in advance, and extendable on recent request. So, that is more with the procedural safeguards. The act of the evaluation body's procedural rule should state whether the officer may introduce any new material if it could have been introduced earlier and was not. So, what these types of rules were introduced in some of these commissions, procedural rules, to avoid a situation where there is a back and forth in terms of written questions with regards to documents, justification of assets, and then, you know, you have the oral hearing and someone shows up with, I found the document which explains, you know, how I, you know, acquired this house.

Parliament and the public should receive periodic consolidated reports on progress and outcomes of the evaluation, and I think that is also maybe to, you know, when thinking about the consideration around time and how long these processes take to, you know, also have a little bit of pressure on the commissions to work swiftly. The evaluation process should run to a fixed but realistic deadline with a statutory clock beginning only once the evaluation body and its secretariat are operational.

The evaluation body should report periodically and publicly based on defined metrics, including number of officers assessed, date of proceedings, and outcomes by category. The body should operate transparently while

limiting interference with privacy and other rights to what is necessary. The legal instrument could specify that interviews with officers be broadcast live with exceptions to be decided by the evaluation body to protect the interests of minors and sensitive private information.

And this is something that commissions have done routinely, you know, with a small minority of hearings being done, being kept closed. The implementation of such an extraordinary process should be understood as a once-off deep cleansing exercise to address documented integrity failures in a compromised institution and restore integrity and rebuild public trust.

ADV CHASKALSON SC: Sorry, can I interrupt you at that point?

MS POP: Yes.

ADV CHASKALSON SC: Because I do want to take up an issue that was ventilated just before lunch, and it was the issue of documented failures and systemic failures. And I mean, I do not know if you are being polite, but it does seem to me that this Commission has been set up to spend at this stage a full year investigating whether our criminal justice institutions have been infiltrated by organised crime.

I am not pre-empting a finding of the Commission, but if this Commission were to conclude that the answer to that question is at least in certain respects yes, it seems to

me that would be a documented systemic failure. Of course, if the Commission concludes that the answer to that question is no, well then these issues do not arise. But I mean, would you agree with that proposition?

MS POP: Yes, I agree on the, you know, on the instrument. And I mean, I would say to a certain extent, I mean, in the countries that we talked about, they did not have the benefit of such a comprehensive exercise. I mean, the documentation that was put together was, you know, sort of from different parts, but it was not sort of a concerted effort of a specialised body that just focused on this issue.

So, I would agree that, you know, this is a process that should be able to give an indication and a finding over, you know, whether there are systemic failures or not. And as I mentioned, I think it would probably already be more than the work that has been done in other countries to document with sort of specificity the problem that this instrument is then trying to deal with to a limited, to a – well, as a first step.

ADV CHASKALSON SC: And then you are concluding paragraph in 90, this is a one sort of deep cleansing exercise. There needs to be alongside it much more longer term ongoing mechanisms. And maybe if you can take us through paragraph 90?

MS POP: Yes. So, this really talks about having on the –

these extraordinary evaluation processes can create the foundation on which to rebuild institutions. And then there is, in order to do this sustainably so that, you know, the same crisis situation is not repeated, then it is also important to deal with routine integrity mechanisms that have to be in place.

So, the mechanisms for dealing with misconduct within institutions, the mechanisms that deal with sort of financial disclosures, having an effective system. And then the issue of appointment processes for senior officials and officials in high risk positions so that, you know, those who leave the system are replaced with, you know, people not only with better integrity, but, and I think we already started having the discussion, but also people who are able to deliver results.

Because ultimately, and, you know, ultimately this whole process is not just to have clean institutions, but the ultimate goal is to have clean institutions so that these institutions can actually deliver results. It is not only about having people with integrity that do not deliver results. So, I think that is also the issue that needs to, once – and once the integrity issue is dealt with, then I think even institutions can look closer to the issue of effectiveness, because then you understand better why an institution is not effective.

Because before you did not know, were people corrupt, or they did not know what they were doing, or they needed training. You know, and just, I think a side note on this, you know, many times, or definitely in our field, you know, international development, there is a lot of talk about trainings and capacity building. And, you know, what I say from my experience is that, you know, you cannot train people who do not have integrity. So, that is really, you know, I mean, you can train them until you are blue in the face. So that is the first prerequisite.

