



Strasbourg, 3 June 2022

CDL(2022)020*

Opinion no. 1064 / 2021

Or. Engl.
(Sc/GiD/is)

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

KOSOVO

REVISED 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

**Ms Grainne McMORROW (Member, Ireland)
Mr Cesare PINELLI (Substitute Member, Italy)
Mr Pere VILANOVA TRIAS (Member, Andorra)**

Opinion co-funded
by the European Union



**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

This document will not be distributed at the meeting. Please bring this copy.

www.venice.coe.int

Contents

I.	Introduction	3
II.	Background	3
	A. Definitions and standards on vetting	3
	B. Vetting in Kosovo	6
	1. Assessment of the current problems in the judicial system (judges and prosecutors)	6
	2. On-going reform of the Kosovo Prosecutorial Council	9
	3. Vetting terminology	9
	C. Constitutional framework	10
III.	Concept paper – five options	10
	A. Option 1 - No change	11
	B. Option 2 – Improving enforcement and execution without legal changes	12
	C. Option 3 - Development of the vetting process and continuous evaluation of performance, integrity and wealth check through legal changes	13
	D. Option 4 - Carry out the vetting process and the continuous performance, integrity and wealth check with constitutional amendments	16
	E. Option 5 - Implementation of the vetting process with constitutional amendments that enable the first wave of vetting to be conducted by an <i>ad-hoc</i> body and then the continuous performance, integrity and wealth check by the KJC and KPC	17
	A. Draft constitutional amendments	17
	1. Revised constitutional amendments	18
	2. Original constitutional amendments	19
IV.	Conclusion	20

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. On 13 March 2022, Ms Albulena Haxhiu, Minister of Justice of Kosovo, requested the postponement of the adoption of the opinion to the next session in order to give more time for dialogue with all stakeholders, on suitable steps on the basis of transparency, fairness and efficiency. She invited the rapporteurs to come to Kosovo to meet all stakeholders, including the judicial and prosecutorial councils, and the international community. On the basis of the positive views of the rapporteurs the Enlarged Bureau had accepted this request, which also had been discussed by the Sub-Commission on the Judiciary at its hybrid meeting on 17 March 2022. The Commission approved the request for a postponement.
5. On 18 May 2022, the Deputy Minister of Justice, Ms Nita Shala submitted revised constitutional amendments for opinion (CDL-REF(2022)022).
6. On 19-20 May 2022, Ms McMorrow, assisted by Mr Schnutz Dürr from the Secretariat, had meetings in Pristina with the President of Kosovo, the Speaker of the Assembly, the First Deputy Prime Minister, the Minister of Justice, the President of the Supreme Court, the Acting Supreme Prosecutor, the President of the Judicial and Prosecutorial Councils, Political parties, academics, international community and NGOs.
7. 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.
8. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 9-11 February 2022 and the meetings in Pristina on 19-20 May 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, ... 2022).*

II. Background

A. Definitions and standards on vetting

9. The concept of Vetting involves the implementation of a process of accountability mechanisms to ensure the highest professional standards of conduct and integrity in public office. Vetting can run parallel with both Integrity checking and the investigation of criminal wrongdoing but they each 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. In other investigations like wider integrity checking the burden of proof will be discharged on the balance of probability.

10. 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.

11. 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 possibly be remedied through training but it is clearly a reason not to recruit a person.

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

13. 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

14. 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

15. 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

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

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.

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.

16. 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 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”.

17. 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

18. 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

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 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.

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

1. Assessment of the current problems in the judicial system (judges and prosecutors)

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

20. 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 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

21. 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"*.

22. 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 that vetting is undertaken only at the time of recruitment and that there is an extremely narrow range of information collected as part of this process.

23. 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 is a lack of professionalism in the judicial system, amongst judges and prosecutors.

24. 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.

25. 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.

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.*"

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

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. During the meetings, the Commission delegation was however informed that recently much stronger disciplinary measures had been taken, notably also by the Kosovo Judicial Council.

