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(VENICE COMMISSION)

KOSOVO

DRAFT OPINION

**ON THE CONCEPT PAPER
ON THE VETTING OF JUDGES AND PROSECUTORS
AND DRAFT AMENDMENTS TO THE CONSTITUTION**

On the basis of comments by

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I. Introduction

1. By letter of 25 October 2021 Ms Albulena Haxhiu, Minister of Justice of Kosovo, requested an opinion of the Venice Commission on the Concept Paper on the Vetting of Judges and Prosecutors (hereinafter, "the Concept Paper" - CDL-REF(2022)005). During online meetings with the rapporteurs, the Minister invited the Commission to include in the scope of the opinion draft amendments to the Constitution (CDL-REF(2022)006).
2. Ms McMorrow, Mr Vilanova Trias and Mr Pinelli acted as rapporteurs for this opinion.
3. On 9-11 February 2022, the rapporteurs, assisted by Mr Schnutz Dürr from the Secretariat and had online meetings with the legal team of the Office of the President, the Minister of Justice and other governmental officials, the Office of the State Prosecutor, the Chairpersons of the Judicial and Prosecutorial Councils, political parties, international community, as well as with civil society. The Commission is grateful to the Council of Europe Office in Pristina for the excellent organisation of these online meetings.
4. This opinion was prepared in reliance on the English translation of the Concept Paper and the draft amendments to the Constitution. 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 online meetings on 9-11 February 2022. *The draft opinion was examined at the meeting of the Sub-Commission on ... 2022. Following an exchange of views with ..., it was adopted by the Venice Commission at its ... Plenary Session (Venice and online, ... 2022).*

II. Background

A. Definitions and standards on vetting

6. Integrity checking and criminal investigation serve different purposes and have different procedural and legal features. A criminal investigation is initiated to ascertain whether a criminal offence has been committed, while integrity checks look at the risk or likelihood that improper conduct will happen in the future. Critically, the burden of proof and the standard of proof will often be different. Criminal investigations seek to establish a fact beyond reasonable doubt, meaning that the burden of proof shall fall on the State.
7. In a system of exceptional vetting and integrity checks, the decision not to recruit a candidate can be justified in case of mere doubt, on the basis of a risk assessment. However, the decision to negatively assess a current post holder should be linked to an indication of impropriety, for instance inexplicable wealth, even if it cannot be proven beyond doubt that this wealth does come from illegal sources.
8. It is very important that integrity checking be clearly separated from the assessment of the professional capacities of a judge, even if both processes can intervene during recruitment or an evaluation. A lack of professional capacities can often be remedied through training but it is clearly a reason not to recruit a person.
9. The OHCHR has defined vetting as assessing integrity to determine suitability for public employment. Integrity refers to an employee's adherence to international human rights standards and professional conduct, including a person's financial propriety.¹ While this refers to recruitment, only, the UN Secretary General stated that "[v]etting usually entails a formal process

¹ <https://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf>.

for the identification and removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary.”²

10. Integrity checking and vetting procedures are not explicitly regulated by international instruments. They have, however, been dealt with and commented upon, by soft law instruments and by case law.³

11. The Venice Commission has dealt with three subcategories of national measures: (i) “pre-vetting” of candidates to a particular position;⁴ (ii) integrity checks which are conducted on a more regular basis (for example the obligation to submit annually an asset declaration);⁵ (iii) full-fledged vetting procedures such as the vetting of Albanian judges and prosecutors.⁶

12. While “pre-vetting” of candidates and integrity checks exercised through the evaluation of asset declarations are quite common and uncontroversial in principle, extraordinary vetting, as stressed by the Venice Commission, might only be justified in case of exceptional circumstances.⁷ In the case of Albania, the Commission based its recommendations on the assumption that the comprehensive vetting of the judiciary had wide political and public support within the country, that it was an extraordinary and a strictly temporary measure, and that this measure would not be advised to other countries where the problem of corruption within the judiciary did not reach that magnitude. Experience has shown that each case is different and needs to be assessed on its own merits.

13. Judicial independence is an integral part of the fundamental democratic principles of the separation of powers and the rule of law,⁸ and is guaranteed *inter alia* by Article 6 of the European

² Report of the UN Secretary-General on “The rule of law and transitional justice in conflict and post-conflict societies”, S/2004/616, para. 52: (<https://undocs.org/en/S/2004/616>).

³ Venice Commission, CDL-AD (2018)034, Albania - Opinion on draft constitutional amendments enabling the vetting of politicians.

⁴ See e.g. Venice Commission, CDL-AD(2021)046, Republic of Moldova - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on some measures related to the selection of candidates for administrative positions in bodies of self-administration of judges and prosecutors and the amendment of some normative acts.

The Consultative Council of European Judges (CCJE) expressed the opinion that a distinction should be made between candidate judges entering the judiciary and serving judges: “In no circumstances should the fight against corruption of judges lead to the interference by secret services in the administration of justice. Corruption of judges is an offence and should therefore be tackled within the framework of established legislation.” The CCJE furthermore warned that screening of judges for corruption could be misused to eliminate politically “undesirable” judges. See CCJE Opinion No. 21, Preventing Corruption among Judges, paragraphs 27f., <https://rm.coe.int/ccje-2018-3e-avis-21-ccje-2018-prevent-corruption-amongst-judges/native/16808fd8dd>.

