Republika e Kosovës
Republika Kosova - Republic of Kosovo
Qeveria - Vlada - Government

MINISTRIA E DREJTËSISË
MINISTARSTVO PRAVDE / MINISTRY OF JUSTICE

CONCEPT PAPER
ON THE DEVELOPMENT OF THE VETTING PROCESS IN THE JUSTICE SYSTEM

September 2021

Table of Contents

Summary of Concept Paper

General Information	
Title	Draft-Concept Paper on the Development of the Vetting Process in the Justice System
Responsible Ministry	Ministry of Justice
Contact person	Lulzim Beqiri, Director of the Department for European Integration and Policy Coordination /Chair of the Working Group, 03820018092
PPQ	Strategic Goal 1, Operational Objective 1.1, Activity 1.1.1
Strategic priority	Goal - Improving the integrity of justice institutions, through vetting and other mechanisms. Operational objective – Development of the legal framework for initiating the vetting process in the justice system.

Decision	
Main issue	Professionalism and integrity of judges, prosecutors and officials in senior positions in the justice system administration.
Summary of consultations	Preliminary consultation of the Concept Paper is scheduled for July, 2021
	The public meeting on the Concept Paper was hold on May 17, 2021. The preliminary consultation were hold from 15 – 30 June 2021. Public consultation were hold from 29 July – 19 August 2021.
Proposed option	Option 5

Main expected impacts	
Budgetary impact	It will be completed after receiving comments from the working group
Economic impact	Economic impacts is envisaged, especially in the doing business climate and increasing investment.
Social impact	Social impact is envisaged through improving the integrity of justice institutions and combating corruption in such institutions.

Environmental impact	There are no direct relevant expected impacts in this field.
Cross-sectoral impact	An impact on fundamental rights is envisaged, addressed in detail below, in Chapter VI.
Administrative charges for companies	No direct impact.
SME test	No SME test has been applied.

Future steps	
Short-term	It will be completed after receiving comments from the working group
Mid-term	It will be completed after receiving comments from the working group

Introduction

Figure 1: General information on the Concept Paper

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Responsible Ministry	Ministry of Justice
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PPQ	Strategic Goal 1, Operational Objective 1.1, Activity 1.1.1
Strategic priority	Goal - Improving the integrity of justice institutions, through vetting and other mechanisms. Operational objective - Development of the legal framework for initiating the vetting process in the justice system.
Working group	**Lulzim Beqiri**, DEIPC/MoJ - *Chair of the Working Group* **Feride Podvorica**, LD/MoJ - *Deputy Chair* **Qerim Ademaj**, KJC - *Member* **Bahri Hyseni**, KPC - *Member* **Alberita Hyseni**, OPM - *Member* **Merita Stublla-Emini**, KBA - *Member* **Besim Kelmendi**, Kosovo Prosecutors Association - *Member* *Member from the Office of the Chief State Prosecutor* *Member from the Ministry of Internal Affairs* **Fatos Haziri**, Kosovo Police - *Member*

	Member from KIA **Esad Ejupi**, ACA - *Member* **Genc Nimoni**, Cabinet of the Minister/MJ - *Member* **Noliana Kusari**, LD/MoJ - *Member* **Eris Hana**, DILC /MoJ - *Member* **Rreze Hoxha-Zhuja**, GLPS - *Member* **Kreshnik Gashi**, BIRN - *Member* **Gëzim Shala**, KDI - *Member* **Arton Demhasaj**, Çohu - *Member* **Florent Spahija**, KDI - *Member* **Nora Bajrami**, FOL Movement - *Member*
Additional information	After the first meeting of the Working Group, the following additional members are included: 1. **Hydajet Hyseni**, MP, Parliament of Republic of Kosovo 2. **Agim Maliqi**, Judge of the Supreme Court 3. **Riza Livoreka**, Kosovo Judges Association 4. **Yll Sadiku**, Senior executive officer, Presidency 5. **Lyra Çela**, DILC/MoJ 6. **Albulena Uka**, MoJ 7. **Vlora Maxhuni**, LO/OPM 8. **Egzon Osmanaj**, DEIPC/MoJ The drafting process of the Concept Paper was directly supported by the Embassy of the United Kingdom in Kosovo through the "Strengthening the Justice System in Kosovo" Project, and experts of the Ministry of Justice: **1. Donikë Qerimi** 2. **Rinor Hoxha**

Chapter 1: Definition of the Issue

The justice system is the main pillar of the democratic functioning of a state. The independence and impartiality of the system, i.e. its members, is a fundamental element to ensure that the system is fair and provides equal access for all. According to the Constitution of Kosovo and relevant legislation, the judiciary and the prosecution are the main institutions of the justice system.

The Kosovo Judicial Council is the main institution responsible for ensuring the independence, impartiality and professionalism of the judicial system. Judicial power in Kosovo is exercised by courts, which are organized in three levels: basic courts, the Court of Appeals, and the Supreme Court. The Constitutional Court, as a special court, is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.[1]

The Kosovo Prosecutorial Council is the main institution responsible for ensuring the independence, impartiality and professionalism of the State Prosecutor. State Prosecutor's Office is organized in: Basic Prosecution, Appellate Prosecution, Special Prosecution, and the Office of the Chief State Prosecutor.

In this system, there are currently 391 judges (with an average of 22 judges per 100,000 inhabitants) and 176 prosecutors (with an average of 10 prosecutors per 100,000 inhabitants).[2] The following figure shows the number of judges and prosecutors, divided by organizational units. This figure does not include the Constitutional Court. The Vetting in the Justice System, as designed in this Concept Paper, will not include within its scope the judges of the Constitutional Court. This is because of the fact that the main problem, causes and effects as outlined below, haven't been identified in the Constitutional Court as they have within regular courts and prosecution offices. The Constitutional Court is the final authority in the Republic of Kosovo for the interpretation of the Constitution and the compatibility of laws with the Constitution.[3] It ensures the functionality of the country's institutions in accordance with the Constitution and guarantees the protection of individual rights and freedoms guaranteed by the Constitution. While the regular courts deal with the examination of facts, the verification

[1] Constitution of Kosovo. Article 112.1.
[2] The European average is 21 judges/prosecutors 11 per 100,000 inhabitants - See the EC Country Report 2019, according CEPEJ.
[3] Article 112, paragraph 1 of Constitution

of the legality of the creation and taking of evidence, the Constitutional Court deals only with the constitutional control of the regular judicial process.

The justice system and the Constitutional Court are divided into separate chapters in the Constitution[4], wherein the justice system includes the regular courts, the Prosecution Offices, the Councils (KJC and KPC) and the Bar, while the Constitutional Court has a different composition, mandate and regulation.

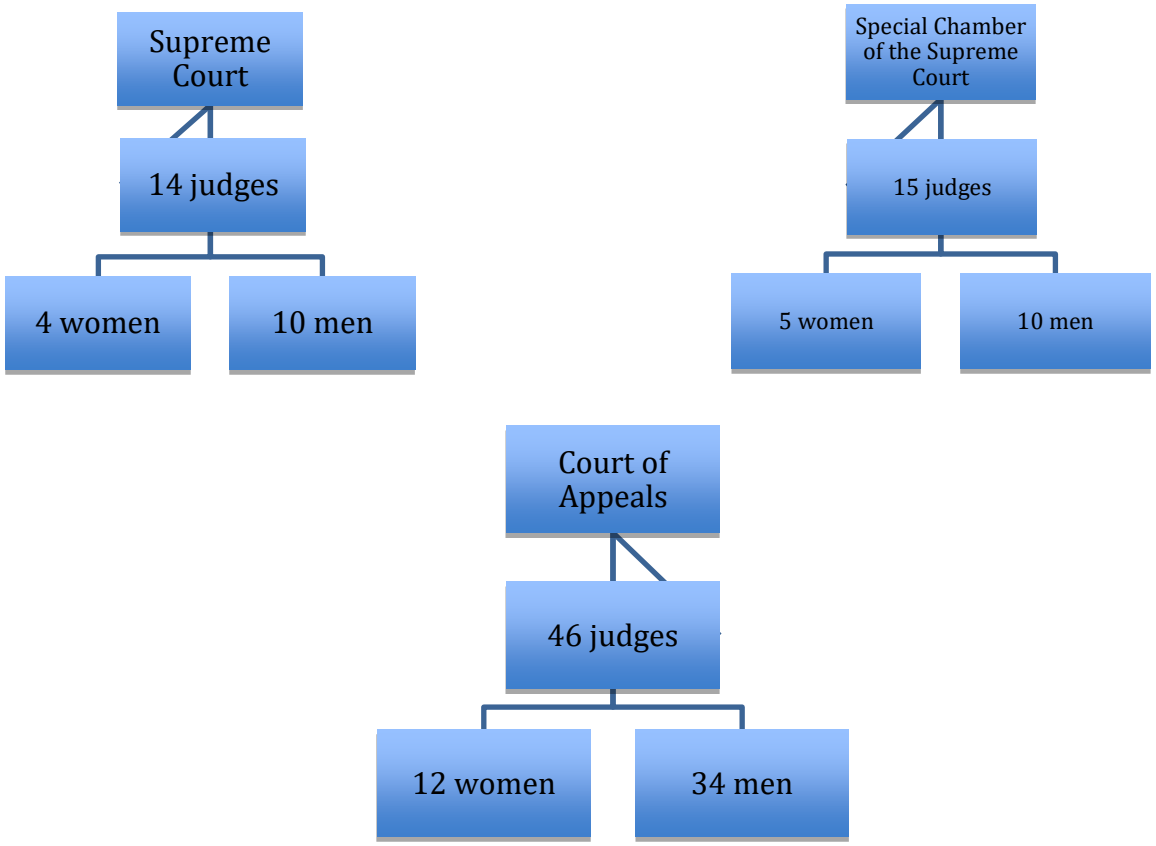
In addition, judges of the constitutional court are appointed for a non-renewable[5] 9-year term, unlike the permanent term of judges of regular courts and prosecutors. Combined with the rotation system of terms, this set up allows for regular reinvigoration in the composition of the court, which differs it from the regular courts and prosecution offices. Moreover, the Constitutional Court represents a distinct entity in the context of the institutional and functional set up of the judiciary. In this regard, it is important to emphasize specifically the process of appointment and proposing of the constitutional judges by the Parliament.

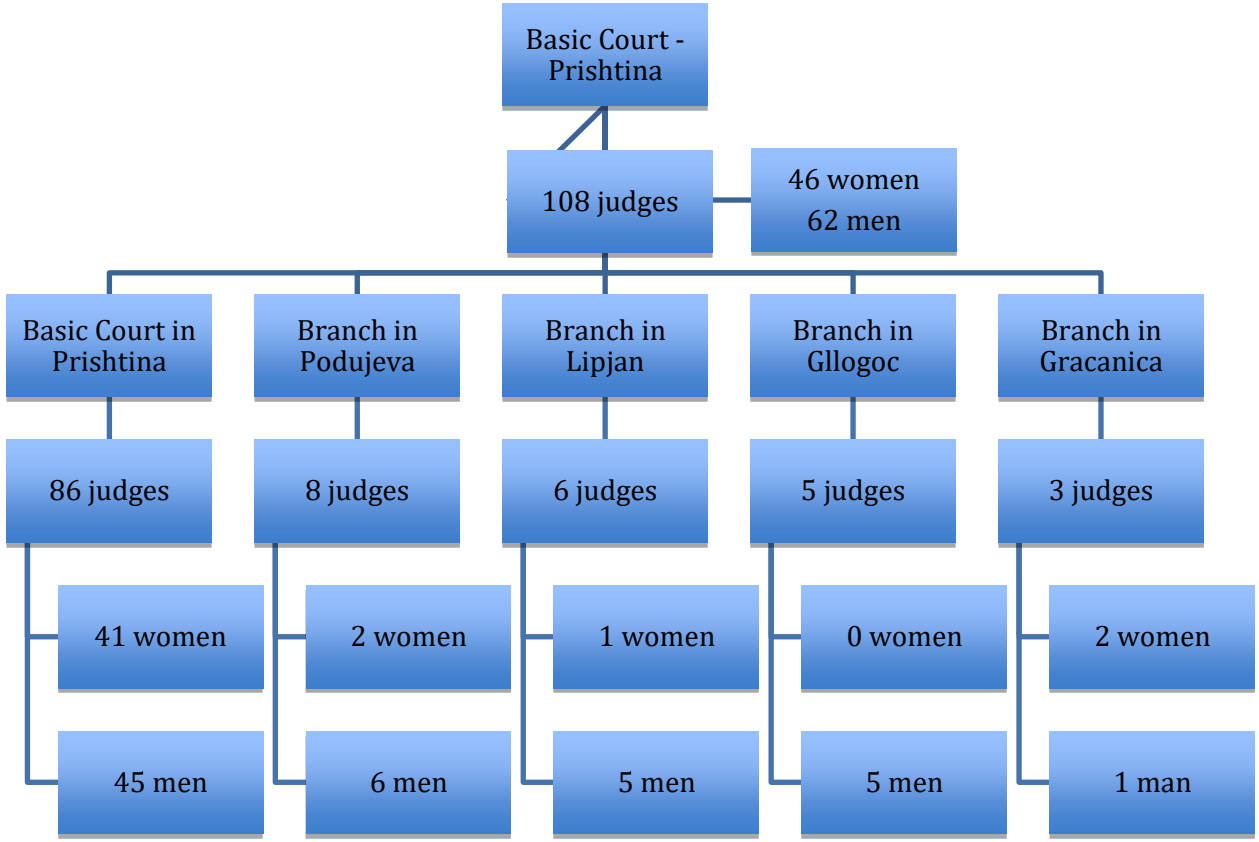
Vetting for Judges of the Constitutional Court would mean profound changes to the Constitution or suspension of constitutional articles that speak of its composition, mandate, independence and organization, the result of which would not be the improvement of the Constitutional Court, but its blocking. The fact that the term of a judge of the Constitutional Court is limited to nine years and without the right to re-election as well as different durations for judges of this court are an opportunity through the Law on the Constitutional Court to provide for a vetting before they are voted by the Kosovo Assembly.