26. 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. In Pristina, the Venice Commission's delegation was informed that this problem was being addressed by way of a change of the applicable performance criteria.

27. 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 meetings, it would seem that judicial corruption 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.¹⁷

28. The rapporteurs were told by the authorities and civil society that the situation in the Judiciary was critically bad and other remedies had already been exhausted. Only a vetting on the basis of constitutional amendments could remedy in this situation. Nepotism would be widespread in the Judiciary, where family members of judges and prosecutors at all levels were employed in judicial and prosecutorial positions. Within the Judiciary, interest groups would have formed that supported each other. Particular criticism was voiced of cases of non-prosecution, prosecution of incorrect crimes (e.g. light bodily harm, instead of attempted murder) or the preparation of indictments that were allegedly purposely drafted in an incoherent manner, ensuring that they would fail in court. The procedure of the appointment of the Supreme Prosecutor had appeared to have involved a series of irregularities, leading the President of Kosovo to refer the case to the Constitutional Court (case currently pending).

29. As concerns the quality of judgments, the rapporteurs were informed that only rarely would there be references to the European Convention on Human Rights or the Case-Law of the European Court of Human Rights, as required by Article 22 of the Constitution.

30. The adoption of the new Law on Disciplinary Liability of Judges in 2018 and the substantive increase of the salaries of the judges had not led to any significant improvements. Many of the judges and prosecutors who had not passed the vetting process in 2010 had actually been re-integrated after 2013. More than 90 per cent of judges and prosecutors had a "very good" performance evaluation.

31. The promise to conduct a comprehensive vetting process in the justice system was one of the key objectives of the Government's 2021 electoral programme in the general elections. This electoral programme was supported by an unprecedented result, which was voted by 50.28% of voters and a vast majority of the population supported vetting as shown by recent polls. It is believed by the Government in Kosovo that the errors made in the vetting process in Albania where the Constitutional and Supreme Court had not enough judges to function for a long time, could be avoided by ensuring that judges and prosecutors who were dismissed were replaced immediately.

32. The Kosovo Judicial Council, on the other hand, referred to a number of improvements in recent times, notably the recent appointment of 49 new judges, which had been monitored and positively evaluated as transparent by international partners and civil society. Now all Supreme

¹⁷ Kosovo has rank 87 in the 2021 TI Corruption Perceptions index, up from rank 104 in 2020, <https://www.transparency.org/en/cpi/2021/index/ksv>. The authorities however, point out that this was Albania's rank when vetting was introduced there with international support.

Court decisions were also published to ensure transparency. The on-going roll-out of the case-management system CMIS/SMIL project¹⁸ supported by Norway and the e-Kosova System had brought about significant improvements, including random case-allocation.

33. According to the KJC, serious disciplinary measures were being taken (reduction of salaries, demotion, dismissal in some cases) and a database showing all disciplinary cases had been established. In Pristina there was indeed a large backlog of cases, but this would soon be addressed with the help of the newly appointed judges. The number of cases settled by the judges had already increased. Recently four court presidents had been evaluated. 953 judgments had been published by the end of March 2022. The work norms and post descriptions of the judges had been revised and this would enable better accountability. The judges also benefitted from specific training with international support. However, the judiciary was seriously lacking funding.

34. As concerns prosecution, 65 prosecutors had been evaluated, seven new prosecutors had been appointed and there had been 16 disciplinary decisions. The SMIL software had been extended to the Police to facilitate co-operation. The budget had been cut by 10 per cent. Sometimes the evidence provided by police was insufficient for proper indictments.

35. In the opinion of the KJC, there was no reason to subject judges and prosecutors who had been undergone sufficient check to a renewed vetting. Vetting judges in the Serb communities could seriously endanger the Brussels agreements, which had resulted in the integration of Serb judges and prosecutors in the Kosovo judicial system. There was also no need for a vetting of current judges because of the fast turnover. Soon 90 judges would be newly appointed.

