

# Vetting in the Judiciary: What should we expect?

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## VETTING IN THE JUDICIARY: WHAT SHOULD WE EXPECT?

### INTRODUCTION

On September 25<sup>th</sup>, 2022, the Minister of Justice, Albulena Haxhiu, requested an opinion of the Venice Commission on the Concept Paper on the Vetting of Judges and Prosecutors in Kosovo (concept paper on the vetting). In order to summarize the concept paper on the vetting, one can shortly say the Ministry of Justice's (MoJ) preferred option to address the problems of the judiciary is one which included constitutional changes creating a new ad hoc mechanism for the first wave of vetting, and then the continuous performance, integrity and wealth check to be conducted by the Kosovo Judicial Council (KJC) and by the Kosovo Prosecutorial Council (KPC).<sup>1</sup> The MoJ also proposed an option to conduct the vetting reform on the basis of legislative changes only, as an alternative to the option implementing constitutional changes.<sup>2</sup> Later on, the MoJ provided a draft to the proposed constitutional changes to the Venice Commission for review as well.<sup>3</sup>

The vetting idea had full support from the current government and civil society organizations, yet skeptical voices were always present among international partners and the system itself. On the other hand, civil society organizations argued that all other means to improve the system had been exhausted and the only salvation would be a vetting system; whereas skeptics of the vetting proposal argued that the main judicial institutions had already started to take concrete steps to address some of the concerns raised.<sup>4</sup>

Faced with the duty to evaluate the concept paper on the vetting produced by the MoJ and the draft constitutional amendments, on June 20<sup>th</sup>, 2022, [the Venice Commission concluded that a thorough vetting process for all judges and prosecutors was not necessary at this stage](#). Aware of the unsatisfactory level of efficiency and professionalism in the system, including the problem of corruption, the Commission concluded that the justice system in Kosovo is in a better state than the other countries which underwent a full-scale vetting of judges and prosecutors.<sup>5</sup> Hence, the Venice Commission recommended:

- constitutional amendments only in regard to integrity checks of the members of the councils, court presidents and chief prosecutors;
- legislative changes in regard to judicial discipline, strengthening the system of asset declaration and strengthening the vetting mechanisms within the councils.

In other words, the Venice Commission concluded that the creation of an independent vetting mechanism is unnecessary to address the problems of professional incompetence which seem to be part of the problem identified. These issues should rather be addressed with better training

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<sup>1</sup> Ministry of Justice. "Draft Concept paper for the development of the Vetting Process in the Justice System". Chapter 3.5. Available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=41154>

<sup>2</sup> *Ibid.*

<sup>3</sup> European Commission for Democracy through Law (Venice Commission). "Opinion on the Concept paper on the Vetting of Judges and Prosecutors and draft amendments to the Constitution". June 2022. Para 5. Available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)011-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)011-e)

<sup>4</sup> *Ibid.* Para 38.

<sup>5</sup> European Commission for Democracy through Law (Venice Commission). "Opinion on the Concept paper on the Vetting of Judges and Prosecutors and draft amendments to the Constitution". June 2022. Para 27. Available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)011-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)011-e)

methods. Whereas vetting should be considered an option to address ‘malevolent acts’, which require integrity checks mechanisms.<sup>6</sup> Although there is no doubt that a reform is required, the Commission is of the opinion that only the councils should be subject to such integrity checks with minimal constitutional changes which would ensure that constitutional guarantees will not be violated, and all changes would be proportional with the aim of the goal and the means to achieve it.

Months after the opinion of the Venice Commission was published, on September 4, the Prime Minister of Kosovo, Albin Kurti, and the Minister of Justice, Albulena Haxhiu, delivered the ‘Vetting File’ composed with the constitutional amendments, the draft law on vetting, the concept document and the explanatory documents, to the Speaker of Kosovo Assembly, Glauk Konjufca. The documents delivered and known for the public as the ‘Vetting File’ are not public. Right after the act of delivering the file to the Speaker of Kosovo Assembly the Minister of Justice in a press conference declared that the file is in compliance with the Venice Commission recommendations. She reinstated that through this reform only those with high moral and professional integrity which will be able to justify their wealth will remain in the judicial system.<sup>7</sup> No further details on the process have been provided.

