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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**KOSOVO**

**DRAFT OPINION**

**ON THE DRAFT AMENDMENTS**

**TO THE LAW ON THE PROSECUTORIAL COUNCIL**

**On the basis of comments by**

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## I. Introduction

1. By letter of 26 October 2021, the Minister of Justice of Kosovo, Ms Albulena Haxhiu, requested an opinion of the Venice Commission on the draft amendments to the law on the Prosecutorial Council of Kosovo (CDL-REF(2020)083; hereinafter – the draft amendments).

2. Mr A. H. Gaspar (member, Portugal), Mr Hamilton (expert, former member, Ireland) and Mr Nicolatos (member, Cyprus) acted as rapporteurs for this opinion.

3. On 18 and 19 November 2021 a delegation of the Commission composed of Mr Gaspar and Mr Hamilton accompanied by Mr Dikov from the Secretariat visited Pristina and had meetings with the Parliament, the Ministry of Justice, the Prosecutorial Council and the Prosecutor General, as well as with the civil society representatives. The Commission is grateful to the office of the Council of Europe in Pristina for the excellent organisation of the visit.

4. This opinion was prepared in reliance on the English translation of the draft amendments. The translation may not accurately reflect the original version on all points.

*5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the visit to Pristina [and the written comments on the draft opinion submitted by ...]. It was examined at the joint meeting of the Sub-commissions on the Rule of Law and on Democratic Institutions on ...]. [Following an exchange of views with ...], it was adopted by the Venice Commission at its ... Plenary Session (Venice and online, ... 2021).*

## II. Background

6. According to the Ministry of Justice, the prosecution system of Kosovo suffers from lack of integrity and professionalism. To a large extent this is due to the failure of the Kosovo Prosecutorial Council (the KPC) to play its role defined in the Constitution, in particular, to secure merit-based appointments within the prosecution service.

7. In the words of the Ministry, the prosecution system is cankered with cronyism and nepotism. The mechanism of performance evaluations does not function. Despite the persistent problem of excessive length of proceedings in criminal cases, and a very low conviction rate (only 45% of prosecutions succeed in the courts), nearly all prosecutors in the country receive good or excellent grades by the KPC.

8. The Ministry further referred to the recent scandals related to the investigation of some high-profile cases, which allegedly showed a blatant lack of professionalism or even misbehaviour by the prosecutors. Despite this, the number of disciplinary sanctions imposed on the prosecutors remained inexplicably low in the past years.<sup>1</sup> Most of the members of the KPC do not participate actively in its meetings, and, in any event, the KPC is subservient to the interests of a small group of senior prosecutors, and especially the Prosecutor General. The current system is undemocratic in over-representing smaller prosecution offices where a small number of individuals may be unduly dominant.

9. The President of the KPC was elected for a second mandate despite a clear prohibition in the law to be re-elected.<sup>2</sup> The EU and the US missions in Kosovo refused to monitor the last elections

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<sup>1</sup> Thus, according to the Ministry of Justice, despite the high number of complaints against prosecutors (44 in 2019, 45 in 2020, and 42 so far in 2021), the KPC opened investigations only in few cases (11 in 2019, 4 in 2020, and 5 in 2021), and most of those proceedings ended either with the findings that no disciplinary breach had been committed, or with very light sanctions, like a non-public reprimand or a temporary reduction of salary.

<sup>2</sup> This allegation has not, however, been the subject of any official enquiry or judicial determination. For more details see paragraph 11 below.

of members to the KPC (which took place in January 2021), reportedly because of the doubts in the transparency of the process.

10. These and other flaws of the current system of governance of the prosecution service were identified in the Rule of Law Strategy, prepared in consultation with the international partners. The draft amendments, developed by a working group at the Ministry, were based on this Strategy. For the Minister, the only possible way out of the current crisis of the prosecution service is to re-boot the KPC by changing its composition and amending the qualification and compatibility requirements for its members. The office of the Prosecutor General (the PG) participated in the discussions and could make suggestions to the working group.

11. The PG and the President of the KPC offered a different account. In their words, it was incorrect to depict the KPC as a non-functioning or captured institution. Thus, nearly a quarter of prosecutors had been brought to a disciplinary liability at some point in their career. There had been no irregularities in the last elections of the members of the KPC. The idea that the President of the KPC was not eligible for a second mandate was misconceived: the President served his first mandate in a different body (albeit with similar functions), so the limitation on re-election did not apply to him.