36. The delegation was also informed that the preparation of the framework for the currently envisaged process of vetting has not included all the stakeholders and that the Concept Paper had been prepared within the Ministry rather than by the stakeholders and experts as had been the case in the aborted attempt in 2019.

37. The KJC and the KPC pointed out that the Rule of Law Index 2021 of the World Justice Project, showed Kosovo in place 60 of the ranking of 139 jurisdictions, up one place from the ranking of the previous year.¹⁹ A vetting of all judges and prosecutors would therefore not be justified.

38. To sum up, the authorities and civil society identify serious malfunctioning in the judicial system. They insist that other avenues have already been exhausted and only a vetting of all judges and prosecutors can remedy the situation. The KJC and the KPC on the other hand point out that recently they already have taken important steps to address these shortcomings. Furthermore, given that successive governments had promised the introduction of effective vetting of the judges and prosecutors, and that there seems to be strongly held view within the Kosovoan population that this is necessary and that there is renewed impetus to do so. It seems however unclear in the public understanding what "vetting" would be precisely.

¹⁸ https://www.coe.int/en/web/cepej/home/newsroom/-/asset_publisher/IJTVWYm3tmNw/content/cepej-key-performance-indicators-included-in-dashboards-for-courts-and-prosecution-in-kosovo-?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcepej%2Fhome%2Fnewsroom%3Fp_p_id%3D101_INSTANCE_IJTVWYm3tmNw%26p_p_lifecycle%3D0%26p_p_stat%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1

¹⁹ <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf> For information on the performance of the Kosovo Judiciary, see also the DASHBOARD at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjxhqKvqP33AhUhif0HHUDAAFoQFnoECAUQAQ&url=https%3A%2F%2Fm.coe.int%2Fkosovo-20210630-deliverable-2%2F1680a5fdf0&usq=AOvVaw2uIE192D0hxrj1TySDyrPk>.

2. On-going reform of the Kosovo Prosecutorial Council

39. The current opinion has also to be seen in the light of the draft amendments to the Law on the Prosecutorial Council of Kosovo, on which the Commission provided two opinions (CDL-AD(2021)051²⁰ and CDL-AD(2022)006²¹). The main idea of the draft amendments – both the original and the revised ones – was to reorganize the KPC by reducing the dominance of the prosecutors in this body and renewing its composition.

40. The first Opinion, adopted in December 2021 made certain key recommendations which have been addressed in a revised draft. The future model of the KPC proposed by the revised draft – with 3 prosecutors elected by their peers, the Chief State Prosecutor sitting *ex officio* and three lay members – is generally in accordance with the standards, according to the opinion, in particular given that one lay member is appointed by the Ombudsman. The revised transitional provisions are more respectful of the security of tenure of the current prosecutorial members, since three of them will be selected by lot and will remain until the end of their mandate. However, the Opinions warned that the special majority required within the new council to take certain decisions may lead to obstacles, and an anti-deadlock mechanism would be needed.

41. The Commission welcomed the revised amendments. The amendments are currently pending before the Assembly. When they enter into force the KPC will have a new composition and the application of the ordinary disciplinary regime should be facilitated. The authorities pointed out that similar changes in respect of the KJC could not be adopted on the level of ordinary law because the composition of the KJC is regulated directly in the Constitution.

3. Vetting terminology

42. The Commission notes that there is some quite some ambiguity in Kosovo as concerns the 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.

43. The current proposal for a reform is not a first attempt to improve the quality of the judiciary in Kosovo.²² 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.²³ 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.²⁴ However, according to the Concept Paper KJC and the KPC, have

²⁰ Venice Commission, CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo.

²¹ Venice Commission, CDL-AD(2022)006, Kosovo - Opinion on the revised draft amendments to the Law on the Prosecutorial Council.

²² 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>.

²³ 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).