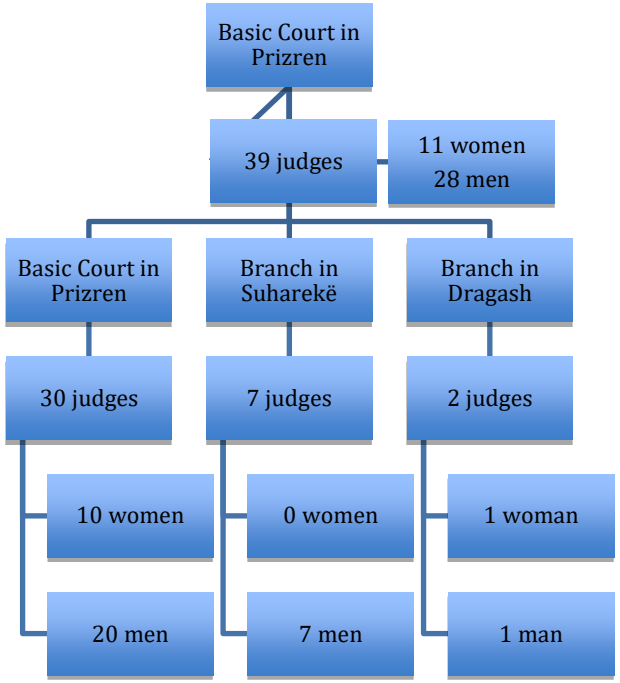
Moreover, the Concept Paper for the Constitutional Court which is planned to be drafted within the governmental mandate, is to address the issue on the need for the verification of Constitutional Court judges. While international reports have been very vocal with respect to the performance and professionalism of judges of regular courts and prosecutors[6], there is no account of such reports to have criticized the professionalism and integrity of the Constitutional Court. As such, the Constitutional Court is not part of this Concept Paper.

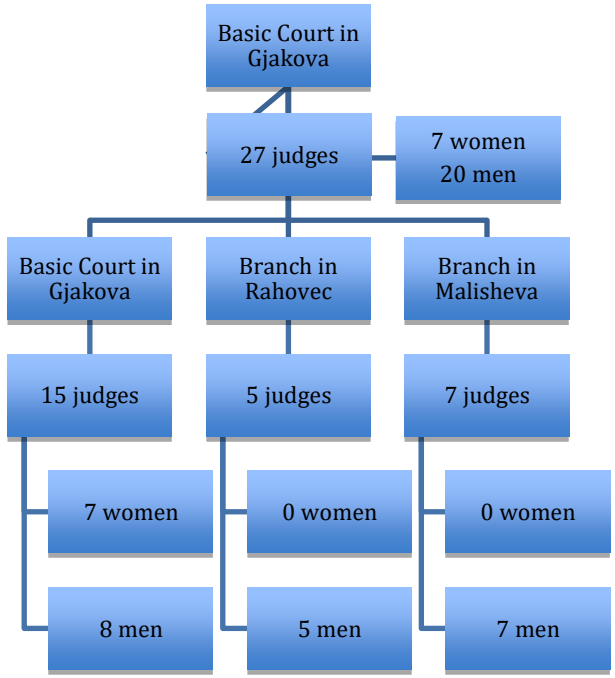
[4] Chapter VII The Justice System and Chapter VIII The Constitutional Court
[5] Article 112, paragraph 2 of Constitution
[6] See p. 43-50 of the present document.

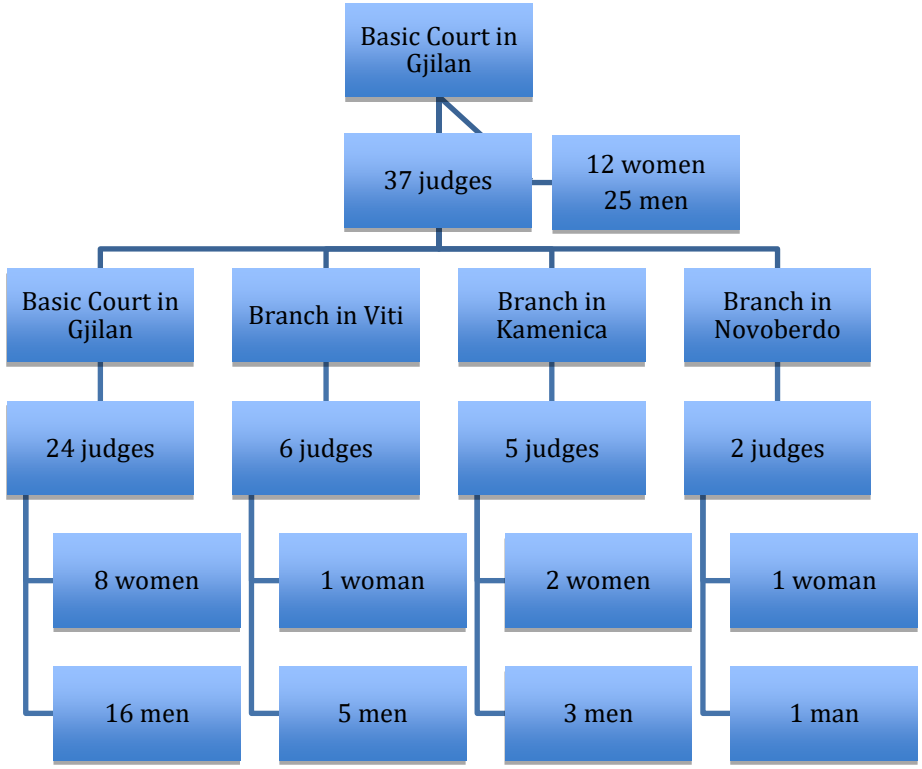
Figure 2: Judges and Prosecutors in organizational units

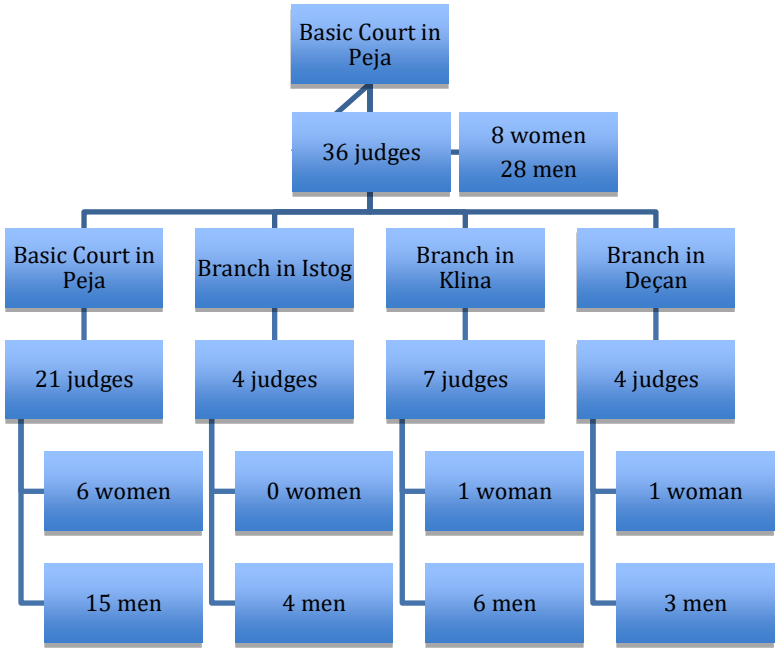


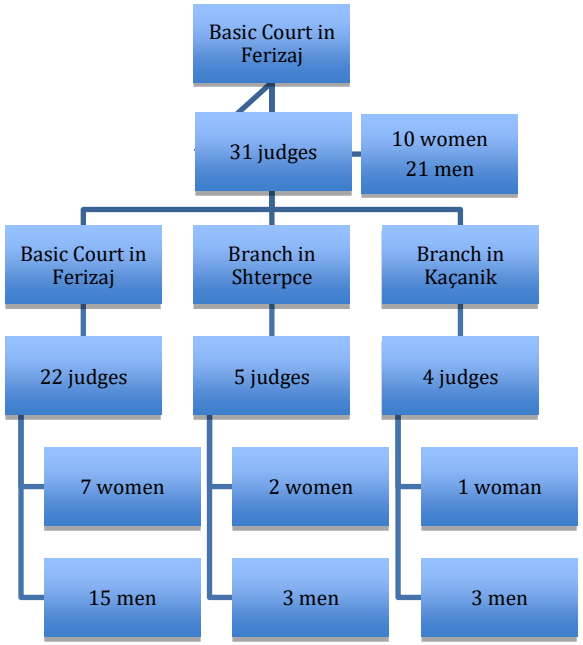

Basic Court - Prishtina
108 judges
46 women
62 men
Basic Court in Prishtina
Branch in Podujeva
Branch in Lipjan
Branch in Gllogoc
Branch in Gracanica
86 judges
8 judges
6 judges
5 judges
3 judges
41 women
2 women
1 women
0 women
2 women
45 men
6 men
5 men
5 men
1 man

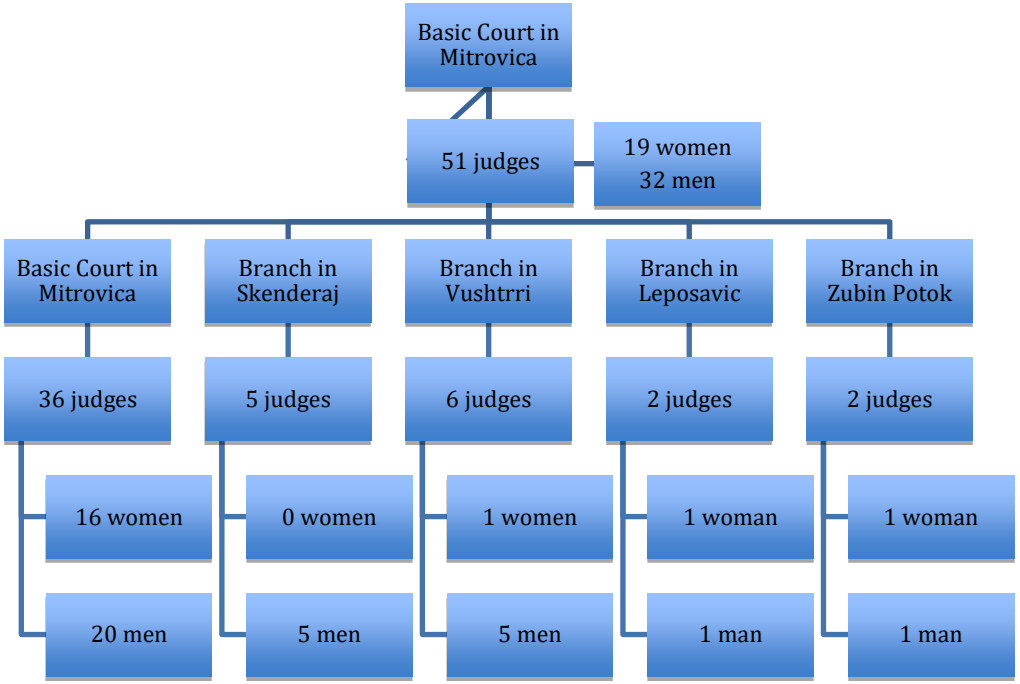

Basic Court in Prizren
39 judges
11 women
28 men
Basic Court in Prizren
Branch in Suharekë
Branch in Dragash
30 judges
7 judges
2 judges
10 women
0 women
1 woman
20 men
7 men
1 man


Basic Court in Gjakova
27 judges
7 women
20 men
Basic Court in Gjakova
Branch in Rahovec
Branch in Malisheva
15 judges
5 judges
7 judges
7 women
0 women
0 women
8 men
5 men
7 men