This article will discuss the recommendations of the Venice Commission and the way forward.

## **THE VENICE COMMISSION OPINION ON THE CONCEPT DOCUMENT ON THE VETTING REFORM IN KOSOVO**

As mentioned above, the Venice Commission concluded that a reform of the judiciary, which would include some form of integrity checks is needed, although not much support was given from the Venice Commission to the proposals of the MoJ in regards to how vetting should be designed and who should be subject to it.<sup>8</sup> The Venice Commission proposed a lighter reform than the MoJ, one which would justify the interference on the constitutional rights of the judicial system members. Accordingly, the Venice Commission proposed constitutional changes only in regards to vetting the members of the KJC and KPC. The Venice Commission argued that because the members of the KJC and KPC are the ones mandated to exert disciplinary power over the other members of the judicial system, once vetted themselves, they would vet the others, as the law requires. By doing so, the reform would not interfere with the rights and competences of the councils and yet, the purpose of the reform would be achieved.

The Venice Commission clarified that this proposal would not necessarily mean that the ‘vetting reform’ would include all aspects of integrity checks, the investigations of wrongdoings and the assessment of professional capacities, as proposed by the authorities and the people of Kosovo. But such a design in coordination with the other initiatives taken by the MoJ and the councils would amount to the desired outcomes.<sup>9</sup> Here one must mention that the Venice Commission recommended legal changes in regard to verification mechanisms enabling the inclusion of judicial officials not covered so far. Moreover, special emphasis was put to the Anti-Corruption Agency in order to strengthen their role in identifying possible cases of corruption and serving as a basis for triggering disciplinary proceedings against those who provide irregular asset

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<sup>6</sup> *Ibid.* Para 129.

<sup>7</sup> Albanian Post News. “*Judicial File Submitted to the Assembly of Kosovo*”. September 2022. Available at: <https://albaniandailynews.com/news/judicial-vetting-file-submitted-at-assembly-of-kosovo>

<sup>8</sup> *Ibid.* Para 130.

<sup>9</sup> *Ibid.* Para 131.

declarations.<sup>10</sup> Lastly, the commission called for coordination among other initiatives undertaken by the MoJ, namely the reform of the KPC and the civil confiscation of illegally acquired assets to be taken in consideration once the constitutional changes are drafted.

In addition, the Venice Commission recognized that undertaking a reform to introduce integrity checks and other forms of verification is quite complex. In order to be successful, all stakeholders must be on board. Adequate time should be allotted and no quick results should be expected. If we rush to evaluate short term results, we might risk the outcomes of the entire reform. And by all means, the Venice Commission emphasized the necessity of a sincere dialogue and cooperation with all interested parties in order to design and implement the reform.

On the other hand, the last recommendation offered in the opinion is the one advising the MoJ to focus on legislative changes and designing a system of integrity checks which will be concentrated to the KJC and KPC, court presidents, and chief prosecutors.

### **WHAT DOES THIS (THE RECOMMENDATION OF THE VENICE COMMISSION) MEAN?**

Undoubtedly, the Venice Commission agreed with the people of Kosovo that the judicial system should undergo reform. The option of *-not taking any measures-* was not an option at all considering doing nothing cannot improve the situation. However, the Venice Commission concluded that individual cases of misconduct and unprofessionalism should be distinguished from the general problems of the judicial system which according to the Venice Commission require measures including a reform of court procedures, amongst others. While recognizing that Kosovo is facing cases of low level professionalism amongst judges and prosecutors and cases of misconduct, the Venice Commission requested that these cases be treated according to the Kosovo law and not used as means to generalize the situation. Hence, cases of unprofessionalism should be addressed with adequate training and cases of misconduct should be addressed through the existing disciplinary mechanism. The Commission argued that the problems can be dealt with using the existing means in place.

Secondly, the Venice Commission considered that conducting a general vetting for all judges and prosecutors through ad hoc mechanisms is unnecessary bearing in mind that all problems seem to be a product of inefficient application of and gaps in the legislation on existing bodies.<sup>11</sup> Here the Commission stresses the lack of proper implementation of legislation and the existing loopholes on legislation, where both the KJC and KPC play an important role. Moreover, the Venice Commission puts a lot of emphasis on the dialogue and cooperation with both of the Councils if the anticipated outcomes of the reform are to be achieved and the legal changes are to be successful. It will be the KJC and KPC implementing the law and ensuring that the purpose and aim of the law is reached. No cooperation with the Councils will surely mean that the reform will not be successful, hence the Commission constantly emphasizes the role of the Councils in implementing legislation.