⁵ See e.g. Venice Commission, CDL-AD(2020)038, Ukraine - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Legislative Situation regarding anti-corruption mechanisms, following Decision N° 13-R/2020 of the Constitutional Court of Ukraine.

⁶ See Venice Commission, CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, and further related opinions.

⁷ See Venice Commission, CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, paragraph 100.

See also Venice Commission, CDL-AD(2021)046, Republic of Moldova - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on some measures related to the selection of candidates for administrative positions in bodies of self-administration of judges and prosecutors and the amendment of some normative acts, paragraph 13: The Venice Commission recalled its previously expressed view that critical situations in the field of the judiciary, as extremely high levels of corruption, might justify equally radical solutions, such as a vetting process of the sitting judges.

⁸ See e.g. Recommendation Rec (2010) 12 of the Committee of Ministers on judges: independence, efficiency and responsibilities,

https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78; Venice

Convention on Human Rights (ECHR) and also by Articles 4 and 31 and Chapter VII of the Constitution of Kosovo. According to international benchmarks, “independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch.”⁹ The vetting of judges, especially when carried out by an executive body, may constitute such an “external pressure”.

14. At the same time, it must be stressed that the preservation of the necessary authority of the judiciary requires that (a) the legal system puts in place adequate mechanisms to ensure that candidates are not appointed as a judge (or prosecutor) if they do not have the required competences, meet pre-determined eligibility criteria or do not meet the highest standards of integrity; and (b) ordinary means of disciplinary and criminal proceedings result in dismissals of those who are found to be incompetent, corrupt or linked to organised crime.¹⁰ This is not only essential in view of the role a judiciary plays in a state governed by the rule of law, but also because a judge – once appointed for life – will in principle be irremovable except for limited grounds for dismissal.¹¹

15. Vetting often involves an interference with the right to private life which is protected *inter alia* by Article 8 of the ECHR. According to the case-law of the European Court of Human Rights (ECtHR), the collection and storage of personal information by a government agency, as well as the transfer of data records between agencies, fall within the ambit of Article 8 ECHR.¹² The Court has made it clear¹³ that a person who is dismissed, transferred etc. from public employment, can complain about a violation of Article 8 ECHR¹⁴. Interference with the right to private life is only acceptable if it is covered by the limitations contained in Article 8 (2) ECHR¹⁵ and if it is proportionate to the aim pursued.

B. Vetting in Kosovo

16. The situation in the judicial system in Kosovo has been subject of numerous analyses with the purpose to improve its functioning.

17. A process entitled Functional Review of the Rule of Law Sector (FRRLS) was launched by the Ministry of Justice, in cooperation with the Kosovo Judicial Council (KJC), the Kosovo

Commission, CDL-AD(2016)007, Rule of Law Checklist, paragraph 74. See also Venice Commission, CDL-AD(2010)004, Report on European Standards as regards the Independence of the Judicial System: Part I – the Independence of Judges.

⁹ Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, paragraph 74.

¹⁰ Cf. Venice Commission, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, CDL-AD(2016)009, paragraph 52: “such measures are not only justified but are necessary [...] to protect itself from the scourge of corruption which, if not addressed, could completely destroy its judicial system.”

¹¹ Cf. Venice Commission, CDL-AD(2018)034, Opinion on draft constitutional amendments enabling the vetting of politicians in Albania, paragraph 48: “The judicial branch of the government has various specificities (judges are usually appointed for life, they have to be independent and impartial, they are not directly accountable to the other branches of the government, their position cannot be challenged by the electorate at general elections, their decisions cannot be annulled by anybody outside the judicial system, etc.) which justify a differentiated treatment.”

¹² See e.g. ECtHR, *Amann v. Switzerland*, no. 27798/95, 16 February 2000; *Chare née Jullien v. France*, no. 14461/88, 9 July 1991; *M.S. v. Sweden*, no. 20837/92, 27 August 1997.

¹³ See e.g. ECtHR, *Amann v. Switzerland*, no. 27798/95, 16 February 2000; ECtHR, *Segerstedt-Wiberg v. Sweden*, no. 62332/00, 6 June 2006.

¹⁴ Or of Article 10 of the ECHR, if this measure was based on an opinion which he or she had earlier expressed. See ECtHR, *Wille v. Liechtenstein*, no. 28396/95, 28 October 1999.

¹⁵ This provision reads as follows: “2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*”

Prosecutorial Council (KPC) and key sector actors, to ensure a comprehensive and consolidated vision of the rule of law, to raise citizens' trust in the justice system, to accelerate economic development and bring Kosovo closer to the European Union.¹⁶

18. In 2020, the Kosovo Task Force for European Integration presented a report of the Thematic Round Table on Justice, Freedom and Security. In respect of judges, the report noted (in 2020) that *"so far none of the Judges in Kosovo have been subject to removal."* The report also points to problems such as concerns regarding the publicity of disciplinary decisions. Regarding prosecutors the report points out that *"[i]t is questionable whether a breach of their specific Code of Ethics as adopted by the KPC leads to a disciplinary procedure and whether it ensures proper addressing/redressing mechanisms through disciplinary channel up to or through the Independent Oversight Board and perhaps also the court system"*.