Basic Court in Gjilan
37 judges
12 women
25 men
Basic Court in Gjilan
Branch in Viti
Branch in Kamenica
Branch in Novoberdo
24 judges
6 judges
5 judges
2 judges
8 women
1 woman
2 women
1 woman
16 men
5 men
3 men
1 man

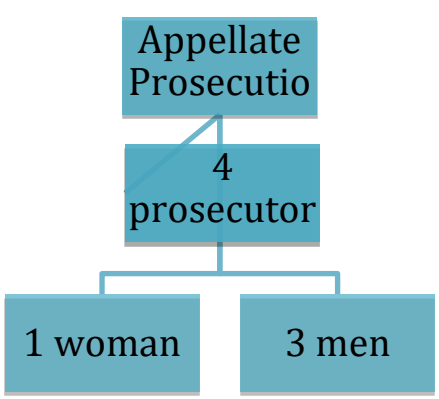

Basic Court in Peja
36 judges
8 women
28 men
Basic Court in Peja
Branch in Istog
Branch in Klina
Branch in Deçan
21 judges
4 judges
7 judges
4 judges
6 women
0 women
1 woman
1 woman
15 men
4 men
6 men
3 men

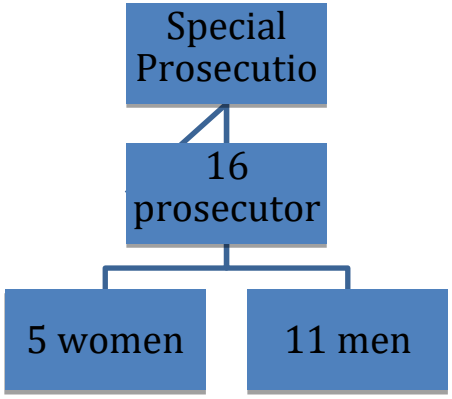

Basic Court in Ferizaj
31 judges
10 women
21 men
Basic Court in Ferizaj
Branch in Shterpce
Branch in Kaçanik
22 judges
5 judges
4 judges
7 women
2 women
1 woman
15 men
3 men
3 men

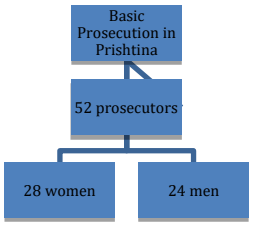


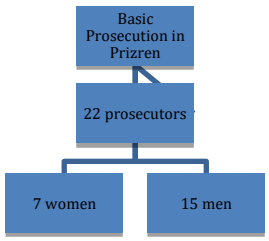
[7]

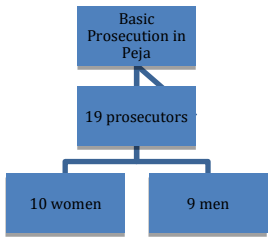
[7] 17 judges are under the Brussels agreement

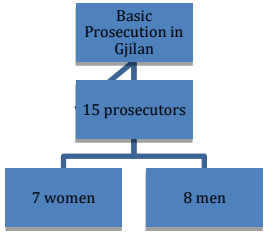

Appellate Prosecutio
4 prosecutor
1 woman
3 men

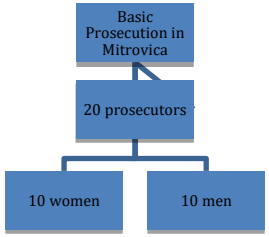

Special Prosecutio
16 prosecutor
5 women
11 men


Basic Prosecution in Prishtina
52 prosecutors
28 women
24 men

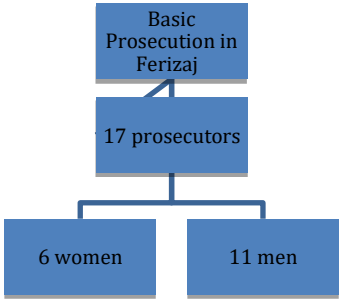

Basic Prosecution in Prizren
22 prosecutors
7 women
15 men


Basic Prosecution in Peja
19 prosecutors
10 women
9 men


Basic Prosecution in Gjilan
15 prosecutors
7 women
8 men


Basic Prosecution in Mitrovica
20 prosecutors
10 women
10 men


Basic Prosecution in Gjakova
11 prosecutors
3 women
11 men


Basic Prosecution in Ferizaj
17 prosecutors
6 women
11 men

For the proper functioning of Kosovo's justice system, a legal framework has been put in place, consisting of primary and secondary legislation, as well as 'soft' laws, i.e. strategic policies or guidance documents, outlining and promoting best practices in the implementation of legislation.

In this regard, the figure below lists the policy documents, laws, bylaws and other documents relevant to the functioning of the judiciary and prosecution.

Figure 3: Relevant policy documents, laws and sub-legal acts

Policy document, law or sub-legal act	**State institution(s) responsible for implementation**	**Role and tasks of the Institution(s)**
Constitution of the Republic of Kosovo[8] Amendment of the Constitution of the Republic of Kosovo regarding the termination of international supervision of the	Institutions of the Republic of Kosovo	The constitution regulates the judiciary and the state prosecutor as constitutional categories. The Constitution stipulates that the principle of independence and impartiality guides judges and the state prosecutor in the exercise of their function. According to the Constitution, the initial mandate for prosecutors and judges is three (3) years, with permanent tenure until retirement after reappointment. The constitution provides for two situations when judges and prosecutors can be removed from office, which is upon conviction of a serious criminal offense or for serious neglect of duties. The Kosovo Judicial Council (KJC) and the Kosovo Prosecutorial Council (KPC), as constitutional categories, ensure the independence and impartiality of the justice system.

[8] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=3702

independence of Kosovo[9] Amendment of the Constitution of the Republic of Kosovo (Amendment no. 25)[10]		The Councils are responsible for recruiting and proposing candidates for appointment and reappointment, transfer, and disciplinary proceedings of judges and prosecutors. The Constitution provides that proposals for the appointment of judges and prosecutors are made on the basis of an open appointment process, based on the merits of candidates, where all candidates must meet the criteria set by law. With the amendment of the Constitution (Amendment No. 25), seven (7) members of the Judicial Council will be elected by the members of the judiciary.
LAW NO. 06/L-055 ON KOSOVO JUDICIAL COUNCIL[11]	Ministry of Justice Kosovo Judicial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** The Kosovo Judicial Council, according to this Law, as an institution responsible for the organization, management, administration and supervision of the functioning of courts, proposes to the President the appointment, reappointment and dismissal of judges, and ensures that all proposed candidates meet the set criteria by law; proposes to the President the appointment and dismissal of the President of the Supreme Court of Kosovo; decides on the selection, appointment and dismissal of the President of the Court of Appeals, the presidents of the Basic Courts and supervisory judges; ensures implementation and oversees the criteria for judicial admission, non-discrimination and equal representation, based on public competition and

[9] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=3293
[10] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=12222
[11] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=18335

		after verifying the competencies of candidates; decides and supervises the implementation of the criteria for the ethnic composition of the territorial jurisdiction of the respective court; decides on the number of judges in each jurisdiction; recommends the establishment of new courts and branches of courts, in accordance with the Law on Courts; conducts judicial inspections; administers the judiciary; drafts and oversees the budget for the judiciary; decides on the promotion, transfer and discipline of judges; sets the criteria for regular evaluation of judges; approves the Code of Professional Ethics for members of the Council, judges and lay judges, as well as the Code of Ethics for judicial administrative staff, etc.
LAW NO. 06/L-056 ON KOSOVO PROSECUTORIAL COUNCIL[12]	Ministry of Justice Kosovo Prosecutorial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** The Kosovo Prosecutorial Council, according to the Law, as an institution responsible for guaranteeing the independence and impartiality of the Kosovo Prosecutorial System, decides on the organization, management, administration and supervision of the functioning of prosecutions; proposes to the President the appointment, reappointment and dismissal of prosecutors, and ensures that all proposed candidates meet the criteria set by law; proposes to the President the appointment and dismissal of the Chief State Prosecutor; ensures that the proposed candidate meets the legal criteria and that relevant procedures are developed; decides on the appointment of Chief Prosecutors of the Basic Prosecution, Special Prosecution, and Appellate Prosecution, in accordance with the Law on State Prosecution and the Law on

[12] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=18920

		Special Prosecution of the Republic of Kosovo; ensures the enforcement and oversees the criteria for admission to the prosecution, in accordance with the principles of merit, equal opportunities, gender equality, non-discrimination and equal representation, via a public competition and after verifying the applicants' competencies; decides and oversees the criteria on the ethnic composition of the territorial jurisdiction of the respective prosecution, guaranteed for members of non-majority communities in Kosovo; decides on the number of prosecutors in each Prosecutor's Office; decides on the promotion, transfer and discipline of prosecutors; sets the criteria for the evaluation of prosecutors; approves the Code of Professional Ethics for Council members, etc.
LAW NO. 06/L-054 ON COURTS[13]	Ministry of Justice Courts	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** The courts established under this law hold trials in accordance with the Constitution of the Republic of Kosovo and the laws in force in the Republic of Kosovo. In the exercise of their functions and decision-making, judges are independent, impartial, and uninfluenced in any way by any natural or legal person, including public bodies.

[13] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=18302

LAW NO. 03/L-225 ON THE STATE PROSECUTOR, AS AMENDED BY LAW NO. 05/L-034 AMENDING LAW NO. 03/L-225 ON THE STATE PROSECUTOR, AND LAW NO. 06/L-025 AMENDING THE LAW NO. 03/L-225 ON THE STATE PROSECUTOR AMENDED BY LAW NO. 05/L-034[14]	Ministry of Justice State Prosecutor	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** State prosecutors exercise their prosecutorial functions independently, fairly, objectively and impartially, and ensure that all persons are treated equally before the law, apply the highest standards of care in the performance of official functions, protect the legal rights of victims, witnesses, suspects, accused and convicted persons, take necessary legal action to detect criminal offenses and perpetrators of crime, and investigate and timely prosecute criminal offenses, take decisions on the initiation, continuation or termination of criminal proceedings against persons suspected or accused of committing criminal offenses, file indictments, and represent them before the court, etc.

[14] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2710

LAW NO. 03/L-052 ON THE SPECIAL PROSECUTOR'S OFFICE OF THE REPUBLIC OF KOSOVO[15]	Ministry of Justice Special Prosecution of the Republic of Kosovo	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** The Special Prosecution, as a permanent and specialized prosecutorial body operating under the State Prosecutor's Office of Kosovo, assumes responsibilities for cases under its special or additional powers, whereas law enforcement bodies and prosecutors working in Kosovo will provide the SPRK with all necessary assistance in order to properly exercise the functions and mandate of this office.
LAW NO. 06/L-086 ON THE SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO FOR ISSUES RELATED TO THE KOSOVO PRIVATIZATION AGENCY[16]	Ministry of Justice Special Chamber of the Supreme Court of Kosovo	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** The Special Chamber has exclusive jurisdiction over all cases and proceedings related to matters within the Privatization Agency of Kosovo, such as: opposing a decision or any other action by KTA or the Agency, undertaken pursuant to the KTA Regulation, or respectively pursuant to the Law on the Privatization Agency of Kosovo; claims against the KTA or the Agency arising from the failure or refusal of the KTA or the Agency to perform an act or to fulfill an obligation required by law or contract; 1.3. claims against KTA or the Agency for financial losses that are alleged to have been caused by a decision or action taken by the KTA or the Agency, etc.

[15] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2526
[16] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=20290

LAW NO. 06/L-057 ON DISCIPLINARY RESPONSIBILITY OF JUDGES AND PROSECUTORS[17]	Ministry of Justice Kosovo Judicial Council Kosovo Prosecutorial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** According to this law, KJC and KPC initiate disciplinary proceedings upon the request of the Competent Authority (Presidents of Courts, President of the Supreme Court, Chief State Prosecutor, Chief Prosecutors, and Councils, as competent authorities for receiving complaints against judges and prosecutors) against a judge, respectively a prosecutor, conduct the disciplinary procedure, decide whether the alleged disciplinary violation has been committed and, in case it finds that the judge/prosecutor has committed the alleged disciplinary violation, imposes disciplinary sanctions in line with the provisions of the Law.
LAW NO. 06/L-082 ON PROTECTION OF PERSONAL DATA[18]	Office of the Prime Minister Kosovo Judicial Council Kosovo Prosecutorial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** KJC, KPC, Courts, and the State Prosecutor, in accordance with this Law, process personal data impartially, legally and transparently, without compromising the dignity of data subjects, collecting personal data only for clear and legitimate purposes.