And then it is, you know, then you can build, you know, you can train people, you can do other things that before it was sort of not clear if it was going to deliver results. And then, you know, sort of – and this point two is when, you know, and having this experience of the extraordinary evaluation that focusses on financial aspects, is it really shows the importance of introducing civil forfeiture for unjustified variations of wealth.

Because in, you know, in all of these countries, you know, as we are mentioning, like 90% of the cases are about unjustified variations of wealth. You can use them as the commission to dismiss someone, but you cannot, you know, you cannot forfeit those assets. So, yes, even if someone, let us say, leaves the system, there is still many times left with these unjustified assets.

I think that it really, these processes make it very obvious why that instrument is very important. Because many times, and I think that the cases really show them, it is very hard to prove the link with criminality. I mean, you do not know exactly what crime, you know, what crime this unjustified assets are, you know, are originating from. So, countries have also introduced this, you know, what my colleague, Dmytro Kotliar, who worked on this issue a lot, calls the pure unjustified variation of wealth civil forfeiture system, in which you do not need, you are just looking at the public officials and at the unjustified variations of wealth, and then you have a civil action to have the forfeiture.

ADV CHASKALSON SC: From my side, that is all the questions that I have. If there is anything that you would want to add in closing remarks beyond what you have just said, feel free, but otherwise I am I am done from my side.

ADV KHUMALO SC: Can I ask one question before you do your closing remarks? We have looked at various case studies and other cases. I was wondering if you have come across a situation where what we are solving for is really a deep cleaning exercise, and you are saying one of the methods of doing it is this extraordinary evaluation exercise.

My question is, have you come across a situation

where instead of people who have failed the integrity test and other tests, instead of them being dismissed or, you know, moved out of the system, people are instead encouraged to come forward and they are given maybe immunity or something like that, or an amnesty, for example?

Because the problem with these checks is you are not going to catch everybody, and you have a situation where outsiders know more than the insiders, and you want to encourage outsiders to come forward with information. Somebody might say, for example, in the past year I have bribed the Chief of Police or the Chief of the Army or the chief of this, but they will not ordinarily come forward because what they have done is a criminal offence and they might be prosecuted.

But because you want to do a deep cleaning exercise of the system, have you ever come across a situation where people were actually encouraged to come forward with the idea that those that have confessed can start on a clean slate and you can have a new code of conduct that governs their conduct going forward?

I know in my profession, my colleague, Commissioner Baloyi, can cite examples where colleagues have gotten into trouble in the past, and to solve the problem, the profession said if you come forward and

confess your sins, you will be forgiven, but going forward, this sort of behaviour cannot be allowed.

In South Africa, I think you know, pre-1994, on both sides of the aisle, after the Constitution, people were not fired for what they did in the past. Instead, they were encouraged to apply for amnesty and then they were forgiven, and those that continued with their jobs continued. So I am interested to know in the European countries and other countries you have looked at, have you had a situation where to solve for this specific problem, people were encouraged to come forward in exchange for immunity or amnesty.

MS POP: I am not aware of, you know, such experiences. I mean, I would also, you know - I am also thinking that this, to what extent this type of, you know, these types of situations cannot just be solved just with some plea bargaining or, you know, sort of in the criminal process to sort of use that cooperation in that particular context.

But from the experiences in other countries, that is not something that we, you know, that I have seen. So, but maybe, you know, this is something that, you know, might emerge somewhere. I think just even linked to this, and so I have not seen this, but, you know, just even linked to the process that, you know, you are suggesting that maybe sort of people can be kept in the system and somehow reformed.

I think it is very hard to turn a page when you have an institution where it is not clear that there is some type of accountability for this type of behaviour for the other people working in the system. And I think also if you are bringing new people in the system, because sometimes, you know, there are issues with sort of, we are talking about financial integrity, but many times I think that comes part and parcel with also certain ways of working that might not necessarily be sort of what you want to keep perpetuating.

