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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

KOSOVO

OPINION

ON THE DRAFT LAW ON THE GOVERNMENT

Adopted by the Venice Commission at its 125th online Plenary Session (11-12 December 2020)

on the basis of comments by

Ms Nadia BERNOUSSI (Member, Morocco)
Mr Philip DIMITROV (Member, Bulgaria)
Mr Murray HUNT (Substitute Member, United Kingdom)
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I. Introduction

1. By letter of 26 October 2020, the Prime Minister of Kosovo requested an opinion of the Venice Commission on the draft Law on the Government of the Republic of Kosovo (CDL-REF(2020)072, hereinafter the "draft Law"), which is part of Kosovo's Legislative Agenda for 2020. The request sets out that the draft Law was drafted by the Office of the Prime Minister in coordination with the main stakeholders and has undergone public consultations in July 2020. It is now submitted to the Venice Commission for an opinion to ensure that it *"adheres to best international practices, standards and norms*" prior to the draft Law being forwarded to the Government and sent to the Assembly to follow the procedure for its adoption.

2. The request asks the Venice Commission to analyse the draft Law and focus on two sensitive issues, which have arisen in the context of the consultation of the draft Law, namely: (1) the constitutionality of setting out the maximum number of ministers in this draft Law (Article 4.3); and (2) to what extent the powers of the Outgoing Government may be restricted until a new government is elected (Article 31).

3. Ms Nadia Bernoussi, Mr Philip Dimitrov, Mr Murray Hunt, Mr Francesco Maiani and Mr Bertrand Mathieu acted as rapporteurs for this opinion.

4. Owing to the sanitary situation due to the Covid-19 pandemic, a visit to Kosovo could not be organised. A series of virtual meetings were therefore organised on 16 and 17 November 2020 with (in chronological order): the Senior Legal Adviser of the Constitutional Court; representatives of the international community and organisations; the First Deputy Prime Minister, the Director of the Legal Office of the Prime Minister, the Senior Legal Officer of the Office of the Prime Minister and civil society. The Venice Commission is grateful to the authorities and to the Council of Europe Office in Pristina for the support provided in the organisation of these virtual meetings.

5. This opinion was prepared in reliance on the English translation of the draft Law. The translation may not accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

6. This opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings and written comments from stakeholders. The present opinion was examined by the Commission members through a written procedure replacing the sub-commission meetings. Following an exchange of views with the First Deputy Prime Minister and the Director of the Legal Office of the Prime Minister, the opinion was adopted by the Venice Commission at its 125th online Plenary Session (11-12 December 2020).

II. Preliminary observations

7. In assessing this draft Law, not only the Constitution of Kosovo must be taken into consideration, but also Kosovo's internal and external situation as a country – before turning to the relevant international standards and best practices.

8. In this context, Kosovo is undergoing a period of governmental instability involving tensions between the Head of State and the Prime Minister, unstable parliamentary coalitions and a particularly difficult geopolitical situation. The challenge for the country is therefore to rationalise the functioning and staffing of its institutions to increase efficiency while, at the same time, respecting the requirements of a democratic state.

9. The institutional system of Kosovo is marked by the fact that governmental power, both as regards the President and the Government *stricto sensu*, finds its source in a single

Parliamentary Assembly: The Assembly elects and dismisses both the President and the Prime Minister. This situation is likely to lead to some instability, notably in the absence of clear parliamentary majorities, which the system has seen.

III. Domestic legal context

A. Constitutional context

10. The draft Law is made pursuant to Article 65.1 in Chapter IV of the Constitution of Kosovo, which deals with the Assembly, its legislative organ. Article 65 sets out the competencies of the Assembly, which include that the Assembly *"adopts laws, resolutions, and other general acts"* (Article 65.1).

11. Chapter VI of the Constitution deals with the Government of the Republic of Kosovo. Article 96 concerns ministries and the representation of communities within the Government. Article 96.1 and 96.2 provide: *"1. Ministries and other executive bodies are established as necessary to perform functions within the powers of the Government; 2. The number of members of Government is determined by an internal act of the Government."*

12. The Constitution's Basic Provisions in Chapter I provide for the supremacy of the Constitution. Article 16.1 provides that the Constitution is the highest legal act of the Republic of Kosovo and that laws and other legal acts shall be in accordance with the Constitution.