[17] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=18336
[18] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=18616

	Courts State Prosecutor	
LAW NO. 05/L-095 ON THE JUSTICE ACADEMY[19]	Ministry of Justice Academy of Justice	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** According to this Law, the Academy of Justice regulates the manner and conditions according to which the training of judges and state prosecutors of the Republic of Kosovo, and the training of judicial and prosecutorial administrative staff takes place, develops the training needs assessment process, based on the requests of the Kosovo Judicial Council (hereinafter: KJC), the Kosovo Prosecutorial Council, as well as other issues.
LAW NO. 04/L-050 ON THE DECLARATION, ORIGIN AND CONTROL OF PROPERTY OF SENIOR PUBLIC OFFICIALS AND ON THE	Ministry of Justice Kosovo Judicial Council Kosovo Prosecutorial Council (Members of	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** Members of KJC, KPC, judges and prosecutors, according to this law, must declare their assets to the Anti-Corruption Agency when taking the office, and must submit regular annual disclosures, disclosures at the request of the Agency, and disclosures upon the termination or dismissal from office regarding the status of their assets and of family members, which contains information about their property, income.

[19] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=13318

DECLARATION, ORIGIN AND CONTROL OF GIFTS FOR ALL PUBLIC PERSONS, AS AMENDED BY LAW NO. 04/L-228 AMENDING THE LAW NO. 04/L-050 ON THE DECLARATION, ORIGIN AND CONTROL OF PROPERTY OF SENIOR PUBLIC OFFICIALS AND ON THE DECLARATION, ORIGIN AND CONTROL OF GIFTS FOR ALL PUBLIC PERSONS[20]	KJC, KPC, Judges and Prosecutors	

[20] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2767

LAW NO. 06/L-011 ON THE PREVENTION OF CONFLICT OF INTEREST IN EXERCISING PUBLIC FUNCTIONS[21]	Ministry of Justice Public officials	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** The provisions of this law set out the principles, rules and procedures regarding the permitted and prohibited conduct of officials during the performance of public duty as well as the measures for violation of the provisions set out in this law.
LAW NO. LAW NO. 03/L-178 ON CLASSIFICATION OF INFORMATION AND SECURITY. CLEARANCES[22]	Office of the Prime Minister Judiciary and Prosecution	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** This law applies to all public institutions exercising executive, legislative and judicial powers and to the Presidency of Kosovo.
LAW NO. 06/L - 114 ON PUBLIC OFFICIALS[23]	MPA/MIA	**Drafting of legislation and oversight of implementation**

[21] https://gzk.rks-gov.net/ActDetail.aspx?ActID=16314
[22] https://gzk.rks-gov.net/ActDetail.aspx?ActID=2690
[23] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=25839

		Implementation of legislation: The Law on Public Officials aims to create the legal basis for the employment of public officials in the institutions of the Republic of Kosovo. This Law regulates the legal relationship between the state and public officials. Among other, the law stipulates that a civil servant within the Civil Service is a public official in the administration of institutions of the justice system.
CODE OF ETHICS AND PROFESSIONAL CONDUCT FOR JUDGES[24]	Kosovo Judicial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** The Code of Ethics and Professional Conduct for Judges stipulates that a judge shall exercise his/her functions independently, based on the Constitution, law and individual assessment of facts, without any restrictions, undue influences, incitement, pressure, threats or interference, direct or indirect, by anyone and for any reason, and shall maintain and promote individual and institutional independence. In the exercise of his/her functions, he/she shall treat all parties to the proceedings equally and without favoritism, bias and prejudice. At all times the judge must be and must appear impartial. Impartiality involves not only the decision, but also the decision-making procedure. During his/her work, the judge shall adhere to the principles of equality of parties in proceedings, recognizing and respecting the societal diversity based on race, color, gender, religion, nationality, sexual orientation, special needs, age, marital, social and economic status and any other criteria, and shall treats equally all those with whom he/she has professional contacts. The

24 https://w.gjyqesori-rks.org/wp-content/uploads/lgsl/Kodi%20Etikes%20Profesionale%20per%20gjyqtar.pdf

		judge shall have an honest and dignified conduct and must always be in harmony with the high moral character, which is essential for maintaining the reputation of the judiciary, etc.
REGULATION NO. 01/2021 ON THE PERFORMANCE EVALUATION OF JUDGES, AS AMENDED BY REGULATIONS NO. 02/2021 AMENDING THE REGULATIONS NO. 01/2021 ON THE PERFORMANCE EVALUATION OF JUDGES[25]	Kosovo Judicial Council Courts (Judges)	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** According to this regulation, all judges of the courts of Kosovo, except the presidents of courts, judges who have held managing positions over the last three years, and members of KJC, during their full time service in the Council, are subject to performance evaluations to the criteria and rules for performance evaluation set forth in this regulation. Performance evaluation is the basis for promotion or demotion, reappointment, and initiation of dismissal proceedings of judges.
REGULATION (04/2020) ON THE AUTHORITY,	Kosovo Judicial Council	**Drafting of legislation and oversight of implementation**

[25] https://w.gjyqesori-rks.org/wp-content/uploads/lgsl/89895_Rregore_Nr_01_2021_per_vleresimin_performances_se_Gjyqtareve.pdf

ORGANIZATION AND FUNCTIONING OF THE JUDICIAL INSPECTION UNIT[26]	Kosovo Judicial Council (Judicial Inspection Unit)	**Implementation of legislation:** According to the Regulation, the Judicial Inspection Unit assists the Kosovo Judicial Council in evaluating the work of the courts and proposes practices for the improvement of courts. The unit, among others, conducts studies to assess the efficiency of court proceedings, the impact of laws, regulations and policies of the Council, and makes recommendations to improve the effectiveness and efficiency of the judiciary, etc.
REGULATION No.03/2020) ON THE ORGANIZATION AND FUNCTIONING OF THE KOSOVO JUDICIAL COUNCIL[27]	Kosovo Judicial Council Kosovo Judicial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** The Judicial Council, according to this regulation, determines the manner of work, organization and functioning of the Kosovo Judicial Council and its units.
REGULATION (02/2020) ON THE INTERNAL	Kosovo Judicial Council Courts	**Drafting of legislation and oversight of implementation**

[26] https://w.gjyqesori-rks.org/wp-content/uploads/lgsl/85990_Rregullore%20nr.%2004-2020%20-%20Per%20autoritetin,%20organizimin%20dhe%20funksionimin%20e%20Njesise%20se%20Inspektimit%20Gjyqesor.pdf

[27] https://w.gjyqesori-rks.org/wp-content/uploads/lgsl/43176_Rregullore%20nr.%2003-2020%20mbi%20organizimin%20dhe%20veprimtarine%20e%20Keshillit%20Gjyqesor%20te%20Kosoves.pdf

ORGANIZATION OF COURTS[28]		**Implementation of legislation:** This regulation applies to all courts of the Republic of Kosovo, including the Supreme Court of Kosovo and the Special Chamber of the Supreme Court and the Appellate Panel of the Kosovo Property Agency, the Court of Appeals, and basic courts and their branches. The internal functioning of courts, according to the regulation, is organized in such a way that the courts perform lawfully, allowing parties to realize their lawful rights, within a reasonable time and at a reasonable cost.
REGULATION (NO. 09/2019) ON THE PROCEDURE AND CRITERIA FOR ELECTION OF MEMBERS OF THE KOSOVO JUDICIAL COUNCIL BY THE JUDICIARY[29]	Kosovo Judicial Council Kosovo Judicial Council Courts	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** This regulation defines the criteria and procedures for the election of members of the Kosovo Judicial Council by the judiciary. This Regulation applies to all judges, including those running for members of the Kosovo Judicial Council, as well as other officials involved in the process of electing Council members by the judiciary.

[28] https://w.gjyqesori-rks.org/wp-content/uploads/lgsl/31597_Rregullore_Nr_02_2020_per_organizimin_dhe_veprimtarine_brendshme_te_gjykatave.pdf

[29] https://w.gjyqesori-rks.org/wp-content/uploads/lgsl/92188_Rregullore_Nr_09_2019_per_Proceduren_dhe_Kriteret_Zgjedhjes_%20Anetareve_te_KGJK-se_nga_Gjyqesori.pdf

REGULATION (05/2019) ON THE DISCIPLINARY PROCEDURE OF JUDGES[30]	Kosovo Judicial Council Kosovo Judicial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** This regulation sets out the procedures for receiving, reviewing, investigating and filing complaints for disciplinary violations against judges as well as organizing the work of the Competent Authorities and the Kosovo Judicial Council, and applies to all Competent Authorities, the Council and judges, including judges who resigned from office during the disciplinary proceedings, or their function has been terminated in any other way.
REGULATION NO.03 / 2019 ON THE ORGANIZATION AND FUNCTIONING OF THE SPECIAL DEPARTMENT WITHIN THE BASIC COURT IN PRISHTINA AND	Kosovo Judicial Council Basic Court in Prishtina and the Court of Appeals	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** The Special Department within the Basic Court in Prishtina has the power to review cases which fall under the competences of the Special Prosecution, in accordance with the law. The Special Department of the Court of Appeals adjudicates in the second instance and has the power to review cases that fall under the competences of the Special Prosecution of the Republic of Kosovo.

[30] https://w.gjyqesori-rks.org/wp-content/uploads/lgsl/6651_Rregullorja%2005-2019.pdf

THE COURT OF APPEALS[31]		
REGULATION NO. 02/2019 ON THE RECRUITMENT, APPOINTMENT, TRAINING, REMUNERATION, DISCIPLINE AND DISMISSAL OF JUDGES[32]	Kosovo Judicial Council Courts Kosovo Judicial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** The relevant court recruits lay judges through a public announcement, who are then appointed by the Kosovo Judicial Council, in accordance with the law, for a five-year term, with the right of reappointment. Lay judges exercise their duties and responsibilities in accordance with applicable law and the Code of Professional Ethics for Judges. The mandate of lay judges can also end with the dismissal from office, in case judges are convicted of a criminal offense, with the exception of acts of negligence, as well as in cases of a serious breach of duty and the Code of Professional Ethics for Judges.
REGULATION NO. 09/2016 ON THE PROCEDURES FOR ELECTION,	Kosovo Judicial Council	**Drafting of legislation and oversight of implementation**

[31] https://w.gjyqesori-rks.org/wp-content/uploads/lgsl/57641_Rregullore_Nr.03_2019_per_Organizimin_Funksionalizimin_Departamentit_Special_Kuader_Gjykates_Themelore_Prishtine_Gjykates_Apelit.pdf

[32] https://w.gjyqesori-rks.org/wp-content/uploads/lgsl/66108_Rregullore_Nr.02-2019_per_Rekrutimin_Emrimin_Trajnimin_Lirimin_nga_Detyra_Gjyqtareve_Porot.pdf

APPOINTMENT, EVALUATION, SUSPENSION AND DISMISSAL OF PRESIDENTS OF COURTS AND SUPERVISORY JUDGES, AS AMENDED WITH REGULATION (NO. 01/2020) AMENDING REGULATIONS (NO. 09/2016) ON THE PROCEDURES FOR THE ELECTION, APPOINTMENT, EVALUATION, SUSPENSION AND DISMISSAL OF PRESIDENTS OF COURTS AND	Kosovo Judicial Council Kosovo Judicial Council	**Implementation of legislation:** The Judicial Council, under this Regulation, shall make the selection and appointment of presidents of courts and supervisory judges through an open, competitive, transparent and merit-based process, as defined by law, excluding any form of discrimination. The Kosovo Judicial Council will assess the suitability of candidates for Presidents and Supervising Judges. In cases where the reason for dismissal is a disciplinary violation, the KJC shall apply the provisions of the Law on Disciplinary Responsibility of Judges and Prosecutors. **Drafting of legislation and oversight of implementation** **Implementation of legislation:** The provisions of this regulation are applicable to all candidates for judges in the recruitment process, the KJC, members of the Commission established by this Regulation, as well as the KJC staff who are involved in the process.