²⁴ 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.

internal administrative verification units, but it seems that they operate without a proper legal basis.²⁵

44. As it is often the case in countries in transition, the renewal of the judges seems to be an answer to those problems. However, a more holistic and lengthy reform of the judicial sector may be necessary, and the vetting alone may not be capable of bringing fast and visible results. A classical vetting alone, as per international definitions, set out in section II.A above, would not be sufficient to improve the situation of the judiciary in Kosovo. A combination of various measures may be necessary to achieve that goal. The Kosovo authorities agree that vetting would be a complementary tool, which together with other reforms in the legal framework, in order to improve the situation in the justice system.

C. Constitutional framework

45. 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*”.

46. 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*”.

47. 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;”

48. 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

49. 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.

²⁵ 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.

50. 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).

51. 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).

52. These five options will be considered and evaluated below.

A. Option 1 - No change

53. 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.”*

54. 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.

55. 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.

56. 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.

57. 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.

58. In Pristina, the Commission's delegation was informed that some judges refused to use the new IT tools. Whether this is simply related to a general aversion of some against new IT or whether the persons concerned wanted to avoid transparency to cover up misbehaviour does not matter. Such refusal should be thoroughly addressed through a combination of training and disciplinary measures, possibly culminating in removal from office, for judges who eventually refuse the new working methods.

59. 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.

60. The Commission was also informed that court proceedings are transcribed manually and that this uses important resources. It would seem easier to record all proceedings and make these records available to the parties in the case via IT tools/restricted sites. This would provide much more transparency and, in addition be much cheaper, once the system was established. In addition, automatic transcription, could be used to quickly identify specific passages in the audio records that could be consulted and listened by the parties and the judges.

61. These elements, taken together, 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.²⁶ 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.

62. 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.²⁷

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

63. 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.”*

64. 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.

²⁶ CDL-AD(2021)031, Netherlands - Opinion on the Legal Protection of Citizens, para 131.

²⁷ It seems that judicial salaries (some 3000 €) are quite high for Kosovo living standards.

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

66. 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.

67. 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.

68. 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.

69. 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.

70. Irregularities in the asset declarations of judges and prosecutors identified by the AKA should not remain on the record but automatically lead to effective disciplinary proceedings against the persons concerned.

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

71. 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.”*

72. 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.

73. 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.”*

74. 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.

75. 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.

76. 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.”*

77. 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.”*

78. 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.”*

79. 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.

80. 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 authorities insist that the input from Councils was included in the Concept Paper

and that the Councils' representatives welcomed that international standards on procedural rights had been incorporated in the Concept Paper.

81. In any case, the Venice Commission recommends seeking the support of the Councils before adopting such changes under Option 3. It seems fundamentally necessary that the final concept for the vetting be prepared on the basis of a sincere dialogue and in close cooperation with all stakeholders, the Ministry, KJC, KPC and also with civil society and legal academics.

82. 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.

83. 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)?

84. 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.

85. 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)vettted 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.

86. 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

87. 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.

88. 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.

89. 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.

90. 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.”*

91. 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.”*

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

93. The Venice Commission has some doubts whether all 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 so that the integrity of the members of the KJC and KPC could be checked. 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 KJC and the KPC. During the meetings they signalled openness for reform and pointed out that recently disciplinary proceedings had resulted in dismissals.²⁸

²⁸ 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 until 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.

94. 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.

95. The Venice Commission is not in a position to assess or verify how widespread the alleged incidents in the Kosovo judicial system (e.g. deliberate non-prosecution, incorrect indictments, inaction to offer protection etc.) are and whether they are individual cases or a sign of systemic problems of corruption in the judicial system. In any case, it is necessary to distinguish between cases of professional incompetence, which can be addressed possibly through training and ordinary disciplinary proceedings, from cases of deliberate and malevolent acts, which relate to an absence of integrity, which could be addressed, if they are widespread, through vetting.

96. In any case, the tenures of the judges and prosecutors concerned are protected under the Kosovo Constitution, which provides for direct application of the European Convention on Human Rights. Any interference with these rights has to be proportionate and a strict test of necessity will be required. Therefore, rather than a vetting of all judges and prosecutors, integrity checks of current and future members of the Judicial and Prosecutorial Councils, possibly also court presidents, would be more commensurate with these limitations. Such a procedure would also be much less disruptive for the judicial system and would require far fewer budgetary resources.