13. The (draft) Law on Legal Acts also acknowledges the supremacy of the Constitution and the requirement that legislation must be in conformity with the Constitution: see the drafting principle set out in Article 4.1.1 (laws and all other legal acts shall be in accordance with the Constitution).[1]

B. The draft Law

14. The purpose of the draft Law is to determine:

- The organisation and manner of functioning of the Government;
- The manner of work and procedures of decision-making in the Government; and
- The relationship between the Government and the Assembly, as determined in the Constitution and other applicable legislation.[2]

15. Article 4 of the draft Law deals with the composition of the Government. It prescribes that the Government shall be composed of the Prime Minister, the Deputy Prime Minister and Ministers,[3] and not more than three Deputy Prime Ministers.[4]

16. Article 4.3 imposes a numerical limit on the number of ministers, subject to the possibility of extension. It states that the Government shall be composed of not more than 15 ministers, but that exceptionally two more ministers without portfolio can be proposed by the person forming the Government.

17. Chapter VIII of the draft Law deals with the end of the Government's mandate and restrictions on the "outgoing" Government. The restrictions are specified in Article 31 of the draft Law.

[1] See Opinion on the draft Law on Legal Acts (CDL-AD(2019)025), paragraph 67.
[2] Article 1 of the draft Law.
[3] Article 4.1.
[4] Article 4.2.

IV. Relevant international standards

18. There appear to be few international standards relevant to the specific questions of the composition of a Government or the powers of an "outgoing" Government. There is therefore little for the Venice Commission to opine on in relation to compatibility of the substance of the relevant provisions in Articles 4.3 and 31 of the draft Law with international standards. There are nonetheless issues of compliance with domestic law, which translate into matters of respect for the Rule of Law.

19. The Venice Commission's Rule of Law Checklist[5] is a useful starting point for evaluating the draft Law, because it identifies clearly and accessibly a number of relevant aspects of the Rule of Law. It also helps to identify some of the most relevant international standards which address those aspects of the Rule of Law. The Checklist was intended by the Venice Commission to be useful when assessing the content of particular laws for compatibility with the Rule of Law.

20. The international standards most relevant to the issues raised by the draft Law are (1) the standards which apply to democratic law-making, particularly the principle of transparency;[6] (2) the principle of legality which, amongst other things, requires laws to be in accordance with the Constitution; [7] and (3) the principle of the separation of powers, which addresses the respective functions of the executive and the legislature and the relationship between them.[8]

A. Transparency as a principle of democratic law-making

21. The principles and standards which apply to the way in which laws are made have much in common across different legal systems and are increasingly the subject of international recognition and agreement. The main sources of these international standards on the quality of law-making are the Venice Commission's own Rule of Law Checklist (see above), the OSCE' Human Dimension commitments, and Reports of OSCE Office for Democratic Institutions and Human Rights (ODIHR).

22. The Rule of Law Checklist contains standards and benchmarks concerning the quality of the procedures by which laws are made.[9] The process for making law must be *"transparent, accountable, inclusive and democratic"*. To satisfy this requirement, the public should have access to draft legislation, and should have a meaningful opportunity to provide input.[10] Where appropriate, impact assessments should be made before legislation is adopted.[11]

23. In addition to the relevant standards in the Venice Commission's Rule of Law Checklist, there are a number of relevant OSCE commitments and standards on the democratic law-making process, which recognise the importance of transparency. The 1990 Copenhagen Document,[12] for example, provides that *"legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability",* and that those *"texts will be accessible to everyone*". The 1991 Moscow Document[13] similarly requires that States *"formulate and adopt legislation as the result of an open process reflecting the will of the people."*