SUPERVISORY JUDGES[33] REGULATION (05/2016) ON THE RECRUITMENT, EXAMINATION, APPOINTMENT AND RE-APPOINTMENT OF JUDGES, as amended by REGULATION (13/2016) AMENDING REGULATION (05/2016) ON THE RECRUITMENT, EXAMINATION, APPOINTMENT AND REAPPOINTMENT OF JUDGES AND		

[33] https://w.gjyqesori-rks.org/wp-content/uploads/lgsl/Rregullore%2009%20-2016%20per%20procedurat%20e%20perzgjedjese,%20emerimit,%20vlersimite,%20pezullimit%20dhe%20shkarkimit%20te%20kyetareve%20te%20gjykatave%20dhe%20gjyqtareve%20mbikqyres.pdf

REGULATION (12/2016) AMENDING REGULATION (05/2016) ON THE RECRUITMENT< EXAMINATION, APPOINTMENT AND RE-APPOINTMENT OF JUDGES[34]		
CODE OF ETHICS AND PROFESSIONAL CONDUCT FOR PROSECUTORS[35]	Kosovo Prosecutorial Council State Prosecutor	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** The State Prosecutor shall exercise his/her functions independently, on the basis of accurate assessment of facts and in accordance with the Constitution, and shall correctly apply the law, with no internal or external influences, avoiding any irregular and illegal attempt which may affect his/her assessment and decision-making, does not seek and does not accept material or intangible benefits to himself/herself, his/her family, third parties and institutions, does not carry out economic activities, including any

[34] https://w.gjyqesori-rks.org/wp-content/uploads/lgsl/RREGULLORE%2005-2016%20per%20Provimin%20Emerim%20dhe%20Riemerim%20e%20gjyqtareve.pdf
[35] https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/PSH/Legjislacioni/ANkodet/2019_02_08_082355_Shqip.pdf

		type of work or business which leads to material or intangible gain, which may affect his/her independence and may create the impression of the use of position for his/her own interests or those of other persons, and he/she should not join social organizations, which create the suspicion that they compromise the figure of the prosecutor and are incompatible with his/her function, etc.
REGULATION NO. 06.2020 ON THE SELECTION OF PROSECUTORS AS MEMBERS OF THE KOSOVO PROSECUTORIAL COUNCIL[36]	Kosovo Prosecutorial Council Kosovo Prosecutorial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** This Regulation defines the rules and procedures for the selection of members of the Kosovo Prosecutorial Council. According to the regulation, the process of selecting KPC members will be open, transparent, and in line with principles of competition, objectivity, impartiality, adequate geographical representation for prosecutorial members, gender equality and multi-ethnicity.
REGULATION NO. 05.2020 ON THE PERFORMANCE	Kosovo Prosecutorial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** The regulation sets out the procedure and criteria for evaluating the performance of prosecutors, and sets out the mandate, tasks, responsibilities, organization and functioning of authorities implementing the performance evaluation of prosecutors. This regulation applies to all state

[36] https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/AkteNenLigjore/Udh%C3%ABzuesit/Rregullore/Rregullore%20Nr.06.2020%20-%20p%C3%ABr%20Zgjedhjen%20e%20an%C3%ABtar%C3%ABve%20prokuror%C3%AB%20t%C3%AB%20KPK-s%C3%AB.pdf

EVALUATION OF PROSECUTORS[37]		prosecutors in the Republic of Kosovo. Types of evaluation of prosecutors are: Evaluation of prosecutors with initial mandate, evaluation of prosecutors with permanent mandate, and irregular evaluation.
REGULATION NO. 02.2020 ON THE ORGANIZATION AND FUNCTIONING OF THE KOSOVO PROSECUTORIAL COUNCIL[38]	Kosovo Prosecutorial Council Kosovo Prosecutorial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** This regulation defines the functioning, organization and activities of the Kosovo Prosecutorial Council and its commissions, as an entirely independent institution in performing its functions.
REGULATION NO. 01.2020 ON TRAININGS AND PROFESSIONAL DEVELOPMENT IN THE	Kosovo Prosecutorial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** This regulation applies to all levels of organization of the State Prosecutor and relevant units of the Kosovo Prosecutorial Council. The main forms of professional development are induction, continuous, voluntary and compulsory trainings.

[37] https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/Legjislacioni/rregullore/Rregullore%20Nr.05.2020%20p%C3%ABr%20Vler%C3%ABsimin%20e%20Performanc%C3%ABs%20s%C3%AB%20Prokuror%C3%ABve.pdf

[38] https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/AkteNenLigjore/Rregullore%20Nr.02.2020%20-%20P%C3%ABr%20organizimin%20dhe%20veprimtarin%20e%20K%C3%ABshillit%20Prokurorial%20t%C3%AB%20Kosov%C3%ABs(1).pdf

PROSECUTORIAL SYSTEM[39]		
REGULATION NO. 06.2019 ON THE APPOINTMENT OF THE CHIEF STATE PROSECUTOR AND CHIEF PROSECUTORS OF THE REPUBLIC OF KOSOVO[40]	Kosovo Prosecutorial Council Kosovo Prosecutorial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** According to this Regulation, the Kosovo Prosecutorial Council will nominate Chief Prosecutors and will propose the appointment of the Chief State Prosecutor, in an objective, transparent, non-discriminatory and comprehensive merit-based process.
REGULATION NO. 05/2019 ON THE DISCIPLINARY	Kosovo Prosecutorial Council	Drafting of legislation and oversight of The Accountability Document has found that, in general, the judicial and prosecutorial system lacks adequate accountability mechanisms within the systems themselves. It is explained that, in principle, the legislation and bylaws are good but that their implementation in practice is stalled. Similarly, the integrity document (compiled with the help

[39] https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/Legjislacioni/Rregullore%20Nr.01.2020%20-%20P%C3%ABr%20trajnime%20dhe%20zhvillimin%20profesional%20n%C3%AB%20sistemin%20prokurorial.pdf

[40] https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/Rregullorja%20Nr.06.2019%20p%C3%ABr%20em%C3%ABrimin%20e%20Kryeprokurorit%20t%C3%AB%20Shtetit%20dhe%20kryeprokuror%C3%ABve%20t%C3%AB%20prokurorive%20t%C3%AB%20Republik%C3%ABs%20s%C3%AB%20Kosov%C3%ABs(1)(1).pdf

PROCEDURE OF PROSECUTORS[41]	Kosovo Prosecutorial Council	of experts hired by the British Embassy in Kosovo) found that these systems lack an adequate verification process. That document emphasized, among other things, that one of the main shortcomings of the system is precisely the lack of an adequate system of verification or control of integrity on a regular and continuous basis. Some of the findings of these documents are briefly summarized and intertwined throughout this document. **Implementation of legislation:** This regulation sets out the procedures for receiving, reviewing, investigating and deciding on complaints for disciplinary violations against prosecutors as well as organizing the work of Competent Authorities and the Kosovo Prosecutorial Council, and applies to all Competent Authorities, the Council and prosecutors, including judges who resigned from office during the disciplinary proceedings, or their function has been terminated in any other way, as outlined with the Law on Disciplinary Responsibility of judges and prosecutors.
REGULATION NO. 07.2016 ON THE DISCIPLINARY PROCEDURE FOR MEMBERS OF THE KOSOVO	Kosovo Prosecutorial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** This regulation sets out the procedures for investigating misconducts of members of the Kosovo Prosecutorial Council, and conducting proceedings against them. According to the Regulation, members of the Council are subject to disciplinary proceedings in cases where they have violated the Code of Ethics and Professional Conduct for KPC members, and

[41] https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/AkteNenLigjore/Nr.1009.2019-Rregullore%2005.2019-P%C3%ABr%20Procedur%C3%ABn%20Disiplinore%20t%C3%AB%20Prokuror%C3%ABve.pdf

PROSECUTORIAL COUNCIL[42]	Kosovo Prosecutorial Council	when they have not exercised the function of Council members in accordance with the Constitution, Law and Council regulations.
REGULATION NO. 03/2016 on the transfer and promotion of state prosecutors[43]	Kosovo Prosecutorial Council Kosovo Prosecutorial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** This regulation defines the criteria and procedures for the transfer and promotion of state prosecutors and applies to the State Prosecutor, including all levels.
REGULATION NO. 07/2015 ON THE RECRUITMENT, EXAMINATION, APPOINTMENT AND REAPPOINTMEN	Kosovo Prosecutorial Council	**Drafting of legislation and oversight of implementation** **Implementation of legislation:** Provisions of this regulation are applicable to all candidates for state prosecutors during the recruitment process, the Kosovo Prosecutorial Council, members of the Recruitment Commission and the Review Commission, as well as KPC staff involved in this process.

[42] https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/AkteNenLigjore/Rregullore%20NR.07.2016%20-%20p%C3%ABr%20procedur%C3%ABn%20disiplinore%20p%C3%ABr%20an%C3%ABtar%C3%ABt%20e%20KPK-s%C3%AB.pdf

[43] https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/AkteNenLigjore/Rregullore%20Nr.03.2016-p%C3%ABr%20transferimin%20dhe%20avancimin%20e%20prokuror%C3%ABve%20t%C3%AB%20Shtetit.pdf

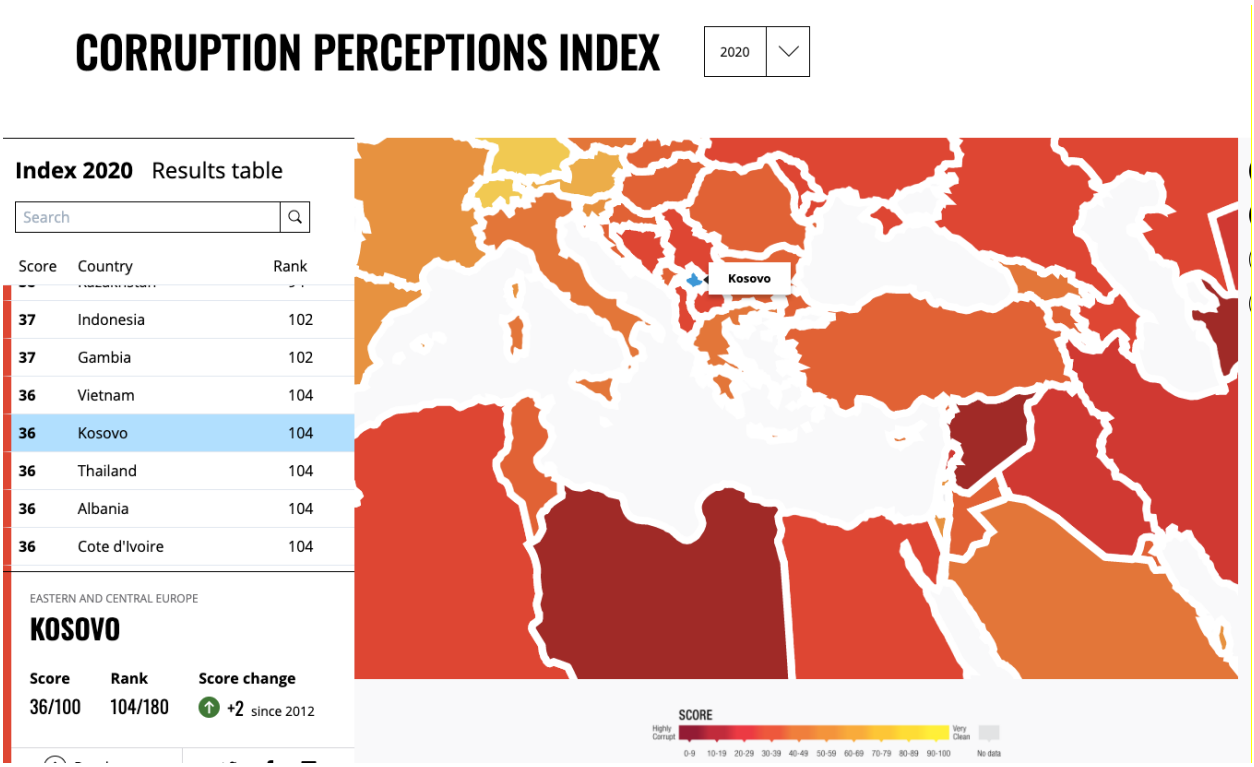
T OF STATE PROSECUTORS[44]	Kosovo Prosecutorial Council	
Draft Strategy on the Rule of Law (2021-2026)[45]	Justice and security system institutions	The Draft Strategy has particularly identified issues with the accountability, efficiency, professionalism and integrity of judges and prosecutors. The Ministry of Justice, in cooperation with justice and security system institutions, have prepared activities to address such issues.

[44] https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/380.%20Rregullore%20NR.07.2015-Per%20rekrutimin%2Cprovimin%2Cemerimin%20dhe%20riemerimin%20e%20prokuroreve%20te%20Shtetit.pdf

[45] The Draft Strategy is available at: https://konsultimet.rks-gov.net/vieëConsult.php?ConsultationID=41053

The judiciary and the prosecution continue to face many challenges of various natures, despite the continued development and progress, especially after 2008. One of these challenges is the professionalism and integrity of some incumbent judges and prosecutors, as well as their administrative and support staff. This finding is acknowledged by all parties involved, including the judicial and prosecution institutions themselves, the international community in Kosovo, the Government, various political entities, and members of the civil society - a finding reflected in the various reports of these parties, as referenced below.

International reports continue to rank Kosovo as one of the countries with high corruption. Transparency International ranks Kosovo 104th, with only 36 points out of 100. Moreover, since 2012, Kosovo has risen by only two positions in this ranking[46]. This indicates a very slow pace of improvement of the situation.



Source: Transparency International

[46] Corruption Perceptions Index, Transparency International, available at: https://www.transparency.org/en/cpi/2020/index/ksv.

In order to fight such a level of corruption, the proper, impartial and intact functioning of the judiciary and the prosecution is vital. However, the European Commission report for several years, including 2020, concluded that "the judiciary is still vulnerable to undue political influence" and that "the administration of justice remains slow and inefficient and rule of law institutions need sustained efforts to build up their capacities".[47]

Similar findings have been made by US State Department Reports, which identify the impunity of corrupt officials as one of the biggest problems in our country. According to them, "a lack of effective judicial oversight and general weakness in the rule of law contributed to this problem."[48] Most importantly, this report states that "corruption cases were routinely subject to repeated appeal, and the judicial system often allowed statutes of limitation to expire without trying cases."[49]

In the 2019 report, the same source points out that despite constitutional guarantees to ensure independence, the judicial system has often failed to reach a fair trial, being slow and not guaranteeing the accountability of officials.[50] Again, this source concludes that "judicial structures were subject to political interference, disputed appointments and unclear mandates."[51]

The internal report of the European Commission's collegial mission states that prosecutors have pressure and interference from outside, including the media, the police, the suspects but also from their own superiors.[52] They also give the impression that there is political influence over the state prosecutor's office, which, according to them, is

[47] Report on Kosovo, p. 6 available at: https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/kosovo_report_2020.pdf.