19. In July 2021, the Ministry of Justice published its Strategy on Rule of Law 2021-2026. This Strategy identifies deficiencies of the "current system of vetting" of judges and prosecutors, notably vetting only at the time of recruitment and the extremely narrow range of information collected as part of this process.

20. In turn, the Concept Paper found that that the justice system in Kosovo is influenced and vulnerable to various interest groups, politics and other external factors. Moreover, there would be a lack of professionalism in the system.

21. During their meetings with the rapporteurs, national and international interlocutors noted that the justice system's main challenge is the massive backlog of cases and delays in judicial proceedings which taint the public image of the judiciary. Property cases could take between 8 and 12 years, a wholly unacceptable state of affairs.

22. This seems to be partially caused by weak ineffectual management of the judiciary. Attempts to address this issue by the Kosovo Judicial Council have failed to deliver the expected results. The existing evaluation system of judges would not seem to be very effective. Notwithstanding the long delays, all judges seem to receive good or very good marks. There are no or very few disciplinary measures taken.

23. It would seem that the judges have to fulfil a norm of 24-26 cases per month. This seems to be a purely quantitative measure and judges would prefer dealing with simple cases first, leaving more complex cases behind.

24. Besides the evident lack of efficiency and professionalism the Kosovo judiciary may also suffer from the problem of corruption. As transpired from the discussions with the national stakeholders and with the international partners of Kosovo during the online meetings, it would seem that a certain level of judicial corruption certainly exists in Kosovo, but it would not be comparable to the scale of corruption that had triggered the necessity for full scale vetting of all judges and prosecutors in other countries.

25. The Commission notes that there is some ambiguity in Kosovo as concerns terminology. In its section on the "Clarifications regarding the term 'vetting'", the Concept Paper refers to the ambiguity of the term, also explaining the difficulties in the Albanian language. The term "vetting" seems to be employed for diverse measures. For instance, the Concept Paper refers to "vetting and continuous vetting-inspired evaluation". Some proposals / options presented in the Concept Paper would have a much deeper impact than past or current mechanisms.

¹⁶ See also the European Commission Kosovo Report 2021, available at https://ec.europa.eu/neighbourhood-enlargement/kosovo-report-2021_en.

26. The current proposal for a reform is not a first attempt to improve the quality of the judiciary in Kosovo.¹⁷ In 2021, the Independent Judicial and Prosecutorial Commission (IJPC), an independent body, part of the KJC, according to the Constitution, had the mandate to decide on the suitability of all candidates for permanent appointment as judges and prosecutors in Kosovo. This process focused on candidates for positions in the judiciary, starting with the Supreme Court down to municipal courts.¹⁸ Declarations made by the candidates were checked against information received from various sources. The current system of verification seems to be a remnant of that exercise.¹⁹ However, according to the Concept Paper KJC and the KPC, have internal administrative verification units, but it seems that they operate without a proper legal basis.²⁰

27. As it is often the case in the countries in transition, the renewal of the judges seems to be an answer to those problems. However, a more wholistic and lengthy reforming of the judicial sector may be necessary, and the vetting alone may not be capable of bringing fast and visible results.

C. Constitutional framework

28. Article 108 of the Constitution is devoted to the Judicial Council, which shall *inter alia* ensure that “the Kosovo courts are independent, professional and impartial”, and “is responsible for recruiting and proposing candidates for appointment and reappointment to judicial office”. Proposals for appointments of judges, it is further added, “*must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall reflect principles of gender equality and the ethnic composition of the territorial jurisdiction of the respective court. All candidates must fulfil the selection criteria provided by law*”.

29. Article 110 of the Constitution establishes the Kosovo Prosecutorial Council, which “*shall ensure that all persons have equal access to justice*”, and “*shall recruit, propose, promote, transfer, reappoint and discipline prosecutors in a manner provided by law*”. As well as for judges, “*proposals for appointments of prosecutors must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall reflect principles of gender equality and the ethnic composition of the relevant territorial jurisdiction*”.

30. Article 84 of the Constitution on the competencies of the President, provides that the President:

“(15) appoints and dismisses the President of the Supreme Court of the Republic of Kosovo upon the proposal of the Kosovo Judicial Council;

(16) appoints and dismisses judges of the Republic of Kosovo upon the proposal of the Kosovo Judicial Council;

(17) appoints and dismisses the Chief Prosecutor of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council;

(18) appoints and dismisses prosecutors of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council;”

¹⁷ A report from Transparency International had established an increase of corruption in the Judiciary <https://www.transparency.org/en/press/20101209-kosovo-level-of-corruption-increased-for-political-parties-the-jud>.

¹⁸ All candidates had to pass an examination on the Code of Ethics. In total, of 372 announced judicial positions, 274 judges were appointed, and 60 prosecutors were appointed out of 89 announced prosecutorial positions (source Concept Paper).

¹⁹ There is a fast change in the composition of the Kosovo Judiciary. Only 133 of the 393 current judges, remain from the 2010 process. It seems that since then the evaluation of judges is done by a “lottery” in an Excel sheet where 1/3 of the judges are drawn for evaluation in the next year.

²⁰ Law No. 06/L-055 on the KJC and Regulation 05/2016 on Recruitment, Exam, Appointment and Reappointment of Judges do not seem to provide a legal mandate for the KJC verification unit and there seems to be a lack clarity of how information can be obtained and used.

31. It would seem that this presidential competence is a formal one, the decisions in substance being made in the KJC and KPC.