Thirdly, because the dialogue and cooperation among stakeholders is an important factor for any of the desired outcomes and results, the Commission suggested that the vetting reform be conducted in coordination with the other legal and institutional reforms on the rule of law sector. The idea of establishing permanent vetting bodies through constitutional changes was considered as a hasty step. Such an undertaking must only be considered after other options

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<sup>10</sup> *Ibid.* Para 121.

<sup>11</sup> *Ibid.* Para 123.

have been exhausted and found to be unsuccessful, and here the Venice Commission was referring to the recommendations that they provided such as the necessary legal and institutional reforms, including integrity checks for members of the councils amongst other means. Only when all these possibilities have proven to be unsuccessful should such options be considered.

Hence, the Venice Commission concluded that the MoJ should focus on preparing constitutional amendments which provide only for integrity checks of the members of the councils and should not go beyond that. In fact they should only provide for the commitments to do a vetting for the heads, a commitment which will then be conceptualized in a law(s).

Faced with the new circumstances, one wonders: What are the options of the MoJ and the Government of Kosovo? Is it still a vetting reform if we only vet the members of the councils and the heads of the institutions? These are all questions that come to mind when analyzing the situation and that the author will try to shortly elaborate on in this paper.

### **WHAT ARE THE POTENTIAL OPTIONS?**

One of the good practices that the Government of Kosovo and other institutions follow is the application for opinions from the European Commission for Democracy through Law, formally known as Venice Commission. The Venice Commission is an advisory body of the Council of Europe and is composed of independent constitutional law experts. As such, when asked by Kosovo institutions to share their opinion in regard to different initiatives which may interfere with good standards or constitutional ones, the Venice Commission shares their views in the initiative. Kosovar institutions consider such 'views' as legal advice in the form of 'legal opinions' on draft legislation or legislation already in force. Although the opinions are generally reflected in the adopted legislation, they are not obligatory for countries to follow. In this particular case, the Venice Commission was asked if the MoJ's concept paper on the vetting reform together with the draft constitutional amendments are in compliance with the standards and best practices of the countries of the Council of Europe. And their answer was not straight forward.

As stated above, the Venice Commission offered a 'middle ground' on the vetting reform by saying that there is no need to create other mechanisms through constitutional changes to vet all judges and prosecutors. Instead the MoJ should focus on drafting short constitutional amendments which would only require integrity checks for the members of the councils, court presidents, and chief prosecutors; while on the other side of the reform, the Venice Commission recommended legislative changes in regard to judicial discipline, strengthening the system of asset declaration, and strengthening the vetting mechanisms within the councils. These recommendations are not binding but are usually followed in practice. Having said this, the MoJ can chose to follow or ignore them. But, if the MoJ chooses to ignore them, once the constitutional amendments and legislation are approved (if it ever gets approved), the Venice Commission's opinion would be used to argue that the reform is unconstitutional in front of the Constitutional Court, and as such it would damage the results and the desired outcomes of the reform.

But, if the MoJ follows the recommendations of the Venice Commission opinion and only requires integrity checks for the members of the councils, court presidents and chief prosecutors by constitutional amendments which would later on vet all judges and prosecutors, will it still be a vetting reform? The question arises in regards to the depth of the reform and the desired

outcomes. To answer such a question, the author will shortly elaborate on what was expected to be achieved with the reform, and what should be expected now