[48] US Department of State Human Rights Report 2020, p. 22, available at: https://www.state.gov/wp-content/uploads/2021/03/KOSOVO-2020-HUMAN-RIGHTS-REPORT.pdf; The same report also reiterates the issue of impunity for police officers for some incidents of violence as well as detention on remand without proper justification.

[49] Ibid.

[50] US Department of State Report on Human Rights, 2019, p. 9, available at: https://www.state.gov/wp-content/uploads/2020/02/KOSOVO-2019-HUMAN-RIGHTS-REPORT.pdf

[51] Ibid.

[52] "Peer Assessment mission to KOSOVO on their ability to successfully address high level corruption, organized crime and money laundering covering the entire criminal procedure from the investigation to the final court rulings", November 2019, p. 14.

reflected in the low number of results in the fight against organized crime and high-level corruption.[53] Problems with political interference have also been reported by judges.[54] The NDI public opinion poll concluded that public confidence in the justice system is rather low, with the judiciary and prosecution in particular being seen by the public as institutions influenced by corruption and politics.[55] As indications of the influence of politics in the judiciary, the civil society has cited the lack of results in the fight against high-profile corruption; as well as light sentences imposed in the handful of cases handled.[56]

Similarly, the UNDP report on the public pulse for 2020 shows a very low level of public satisfaction with the judiciary.

Table 1. Citizen satisfaction with the key executive, legislative, and judicial institutions in Kosovo

Political Indicators		Mar-15	Sep-15	Apr-16	Oct-16	Oct-17	May-18	Nov-18	May-19	Nov-19	Apr-20	Trend
Satisfaction with executive government	Government	18.10%	17.30%	17.80%	20.20%	32.40%	30.00%	31.30%	17.70%	14.40%	60.70%	
	Prime minister	23.60%	14.60%	18.30%	19.70%	42.30%	33.20%	35.10%	36.50%	20.70%	65.40%	
Satisfaction with legislative	Parliament	19.30%	19.90%	17.30%	18.90%	31.70%	32.90%	36.10%	19.60%	18.60%	33.40%	
	Speaker of parliament	20.10%	19.80%	24.30%	24.90%	36.00%	31.50%	36.30%	23.60%	20.50%	72.40%	
Satisfaction with President	President	30.20%	30.40%	45.70%	25.50%	37.60%	39.10%	38.40%	20.40%	21.20%	18.70%	
Satisfaction with judiciary	Court	17.20%	13.90%	18.40%	22.10%	36.90%	31.20%	37.80%	18.70%	13.60%	24.80%	
	Prosecutor's office	17.00%	12.80%	16.90%	16.30%	33.10%	29.90%	35.30%	16.40%	14.20%	22.30%	

Source: Public Pulse Brief XVIII for Kosovo, for 2020[57]

[53] Ibid.
[54] Ibid. p. 27.
[55] See: 'Public Opinion Poll in Kosovo.' NDI 2020. Pages 9 and 10 available at: https://www.ndi.org/sites/default/files/NDI%20Kosovo%20Public%20Opinion%20Poll%20-%20May%202020.pdf or 'Performance Index of Rule of Law Institutions in Kosovo' GLPS. 2020. Pages 10, 11 and 15 available at: http://www.legalpoliticalstudies.org/wp-content/uploads/2020/01/RoLPIK_Botimi-5.pdf
[56] See for example: Program "Iustitia", Episode 1, "Legal amnesty for high-level corruption": https://www.youtube.com/watch?v=owetDPfnhkQ (last accessed on November 9, 2021).
[57] Available at: https://www.ks.undp.org/content/kosovo/en/home/library/democratic_governance/public-pulse-xviii.html

In the same spirit, reports compiled by various local civil society organizations have revealed a significant number of irregularities in the judiciary.[58] They have reported on the "caressing corruption" by the courts. Moreover, the reasons for lack of accountability tend to be mainly the lack of will of the respective institutions (KJC and KPC).[59] *The following table contains a short list of sources published by civil society organizations, which include findings in line with this:*

ORGANISATION	TITLE	LINK
IKD	Sentencing policies in Kosovo	https://kli-ks.org/politika-e-denimeve-ne-kosove/
IKD	Special failures in the fight against corruption	https://kli-ks.org/deshtimet-speciale-ne-luftimin-e-korrupsionit/
IKD	Failed targeting	https://kli-ks.org/shenjestrimet-e-deshtuara/
IKD	Kosovo (does not) has (have) high profile corruption	https://kli-ks.org/kosova-ska-korrupsion-te-profilit-te-larte/
IKD	Second instance justice	https://kli-ks.org/drejtesia-ne-shkalle-te-dyte/
IKD	Tips for Advice: Annual monitoring report of the Judicial Council and the Prosecutorial Council (1 January – 31 December 2019)	https://kli-ks.org/keshilla-per-keshillat-raport-vjetor-i-monitorimit-te-keshillit-gjyqesor-dhe-keshillit-prokurorial-1-janar-31-dhjetor-2019/
IKD	(Il)legality of the adjudication of illegal possession of weapons	https://kli-ks.org/pa-ligjshmeria-e-gjykimit-te-armembajtjes-pa-leje/

[58] Balkan Investigative Research Network, "Caressing Corruption", Court Monitoring Report 2020, available at: https://kallxo.com/wp-content/uploads/2021/05/RAPORTIO-I-MONITORIMIT-2020-WEB.pdf

[59] Kosovo Law Institute, "Accountability of Judges and Prosecutors", October 2020, available at: https://kli-ks.org/wp-content/uploads/2020/10/IKD-Llogaridh%C3%ABnia-e-gjykat%C3%ABsve-dhe-prokuror%C3%ABve-14.10.2020-1.pdf

IKD	Failure of the courts to implement the Crime Victims Compensation Program	https://kli-ks.org/deshtimi-i-gjykatave-ne-mbushjen-e-programit-per-kompensimin-e-viktimave-te-krimit/
IKD	Fight for corruption statistics	https://kli-ks.org/lufta-per-statistika-te-korrupsionit/
IKD	Justice in the eyes of citizens	https://kli-ks.org/drejtesia-ne-syte-e-qytetareve/
IKD	Amnesty for war crimes in Kosovo	https://kli-ks.org/amnistia-e-krimeve-te-luftes-ne-kosove/
IKD	Passive Appellate Prosecution	https://kli-ks.org/prokuroria-pasive-e-apelit/
IKD	ECHR practice, paper obligation	https://kli-ks.org/praktika-e-gjednj-se-obligim-ne-leter/
IKD	Accountability of Judges and Prosecutors	https://kli-ks.org/llogaridhenia-e-gjykatesve-dhe-prokuroreve/
IKD	Lack of additional sentences in fighting criminality	https://kli-ks.org/mungesa-e-denimeve-plotesuese-ne-luftimin-e-kriminalitetit/
IKD	Civil Justice 2019	https://kli-ks.org/drejtesia-civile-2019/
IKD	Legality of promotions and benefits in the Office of the Chief State Prosecutor	https://kli-ks.org/ligjshmeria-e-avancimeve-dhe-perfitimeve-ne-zyren-e-kryeprokurorit-te-shtetit/
IKD	Legality of benefits in the Supreme Court of Kosovo	https://kli-ks.org/ligjshmeria-e-perfitimeve-ne-gjykaten-supreme-te-kosoves/
IKD	By not acting, the state deprives Sebahate Sopi of her life	https://kli-ks.org/shteti-me-mos-veprim-privon-nga-jeta-sebahate-sopin/
IKD	Conflict of interest in promotions and benefits in the Judicial and Prosecutorial Council	https://kli-ks.org/konflikti-i-interesit-ne-avancime-dhe-perfitime-ne-keshillin-gjyqesor-dhe-prokurorial/

IKD	Violation of the integrity of Councils by Councils	https://kli-ks.org/cenimi-i-integritetit-te-keshillave-nga-keshillat/
IKD	Addressing killings in Kosovo	https://kli-ks.org/trajtimi-i-vrasjeve-ne-kosove/
IKD	Punishment of corruption as a misdemeanor	https://kli-ks.org/denimi-i-korrupsionit-si-kundervajtje/
GLPS	Five Integral Questions about the Vetting Process	http://www.legalpoliticalstudies.org/five-integral-questions-about-the-vetting-process/
GLPS	KOSOVO in 2020: The Breakthrough of the Specialist Prosecutor's Office	http://www.legalpoliticalstudies.org/kosovo-in-2020-the-breakthrough-of-the-specialist-prosecutors-office/
GLPS	The Functional Review of the Kosovar Justice system: an overview of the process so far	http://www.legalpoliticalstudies.org/the-functional-review-of-the-kosovar-justice-system-an-overview-of-the-process-so-far/
GLPS	Rule of Law Performance Index in Kosovo (RoLPIK) – 4th Edition	http://www.legalpoliticalstudies.org/rule-of-law-performance-index-in-kosovo-rolpik-4th-edition/
GLPS	The nature of disciplinary matters in the judicial and prosecutorial system of Kosovo and the functioning of the disciplinary mechanism	http://www.rolpik.org/natyra-e-ceshtjeve-disiplinore-ne-sistemin-gjyqesor-dhe-prokurorial-te-kosoves-dhe-funksionimi-i-mekanizmit-disiplinor/
GLPS	Lack of prosecution of private companies	http://www.rolpik.org/mungesa-e-ndjekjes-penale-te-kompanive-private/
GLPS	Monitoring of the Judicial and Prosecutorial System in Kosovo for the period January-December 2020	http://www.rolpik.org/monitorimi-i-sistemit-gjyqesor-dhe-prokurorial-ne-kosove-per-periudhen-janar-dhjetor-2020/
GLPS	Deficiencies of indictments in corrupt criminal offenses	http://www.rolpik.org/mangesite-e-aktakuzave-ne-veprat-penale-korruptive/
GLPS	Rule of Law Institution Performance Index	http://www.rolpik.org/indeksi-i-performances-se-institucioneve-te-sundimit-te-ligjit/

GLPS	Corruption offenses: lack of additional sentences	http://www.rolpik.org/veprat-penale-te-korrupsionit-mungesa-e-denimeve-plotesuese/
GLPS	Disciplinary measures against judges and prosecutors	http://www.rolpik.org/masat-disiplinore-ndaj-gjyqtareve-dhe-prokuroreve/
GLPS	Application of a fair trial within a reasonable time in the courts of the Republic of Kosovo	http://www.rolpik.org/aplikimi-i-gjykimit-te-drejte-brenda-nje-afati-te-arsyeshem-ne-gjykatat-e-republikes-se-kosoves/
GLPS	Application of the institute of guilty plea for the criminal offense committed in co-perpetration	http://www.rolpik.org/aplikimi-i-institutit-te-pranimit-te-fajesise-per-vepren-penale-te-kryer-ne-bashkekryerje/
GLPS	Institutional Handling of Cases of Non-Declaration and False Declaration of Assets to Senior Public Officials in Kosovo during 2019	http://www.rolpik.org/trajtimi-institucional-i-rasteve-te-mosdeklarimit-dhe-deklarimit-te-rrejshem-te-pasurise-ndaj-zyrtareve-te-larte-publik-ne-kosove-gjate-vitit-2019/
BIRN	Corrupt liberalization	https://birn.eu.com/wp-content/uploads/2018/04/BIRN-Raporti2018-LiberalizimiiKorruptuar-Final-Web.pdf
BIRN	Court monitoring report 2018	https://birn.eu.com/wp-content/uploads/2019/10/Court-Monitoring-Report_ENG-final.pdf
BIRN	Court Monitoring Report 2020	https://kallxo.com/wp-content/uploads/2021/05/RAPORTIO-I-MONITORIMIT-2020-WEB.pdf
BIRN	Court Monitoring Report 2017	https://birn.eu.com/wp-content/uploads/2019/04/BIRN-RAPORTI-I-GJYKATAVE-RAPORTI-ENG-WEB.pdf
BIRN	Court Monitoring Report 2019	https://kallxo.com/wp-content/uploads/2020/11/Recesioni-i-Drejtesise-per-print.pdf