III. Concept paper – five options

32. The Concept Paper contains a detailed presentation of applicable international standards, including opinions of the Venice Commission (chapter 1.4), a comparative study of international practice of vetting, notably on Albania (chapter 1.5). Five options for reforms are presented in chapter 3. Chapter 4 identifies and assesses impacts. Chapter 5 presents the process of communication and consultation. Chapter 6 then evaluates five options according to the criteria of efficiency, effectiveness, and ethics.

33. The five options presented in the Concept Paper are:

1. Option 1 – *No changes, providing for the maintenance of the status quo* (chapter 3.1);
2. Option 2 – *Improved implementation and enforcement of the existing legal framework, without legal changes* (chapter 3.2);
3. Option 3 – *Vetting of all judges and prosecutors through specific legislative changes through the existing mechanisms in the Judges and Prosecutorial Councils* (chapter 3.3);
4. Option 4 – *Establishment of a special vetting body, i.e. by an external mechanism (ad hoc vetting), and further continuous performance, integrity and wealth check, by an external mechanism, through constitutional changes* (chapter 3.4), and
5. Option 5 – *Carry out a vetting process with constitutional amendments which enables the first wave of vetting by an ad hoc body, and then the continuous performance, integrity and wealth check by the KJC and KPC* (chapter 3.5).

34. In its Chapter 7 the Concept Paper recommends the implementation of Option 5 (vetting with temporary constitutional changes) and of Option 3, as alternative (vetting on the basis of legislative changes only).

35. These five options will be presented below.

A. Option 1 - No change

36. This Option would be simply to carry on with existing mechanisms. Right away, the Concept Paper asserts however, that these mechanisms are not sufficiently effective: *“the main issue is that in practice, accountability and integrity of some judges and prosecutors are not at the level that the legal norms of the Republic of Kosovo set out as necessary”* and *“the existing mechanisms are quite generous in their assessments of judges and prosecutors – and as such, unfair to judges and prosecutors doing their job properly”*. *“[D]isciplinary proceedings against judges and prosecutors rarely result in sanctions, and even when that happens, the sanctions are very lenient.”*

37. The Venice Commission agrees that in view of the problems identified, both as concerns individual cases and general efficiency of the judicial system, Option 1 would not be sufficient to improve the current state of affairs.

38. Both the Concept Paper and the various meetings of the rapporteurs with stakeholders revealed convincingly that there are some serious problems in the Kosovo judiciary. The Commission learned about cases of insufficient prosecution and/or compromised sentencing of persons who would seemingly related to organised crime. There also seems to be a wider issue relating to excessive length of judicial procedures in general and in property cases in particular. Taken together, these problems seem to have led to a loss of trust in society in the judiciary. This state of affairs certainly has to be addressed and the preparation of the Concept Paper is a laudable move to address these problems.

39. In view of these problems, the Venice Commission proposes distinguishing between individual cases of judicial misconduct and the wider problems related to the inefficiency of the judicial system, notably the excessive length of proceedings, which also violate Article 6 of the ECHR, which according to the Article 22 of the Kosovo Constitution is directly applicable in Kosovo, even if Kosovo is not a member of the Council of Europe or a party to the Convention yet.

40. The problems related to the excessive length of procedures should be addressed through a combination of several approaches. An important element in this respect would be a thorough digitalization of judicial proceedings. This should include not only the internal working within the judiciary and prosecution but also exchanges with external actors, the parties, and their legal representatives. Exchanges of original documents in paper form should become the exception rather than the norm.

41. In the event of digitalisation it would also be necessary to adapt and regulate the procedural rules (codes) in order to allow for the new court management methodology. This should also be the occasion to simplify and streamline other aspects of judicial proceedings. There are precedents for setting up such judicial procedure management systems and the efficiencies are enormous including reducing the amount of court time that is needed. Documents can be exchanged online case progression can be expedited and consents filed online without the need for an allocation of Court time.

42. This could be a means of providing hitherto technically impossible levels of transparency. All judgments can be rendered accessible and in an anonymised form, if necessary, when they are entered into the computer system which can also facilitate separating personal data from the outset.²¹ Such wide public access is an important means to enable public scrutiny of the judiciary through civil society and the media. And it is such scrutiny which is an important mechanism against corruption. In addition, the publication of judgements can expose incompetence when judgements systematically lack coherent reasoning.

43. Judge's salaries have been raised in recent years, this also has an important preventive effect, because judges will not feel compelled to resort to corrupt practices when they are able to support their family in a decent manner.²²

B. Option 2 – Improving enforcement and execution without legal changes

44. The Concept Paper proposes as Option 2 *“the possibility of improving the current situation through the full and proper fulfilment of existing legal obligations, including a possibility of a stronger budget support. In this option, interventions in secondary legislation, such as the current KJC and KPC Regulations, cannot be foreseen either. The possibility of improving the current situation only by improvement in the implementation of the current legal framework is largely limited by the legal framework itself.”*

45. The Concept Paper points out that the existing verification units within the KJC and the KPC operate without a proper legal basis. While the laws on the KJC and the KPC refer to personal integrity as a requirement for judges and prosecutors and call for the verification of data submitted by the candidates, these laws do not provide a specific legal basis for the existing verification units.