And I think going back to the issue of results for the system, and maybe that might be my sort closing remark, is that without, and now I, you know, I spoke a lot about the experience, you know, of this vetting system and financial disclosure, but, you know, I was mentioning earlier that, you know, a big part of my work is sort of dealing with sort of supporting this asset recovery processes and, you know, investigation and prosecutions of money laundering.

And I think when you are looking at who gets results in these types of complex cases, you know, returns from, you know, foreign jurisdictions, you know, probably some of the more complex cases that someone in the criminal justice system deals with at all levels. I would say that, you know, it is very hard to believe that, you know, people who have sort of integrity challenges would be very motivated to focus to like really, you know, do the work for

these types of really complex issues.

So, this is an important exercise in order to have people equipped to deal with sort of what everyone wants from the criminal justice system, and so that, you know, there are either the people in the institution who then are focused on sort of their effectiveness, but sort of, you know, potentially even having new people who want to be in, you know, work in these on these issues, that is a little, that is the precondition for getting those results in terms of effectiveness.

And I think in some of the, you know, in some of these countries that have now done the reform is, you know, now they can sort of, they can focus on sort of their core job, and then, too, it is also very important, and maybe this is a very narrow perspective on issues, but it is also important, you know, a big part, for example, when you are doing this complex case in asset recovery is international cooperation, and it is very important for in order to receive cooperation for a different body, it is really important that people trust you.

I think building that sort of reputation for integrity in a system is also very important from that perspective. I mean, it is a very sort of like niche angle, but it is very important when you are doing like all of the types of international cooperation from the police to police to formal

international cooperation. But, you know, there are many other ways in which this is relevant. So this is just the, you know, first step in the sort of bigger sort of work that needs to be done.

CHAIRPERSON: I know that we will have to decide for ourselves what systemic means if we are to go the route of extraordinary measures that your review deals with, but what I just want to ask, regardless of the fact that we will have to do our own interpretative exercise, is this. Because of the very short life of this Commission, Advocate Chaskalson said it was initially for three months. It was actually initially for six months, not three, but it still has a very short life.

So regard being had to that, what we shall have looked at in the end, we shall have looked through a very small window, and therefore we shall have seen very little through that very small window. In percentage terms, I think if we look at the players within the criminal justice system as a whole, we shall have looked at maybe zero comma whatever. So the first one after the zeros will be, it will not even be, you know, it may be zero comma another zero before you get to a one.

Now, if that be the case, it should also mean that those that we may find to have been infiltrated by criminal syndicates will themselves also constitute a very narrow or

small percentage out of tens of thousands of players within the criminal justice system.

Now, the question that I say I will still ask, regardless of the fact that we will do our own interpretation, is if you look at that very small window and the likelihood that those that we will find to have been infiltrated will also be a miniscule number, are we able to make the jump to systemic in those circumstances?

MS POP: The way, you know, I would think about this issue of systemic is that there is, you know, and ...[intervenes].

CHAIRPERSON: Perhaps let me just say, also I do realise that the answer may not necessarily lie in numbers, but I would imagine that they should bear some relevance to the question, but the answer does not necessarily lie in numbers or purely in numbers. All right, thank you.

MS POP: The systemic nature, I mean, I would think that it is taking different data and elements and looking at, you know, if it is criminal justice system, you want to look at what are the sort of the outputs in terms of how the system deals with, I mean, the criminal justice system. So what is the outcome of people working in the criminal justice system when dealing with this particular issue?

And, you know, looking at what the data says about that, and if that, you know, if those numbers are, you know,

very satisfactory, maybe there is not a big problem, but taking those numbers with your very small sort of perspective in the system, you know, and other sort of maybe research that has been done at the sort of more global level and national level with regards to, you know, organised crime.

There was a presentation, I think, a few weeks ago by a global expert on these issues, and sort of taking all of that together, you know, could point to the answer to that issue. Because, you know, ultimately, in a lot of the issues, even when you and then sort of trying to disaggregate what is the reason for that, like, for example, you know, even going even beyond, because I work more on sort of corruption, money laundering.

I mean, I always look at what are the results in terms of, you know, investigation, prosecution, and adjudication of cases, and that gives a good sense of, you know, where things are, and then you can look, you know, downstream at maybe what are the consequences. So maybe that is a helpful sort of a source to also look at the systemic issues.