KDI	"CULTURE OF IMPUNITY" IN KOSOVO	https://kdi-kosova.org/publikimet/kultura-e-pandeshkueshmerise-ne-kosove/
KDI TRANSPARENCY INTERNATIONAL	EXAMINING STATE CAPTURE: UNDUE INFLUENCE ON LAW-MAKING AND THE JUDICIARY IN THE WESTERN BALKANS AND TURKEY	https://kdi-kosova.org/publikimet/examining-state-capture-undue-influence-on-law-making-and-the-judiciary-in-the-western-balkans-and-turkey/
KDI CILC FOL	INTEGRITY SCANNING IN THE JUSTICE SECTOR	https://kdi-kosova.org/publikimet/skanimi-i-integritetit-ne-sektorin-e-drejtesise/
KDI	SURVEY REPORT "INITIATIVE FOR INTEGRITY IN THE JUSTICE SYSTEM"	https://kdi-kosova.org/publikimet/raporti-i-anketes-iniciativa-per-integritet-ne-sistemin-e-drejtesise/
KDI	WAITING FOR JUSTICE	https://kdi-kosova.org/publikimet/pritja-per-drejtesi/
FOL	IMPLEMENTATION OF THE WORK PLAN OF THE KOSOVO PROSECUTORIAL COUNCIL (KPC) AND THE STATE PROSECUTOR (SP) FOR 2020	https://levizjafol.org/wp-content/uploads/2021/05/REALIZIMI-I-PLANIT-T%C3%8B-PUN%C3%8BS-S%C3%8B-K%C3%8BSHILLIT-PROKURORIAL-T%C3%8B-KOSOV%C3%8BS-KPK-DHE-T%C3%8B-PROKURORIT-T%C3%8B-SHTETIT-PSH-P%C3%8BR-VITIN-2020.pdf
FOL	PROSECUTOR'S PERFORMANCE IN THE FIGHT AGAINST CORRUPTION 2020	https://levizjafol.org/wp-content/uploads/2021/04/Performanca-E-Prokuroris%C3%AB-N%C3%AB-Luft%C3%ABn-Kund%C3%ABr-Korrupsionit.pdf
BIRN FOL	PROGRAM FOR STRENGTHENING THE JUSTICE SYSTEM REPORT ON MONITORING THE PUBLICATION OF JUDGMENTS	https://kallxo.com/wp-content/uploads/2021/04/01-Raporti-per-publikimin-e-aktgjykimeve-ALB-05.pdf
BIRN FOL	DISCIPLINARY COMPLAINTS AGAINST JUDGES	https://kallxo.com/wp-content/uploads/2020/11/Raporti-Shqip_compressed.pdf

BIRN FOL	Disciplinary Complaints against Judges	https://kallxo.com/wp-content/uploads/2020/02/AL-Ankesat-Disiplinore-ndaj-Gjyqtar%C3%ABve-31.01.pdf

Throughout 2018-2021 the Ministry of Justice, in cooperation with the KJC, KPC and other institutions and international partners, has developed the process of Functional Review for the Rule of Law Sector. The process has already culminated with the adoption in August 2021 of the Rule of Law Strategy for the years 2021-2026. This process, which aimed to culminate with the drafting of the Strategy for Rule of Law, was developed through numerous thorough analysis of the main challenges to rule of law in Kosovo. Among others, the Policy Document on Accountability in the judicial and prosecutorial system (compiled with the support of experts engaged by the European Union) as well as the Document on Integrity in the judicial and prosecutorial system are relevant to the topics treated within this document. The Accountability Document has found that, in general, the judicial and prosecutorial system lacks adequate accountability mechanisms within the systems themselves. Similarly, the Integrity document (compiled with the help of experts hired by the British Embassy in Kosovo) found that these systems lack an adequate verification process. That document emphasized, among other things, that one of the main shortcomings of the system is precisely the lack of an adequate system of verification or control of integrity on a regular and continuous basis. Some of the findings of these documents are briefly summarized and intertwined throughout this document.

This Concept Paper will analyze the current situation – challenges related to the professionalism and integrity of judges and prosecutors in Kosovo; objectives aimed to be achieved through the justice system vetting; various options that can be pursued towards the functioning of vetting mechanisms; and expected impacts. The scope of this Concept Paper will also address certain positions of senior management officials in the justice system, namely: General Director of the KJC Secretariat, General Director of the KPC Secretariat, officials serving in the role of Chief Administrative Officers of the Councils[60], as well as court administrators, responsible for the efficient and effective administration of the courts[61], but also the Director of the Judicial Inspection Unit within

[60] See Article 35 of the Law on the KJC and Article 32 of the Law on the KPC.
[61] See Article 38 of the Law on the KJC.

the KJC[62]. As for other officials are concerned, the Ministry of Justice has envisaged the drafting of another Concept Paper which is expected to be drafted by March 2022, and will address, among other things, the issue of their control. As the vetting in the Kosovo Police, Kosovo Police Inspectorates, KIA and other institutions falls outside the competence of the Ministry of Justice, the development of the process in these institutions is left to the relevant institutions.[63]

Returning to the issue addressed in this Concept Paper, prior to entering into specific challenges of professionalism and integrity, it is worth noting that a type of vetting has been developed previously in Kosovo for judges and prosecutors.[64] This occurred in 2010, when the Independent Judicial and Prosecutorial Commission (IJPC), an independent body of 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 was developed in three consecutive phases:

- Phase I, focused on the selection of judges for the Supreme Court and the selection of prosecutors for the State Prosecution and Special Prosecution;
- Phase II, focused on the selection of judges for District Courts, the Commercial Court, the High Court for Minor Offenses, and the District Prosecutions, and
- Phase III, focused on the selection of judges and prosecutors in municipalities.

According to Administrative Direction 2008/2, which regulated this process, all candidates, without exception, were required to undertake the examination on relevant Codes of Ethics, and only those who pass the exam may continue their work. In total, of 372 announced judicial positions, 274 judges were appointed, and 60 prosecutors were appointed out of 89 announced prosecutorial positions. The following table shows the data from the process in three phases:

Figure 4: 2010 vetting data

[62] See Article 36 of the Law on the KJC.

[63] This conclusion has been reached during the discussions of the Working Group in the workshop held in Prevalla, on 2 and 3 June 2021. It was discussed that the vetting of other institutions will be carried out by these institutions themselves.

[64] This process is explained in the document 'Accountability modalities with the involvement of Vetting in the justice system in Kosovo', December 15, 2020 (Chapter 1.6, pages 14-17). The document was developed by a working group composed of the Government, justice system institutions, representatives of the civil society, and the international community. The document is available at: https://md.rks-gov.net/desk/inc/media/49D1EDD2-D94B-4A6A-87C0-79F64275F928.pdf

Faza	Pozitat e shpallura	Të emëruar	Riemërimet	Të emëruarit e rinjë	Femra	Minoritetet
Faza I	33	26 (78.79%)	9 (34.61%)	17(65.38%)	11 (42.31%)	1 (3.84%)
Faza II	109	86 (78.90%)	31 (36.04%)	55 (63.96%)	21 (24.4)	6 (6.97%)
Faza III	319	222 (69.59%)	92 (41.44%)	130 (58.56%)	63 (28.37%)	8 (3.60%)
Totali	**461**	**334 (72.45%)**	**132 (39.52%)**	**202 (60.48%)**	**95 (28.44%)**	**15 (4.45%)**

In phase I (one), out of 33 announced positions, 26 positions for judges and prosecutors have been filled or (78.79%. It is important that out of these 26 positions, 9 of them have been reappointments or 34.61%, and 17 new appointees, or 65.38%. In phase II (two), 109 positions were announced, 86 positions were filled or 78.90%, of which 31 or 36.04% were reappointments and 55 or 63.96% were new appointees. In phase III (three), 319 positions were announced, 222 or 69.59% were filled, of which 92 or 41.44% were reappointments and 130 or 58.56% were new appointees. Thus, out of the total of 461 vacancies, 334 or 72.45% were filled, of which 132 were reappointments or 39.52%, while 202 or 60.48% were newly appointed judges and prosecutors. This comparison shows that the process in terms of reforms of positions has been quite positive and a very impartial and credible assessment.[65] Thus, through this process was not possible to fill all the vacancies announced, consequently leaving the judicial system with a low number of judges and prosecutors and a high number of cases in the courts and prosecutions, already overloaded and understaffed, even before this process.

It can be concluded that the process has had its negative and positive sides. The positives are as follows[66]:

- Experience gained in organizing and administering such a process safely, including the use of information technology to facilitate the process;
- Cooperation with local and international institutions to use their data for the process;
- Use of standard operating procedures for verification /vetting of each applicant;
- Creating and using standard interview questions that cover all relevant evaluation criteria;

[65] See for example: Final Main Report, Annex G: Country Report - Kosovo under Thematic Evaluation of Rule of Law, Judicial Reform and Fight against Corruption and Organised Crime in the Western Balkans – Lot 3, February 2013, p. 209. available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/financial_assistance/phare/evaluation/2013_final_main_report_lot_3.pdf

[66] This process is explained in the document 'Accountability modalities with the involvement of Vetting in the justice system in Kosovo', 15 December 2020 (Chapter 1.6, pages 16-17).

● Use of standard evaluation forms;
● The verification process should be continuous, with follow-up in certain time periods. Verification should not be performed as a one-off event, discontinued in the future;
● The final report of the process concludes that the process did not adequately include the verification of property, the financial aspect - financial interests, income and expenses, past work of applicants, etc.
● There were no precise evaluation criteria defined in advance, in particular for elimination. Such criteria must be set in advance in order to eliminate any discretionary possibility in the process.

1.2. Main Issue, Causes and Effects

In order to better understand the current situation, on Kosovo judiciary, in accordance with the approved guidelines of the Government for drafting Concept Notes[67], a problem tree was developed to display the '**main issue'**, the '**causes'** – the factors that cause the main problem, and the '**effects'** caused by this main issue for Kosovo society and individuals in particular.

Figure 5: Problem tree

Effects	Loss of citizens' trust in justice
	Human rights violations
	Stagnation in economic and social development
Core Problem	**Professionalism and integrity of judges, prosecutors and officials in senior positions in the justice system**
Causes	Legal gaps

[67] http://kryeministri-ks.net/wp-content/uploads/2018/06/Udhezuesi-dhe-Doracaku-per-Hartimin-e-Koncept-Dokumenteve-Shq-24-05-18_Publish.pdf

	Inadequate implementation of applicable legislation

Core Problem

Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them. According to the constitutional and legal system in the country, also based on international instruments, the judiciary should be a branch of power entirely independent of the executive and the legislature. In addition to its independence, the impartiality of the judiciary is another essential quality of the judiciary.

However, as noted in the introduction to this Concept Note, it has been consistently found and reported that the justice system in Kosovo is influenced and vulnerable to various groups of interest, politics and other external factors. Moreover, there is a lack of professionalism in the system. As a result, some judges and prosecutors, but also officials in senior positions, may take actions or render decisions that do not serve justice and the constitutional and legal provisions which they should serve. Despite this overall image created, there are professional and regular individuals among judges and prosecutors as well as administrative and support staff. However, the existing circumstances do not allow them to have an impact on improving this overall image.

Causes

The Working Group has identified two main causes that have influenced so far, and have the potential to affect in the future, the vulnerability of the integrity of judges and prosecutors in the Republic of Kosovo, as well as senior officials within the justice system. These are elaborated in the following sections.

1.2.1. Legal gaps

Legislation governing the justice system, to some extent, does fail to provide solutions in a way of ensuring a system, whose members are persons of high integrity. This is because:

1. At the onset, the existing legal framework does not provide an **adequate mechanism for a repetitive or continued verification of the integrity** of judges and prosecutors. Verification of personal integrity is conducted, in principle, only when recruiting candidates for these functions. Even during this process, the integrity of a candidate is assessed by scores of points, which are then calculated together with other

scores assigned to professional skills of such candidate. As mentioned above, these two assessments should be distinct. This would disallow the accumulation of high scores for a candidate who is highly rated in professional skills, but who displays flawed integrity, and vice versa.

It should also be mentioned that some kind of fitness assessment is conducted in the case of promotions, i.e. judges and prosecutors assuming managerial positions. Such an assessment is not based on any specific norms or rules introduced by primary legislation, it is only regulated by secondary acts issued by the KJC, respectively KPC. In cases of promotion of prosecutors, this assessment, in terms of integrity, is even more limited, as it is based mainly on records regarding the disciplinary background of the candidate. For the promotion of judges, a wider range of data is analyzed in terms of their integrity.

The biggest drawback lies in the fact that the assessment of the integrity of judges and prosecutors in their regular careers is currently incorporated in the context of periodic performance appraisal, a segment of numerical scores, in which case integrity is calculated cumulatively with other relevant segments, in evaluating performance[68]. In this case, no investigative mechanisms are not engaged in terms of integrity verification. In addition, it should be noted that the set of data that can be collected in the framework of this assessment is legally limited and prevents proper data collection (see above for clarifications on this issue).

Hence, in conclusion, there are only two moments when it is properly investigated whether or not an individual has the appropriate personal integrity to hold a relevant position within the justice system in Kosovo.

The situation is similar with officials in senior positions in the system. They are not subject to the necessary integrity verification, either at the recruitment stage or on an ongoing basis. Criteria for their recruitment, which apply to all public officials[69] alike, among others involving integrity are as follows:

1. No final conviction on the commission, with intent, of a criminal offense, and
2. No current disciplinary measure for dismissal of a public official from a position.