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

97. 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, 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.*

98. 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.

99. 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”.²⁹ 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.

A. Draft constitutional amendments

²⁹ Venice Commission, CDL-AD(2015)045, Interim Opinion on the draft constitutional amendments on the judiciary of Albania, para. 102,

100. 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). On 18 May 2022, the Deputy Minister of Justice, Ms Nita Shala submitted revised constitutional amendments for opinion (CDL-REF(2022)**). The Venice Commission makes the following comments relating to these draft amendments.

101. It should be pointed out that the original constitutional amendments were very detailed and set out a number of procedural elements that should usually be regulated in ordinary law. Constitutions should not contain detailed procedural provisions but only set out basic principles and establish the cornerstones of institutions, possibly but not essentially, notably their composition and main functions. A vetting of all judges and prosecutors, bypassing or changing the powers of the KJC and the KPC for discipline and dismissal could only be undertaken if underpinned by constitutional amendments.

102. As set out above, the Venice Commission considers that a reform of the judicial system in Kosovo is indeed necessary but also believes that large parts of such a reform can be adopted on the level of ordinary law. A vetting or integrity checks introduced could be limited to the members of the KJC and the KPC who exert disciplinary power over the other members of the judges and prosecutors. These measures should be strictly proportionate. Any constitutional amendments should therefore aim at minimal invasiveness in the competences of the KJC and the KPC while achieving the goal to reform the judiciary.

103. Adopting the complete procedure on the constitutional level would also remove it from control by the Constitutional Court, which would be problematic.

104. In such a vetting and integrity check framework the constitutional amendments 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.

1. Revised constitutional amendments

105. The revised constitutional amendments (CDL-REF(2022)023) are much shorter and focus on the main elements of the competences and composition of the vetting bodies, which is positive. The draft amendments to Articles 104 (4a) and 109 (6a) of the Constitution define the ground for dismissal "serious neglect of duties" as including cases when the judge or prosecutor "has been rated with insufficient performance, or has been found to have unjustifiable wealth, or vulnerable integrity, or has committed serious disciplinary offenses, as regulated by law."

106. These two constitutional amendments would also facilitate the dismissal of judges or prosecutors who provide irregular asset declarations. Their dismissal could be triggered by the Anti-Corruption Agency (and decided upon by the KJC and the KPC, possible after their integrity assessment). This would not depend on a vetting of all judges and prosecutors.

107. Draft Articles 163 to 168 establish a system of general vetting of all judges and prosecutors called transitional evaluation. The transitional evaluation would last for five years but could be extended for another two years. A Transitional Evaluation Authority (TEA) would be established, composed of evaluation panels, an Appellate Panel and a Secretary. They all would be elected by the Assembly through a 2/3 majority.

108. The evaluation panels would be composed of two judges / prosecutors respectively and one lay member, composed *ad hoc* for each case. The Appellate Panel would be composed of five members. Cooperation with international institutions is a possibility. In Pristina, the Commission's delegation was informed that international participation in the selection of the members of the TEA is clearly the intention of the authorities.

109. The Venice Commission welcomes that the revised draft amendments are more concise than the first set of draft amendments. The qualified majority for the election of the members for the TEA is positive. The transitional evaluation would cover performance, wealth and integrity. However, in order to provide for a proportionate reform and to limit the disruption of the judicial system, the Venice Commission recommends limiting a transitional evaluation to the members of the KJC and KPC and possibly court presidents. That evaluation should cover integrity (including inexplicable wealth) only but not cover performance, which is not a permissible ground for vetting. Furthermore, it is not a relevant issue for the members of the councils.

2. Original constitutional amendments

110. Even though they have been superseded by a revised set of draft constitutional amendments, this Opinion briefly examines also the earlier draft amendments because detailed procedural provision that were in those amendments are likely to become part of a draft law, implementing the shorter revised constitutional amendments (see below).

111. Due to the wide-ranging powers given to the vetting bodies, the original draft constitutional amendments, as they were presented, 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).