12. The PG and the President of the KPC did not deny that certain reforms might be needed. However, they insisted that those reforms should lead to reinforcing the *existing* mechanisms and institutions – and, in particular, the subordinate bodies of the KPC. The restructuring of the whole KPC was not warranted and endangered the independence of the prosecution service.

13. In the opinion of the leadership of the prosecution service, the Rule of Law Strategy implied a wholistic approach to the legal reform. For some reasons, the Ministry rushed with the proposal to reform the KPC, while setting aside other important elements of the Strategy. The office of the PG received the draft amendments only the day before the meeting of the working group at which those amendments were to be discussed. The prosecutors participated in the discussions but had to withdraw recently because of a public statement made by the Deputy Minister of Justice where he unjustly accused the prosecution system of corruption. The rushed preparation of the draft amendments may be connected to the imminent retirement of the current PG and a desire to enable the Government to influence the choice of a successor.

14. It is not the task of the Venice Commission to evaluate in detail the situation in the prosecution service of Kosovo. The Government maintains that the prosecution service is in crisis which has its origins in the culture of corporatism within the KPC. The damning picture presented by the Ministry may be correct, but the Ministry does not seem to rely on a careful analysis of statistical data, but rather on some anecdotal evidence and general assumptions. The critics of the amendments may be right in their assessment of the real political underpinning of the planned reform of the KPC. Furthermore, alleged corporatism of the KPC is certainly not the *only* cause of the current situation, and other reforms, identified in the Strategy, must also be pursued.

15. That being said, the Government is better placed to evaluate local needs and conditions and identify priorities. Scarcity of data and analytical research may be explained by the relative immaturity of the Kosovo legal system. It is true that the KPC is composed almost exclusively of prosecutors (on this see more below), and, therefore, there is at least a *tangible risk* of a corporatist governance. It follows that the assumption of the Government does not seem unreasonable: the Venice Commission will take it as a starting point for its analysis.

### **III. Main elements of the draft amendments**

16. The KPC is provided for in Article 110 of the Constitution of Kosovo. This provision is located in the chapter entitled “Justice System” which deals with courts, judges, prosecutors, and advocates. All these legal professions are declared to be independent. The main role of the KPC

is to ensure that the prosecutors are independent, professional, and impartial. The composition of the KPC is not provided for in the Constitution but is to be determined by law. The PG is appointed by the President of the Republic upon the proposal of the KPC.

#### **A. New composition of the Kosovo Prosecutorial Council**

17. Currently the KPC is composed of 13 members. 10 members represent the prosecution system: the PG is a member *ex officio*; seven members are elected by the prosecutors of the basic (lower level) prosecution offices,<sup>3</sup> one member is elected by the prosecutors working in the Appellate Prosecution Office and one by the prosecutors from the Special Prosecution Office.

18. There are three lay members in the KPC: one represents the Bar, another is a university professor, and one represents civil society. The lay members are to be elected by the Assembly of Kosovo, upon nominations from the respective institutions, by a simple majority of votes of all the MPs. In practice, in the past few years the KPC functioned almost exclusively with the prosecutorial members, since the Assembly failed to secure the election of two lay members.<sup>4</sup>

19. Under the draft amendments, the future KPC will be composed of seven members: three of them will be prosecutors elected by their peers, three will be lay members elected by the Assembly by a simple majority of votes of the MPs and one will be a prosecutor elected by the Assembly, also by a simple majority. Under the draft amendments, all members of the KPC will be full-time (contrary to the current situation where only three members receive salary for performing their function).

#### **B. Procedure of election of members**

20. For the *members to be elected by the Assembly* the draft law introduces a pre-selection procedure: a special parliamentary selection commission will be created in the Assembly (the ASC). The ASC will be composed of the Speaker, the leaders of all parliamentary groups, and six other members representing external institutions or officeholders (for more details see below, Section IV, "Analysis"). The ASC will receive applications of aspiring candidates and, under Article 10 (7), could reject those which "do not meet the conditions set out in law". After that the ASC will interview the candidates and shortlist the two best candidates. These two candidates will be submitted to the Assembly for election. It is understood that for each of the four positions of lay members the ASC should propose to the Assembly two best-suited candidates. It is not entirely clear what would happen if all four positions of lay members become vacant (as it will be the case following the renewal of the composition of the Council – see below subsection C of Section IV): presumably, the ASC will have to propose two candidates for each of the four positions.