46. Furthermore, according to the Concept Paper, these units do not have sufficient human resources. This could be relatively easily remedied but that would not address the problem in the *“absence of a sufficient legal and regulatory framework, which would clearly establish their competencies and authorizations, as well as the very narrow range of information collected for*

²¹ CDL-AD(2021)031, Netherlands - Opinion on the Legal Protection of Citizens, para 131.

²² It seems that judicial salaries (some 3000 €) are relatively high for Kosovo living standards.

candidates.” And “most importantly, these units lack the legal and regulating authority to do this work on a regular basis.”

47. Finally, the Concept Paper identifies certain officials within the judicial administration that are not covered by the existing mechanisms by virtue of Judgment no. KO203/19 of the Constitutional Court.

48. The Venice Commission agrees that such verification units should have a proper legal and regulatory basis. Simply increasing the capacity of the verification units without changing the legal basis may not be sufficient to remedy to the problems identified. Legal changes should also enable the inclusion of officials that are not covered by existing mechanisms. However, additional legal changes may well be required.

49. An important general measure to prevent corruption are asset declarations. They allow establishing a discrepancy between income and assets of state officials, including judges and prosecutors. For this tool to be of use, the results of asset declarations must not just remain on the record; in case of stark discrepancies between the official income and wealth of judges and prosecutors needs to be actively scrutinised and disciplinary and/or penal measures must be taken in case of misbehaviour. Assets that cannot be accounted for should be seized, in fair procedures.

50. The Venice Commission has consistently supported institutional specialisation in the fight against corruption. In its 2018 Opinion, it also recognised the “advantages of the recourse to specialised prosecutors, associated with appropriate judicial control, for investigating very particular areas or offences including corruption, money laundering, trading of influence etc”. Judges and prosecutors should be in the remit of specialised anti-corruption bodies that apply to all state officials, including judges and prosecutors. The Commission welcomes the fact that the Kosovo authorities have recently requested an opinion on the Draft Law No.088/L-121 on the State Bureau for Verification and Confiscation of Unjustified Assets. The results of these reforms and a strengthening of the Anti-Corruption Agency (AKA) could also benefit the fight against corruption in the judiciary.

C. Option 3 - Development of the vetting process and continuous evaluation of performance, integrity and wealth check through legal changes

51. Option 3 provides for the establishment of a special *ad hoc* mechanism for an “*evaluation process in terms of the professional skills and performance, integrity and wealth of all judges, prosecutors and officials in senior management positions within the justice system. This process is intended to take place within a tentative period of five (5) years, from the moment of functioning of the mechanisms.*”

52. With the assistance of and on the basis of agreements with international bodies, two panels each for judges and prosecutors respectively would assess the integrity of the judges and prosecutors. Each of these four panels would be composed of one lay member and two judges or prosecutors respectively. These panels would assess the integrity of the candidate or sitting judge or prosecutor. An Independent Supervisory Council would serve as second instance and the Supreme Court as final instance.

53. However, the Judicial and Prosecutorial Councils (and finally the President of Kosovo) would remain competent in the final decision on dismissal, under the existing constitutional provisions: “...*according to the constitutional definition, the competent bodies during the vetting process will continue to remain the instance that decides on the career of a judge/prosecutor. The panels do not issue binding decisions but ‘assessments’ that are made available to the relevant Council for decision-making, and when necessary, the panels also recommend the measures to be taken against the candidate.*” Accordingly, “*the proposal for dismissal is made by the Judicial Council,*

[or] the Prosecutorial Council and the dismissal is made by the President. Whereas, in the second instance, the Supreme Court acts according to the appeal against the decision for dismissal. The decision of the Supreme Court on the legality of the decision on dismissal of a judge or prosecutor is final and produces a legally binding effect on the parties."

54. As there are no constitutional changes, the dismissal of judges and prosecutors can be based only on the existing constitutional grounds: committing a serious criminal offense and serious neglect of duties by judges (Article 104 (4) of the Constitution) and prosecutors (Article 109 (6) of the Constitution). According to Option 3, a negative assessment would be considered as a constituting a serious neglect of duties. It seems that this could relate both to problems of a lack of integrity and a lack of professionalism.

55. The members of the KJC and the KPC themselves would be subject to the vetting as well, however, - as for other parts of the judiciary – implemented in a staggered manner to ensure that the Councils retain their decision-making quorum in case of a dismissal of one or several of their members. The idea seems to be that the vetting would start slowly only because of possible initial resistance of the Councils in their current composition.

56. The Concept Paper itself identifies possible drawbacks of this option: *"...the inability of the mechanisms themselves to make decisions on the measures to be imposed on vetting subjects and the need for every assessment and recommendation to be subject to free decisions of the Councils, may limit the success of this process."* And *"the final decision for all members of the mechanism remains with the Councils themselves, whose members at that point are not vetted."*

57. In conclusion, *"[t]his option envisages the conduct of an ongoing vetting process while maintaining the powers of the Councils [judicial and prosecutorial] within the current constitutional framework. Thus, the option tries to maximize the possibilities of conducting a vetting process within the Councils as decision-making authorities but trying to guarantee a kind of independence of the vetting mechanisms within these Councils."*

58. The Concept Paper foresees *"a more challenging start and perhaps slower results" but envisages "an investment in the long-term development of the Councils' capacity to manage regular and ongoing vetting processes. The lessons learned from the beginning of this process would remain within the institutions and could pave the way for continuous process improvements over the coming decades. ... However, the cost of this option in relation to the effectiveness and expectations of public opinion and stakeholders involved is very high."*

59. The Venice Commission notes that the establishment of such a highly complex *ad hoc* vetting system would have a high cost and, as pointed out by the Concept Paper, the final results would very much depend on the willingness and capacity of the existing Judicial and Prosecutorial Councils to support the reform. From the Concept Paper it is not clear why a general vetting of all judges and prosecutors establishing *ad hoc* vetting bodies is needed if an important part of the problem is related to an inefficient application of and gaps in the legislation in existing bodies.