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[5] Rule of Law Checklist (CDL-AD(2016)007), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e
[6] See Kosovo, Opinion on the draft Law on Legal Acts (CDL-AD(2019)025), paragraph 16.
[7] Ibid, paragraphs 9-13.
[8] Ibid, paragraphs 14-18.
[9] Rule of Law Checklist, Benchmarks A.5.
[10] Rule of Law Checklist, Benchmarks A.5.iv.
[11] Rule of Law Checklist, Benchmarks A.5.v.
[12] https://www.osce.org/fr/odihr/elections/14304
[13] https://www.osce.org/fr/odihr/elections/14310

24. The OSCE/ODIHR has also assessed legislative processes in a number of countries, particularly in Eastern Europe, the Western Balkans, the South Caucasus and Central Asia, and, drawing on those Reports, has also commented on the adequacy of the legislative process in its Reports on draft laws. Its Reports contain a number of observations about the quality of legal acts adopted, and the importance of the legislative process satisfying certain minimum conditions in order to improve the quality of the legal acts which are the product of that process. For example, the need for thorough impact assessment; the need for broad and inclusive public consultations; the need for transparency in the legislative process, and for consistency in the laws.

B. The principle of legality

25. The *principle of legality* requires that *supremacy of the law* is recognised. Amongst other things, this means that conformity of legislation with the Constitution must be ensured, and the action of the executive branch must conform with the Constitution and other laws.[14]

C. The principle of the separation of powers

26. The principle of legality, which also requires that discretion of the executive cannot be unlimited, is closely related to the *principle of the separation of powers*, which underpins the Rule of Law requirement that applies to the law-making powers of the executive: that where law-making power is delegated to the executive by the legislature, the *supremacy of the legislature* over the executive must still be ensured.

27. This means that general and abstract rules should be included in an Act of Parliament or a regulation based on that Act, save for limited exceptions provided for in the Constitution, and when legislative power is delegated by Parliament to the executive, the objectives, contents, and scope of the delegation of power should be explicitly defined in a legislative act.[15]

28. Where legislative power is delegated directly to the executive by the Constitution (as in Article 96.2 of the Constitution of Kosovo), the separation of powers precludes the legislature from usurping that legislative power from the executive. However, it does not preclude the legislature from regulating it, for example by specifying the criteria that govern the exercise of that power, and such regulation is consistent with the Rule of Law's abhorrence of unlimited executive law-making power.

V. Analysis

A. Transparency of the law-making process: the lack of Explanatory Material

29. On 11 December 2020, the Government sent the Venice Commission a very succinct explanatory memorandum entitled "Consultation Document on the Draft Law on Government," setting out in very general terms the object and purpose of the draft Law. The Venice Commission was unaware of the existence of this document during the preparation of this opinion and hence did not get the opportunity to analyse it, as it was not submitted to the Venice Commission together with the draft Law, which would have been welcome. The Venice Commission would like to recall that it encourages the preparation of such a document, which should always accompany draft laws, because they are useful in setting out clearly the rationale for the proposed law: for example, why it is necessary, what its main objectives are, what other alternatives have been considered in order to achieve those objectives, why the measures in the draft Law have been chosen as the best way to achieve those objectives, and so on. The rapporteurs have had to construct the Government's rationale from secondary material and from virtual meetings with

[14] Rule of Law Checklist, Benchmarks A.1.ii and iv.
[15] Rule of Law Checklist, Benchmarks A.4.i and iii.

representatives of the Government. This makes the Venice Commission's task of scrutinising the draft Law for compatibility with international standards and best practice more difficult.

30. The lack of sufficiently detailed explanatory material from the Government is likely to hinder effective participation by the public and civil society in the law-making process.

31. The Venice Commission would also like to recall that providing sufficiently detailed explanatory material to accompany draft laws is very much in the interest of the government proposing the law. It is an opportunity to make clear why the law is considered necessary and to demonstrate that the policy-making process has properly considered alternative ways of achieving the principal policy objectives of the proposed law. In addition, the Venice Commission understands that the drafting of an explanatory memorandum on draft legislation is a requirement under Article 30 of the Regulation of Rules and Procedure of the Government.[16]

B. Specific remarks on the composition of the Government and on restrictions on the Outgoing Government

1. Limit on the number of ministries (Article 4.3)

32. In general, while the number of members of parliament is often fixed by the constitution, this is rarely the case for the members of the government. Rather, the constitutional and legislative tradition seems to be one that allows for a maximum amount of flexibility so as to be able to adapt to new developments.