21. The election of the *prosecutorial* members (i.e. prosecutors elected by their peers) starts with the pre-selection of candidates by a three-member Electoral Commission under the KPC (the EC). The EC, like the parliamentary selection commission, may reject the candidates who "do not meet the conditions set out in law". However, the draft amendments provide for a possibility to appeal against the decision of the EC before the KPC. It appears that the EC prepares a list of shortlisted candidates, which is submitted to the voting, albeit, contrary to the ASC, the shortlist is not limited to two candidates. Every prosecutor in Kosovo has one vote (contrary to the previous system where each lower-level office delegated one representative). Under Article 10A (10) the candidate who receives the majority of votes is elected, and there is a possibility for unsuccessful contenders to appeal before the KPC.

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<sup>3</sup> The biggest of these is Pristina with almost half of all of the prosecutors; some of the other basic prosecution offices have as few as 10 prosecutors.

<sup>4</sup> It is unclear, despite enquiries made during the mission in Kosovo, why the Assembly failed to elect those two members. It has been suggested that suitable candidates were unwilling to come forward.

22. The draft amendments also re-formulate the eligibility requirements for the lay and prosecutorial members of the KPC. Most importantly, candidates for the positions of lay members should have had no affiliation with political parties in the three years preceding their election. In addition, candidates for the positions of prosecutorial members should have held no managing posts within the prosecutorial system in the two years preceding their election.

22. The draft amendments contain other eligibility conditions (an appropriate university degree and professional experience, no criminal conviction, certain minimal professional experience, etc.). Most importantly, both prosecutorial and lay members should be of “high moral integrity” and, in addition, for the prosecutorial members, there may be “additional qualification criteria which demonstrate their managerial skills”.

### **C. Dismissal of members**

23. According to new Article 10 (17), the KPC or the ASC may propose to the Assembly to dismiss a member elected by the Assembly, which is done by the majority of votes of all the MPs. By contrast, prosecutorial members are dismissed by the KPC itself, on the conditions and following a procedure defined by the law (Article 10A (14)).

### **D. Replacement of the current members**

24. The adoption of the draft amendments will lead to the automatic termination of the mandates of the current members of the KPC, and their replacement with the members elected according to the new rules (see Article 36 (1)). First of all, four members are to be elected by the Assembly;<sup>5</sup> the KPC can start operating when these four are elected since Article 36C (4) provides that until the election of the prosecutorial members the quorum is four members (except for the disciplinary cases where the quorum is five members). Once four lay members are in place, three members are to be elected by the prosecutors, under the supervision of the EC.

## **IV. Analysis**

### **A. New composition of the Kosovo Prosecutorial Council**

#### **1. Increased presence of lay members**

25. Currently the prosecutors wield a decisive influence in the KPC. The draft amendments propose a different model. In the newly composed KPC, prosecutors “elected by their peers” will be in a slight minority (three out of seven members). Four members are elected by the Assembly. One of them should be a prosecutor, but since he or she owes the mandate to the Assembly, in the opinion of the Venice Commission this member should rather be counted as a “lay member” (contrary to the “prosecutorial” members elected by their peers).

26. The Venice Commission has always acknowledged that in some democratic legal orders there are no prosecutorial councils, and, where they do exist, there is a range of acceptable models of how such councils should be composed. In this respect there is an important difference between standards regarding judicial and prosecutorial councils.<sup>6</sup> While prosecutors should be protected from political interference, and while a prosecutorial council may offer such protection, there is no requirement that such council should necessarily be *dominated* by the prosecutors.

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<sup>5</sup> The draft law refers to these as three lay members and one prosecutorial member; however, the Commission refers to them as four lay members for reasons which are explained below.

<sup>6</sup> See the 2017 Opinion on Bulgaria, cited above.

The Venice Commission consistently advocated for prosecutorial councils where prosecutors elected by their peers represent a “substantive part”, yet not necessarily a majority of members.<sup>7</sup>

27. The current KPC is almost entirely composed of the prosecutors and is therefore prone to the risk of corporatism. In addition, in Kosovo most of the prosecutorial members of the KPC come from the low-level prosecutorial offices. It is only natural that even in absence of formal ties of subordination they would vote together with their more senior colleagues, and in particular the PG himself.<sup>8</sup> As witnessed by some NGOs, this is exactly how the KPC functioned in the past. Therefore, reducing the proportion of the prosecutorial members may help combatting the corporatist tendency of this body.