60. During the meetings, the rapporteurs learned that the KJC and the KPC participated in meetings of the working group preparing the Concept Paper, but they were not able to participate in the drafting of the Concept Paper. On the contrary, they felt excluded from that process, and they complained that the Concept Paper had not even been officially transmitted to them for comment. The Venice Commission recommends seeking the support of the Councils before adopting such changes under Option 3.

61. As to the data collected, it is positive that the Concept Paper excludes relying simply on substantive issues arising from past judgments. A judicial decision would be taken into account only if it *"presents strange and deficient rationale, so as to result in a lack of fairness and impartiality. This assessment, if it is alleged that the judge has not been professional in issuing a particular decision, cannot be done by applying a 'general formula'"*. The Venice Commission is

of the opinion that repeated judgements (or indictments) without sufficient legal arguments can indeed be grounds for disciplinary proceedings. In such cases, the question arises whether these judgements should be re-opened. A large-scale re-opening of res judicata should be avoided and cases should be re-opened only when there is proof of bribery.

62. However, for their assessments, the panels would take into account *“political connections/affiliations or other interest groups of the candidate, which affect their decision-making, and other information collected from the field.”* This source of information seems ill defined, however with *“other information collected from the field”* being particularly vague. The Venice Commission recommends defining more clearly the sources of information. It is also important to address the question as to which type of information (documents, witness statements, etc) can be used for the vetting, and what powers the vetting bodies have in collecting this information (the power of search and seizure, collecting witness statements under oath etc)?

63. Finally, another source of data to be collected is a verification of assets. Asset declarations are certainly highly important in order to ensure the integrity of state officials, including judges and prosecutors. However, the Concept Paper does not address the question why the examination of asset declarations could not be performed in the framework of a general system, applicable to all State officials. When unexplained wealth is detected by those bodies, the regular procedures could apply.

64. The Concept Paper also mentions the possibility of judges and prosecutors resigning before they undergo the vetting. It does so from the perspective of a possibility of these persons re-applying for a position (in which case the persons would have to undergo vetting). However, a wider issue to take into account is the general feeling of insecurity that pervades a judicial system being (re)vetted entirely. Not only judges and prosecutors who are corrupt or incompetent may resign. Often, judges and prosecutors with an impeccable track record will simply avoid an invasive examination of their private lives by resigning before the vetting. This resignation of “good” judges and prosecutors can result in a serious loss of human capacity in the judicial system, which is hard to fill with newly recruited persons, who may have an impeccably clean records simply because they never before had an occasion to become corrupt.

65. The Commission is of the opinion that a reform that depends on the active co-operation with a constitutional body needs to be developed in co-operation with that body. It is doubtful whether the high investments – and the expectations raised - in setting up such a new vetting system can be justified if the deciding bodies are not sufficiently included in the process of developing that reform. Therefore, the Commission recommends that before deciding on and implementing Option 3, the KJC and the KPC should be included in the process of preparing the reform and “brought on board”.

D. Option 4 - Carry out the vetting process and the continuous performance, integrity and wealth check with constitutional amendments

66. Option 4 envisages vetting through a special mechanism, as set out in Option 3, but the decision on dismissal would not be made by the KJC and the KPC respectively but directly by the organs of new this mechanism. The members of the KJC and the KPC would be submitted to this vetting as well but they would not be in charge of deciding on dismissals, including that of their own members. While the final dismissal would continue to be enacted by the President of Kosovo, the proposal would come from the assessment panels.

67. While the vetting under Option 3 would have to rely on the constitutional ground of “serious neglect of duties” of Articles 104(4) and 109(6) of the Constitution, the constitutional amendments would introduce “failure to pass the vetting” as a specific ground for dismissal.

68. The general composition of the vetting panels (here, three panels for judges, two for prosecutors) would be the same as described under Option 3 above. Appeals would be heard by an Appellate Panel, consisting of five judges. The procedure is envisaged to comply with Articles 6 and 13 ECHR.