33. From a comparative law perspective, flexibility seems to be the rule and limitation the exception and countries as diverse as Germany (Articles 62, 63, 64 of the Basic Law), France (Article 8 of the Constitution), Morocco (Article 87 of the Constitution), Tunisia (Article 89 of the Constitution) or Spain (Article 98 of the Constitution) all enshrine the non-limitation of the number of members of the government. There are only a few countries, such as Belgium, which require a limit in their Fundamental Law (Article 99: The Council of Ministers has a maximum of fifteen members) or Ireland, which sets a minimum and a maximum limit in its Constitution (Article 28.1: The Government has a minimum of seven and a maximum of fifteen members). For Ireland, this limitation has been found to be a problem as the complexity of government increases, with the result that law provides for many 'junior ministers' – although not members of the cabinet itself – to attend cabinet meetings without the right to vote. Although Kosovo does not set the exact limit in its Constitution, the Government of Kosovo proposes to do so with this draft Law.

a. *The policy objective*

34. During the virtual meetings, it became clear to the Venice Commission delegation that limiting the number of ministries is one of the principal policy objectives of the draft Law. There has been a problem in recent years of the number of ministers growing significantly, which is both costly and gives rise to a problem or a perception of patronage, or even cronyism, whereby governments are perceived to appoint friends or associates to ministerial positions, or reward supporters. The First Deputy Prime Minister considered this to be a vital step to take in Kosovo's political maturing. The civil society groups met by the Venice Commission delegation were also strongly in favour of this policy objective on the grounds that it would both save money and prevent the risk of corruption.

[16] http://mei-ks.net/repository/docs/RREGULLORE_E_PUNES_SE_QEVERISE_SE_REPUBLIKES_SE_KOSOVES_NR_09_2011.pdf

b. *The constitutional obstacle*

35. The problem with the draft Law prescribing a numerical limit (15 + 2) on the number of ministries in Article 4.3 is that Article 96.2 of the Constitution appears to be clear in what it requires: *"The number of members of the Government is determined by an internal act of the Government."* This is not cast in permissive language (e.g. the number of ministers "may be determined by an internal act of the Government"); it is categoric (the number of members "***is*** determined by an internal act of the Government"). Article 96.2 therefore makes it the constitutional competence of the executive branch to determine the number of ministers.

36. If enacted in its present form, Article 4.3 of the draft Law would seem to constitute an encroachment by the Assembly on this competence. Such a conclusion could only be avoided if Article 96.2 of the Constitution were to be interpreted as not prohibiting a parliamentary intervention to define a maximum number of ministers, so long as this "cap" leaves to the government sufficient leeway in determining the exact number of ministers.

37. It is, of course, for the Constitutional Court of the Republic of Kosovo to determine such questions of constitutional law. For its part, the Venice Commission is concerned with the principle of legality, which is recognised as an aspect of the Rule of Law by the Venice Commission's Rule of Law Checklist[17] and is also reflected in Article 16 of the Constitution: the supremacy of the Constitution must be recognised and requires legislation to be compatible with the Constitution.

38. Should Article 4.3 of the draft Law be incompatible with Article 96.2 of the Constitution, as correctly interpreted, its enactment would be a breach of the principle of legality and therefore of the Rule of Law.

c. *Alternative ways to achieve the policy objective of limiting the number of ministers*

39. Article 96.1 of the Constitution provides that ministries are established *"as necessary to perform functions within the power of Government.*" A law which sets out the criteria to be applied by the Government when deciding how many ministries are necessary would not appear to encroach on the Government's constitutional competence to determine the number of ministers by an internal act of the government. Rather it would be the Assembly seeking to guide the executive in the performance of its constitutional competence, which would be in keeping with the principle of the separation of powers.[18]

40. The criteria of necessity could reflect the rationales that lie behind the policy objective, which Article 4.3 is meant to achieve. They could include, for example, a rational connection between what the ministry proposed, and the functions the Government's work programme requires it to perform; economic efficiency; value for money; effectiveness; prevention of redundancy; and proportionality. The inclusion of such criteria in a law of the Assembly would appear to be compatible with Article 96.2 because it would leave the determination of the number of ministers to the government, applying the criteria stipulated by the Assembly.