28. However, reforming the KPC should not lead to its subordination to the ruling majority in the Assembly. What is important is that the composition of the KPC is *pluralistic* enough<sup>9</sup> to ensure that the prosecutors cannot govern alone, and, at the same time, that the lay members whose election was secured by the votes of the majority or who represent the executive cannot easily outvote them.<sup>10</sup> There are several models which may help avoiding politicisation of the KPC, summarised in a recent opinion on Montenegro.<sup>11</sup>

29. The first model is to require that some (or all) lay members are elected by a qualified majority of votes. In theory, it might guarantee political neutrality of those lay members, assuming however that the ruling majority does not already have the required number of votes. Furthermore, an anti-deadlock mechanism would be needed to ensure that the members could be elected even if the necessary majority cannot be reached in the Parliament.<sup>12</sup>

30. However, the Constitution of Kosovo sets out the limited number of cases in which the Assembly may vote by qualified majority.<sup>13</sup> It follows that a constitutional amendment would be necessary to introduce the requirement of the election of the lay members by qualified majority.

31. Another model consists of providing for a proportionate system of election of the lay members, where some of them would be elected with the voices of the opposition.<sup>14</sup> In such a model the prosecutorial members should get support from a certain number of lay members to pass decisions, and, on the other hand, lay members affiliated with the majority could not govern alone but should get support of either some prosecutorial members or some “opposition” members.

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<sup>7</sup> See Venice Commission, CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, para. 45.

<sup>8</sup> See Venice Commission, CDL-AD(2017)018, Bulgaria - Opinion on the Judicial System Act.

<sup>9</sup> Venice Commission, CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, paras . 33, 35 and 36.

<sup>10</sup> Differently, the CCPE has advocated that the prosecutors should be in a slight majority in the prosecutorial councils.

<sup>11</sup> Venice Commission, CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, para. 37.

<sup>12</sup> See Venice Commission, CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, para. 162; see also Venice Commission, CDL-AD(2015)024, Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia, para. 21.

<sup>13</sup> See Article 65 of the Kosovo Constitution which gives an exhaustive list of powers of the Assembly. The vote by 2/3 majority is mentioned there explicitly only twice – in (2) where the Constitution speaks of the amendments to the Constitution, and in (15) which regulates amnesty. It appears that in all other cases the decisions are taken by a simple majority. This is confirmed by Article 80 (“Adoption of Laws”), which says that “Laws, *decisions and other acts* are adopted by the Assembly by a majority vote of deputies present and voting, except when otherwise provided by the Constitution.” (italics added).

<sup>14</sup> This solution was recommended in Venice Commission, CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, paras. 17 and 19.

32. Finally, a certain number of seats in a prosecutorial council could be reserved to representatives of external independent institutions (such as the Bar, the conference of the law faculties, the Ombudsperson, etc.) or to civil society. In this model it is necessary to ensure that the institution delegating lay members is genuinely neutral (which may be difficult to achieve in a small and very politically polarised society), and/or that the members delegated by the NGOs are truly representatives of the civil society.<sup>15</sup>

33. None of these models is without flaws. Thus, there is always a risk of behind-the-scenes political deals between the prosecutorial members and a certain number of lay members which would prevent a transparent and fair governance of the prosecution system. Furthermore, independent institutions or officeholders may in practice be not as independent as they are in theory. However, any pluralist model is better than a model where the prosecutorial council is dominated by a monolithic group of prosecutorial members, subservient to the prosecutor general, or a monolithic group of political appointees loyal to the ruling majority.

34. The Venice Commission notes that under the draft amendments candidates to the positions of lay members should not have had any affiliation with political parties, associations, or foundations for the three years prior to their election. As noted by the Venice Commission in an opinion on Montenegro, ineligibility criteria of that kind “create some ‘safety distance’ between lay members and party politics, which could make the [prosecutorial council] more politically neutral”.<sup>16</sup> So, the introduction in the law of this new eligibility criterion is welcome. However, as follows from the same opinion, this measure by itself is incapable of preventing politicisation of this body if those members are still elected by a simple majority in the Parliament.<sup>17</sup>

35. Thus, the first recommendation of the Venice Commission would be to ensure that lay members in the future composition of the KPC are elected in a manner which ensures sufficient pluralism in the composition of the KPC and “counterbalances” the members appointed with the votes of the ruling majority.

## **2. Exclusion of the Prosecutor General as an *ex officio* member**

36. In the reformed KPC the PG will not anymore be a member *ex officio*. Moreover, Article 8 (1.5) provides that the prosecutors holding executive positions cannot be elected as prosecutorial members of the KPC. That excludes the PG from being elected.