### **IS IT STILL A VETTING REFORM?**

The idea of a vetting reform came from the high level of dissatisfaction regarding the performance of the justice system. For years Kosovo's civil society has requested a justice system reform through vetting. Civil society has requested a reform which would emphasize indispensable aspects of personal integrity, morale and values of people holding senior positions and running the chain of the justice system. They have argued that reason behind the malfunctioning of the justice system is not laws, structures, or legislation, but human behavior.<sup>12</sup> People in the system lack the willingness and courage to overrule strong political elites. Ethics, professionalism, integrity, independence, and impartiality from criminal cycles and partisan interests are all aspects that relate to human behavior of judges and prosecutor. Hence, a vetting reform which would address the ethical integrity, professional standing and impartiality of judges and prosecutors has been seen by civil society as a necessity. Furthermore, they have argued that if the reform is to be successful, the vetting process in Kosovo should be extensive and include judges of the Constitutional Court; the Heads and members of the Kosovo Judicial Council (KJC) and Kosovo Prosecutorial Council (KPC); other judges and prosecutors, including the Chief State Prosecutor; legal advisers of the Constitutional Court and regular courts; legal advisers of all prosecution offices; and anyone else who intends to join the justice system. Moreover, the civil society have argued that subject to this process should also be the Tax Administration Office, Customs, Kosovo Intelligence Agency and Kosovo Police as well.<sup>13</sup> Most importantly, they have considered that if such a reform is meant to be successful, it should be designed to implicate constitutional changes and not only legislative ones.<sup>14</sup> Shortly, this is what has been requested to be addressed in order to be considered as a reform. Anything other than this would only address subsidiary rather than essential angles of the problem.<sup>15</sup>

On the other hand, the MoJ only foresaw a vetting process for judges and prosecutors, excluding other categories requested to be subject to the reform from this concept note. The favorable option to design it was through constitutional changes and by establishing an ad hoc mechanism serving to vet all judges and prosecutors in the country through a five-year period. In addition, the vetting procedure would try to address issues of professionalism and integrity of the system.

Then again, the Venice Commission recommended that full-scale vetting of all judges and prosecutors should only be considered if other avenues have taken place and evaluated as were found to be unsuccessful. By other avenues, the Commission suggested that if the MoJ drafts a constitutional amendment regarding the reform, it should only be drafted to include integrity checks for the members of the councils, court presidents and chief prosecutors, who would later be responsible for vetting all judges and prosecutors. Meanwhile, legislative changes need to happen in regards to strengthening the judicial discipline, the asset declaration process and vetting mechanisms within the councils.

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<sup>12</sup> Group for Legal and Political Studies. *"Five Integral Questions about the Vetting Process"*. April 2021. Available at: <http://www.legalpoliticalstudies.org/five-integral-questions-about-the-vetting-process/>

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*



Eventually, from a thorough reform including the entire chain of all institutions falling under the rule of law sector, the MoJ narrowed the scope to the justice sector only. Moreover, the Venice Commission tightened the scope to only members of the councils, court presidents and chief prosecutors who would later on vet all judges and prosecutors for integrity checks only.

One should also consider the other parallel legislative initiatives that are taking place, including: the new law on KPC which will reform the council, the draft law on civil confiscation of illegally obtained assets, and the new law on Anti-Corruption Agency. All have been drafted and some adopted to tackle the deficiencies of the justice system. These initiatives should always be considered once vetting process is discussed. As the Venice Commission advised, a thorough dialogue should take place to coordinate and involve all stakeholders in order for such a reform to succeed. And although the vetting reform might not be designed as requested, one can always choose to trust the process and hope for the best.

On the same line, GLPS offers a set of recommendations for consideration by all stakeholders about drafting the final version of the constitutional amendments and the legislation that will follow.

The Kosovo Government:

- Should start a dialogue with opposition parties and truly consider their inputs and involve them in the process.
- Should start a dialogue with the non-majority parties represented in the parliament, especially the Serbian ones, in order to include them and provide them a platform to exchange their views.
- Continue the dialogue with all stakeholders, including the KJC and KPC to draft the final version of the constitutional amendments and the legislation that will follow.
- Continue to include civil society and the academia constantly in the process to share expertise and consider seriously their inputs.

The opposition parties:

- Should get involved in the process of writing the final draft of the constitutional amendments and the draft law.
- Provide support for the dialogue with non-majority parties when the final legal documents are up for discussion in the Assembly.
- Make sure all recommendations of the Venice Commission are being integrated in the final drafts.

The KJC and KPC:

- Should stop impairing the reform and instead become constructive partners of the Government in order to design the reform in a way that can be successfully implemented.
- Should start living up to their role and serve as the policy body they should be for the system.
- Should present the best of all professional, high integrity judges and prosecutors in the system.

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