69. A key issue is the composition of the panels and the appeal mechanism: *“The process of selecting the members of the Mechanism will take place in cooperation between the Assembly and the President. The selection procedure and the manner of monitoring the selection, but also the implementation of vetting and continuous check, will be determined by law. The purpose of the working group for drafting this Concept Paper is for the whole process to be monitored by a mixed body, which also includes international partners. The members of the Mechanism will be vetted in advance by a body with international assistance.”* *“The Office of the President will enter into agreement with an international institution/organization to conduct the vetting of candidates for members of the mechanisms. The nominated names that pass the vetting, along with the rationale for the proposals, will be submitted to the President for approval. After approval by the President, the names of the members of these mechanisms will be sent to the Assembly for approval.”*

70. Once the “first wave” of vetting of sitting judges and prosecutors were finished, the new mechanism would remain in place under the authority of the new constitutional provisions: *“after the completion of the vetting, the Vetting Mechanism will be transformed into a Mechanism for continuous performance, integrity and wealth check.”*

71. The data collected is similar to that under Option 3. The remarks made above apply.

72. The Venice Commission has some doubts whether the problems identified in the Concept Paper warrant constitutional amendments. Before removing the competences of the KJC and KPC, a thorough reform of existing legislation could be sought. This reform should certainly go further than that envisaged under Option 2. Notably a unified system of control of asset declarations should be envisaged and the existing disciplinary mechanisms should be strengthened, together with the KPC and the KPC. During the meetings they signalled openness for reform and pointed out that recently disciplinary proceedings had resulted in dismissals.²³

73. It is true that constitutional amendments would remove the need to come to an agreement with the sitting KJC and the KPC. However, it does not seem to be established whether a reform of the existing mechanisms cannot be achieved also in – critical – dialogue with these institutions. Before a large scale vetting, involving high costs and the inevitable disruption of the judiciary is being envisaged, milder forms of reform should be explored. Constitutional changes could of course be the final remedy if such a reform could not be effectively implemented. It may however be too early for giving up on the potential impact of legislative and regulatory reforms.

E. Option 5 - Implementation of the vetting process with constitutional amendments that enable the first wave of vetting to be conducted by an *ad-hoc* body and then the continuous performance, integrity and wealth check by the KJC and KPC

74. Option 5 would be very similar to Option 4 but the vetting mechanism would be temporary only: *“the establishment of a Vetting mechanism through constitutional changes with a temporary mandate to be ended once the first verification period ends. The verification process would be then transferred to the Kosovo Judicial Council (KJC) and the Kosovo Prosecutorial Council (KPC). Subject to the Vetting would be members of the KJC and KPC, the Chief State Prosecutor,*

²³ According to information provided by the KJC, 43 disciplinary procedures were performed since the entry into force of the Law on Disciplinary Liability of Judges and Prosecutors in *** and 31 December 2021. In seven cases the salary of judges was reduced between 10 and 30% and for periods between three and six months. There have been seven non-public and five public “warnings”. One judge was transferred to a basic court and four judges were suspended.

all judges and prosecutors, court administrators, directors of the council's secretariat, director of the judicial inspection unit, as well as other officials engaged in courts and prosecution offices.

75. The mechanism (panels / appeals) would be similar to the one established under Option 4. Most of the arguments presented under Option 4 are therefore valid also for Option 5. The main difference is that the new mechanism would be dismantled after a first phase lasting five years and the disciplinary - and dismissal - powers would be handed back to the KJC and the KPC.

76. In its interim opinion on the draft Constitutional Amendments on the Judiciary of Albania, the Venice Commission discussed the question of the duration of the one-time vetting process. The Commission saw a "risk of transforming the vetting process into a de facto permanent arrangement, parallel to the ordinary accountability mechanisms. The Draft Amendments should make it clear that once a sitting judge passes through the vetting, his/her accountability would be further regulated by the ordinary rules contained in the Constitution and in the implementing legislation".²⁴ The Venice Commission is of the opinion that an *ad hoc* vetting bodies should have a strictly limited task to perform a one-time vetting only. Once this is over, there is also a need to provide for a stable environment for judicial work.

77. The Minister of Justice requested an opinion of the Venice Commission specifically also on draft constitutional amendments relating to Option 5 (CDL-REF(2022)006). The Venice Commission makes the following comments relating to these draft amendments.

F. Draft constitutional amendments

78. First it should be pointed out that the constitutional amendments are very detailed and set out a number of procedural elements that usually should be regulated in ordinary law. The Constitution should regulate only the cornerstones of a vetting system, such as the composition and powers of the vetting bodies. The remaining provisions should be part of ordinary law. Adopting the complete procedure on the constitutional level would also remove it from control by the Constitutional Court.

79. However, conversely due to the wide-ranging powers given to the vetting bodies, the draft constitutional amendments, as they stand, cannot be adopted as ordinary law because that law would obviously contradict Articles 85, 108 and 110 of the Constitution. If the draft constitutional amendments were adopted as ordinary law, they would have to be accompanied by a short constitutional amendment establishing the composition and powers of the vetting mechanism, the Transitional Evaluation Authority (TEA).

80. Concerning the composition of the TEA, according to draft Article 165 of the Constitution, the President organises the recruitment (Article 165 (1)) and Parliament elects TEA members by a simple majority (Article 165 (5)). However, the election of the TEA members by simple majority creates a danger of politicisation. In any case, the chicken and egg problem would remain. Who would vet the integrity of the members of the new TEA? A qualified majority for the election of the TEA Members, combined with input from civil society, could be part of a solution.

81. Under draft constitutional Article 166, the Transitional Evaluation Panel (TEV) would take decisions on demotion and mandatory training but would make only proposals for dismissal. Who would dismiss a judge/prosecutor upon such a proposal? Under Article 84 of the Constitution, it is the President who appoints judges and prosecutors upon proposals by the KJC and the KPC respectively. A clear procedural chain, from proposal to decision, should be established in the constitutional amendment. The draft amendments do not envisage changes to Article 84 of the Constitution.