37. For the Venice Commission, in a hierarchically organised prosecution service it is natural for the PG to participate in decisions about the appointments, career, and discipline of the prosecutors, to influence budgetary and organisational policies, and to take part in the development of professional standards and procedures.<sup>18</sup>

38. Indeed, the PG should not be able to take decisions alone – this is why the prosecutorial councils are created. However, completely excluding the PG from the KPC is objectionable. If the PG returns to the composition of the SPC as an *ex officio* member with the voting right, that may require a revision of the composition of the KPC in order to preserve the balance between different groups of members.

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<sup>15</sup> See the discussion about the representation problem in Venice Commission, CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, paras. 32 et seq.

<sup>16</sup> Venice Commission, CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, para. 29.

<sup>17</sup> *Ibid.*, para. 40.

<sup>18</sup> The position of the PG within the KPC should be broadly similar to position of a chief executive of a private company and the Board of that company: it would be risky for the Board to take important decisions without first consulting with the CEO. Under such a model the chief executive usually has a right to speak but not to vote.



39. The Commission has also understood that under the law the KPC and the PG have some overlapping functions in the management of the prosecution system.<sup>19</sup> Currently such overlapping does not give rise to any tensions. This is partly explained by the fact that the PG, due to his position in the prosecutorial hierarchy, is the most influential member of the KPC, and may resolve such conflicts internally. However, if the PG leaves the KPC, and the composition of the KPC is redefined as planned, such conflicts may start arising. It is therefore important to delineate in the law more clearly the respective spheres of competency of the PG and of the KPC. It is also an additional argument for keeping the PG in the renewed composition of the KPC as an *ex officio* member.

### 3. Procedure of election of members

40. Another key element of the proposed reform is the new procedure of selection of candidates to the positions of lay members and prosecutorial members, by two selection commissions. The Venice Commission reiterates that the Constitution of Kosovo, besides providing that (at least some) members of the KPC are elected by the Assembly by simple majority, does not set out in detail the procedure that needs to be followed for this election.

41. The Commission however notes the following. The two selection commissions wield a very significant power: they can reject candidates not only on the basis of formal criteria (like the minimal work experience or absence of convictions, for example), but also with reference to a vaguely formulated concept of “high moral integrity” and/or on the basis of “additional qualification criteria which demonstrate [the candidate’s] managerial skills”.<sup>20</sup> In essence, the role of those two commissions is at least as important as the role of the Assembly and of the prosecutorial community. It is therefore necessary to ensure that those two commissions are appropriately composed and follow a transparent and fair procedure.

#### a. Election of lay members

42. As stressed above, since at least some if not all (the Constitution does not indicate how many) lay members in the KPC are elected by a simple majority of votes in the Assembly, there is a risk of politicisation of the former. In principle, a properly organised selection procedure might offset this risk, but only on three conditions. First, it is necessary that any selection body is *truly pluralistic*, i.e. not dominated by the ruling majority or members affiliated with it. Second, the decision-making process within such a body should ensure that the candidates nominated for the election by the Assembly have support across the broad political spectrum (i.e. at least some members not affiliated with the political majority should have voted for them). Third, the majority in the Assembly should not be able to circumvent or sabotage the selection procedure.

43. As to the composition of the parliamentary selection commission (the ASC), it is comprised of several representatives from each parliamentary group plus seven members who either sit there *ex officio* or who are delegated to the ASC by external institutions. Currently there are seven political groups in the Assembly.<sup>21</sup> Thus, in the existing political landscape the ASC would have 14 members *in toto*.<sup>22</sup> A certain number of seats would belong to the representatives of the

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<sup>19</sup> The powers of the PG are described in the law on the prosecution service which is not analysed in the present opinion – but see Article 7 (1) (1.1.) of the law under examination which provides that the Council “decides on the organization, management, administration and oversight of the functioning of the Prosecution Offices according to the Law”. Normally, it is also a part of the mandate of the PG to “manage” and “oversee the functioning” of the prosecution offices.

<sup>20</sup> This last criteria is to be applied to candidates to the position of a prosecutorial member. See Article 9 (1) (1.3) and (1.7).

<sup>21</sup> If the independents are to be counted – see <https://www.kuvendikosoves.org/eng/parliamentary-groups/>.

<sup>22</sup> Other members are as follows: the Speaker (who is the chair of the commission *ex officio*), the President of the Kosovo Judicial Council, the Ombudsperson, the President of the Supreme Court, a representative of the Community Consultative Council, the President of the Bar, and the Director of the Anti-Corruption agency.

opposition (depending on the number of the opposition political groups).<sup>23</sup> At least four members would represent independent institutions or officeholders.<sup>24</sup> As to other members of the ASC,<sup>25</sup> their political affiliation is uncertain. However, on the whole, the ASC does not appear to be dominated by the members affiliated with the ruling majority. This is certainly positive.