41. The proposed statutory cap of 15 +2 could be set out in an internal act of the government, which would be compatible with Article 96.2, and any future government proposing to increase the number of ministries beyond that limit would have to justify the increase by reference to the criteria of necessity contained in the Law on Government. Any dispute as to whether the criteria of necessity in the Law on Government are satisfied could also, presumably, be challenged in

[17] Rule of Law Checklist, Benchmark A 1.ii

[18] For a similar argument see paragraph 30, Opinion on the draft Law on Normative Acts of Bulgaria (CDL-AD(2009)053).

the courts. This approach would therefore still amount to legally enforceable regulation of the number of ministries.

42. Doubt was expressed by civil society interlocutors during the virtual meetings with the Venice Commission delegation, on whether this approach would be very effective in achieving the draft Law's principal policy objective, because it would not constrain the Government in the same way that a statutory cap on the number of ministers would. However, this would appear to be the only way to achieve the Government's policy objective compatibly with the principle of legality and the supremacy of the Constitution.

43. The only other alternative to the above-mentioned option of articulating statutory criteria of necessity would seem to be to amend Article 96.2 of the Constitution.

2. Competences of the Outgoing Government

44. Article 31 of the draft Law on the Restrictions on the Outgoing Government is made up of five paragraphs, the first of which provides a list of activities that an outgoing government should not carry out. This includes not concluding international agreements to be ratified by the Assembly, not approving draft constitutional amendments etc., and not initiating new procedures for the appointment of public positions. The second paragraph provides an exception to these restrictions by allowing the outgoing government to propose to the Assembly the approval of the country's budget. The third paragraph provides for another exception to the restrictions during an emergency, as defined by law. The fourth paragraph allows the outgoing government to enter international agreements that are ratified by the President and the fifth paragraph sets out that Article 31 also applies to a government that has reached the end of its mandate under Article 28.

45. Article 31 of the draft Law therefore seeks to limit an outgoing government's powers within the meaning of Article 30 (on Outgoing Government) and Article 31.5 of the draft Law, as stated, adds a further situation in which Article 31 applies, and it is unclear why this has not been listed under Article 30 (or why indeed Article 30 does not directly refer to Article 28 on the "End of Mandate", which covers the exact same situations).

46. Although the Constitution does not explicitly provide for the introduction of limitations against the powers of an "outgoing" government, this does not in itself render Article 31 problematic in any way. While the Constitution pre-determines some of the subjects that should feature in a Law on the Government (see e.g. Article 95.6 of the Constitution in conjunction with Article 6 of the draft Law), there seems to be no provision to the effect that a Law on Government may only cover such constitutionally mandated subjects. Nor is this a necessary consequence of more general principles of the European Constitutional heritage, such as the rule of law and the separation of powers.

47. Having established that a Law of Parliament may in principle delimit the powers of an outgoing government, the remaining issue is whether Article 31 of the draft Law does so with the requisite clarity and in a reasonable manner. Article 31 of the draft Law entrusts the outgoing government with what one might call "*day-to-day management*", the draft Law provides that the Government *"continue discharging its responsibilities"*. This notion is often difficult to define and can be unclear as it can easily cover anything.

48. To illustrate this, under French law, the notion of "*affaires courantes*" (day-to-day business) has not been clarified, and it is for the Council of State to judge whether or not decisions taken by an Outgoing Government are part of "*affaires courantes*".[19] In Morocco, on the other hand, the

[19] There is also very little case-law on the matter, but mention could be made of Mr Delvolvé and Mr Galmot in their conclusions in a Council of State decision, CE no. 59340 of 1966, defining *current affairs* as "*those relating to the day-to-day and continuous activity of the administration, decisions that are prepared automatically every day by*

notion has been clarified to the extent that the outgoing government *"is only carrying out day-to-day business. That is to say, it only has to ensure that cases that were already in place continue to be dealt with until their conclusion and urgent measures. But it must not initiate anything new that commits the next government"*.[20]

49. In our case, the draft Law refers to the implementation of an already established policy. The exceptions to the limitations appear to be justified by the consideration that (a) the orderly approval of the Budget by the Parliament should ideally be ensured also in phases of political transition and (b) the incumbent government, even if outgoing, must be possessed of the legal powers necessary to overcome national emergencies – the principle of necessity being explicitly recalled in Article 31.3 of the draft Law.