112. 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.

113. 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.

114. 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?

115. 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.

116. 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)?

117. 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.

IV. Conclusion

118. 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 judicial system in Kosovo and proposes five options to go about the problems identified. The Venice Commission welcomes that the Concept Paper includes an important section on comparative experience on vetting. There is, however, 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”.

119. 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).

120. 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)³⁰ and a reform of court procedures.

121. 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. The Anti-Corruption Agency should be given sufficient resources for its work and it should be enabled – and obliged – to trigger disciplinary proceedings against the judges or prosecutors who provide irregular asset declarations.

122. 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 civil confiscation of illegally acquired assets which would make the asset declaration system more effective. The results of these reforms should be taken into account when considering constitutional amendments.

123. 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 existing 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.

124. 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 on a vetting of all judges and prosecutors only after other avenues, legal and institutional

³⁰ CDL-AD(2021)043, Cyprus - Opinion on three Bills reforming the Judiciary, para 9.

reforms, possibly including integrity checks of the member of the KJC and KPC, have taken place and evaluated and were found to be unsuccessful.

125. 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.

126. Option 5 raises its own difficulties, and the Venice Commission feels the draft constitutional amendments that have been prepared under Option 5, even in their revised shorter version, go too far by providing for a vetting for all judges and prosecutors, constitutional amendments, where necessary, should only provide for integrity checks of the members of the KJC and the KPC, and possibly court presidents.

127. Constitutional amendments should ideally establish only a State's commitment to a principle, or to the aspiration or ethos a country seeks to enshrine in its Laws. That would then facilitate measures concerning the composition and powers of the vetting bodies and its framework to be set out elsewhere in legislation and regulation. On the other hand, the Commission acknowledges, that in this instance, the same original draft constitutional amendments could not be entirely adopted in the form of simple law without constitutional underpinning. 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 would create a danger of politicisation. This has been taken into account in the revised constitutional amendments.

128. 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 for integrity checks of the members of the KPC and the KPC.

129. The Venice Commission is not in a position to assess how widespread the incidents in the judiciary of which its delegation was informed are and whether they concern individual judges and prosecutors or a large proportion of them. In any case, it is necessary to distinguish cases of professional incompetence, which can be addressed through training, from cases of deliberate malevolent acts, which can be addressed through integrity checks.

130. The Venice Commission considers that a reform of the judiciary in Kosovo is indeed necessary and that this may involve some form of effective integrity checks. It is however the Commission's opinion and that many elements of such a reform can be adopted on the level of ordinary law. Any vetting or integrity checks system introduced could be limited to KJC and KPC who exert disciplinary power over the other members of the judicial system. It would then be for the KJC and the KPC to deal with problems in the rest of the judicial system, both as concerns integrity and professionalism. The interference in constitutional rights should be strictly proportionate. Any constitutional amendments should aim at minimal invasiveness in the competences of the KJC and the KPC while achieving the goal to reform the judiciary.

131. In the context of Kosovo effective "vetting" will of necessity mean a combination of various measures that will have a positive effect on the integrity and efficiency of the judiciary. Even if this type of vetting does not necessarily correspond to the formal definition given in section II.A above, all these measures taken together are part of a judicial reform that amounts to a "vetting" as legitimately aspired by the people and the authorities in Kosovo which is capable of delivering the required outcomes.

132. Experience shows that the introduction, sequencing and compatibility of vetting or integrity checking measures is operationally problematic and a precise model for each should therefore be designed with stakeholders on board. Failing which it may result in incomplete implementation. Then it crucially must be given sufficient operational roll - out time in order to evaluate its efficacy before other measures are introduced, otherwise this could obstruct everyone's best endeavours and compromise the desired outcomes.

133. To make this reform viable, the final concept for the vetting and corresponding constitutional and legislative changes should be prepared on the basis of a sincere dialogue and in close cooperation with all stakeholders, the Ministry, KJC, KPC but also civil society and interested academics.

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

Draft-restricted