44. However, the decision-making process in the ASC is unclear. Thus, the ASC decides by a simple majority of votes (Article 10 (9)) but has to propose two candidates for each position, by attributing them “evaluation points”. The draft law does not describe how those points are attributed, and on the basis of which criteria.<sup>26</sup> The Venice Commission notes that the eligibility criteria contained in new Article 8 (2) seem to be categorical, i.e. they permit to *filter out* candidates, but not to *rank* them. It is unclear why, out of all candidates who are eligible and who have necessary “moral integrity”, only two are retained. Finally, it is unclear whether both candidates should receive the support of the majority of the ASC. If a candidate can be included in the shortlist with the votes of the members of the ASC affiliated with the majority only, that would offset the positive effect of the pluralistic composition of the selection ASC, since such a “minority candidate” would be, in all evidence, chosen by the Assembly by a simple majority of votes.

45. Finally, the Assembly is not bound by the choice of the ASC. If neither of the candidates received an absolute majority of votes in the first or second round of voting, the procedure would have to restart.<sup>27</sup> So, ultimately, the ruling majority in the Assembly will retain at least the power to outvote any candidate they do not want to be elected.

46. In sum, the procedure of election of lay members proposed in the draft amendments is, at the same time, too complex and too unclear, which opens the door to manipulations. This proposal should be abandoned or significantly reviewed. The Venice Commission returns to its earlier recommendation to elect lay members on the basis of a proportional system, or to provide for the appointment of a certain number of lay member by independent bodies, in order to achieve a pluralistic composition of the KPC. Any of these solutions is simpler and, at the same time, reduces the risk of excessive political influence over the KPC.

#### b. Election of prosecutorial members

47. The rationale behind the procedure of pre-selection of candidates to the position of prosecutorial members of the KPC is unclear. Insofar as the formal eligibility criteria are concerned, in theory all prosecutors who are entitled to exercise prosecutorial functions should also be entitled to stand for the elections to the KPC (though the law might provide for additional criteria related to seniority or an impeccable professional record).

48. The composition of the Electoral Commission (the EC) is a source of concern. Out of three members<sup>28</sup> only one may arguably be seen as a representative of the prosecutors – a member appointed by the PG. Thus, the EC is dominated by the non-prosecutorial members. As with the ASC, the EC wields an important “negative power” since it may reject candidates who do not

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<sup>23</sup> It should be noted that, in a very particular constitutional arrangement existing in Kosovo, some groups cannot be clearly attributed a label of “opposition”, because of the mandatory representation of MPs representing a minority ethnic group in the Government.

<sup>24</sup> President of the Judicial Council, Ombudsperson, President of the Supreme Court, President of the Bar.

<sup>25</sup> A representative of the Community Consultative Council, and the Director of the Anti-Corruption agency.

<sup>26</sup> Unless it is a problem of translation, Article 10 (10) does not make sense: “10. The shortlist contains two (2) candidates for each position, unless within number two (2), there are more candidates with equal evaluation points”.

<sup>27</sup> Article 10 provides for two rounds of vote in the Assembly: in the first the successful candidate should receive the majority of votes of all MPs, in the second, the candidate who obtained most of the votes in the first round is voted again. If he or she did not obtain the majority of votes in the second round, the vacancy is announced again and the procedure restarts.

<sup>28</sup> The EC is composed of one “non-prosecutorial” member of the KPC (i.e. the lay member who has no prosecutorial background), one representative of the PG’s office, and one member of the Secretariat of the KPC.

meet conditions set out in the law. Most importantly, the EC may reject candidates with reference to their “moral integrity” and “managerial skills”.

49. In essence, the participation of the EC in the selection process seriously curtails the right of the Kosovo prosecutors to select their representatives in the KPC. The proposed model is therefore hardly compatible with the requirement that prosecutors *elected by their peers* should be sufficiently represented in a prosecutorial council. Even if some sort of a filtering body is necessary, it should be composed of the prosecutors, or at least of a majority of prosecutors.

### **B. Dismissal of members**

50. Articles 10 (17) and 10A (14) provide for the dismissal of the lay members and prosecutorial members by the decision of the Assembly or the KPC respectively. First of all, it is unclear how the dismissal by the Assembly provided by the new Article 10 (17) correlates with the dismissal for a disciplinary violation which is to be decided by the KPC itself, provided by the existing Article 19 (3), and whether Article 10A (14) refers to the disciplinary procedure described in Article 19 (3).