50. In conclusion, overall, the restrictions on the outgoing government provided in Article 31 of the draft Law do not appear to raise any issues of compatibility with international standards.

C. Descriptive rather than prescriptive content

51. The draft Law is extremely detailed and lays down every aspect of the organisation and functioning of the Government. This may have been done in an attempt to clarify matters but providing such an amount of detail in a law often has the opposite effect.

52. Hence, consideration to removing some of the text should be envisaged for two reasons:

53. First, in a number of places, the draft Law simply repeats provisions which are already in the Constitution (e.g. Article 4.1 in regard of Article 92 of the Constitution or makes an unclear reference to it e.g. Article 4.4 in regard of Article 93 of the Constitution), or in other laws regulating the relations between the Government and the Assembly. Any such repetition should be removed from the draft Law. It is unnecessary to include it, from a normative perspective, but it also risks giving rise to undesirable legal uncertainty, for example if there are slight textual differences between the provisions in the Constitution and those in the draft Law.

54. Second, the draft Law contains a lot of content which appears to be more descriptive than prescriptive, in that it simply describes how the Government will operate in practice, rather than prescribing how it should operate. Many of the ambiguities and inconsistencies in the draft Law can be traced back to the great amount of detail in the text. For instance, the draft Law contains many provisions or parts of provisions that are superfluous (e.g. Article 2 on the scope), and/or have extremely weak, or lack, normative content (e.g. Article 7 on the programme of the Government). Another example is the extent of detail provided in Articles 13 and following, which are not very prescriptive and are, often, obvious.

55. Other provisions in the draft Law introduce unclear or undefined terms. Article 8.4.4.3 concerning the Government's competence to provide opinions on legislative initiatives and draft constitutional amendments, which are not initiated by the Government – is fine if it is interpreted as a mere possibility. However, the text might create the impression that the Government should provide *opinions* on any legislative initiative, including the ones introduced by members of parliament, which raises some concerns with respect to the principle of the separation of powers.

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the offices over which ministers usually limit themselves to exercising simple control and signature (our translation)".

[20] Mr Fernand Bouyssou, a constitutionalist and former member of the Moroccan Constitutional Review Commission. The Moroccan Organic Law on the Conduct of Government Business, published in the Official Gazette in 2015, gives us a slightly clearer idea: "*Carrying out day-to-day business means the adoption of the necessary decrees, orders and administrative decisions and the urgent measures required to guarantee the continuity of State services and institutions and the regular functioning of public services* (our translation)" (Article 37). It follows from the same Law that matters that commit the future government on a lasting basis do not fall under routine, day-to-day business.

For instance, Article 9.1.1.3 refers to both decisions and decrees (acts of the Prime Minister) which, if they are not defined, can refer to nearly anything, including overtaking prerogatives of the collective body of Government. In case it is meant to be linked specifically to Article 9.1.1.7, this should be explicitly stated.

56. Article 12.1 concerning the appointment and competencies of Deputy Ministers should perhaps refer to Article 96.4 of the Constitution. Under Chapter VI on the Cooperation of the Government with other institutions, it is unclear in Articles 23 and 24, whether these provisions entail an obligation upon the Government to "*debate*" or "*respond*" to any *"opinions and initiatives of civil society"* respectively to "*all questions, initiatives and proposals*" addressed to it by anyone – which should not be the case. While Article 25 on responsibility, implements Article 97 of the Constitution, which provides for both joint and several liability of the government and individual liability, the draft Law should clarify the effects resulting from a minister's personal liability being called into question. In this case, Article 30 of the draft Law does not provide that the term of office of the minister, whose liability has been incurred in such a case, ends.