²⁴ Venice Commission, CDL-AD(2015)045, Interim Opinion on the draft constitutional amendments on the judiciary of Albania, para. 102,

82. In the same vein, the system of appeals remains unclear. Appeals to the Appellate Panel are directed against a “decision” of a Panel. Does this mean that there is no appeal against a “proposal” for dismissal and only against a final decision by the President?

83. The composition of the Appellate Panel remains unclear because the constitutional amendments refer to ordinary law for its composition. However, that composition is one of the provisions that should be regulated on the constitutional level.

84. Draft Article 175 also refers to the publication of “decisions”. Does this mean that the “proposals” are not published? Is only the final decision (by the President of Kosovo) that is published (and appealable)?

85. Article 174.4 excludes appeals to the ordinary courts. Is there a possibility of appeal to the Constitutional Court possible under Article 113 (7) of the Constitution against a “*violation by public authorities of their individual rights and freedoms guaranteed by the Constitution*”? (e.g. right to political participation, fair trial, etc). That provision requires the prior exhaustion of all legal remedies. This would probably include an appeal to the Appellate Panel.

86. On a more technical level, the references to references to “special law” in draft Articles 170.2 and 178 seem unclear. This may be an issue of translation, however. Furthermore, draft Article 164 (8), last sentence, seems to contradict draft Article 164 (5).

IV. Conclusion

87. The Minister of Justice of Kosovo requested an opinion on the very detailed Concept Paper for the vetting of judges and prosecutors (CDL-REF(2022)006). The Concept Paper sets out why it is necessary to reform the judiciary in Kosovo and proposes five options to go about the problems identified. The Venice Commission welcomes that the Concept Paper includes an important part on comparative experience on vetting. There is an absence of clarity, concerning terminology, for example, the Concept Paper proposes the introduction of “vetting” as a one-off *ad hoc* process but it also refers to existing recruitment and disciplinary mechanisms as “vetting”.

88. The five options range from not taking any specific action, via reinforcing existing mechanisms, to legal amendments and finally constitutional amendments. Within the framework of the last option, the Minister of Justice also requested the Venice Commission to provide its opinion on draft constitutional amendments (CDL-REF(2022)006).

89. In the light of the Concept Paper, other reports and the rapporteurs’ meetings with stakeholders, the Commission agrees that Option 1 – not taking any measures - would not be sufficient to improve the current state of affairs. The Venice Commission proposes distinguishing between individual cases of judicial misconduct and the wider problems related to the inefficiency of the judicial system, notably the excessive length of proceedings. The latter seem to require different measures as a remedy, notably also technical (IT)²⁵ and a reform of court procedures.

90. The Concept Paper sets out convincingly that legal changes are warranted, and Option 2 refers to some of them. For instance, verification mechanisms should have a proper legal and regulatory basis. Legal changes should also enable the inclusion of judicial officials, including support staff, that are not covered by existing mechanisms. The Commission is of the opinion that further legal changes may be warranted, notably concerning the active use of asset declarations of judges and prosecutors (and also other State officials) for identifying possible cases of corruption and to take action in these cases.

²⁵ CDL-AD(2021)043, Cyprus - Opinion on three Bills reforming the Judiciary, para 9.

91. The Commission also notes that a reform of the Kosovo Prosecutorial Council is being prepared and the Minister of Justice requested an opinion of the Venice Commission on this issue. The Minister of Justice has also requested an opinion of the Venice Commission on amendments to anti-corruption legislation which would make making the asset declaration system more effective. The results of these reforms should be evaluated before considering constitutional amendments.

92. As concerns Option 3, special vetting bodies would be established but the existing Judicial and Prosecutorial Councils would retain the power to recommend the dismissal of judges and prosecutors to the President of Kosovo. From the Concept Paper it is not sufficiently clear why a general vetting of all judges and prosecutors establishing *ad hoc* vetting bodies is needed if an important part of the problem is related to inefficient application of and gaps in the legislation on exiting bodies. The Venice Commission recommends entering into a thorough dialogue with Councils before adopting such changes. Without their active support, Option 3 is not likely to achieve the results hoped for.

93. Option 4 also envisages establishing special vetting bodies on a permanent basis but on the basis of constitutional amendments. The Commission recommends introducing constitutional changes only after other avenues, legal and institutional reforms, have taken place and evaluated and were found to be unsuccessful.

94. Option 5 envisages establishing special vetting bodies on a temporary basis (for five years), also on the basis of constitutional amendments. After that period the power to recommend the dismissal of judges and prosecutors would be handed back to the KJC and the KPC.

95. Specifically, the draft constitutional amendments that have been prepared under Option 5, the Venice Commission finds them too detailed to be incorporated into the constitution. Constitutional amendments should establish only the principle, composition and powers of the vetting bodies. On the other hand, the same draft constitutional amendments could not be adopted in the form of simple law. As a stand-alone law, these provisions would need to be accompanied by a (shorter) constitutional amendment, otherwise they would contradict Articles 85, 108 and 110 of the Constitution. The election of the TEA members by simple parliamentary majority creates a danger of politicisation.

96. To sum up, the Venice Commission recommends introducing legislative changes that would improve the current system of judicial discipline, as a thorough extension of Option 2, this concerns notably a strengthening of the system of asset declarations and strengthening the vetting units within the KJC and the KPC. Constitutional changes (Option 5) should be considered only if the legislative changes turned out to be insufficient.

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