51. The Venice Commission reiterates that the early termination of the mandate of a member of a council (where it is not due to the voluntary resignation, abolition of the whole institution, or to other similar reasons) should always be related to an *identifiable wrongdoing* or the failure to perform his or her duty. Members of the KPC should not be “impeached” simply because the parliamentary majority or their colleagues disapprove of the decisions they take.<sup>29</sup>

### **C. Replacement of the current members**

52. New Article 36 (1) provides that as soon as new lay members are elected by the Assembly, the mandate of the current members will be terminated. As appears from Article 36B, this renewal of the composition of the KCP will take place in three phases.

53. In phase one, the Assembly will elect four lay members, following the procedure described above. Pursuant to Article 36C, at this stage (“until the selection of the prosecutorial members”) the new KPC will need *only four members* to take decisions (except decisions in disciplinary cases).<sup>30</sup> In phase two, the “reduced KPC” will form the EC (composed of three members – see above), which will oversee the election of the remaining three prosecutorial members of the KPC. The “reduced KPC” will also hear appeals against the decisions of the EC. In phase three, once three prosecutorial members are elected, the full KPC will start functioning under the normal rules.

54. These transitional provisions raise two major concerns. First of all, the “reduced KPC” will be composed exclusively of lay members, elected by a simple majority in the Assembly. With one exception (concerning disciplinary proceedings), the “reduced KPC” will have the same power as the full KPC. Most importantly, it may decide on the election of the new PG, which is to take place in the beginning of 2022. Furthermore, the “reduced KPC” may replace the head of the Secretariat of the KPC and thus ensure full control of the EC,<sup>31</sup> which oversees the process of election of the prosecutorial members.

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<sup>29</sup> Venice Commission, CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, paras. 52 – 54.

<sup>30</sup> In the draft amendments it is formulated as a rule on the quorum; but, as explained to the rapporteurs during the meetings in Pristina, in fact this means that the KPC will start functioning as a body, but in a “reduced composition”.

<sup>31</sup> Which has three members: one lay member of the KPC, one representative of the PG (which may be a representative of the new PG elected by the “reduced KPC”) and one representative of the Secretariat of the KPC (which may also be replaced by that time by a person loyal to the lay members of the KPC and thus to the ruling majority).

55. In the opinion of the Venice Commission, the proposed amendments are against international and European standards: they effectively remove prosecutors from the governance of the system at the most critical moment when both the PG and the prosecutorial members are to be elected.

56. The second objection relates to the early termination of the mandates of the currently sitting members of the KPC. The Constitution does not fix the term of office of the members of the KPC but authorises it to be determined by law. However, it does not mean that the legislature may reduce the duration of a mandate or interrupt it at will. The security of tenure should be respected. In an opinion on Montenegro the Venice Commission formulated a general rule that even when the prosecutorial council is reformed, its current members should normally be allowed to terminate their mandate. It would be incorrect to allow for a complete renewal of the composition of a prosecutorial council following each parliamentary election, when the ruling majority changes.<sup>32</sup>

57. That being said, the principle of security of tenure is not absolute; early termination of mandates may sometimes be justified. Thus, in the same opinion on Montenegro the Venice Commission admitted that the renewal of the composition of a prosecutorial council may be necessary when the manner of the appointment of lay members changed from simple to qualified majority, as this would lessen the risk of politicisation of the council. Similarly, the introduction of some new ineligibility criteria which would strengthen the independence and political detachment of members may arguably justify replacement of those members who do not correspond to those criteria.<sup>33</sup> In simple words, the early termination of the mandates of some members may be justified if it leads to a significant improvement of the overall system.

58. The main goal of the proposed reform is to combat corporatism within the KPC, by increasing representation of lay members therein. In theory, this goal may be achieved by adding to the current composition of the KPC a certain number of additional lay members. That would allow the current prosecutorial members to remain in the KPC until the expiry of their mandates. However, in this case the KPC would become too big (with more than 20 members), considering the relatively small number of prosecutors in Kosovo.<sup>34</sup> And this solution would be certainly very expensive, given that the amendments also provide for the full-time employment of all members of the KPC.

59. The Commission considered whether, instead of the simultaneous termination of mandates of all prosecutorial members, some alternative models of the renewal of the composition of the KPC might be explored. For example, three of the prosecutorial members, selected by lot, might remain on the KPC. This would at least respect their security of tenure and, at the same time, permit the KPC to start functioning with the new composition immediately.