57. While the draft Law is over specific on most matters, it is perhaps too vague on the issue of establishing "government bodies" (Article 19). Assurances have been given by local stakeholders that this provision only refers to committees and working groups internal to the executive. In such a case, of course, there would be no major problem. Still, more precise drafting as to what bodies the government may set up, and under which conditions, would be welcome – particularly in light of the general objective of preventing the executive from becoming a plethoric administration.

58. Similar considerations apply to the important issue of gender, which is merely referred to in Article 1.1.6 under "Gender equality". It should be briefly underlined here that the prohibition of discrimination of women on the basis of sex and gender *"has been recognised by many human rights treaties and addressed by a number of UN treaty bodies as well as by the European Court of Human Rights"*.[21] There is also a Recommendation by the Committee of Ministers of the Council of Europe entitled Rec(2003)3 on Balanced participation of women and men in political and public decision-making.[22] While it is true that Kosovo is not a party to these treaties, the fact remains that these concerns are reflected in the Constitution of Kosovo under Article 7.2 which states that *"The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life"*. In addition, under Article 101.1, the Constitution provides that *"The composition of the civil service shall reflect the diversity of the people of Kosovo and take into account internationally recognised principles of gender equality."* To that end, Article 4 of the draft Law which deals with the Composition of the Government, should take gender equality into account, as provided in Article 7 of the Constitution.

59. In conclusion, non-normative text has no place in a Law on the Government and should be removed. A good practice in this respect is to include this non-normative text in something like a Government Manual or Handbook, which sets out how the Government works in practice, and perhaps includes best practice, but is not the source of legally binding, normative requirements on the Government.

VI. Conclusions

60. The Venice Commission welcomes and fully acknowledges the aim of the draft Law on Government of the Republic of Kosovo to limit the number of ministries to streamline the

[21] See paragraph 24 of Armenia, Opinion on the constitutional implications of the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) (CDL-AD(2019)018).
[22] https://rm.coe.int/1680519084.

functioning and activities of the Government so as to be cost effective and prevent the risk of corruption.

61. The draft Law on Government of the Republic of Kosovo raises one main issue of compatibility with international standards, notably, whether the prescribed limit on the number of ministers in the draft Law is compatible with the principle of legality, which requires states to acknowledge the supremacy of the Constitution, given the provision in Article 96.2 of the Constitution, which appears to allocate constitutional competence on that issue to the Government, not the Assembly.

62. The Venice Commission makes the following recommendations:

(1) Explanatory Memoranda should be published alongside all draft laws in future to satisfy the requirements of transparency in law-making and to facilitate meaningful public and civil society engagement in the legislative process;
(2) Should Article 96.2 of the Constitution be interpreted as precluding a parliamentary intervention to define the maximum number of ministers in the Government, consideration should be given to whether the draft Law's policy objective of limiting the number of ministers in the Government could be achieved by replacing the numerical limit in the draft Law with explicit criteria of necessity which must be objectively satisfied before there can be any increase in the number of ministers beyond the number specified in the relevant internal act of the government.
(3) An alternative to the option in (3) above is to amend Article 96.2 of the Constitution.
(4) Consideration be given to providing more precise wording on the issue of establishing "government bodies" (Article 19 of the draft Law) – notably which bodies the government may set up, and under what conditions;
(5) Consideration be given to the issue of gender, which is merely referred to in Article 1.1.6 under "Gender equality", with a further reference in Article 4 of the draft Law, which deals with the Composition of the Government;
(6) Text be removed from the draft Law the content of which:
    - merely repeats provision already made in the Constitution or other applicable laws; and
    - is merely descriptive of how the Government operates, as opposed to prescribing how it should operate.

    A good practice in this respect is to include this non-normative text in something like a Government Manual or Handbook, which sets out how the Government works in practice, and perhaps includes best practice, but is not the source of legally binding, normative requirements on the Government.

63. The Venice Commission remains at the disposal of the Kosovo authorities for any further assistance on this matter.