But I would say that just in general, you know, other countries did not, you know, even have the benefit of this type of process. So in a sense, even maybe with your perspective that is very narrow, it is still more than, you

know, other countries, you know, have done, and I think ultimately there is also, I think there is also a trade-off between sort of documenting things and sort of using whatever information is available, even if it is not perfect, to try to change certain outcomes.

CHAIRPERSON: Thank you.

ADV BALOYI SC: On this, can I just ask a clarification question? You say systemic failures where, I forget the exact wording, where the ordinary tools or means of dealing with, of avoiding the problem do not reach. I do not remember the exact wording, but I think you know what I am referring to. Do you draw a distinction between those monitoring institutions or agencies or tools that are in place where they are weak inherently and therefore they are not suited to deal with what has happened, the failures that have happened? That is one scenario.

The other is you have strong tools in place, but they are simply not applied. Do you draw such a distinction? Because I can conceive of a situation where there has been a failure, maybe even systemic, but it is not because you do not have the tools that would have prevented or have addressed it and therefore prevented the failure or the systemic failure that we are speaking of. I can conceive of that situation.

And then you look into the explanation why these

good tools that we have in place, and so it is not a question of reinventing. It may be a question of how do we make what we have work. You, on the other hand, your experience is about really a reinvention, if you like, an overhaul and that is when the tools that we have in place, either because they are corrupted, because the individuals that should be keeping check are not doing what needs to be done. Is there a distinction that you draw between the two?

MS POP: If, Commissioner Baloyi, if I understand your point correctly, the way I see it is two parts. The first part is, and you are correct that there should be oversight mechanisms. There should be instruments and there should be institutions. Are the instruments sufficient? And then are the institutions that are supposed to use this instrument strong enough?

And I think that is an important question, you know, and I think that my colleague was here to talk about financial disclosure, for example. And even there, there is, you know, sort of an issue in terms of what is the institutional architecture and then there is an issue in terms of even the instruments. Because, you know, as a declaration form in South Africa is very limited. So, even if you had the best, most specialised institution in the world, with that form, they could not have done miracles. And so,

that is that part.

And I think the question is, it is the way I look at it, it is linked with the foundation and then what is the long-term solution? And I think this is part of the long-term solution because, for example, if you take some of these oversight mechanisms, this disciplinary mechanism, in few places, even if they have the legal instruments, the institution, I mean, in some cases, the institutions themselves are not effective.

I do not know. They might be just, you know, not strong enough or not, you know, or might be easily influenced, but they might also not have the right perspective on things. But even if they did, I think it is very hard to remove people from the criminal justice system using those tools. I think those are tools for the, you know, after you clean the foundations, and then they, even this institution see this is how you look at these issues.

I think that is also an important role for these extraordinary commissions. It is not only to, you know, clean the system, but it is also then to more or less, quote-unquote, teach the institutions that are supposed to do that, how they are supposed to look at this because many times some of these institutions look at things very procedurally. They do not look in a reason, you know, they just kind of look more at the process, not at the substance.

So, I see that, you know, even the role of these kind of extraordinary commissions is also a kind of a capacity building role for the long term. And even some of these, you know, I think there was a good example in Ukraine where you had this extraordinary commission that had to work side by side with this, you know, body that by that time had not even been reformed, and even they, these members of the commission started the unreformed body because they are working together.

They were pushed to take more sort of different approaches to the issues of integrity. And so, I think that what you are saying is the, I mean, it is the core of the long term issue because that needs to be there forever. Then the next issue, the next consideration is do these institutions, if we are now, if they are dealing with the clean plate, do they have all of the instruments legally and institutionally to be able to maintain this work, or do we have to come back in 15 years and redo it?

CHAIRPERSON: Thank you very much, Ms Pop. Most appreciated. You are excused.

MS POP: Thank you.

NO FURTHER QUESTIONS

ADV CHASKALSON SC: Thanks, Chair. Tomorrow, the Commissioner for Correctional Services will be giving evidence.

CHAIRPERSON: Thank you very much. Let us adjourn and resume at 09:30 tomorrow.

HEARING POSTPONED TO 17 SEPTEMBER 2026

HEARING ADJOURNS