60. Such revision of the composition of the KPC could also be supported by the fact that the future system would eliminate a certain disparity of representation of the lower prosecution offices in the KPC, which is a feature of the current system. Currently, every lower office delegates one candidate to the KPC, which means that smaller offices are over-represented, while larger offices are under-represented in the KPC. The revised system would restore the balance, by providing that each prosecutor has one vote.

61. However, it is questionable whether this consideration alone is sufficient to justify the replacement of all prosecutorial members. Most importantly, it may not even actually be a real

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<sup>32</sup> See Venice Commission, CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, para. 40 et seq., with reference to the opinion of the Venice Commission CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption.

<sup>33</sup> Ibid.

<sup>34</sup> Reportedly there are around 200 prosecutors in Kosovo.

reason why the draft law proposes their replacement. The Venice Commission reiterates that the transitional provisions, analysed above, demonstrate quite clearly the plan of the Government to completely remove the prosecutors from the governance of the prosecution system, which is a highly contestable measure from the rule of law perspective.

62. In conclusion, the Venice Commission recommends abandoning the idea of the “reduced KPC” which can start operating without the prosecutorial members. Furthermore, currently sitting prosecutorial members should be allowed to finish their mandates. They can be removed prematurely only if the Government demonstrates convincingly that their replacement serves a vital public interest and leads to the overall improvement in the system.

#### **D. Other amendments**

63. The draft proposes several other amendments to the current law. Some of these amendments are clearly positive. Thus, Article 23A introduces the right of appeal before the Supreme Court against decisions on appointment or reappointment of the prosecutors. Article 10B provides for a monitoring of the process of election of the members of the KPC.

64. Other proposals are potentially problematic. Thus, the prohibition for the members of the KPC to be promoted during two years after the end of their mandate may help avoiding conflicts of interests, but, at the same time, such prohibition will certainly deter prosecutors from joining the KPC, and unduly penalise those prosecutors who are already members of the KPC. Article 28 (6) provides for the power to the PG to transfer the prosecutors to another place “in exceptional cases” and “in accordance with the relevant legislation”, without explaining what those “exceptional cases” are.

65. However, the Venice Commission will not comment on those proposals in detail until the main issues identified in this opinion – namely the future composition of the KPC and the method of election of its members – are addressed.

#### **V. Conclusion**

66. On 26 October 2021, the Minister of Justice of Kosovo, Ms Albulena Haxhiu, requested an opinion of the Venice Commission on the draft amendments to the law on the Kosovo Prosecutorial Council (the KPC). In the assessment of the Ministry, in order to combat the corporatism within the prosecution system the number of prosecutorial members of the KPC should be reduced, while the proportion of lay members should be increased, and the procedure for their selection should be changed.

67. The central element of the reform – namely the new balance between prosecutorial and lay members in the KPC – is not contrary to the European standards. Prosecutors elected by their peers still represent a substantive part of this body (three members out of seven).

68. However, the reform should not lead to the subordination of the KPC to the ruling majority. The draft amendments propose to elect all lay members by a simple majority in the Assembly. This proposal increases the risk of undue political influence over the KPC and should be reconsidered: election by simple majority should be replaced by a proportional system of election, or the appointment of some lay members by external independent institutions or civil society. It is necessary to ensure that the lay component of the KPC is sufficiently *pluralistic*, so that the members appointed with the votes of the ruling majority cannot govern alone.

69. Other key recommendations of the Venice Commission are as follows:

- the Prosecutor General should remain as an *ex officio* member of the KPC (with a corresponding adjustment of the composition of the KPC, if necessary);

- the law should delineate more clearly the respective spheres of competency of the PG and of the KPC;
- the procedure of pre-selection of lay members by a parliamentary commission is too complex, and, at the same time, unclear. This opens door to manipulations, so the Venice Commission recommends abandoning this procedure altogether;
- similarly, the procedure of pre-selection of prosecutorial members gives too much power to the electoral commission of the KPC, dominated by the non-prosecutorial members. If some sort of a filtering body is necessary, it should be composed of the prosecutors, or at least a majority of prosecutors;
- the transitional provisions providing for the early termination of mandates of all the current members of the KPC, and allowing the renewed KPC to function only with the lay members in its composition, are dangerous for the prosecutorial independence and must be reviewed. The new KPC may start functioning only when all members are elected. Replacement of the currently sitting members with the new ones may be exceptionally justified only if it leads to a major improvement in the current system (in particular, its depoliticisation). If this is not the case, currently sitting members – or at least some of them - should be allowed to continue serving their mandates.

70. The Venice Commission remains at the disposal of the authorities of Kosovo for further assistance in this matter.

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