[68] According to the KJC comments, an integrity test is performed at the end of the initial training. However, it has been confirmed that the final evaluation after the completion of the initial training is an evaluation focused only on aspects of the judge's professionalism. Also, the limited set of data that can be legally collected is very limited, as explained within the document.
[69] Law on Public Officials, Article 8.

Meanwhile, their dismissal from a position is possible only if:

1. No final conviction on the commission, with intent, of a criminal offense;[70]
2. No final convicting ruling for any criminal offense, imposing an effective imprisonment for three (3) months or more;[71]
3. after two "unsatisfactory" scores, for two years in a row, in terms of performance at work;[72] if found incapacitated for work by a competent medical commission, according to the law;[73]
4. found in a situation of ongoing conflict of interest, declared by themselves and, according to the law, no measures provided for the avoidance of conflict of interest are taken;[74]
5. when they join a political party or become members of managing bodies of a political party;[75]

In 2017, the KJC has also rendered specific Regulations for the appointment of the Director General of the KJC Secretariat.[76] The criteria, among others, emphasize the high professional reputation and personal integrity that candidates for this position should have, but for this issue, there has been no formal verification procedure.

Regarding the disclosure of assets, according to the Law on Disclosure of Assets, the Directors of the Secretariats declare their assets, and are subject to verification of assets, in accordance with that Law, while the administrators of courts and prosecutor's offices are not obliged to declare assets at all.

Furthermore, according to Judgment no. KO203/19, the Constitutional Court has concluded that Law no. 06/L-114 on Public Officials does not apply in relation to these positions. Consequently, the issue of recruitment and discipline of these positions remains unregulated, as neither the provisions nor the relevant regulation of the mentioned law apply. With regard to the institutions of the justice system, the

[70] Ibid. Article 60.1.5.
[71] Ibid. Article 60.1.6.
[72] Ibid. Article 61.1.3.
[73] Ibid. Article 61.1.2.
[74] Ibid. Article 61.1.5.
[75] Ibid. Article 61.1.6.
[76] Regulation no. 03/2017 on the Procedure for the Selection and Appointment of the Director of the Secretariat of the Judicial Council. Available at: https://www.gjyqesori-rks.org/wp-content/uploads/lgsl/RREGULLORE%20NR.%2003%202017%20P%C3%8BR%20PROCEDUR%C3%8BN%20E%20P%C3%8BRZGJEDHJES%20DHE%20EM%C3%8BRIMIT%20T%C3%8B%20DREJTORIT%20T%C3%8B%20SEKRETARIATIT%20T%C3%8B%20K%C3%8BSHILLIT%20GJYQ%C3%8BSOR%20T%C3%8B%20KOSOV%C3%8BS.pdf

Constitutional Court has not found it necessary to annul these provisions in their entirety as these provisions also apply to officials of independent constitutional institutions as long as they do not infringe on their independence and also apply in relation to officials of other institutions whose constitutionality has not been specifically challenged before the Court. Until the completion and amendment of Law no. 06/L-114 on Public Officials by the Assembly, the provisions of this Law shall apply only insofar as they do not affect the functional and organizational independence of the Independent Institutions specifically referred to in the Provisions of this Judgment.

Thus, based on the above, one may notice that even in terms of officials in senior positions, there are legal gaps in terms of integrity verification.

2. There are also shortcomings in terms of the **legal establishment of the mechanisms for integrity evaluation** of candidates for judges and prosecutors. To date, integrity assessment mechanisms are not grounded upon primary legislation, but are generally established by derivative regulations drafted by councils. Moreover, while the KJC has determined the establishment of an integrity checking unit, the KPC regulation stipulates that the Recruitment Committee, when evaluating candidates, is assisted by responsible KPC officials. **There is no provision of integrity checks of those who assess the integrity of candidates for judges and prosecutors, and as a result, they are practically not subject to vetting themselves.**

3. Further, current regulations define **a rather narrow range of data obtained** when checking the integrity of candidates. Data sources used in the case of integrity assessment include data submitted by the candidate himself or herself, and data from public registries, which also include records of criminal background. **A major issue here is that there is no consideration of financial data,** including the bank accounts, of the candidates.

4. Applicable provisions also **fail to give due importance to the outputs of the integrity assessment**. The Verification Unit does not have the power to suspend the appointment of a candidate as a prosecutor or judge, since Recruitment Committees are the authorities with the decision-making power.

5. There are also legal shortcomings regarding the **suspension of a judge or prosecutor under investigation for a serious disciplinary offense**. In drafting the Law on Disciplinary Liability of Judges and Prosecutors, a technical omission was

allowed, the rectification of which required a full amendment process. Consequently, prosecutors and judges who are actually under investigation for serious disciplinary offenses may continue to exercise their function regularly until a ruling is rendered in such disciplinary proceeding. It is worth mentioning that this law is already in the process of amendment in the Assembly, so this shortcoming is expected to be eliminated rather soon.

6. **The ambiguity and scope of the grounds for dismissal for "serious neglect of duties"** is also considered a shortcoming. The Constitution of the Republic of Kosovo provides on one of the causes for dismissal from office, which is the sentence for a serious criminal offense, or serious neglect of duties, however the latter is not clearly defined[77]. The dilemma is whether integrity flaws of a judge constitute "serious neglect of duties". It requires to be reiterated that currently, the integrity assessment of judges and prosecutors is part of their performance appraisal. Judges are also required to disclose their assets on an annual basis. However, it is still impossible to comprehend from the applicable legal and constitutional framework which of the flaws identified in such appraisal would reach the bar of "serious neglect of duties".

As a result of the above, and in due consideration of the constitutional provisions of an independent and impartial justice system, one may claim that the applicable legal framework does not underpin the guarantee of these requirements.

1.2.2. Inadequate implementation of applicable legislation

Having a comprehensive and well-structured legal framework is a prerequisite for the proper functioning of a democratic state. However, legislation norms by themselves do not necessary guarantee success. There is much criticism of the implementation of applicable law by judges and prosecutors, and councils. Deficiencies in implementation have been noted, as follows:

1. Inadequate implementation of the rules on **"fit for purpose" for being a judge or prosecutor, or even a member of the KJC, respectively KPC.**

   Under the applicable legislation, judges and prosecutors must obtain prior approval from the respective Court Presidents/Chief Prosecutors to engage in non-judicial activities, which are not strictly prohibited. On the other hand, the

[77] Articles 104 and 109 of the Constitution of the Republic of Kosovo.

relevant Court Presidents and Chief Prosecutors must seek the prior approval of the KJC/KPC. There are concerns regarding the fact that decisions on these requests do not seem to be grounded upon any thorough analysis of the suitability of such exercise of activities in the relevant cases. Further, there are frequent reports on some judges and prosecutors exercising a number of extra-judicial functions, from which they obtain financial remuneration, and not only from the state budget, but also from external donors, and occasionally from non-governmental organizations.[78] Consequently, these occurrences seriously undermine the independence and impartiality of these judges and prosecutors, and potentially lead to conflict of interest.

Representatives of the prosecutorial and judicial systems often engage in a rather extensive interpretation of the independence of the justice system, thus leading to a **stalling in accountability**. This is despite the fact that the constitutional and legal regulations provide for such an obligation.

As extensively elaborated in this Concept Paper, there is stagnation in accountability, both within the system and externally. These setbacks are evident, especially in the qualitative sense of accountability. Within the judiciary and the prosecution, problems with accountability are thought to be extended in two aspects: 1) regarding the relationship between the relevant Councils, and judges, respectively, prosecutors, and 2) the relationship between prosecutors and judges in management positions with the respective councils.[79]

Accountability before the public is not in better state either, where for many years, there have been reports on difficulties in accessing information, as well as on annual reports with incomplete and fragmented data although there has been progress recently.[80] As the work of courts and prosecutors has always been difficult to access for the public, the good work of judges and prosecutors has remained out of the public eye.

2. Another issue in the context of inadequate implementation of current legislation is the **performance appraisal of judges and prosecutors**. Over the years, the legal norms have been used to establish adequate mechanisms and procedures for conducting performance appraisals of judges and prosecutors. However, civil

[78] Policy Paper "*Improving the Accountability of Judicial and Prosecutorial Systems*", Functional Review of the Rule of Law Sector in Kosovo (June 2019).
[79] This section will be further elaborated
[80] See: Policy Paper "*Improving the Accountability of Judicial and Prosecutorial Systems*", p. 38.

society organizations note that such regulations are constantly changing. According to them, in addition to not providing any quality, this frequent change to some extent has affected the legal security of entities which are subject to performance appraisal.[81] Moreover, in practice, the occurrence of "formulate" performance appraisal is reported all the time, together with a lack of action taken to counter the occurrence. In 2018, 94% of prosecutors and 100% of judges in permanent terms were scored "good" or "very good", and none of them was rated "insufficient"[82]. Similarly, in 2019, 95% of prosecutors and 99% of full-term judges were rated "good" or "very good", and none were rated "insufficient"[83]. At first glance, these figures generate the impression that the system is functioning almost perfectly, with no delays, free of any influence, with a high level of professionalism, but when one views international and civil society reports, one will see the above figures are not based on reality.

As a result of these figures, difficulties have arisen in the case of promotion of judges, namely prosecutors. Due to the largely identical evaluation of their performance, it has been difficult to select the most professional candidates[84]. Due to this, according to civil society organizations, even possible manipulations in the case of promotion of judges and prosecutors are difficult to prove, because almost all candidates have the same level of formal skills and this fact increases the potential for arbitrariness with the case of promotions of judges or prosecutors.[85] Moreover, delays in performance appraisal generate a perception of forgiveness of errors by certain judges and prosecutors, potentially rendering them comfortable in the face of undue influence and non-professionalism. At the same time, with these setbacks and irregularities in performance appraisal, the performance of those judges and prosecutors who do a good job cannot be properly assessed. For now, both Councils have adopted new performance appraisal rules for judges and prosecutors, focusing more on qualitative criteria.

A similar situation appears also in performance appraisals of officials in senior positions.

3. There is reporting also on **improper functioning of disciplinary mechanisms for judges and prosecutors.** Although domestic legislation provides for a number of

[81] IKD comments from the Public Consultation, p. 6.
[82] Progress Report for Kosovo, 2019, p. 17.
[83] Progress Report for Kosovo, 2020, p. 20.
[84] Interview with the President of the Court of Appeals, on 18.11.2019, conducted by the British Embassy project for Strengthening of Justice, quoted in the Integrity Policy Document.
[85] IKD comments from the Public Consultation, p. 5.

sanctions that may be imposed by the KJC/KPC, the disciplinary sanctions imposed so far have been deemed disproportionate to the degree of offenses or misconducts of judges and prosecutors. In this regard, civil society organizations have stated that they have repeatedly requested the initiation of disciplinary proceedings against prosecutors and judges for disciplinary offenses, but rarely have measures been taken.[86] Even in those cases where allegations of violations have been initiated, according to civil society, the measures have been lenient, such as: salary-related sanctions, reprimands, and the like.[87] However, the Councils do not agree with such a finding. According to KPC, until 2021, this Council has imposed disciplinary measures against more than 20% of prosecutors, while in recent years, there have been decisions even on mandatory re-training.[88] While it may be quite the positive fact that the Councils have begun imposing adequate measures against offenses and poor performance, the concern is that there are no specific mechanisms and procedures in place to implement these measures.[89] According to the Justice Academy, none of the judges upon which a ruling on mandatory training was imposed have attended such training.[90]

Effects

The issues elaborated within the frame of this Concept Note have resulted in the disclosure of **a number of negative effects** on the Kosovan society. Three are the most essential ones:

1. Initially, the current situation with the courts and the state prosecution, as well as the justice system in general, results in the loss of citizens' trust in justice, as evidenced by the various surveys conducted over the years, yielding similar results. It is certain that in the justice system there are worthy judges and prosecutors with high integrity. Despite this, the general situation has resulted in a loss of citizens' trust, thus overshadowing the good work of these judges and prosecutors.
2. Beyond the loss of trust in justice, another result is also the violation of human rights. Numerous cases of statute of limitations in cases and intentional violations of legal deadlines by professionals within the system have been reported over the

[86] Extracted from the Workshop on drafting the Concept Paper for the development of the vetting process in the justice system, held on 02-04.06.2021.
[87] Ibid.
[88] Extracted from the data provided by KPC, for the purposes of this Concept Paper, on 09.06.2021.
[89] Extracted from the Concept Paper Drafting Workshop.
[90] Ibid.

years. Such cases, when they involve citizens, violate, among others, the right to a fair and impartial trial, as guaranteed by the Constitution and international law.

3. Finally, the lack of integrity in the justice system adversely affects the economic and social development of Kosovo. This is due to the absence of foreign investments, which require as a precondition a stable and fair justice system, as well as stagnation in Kosovo's path towards Euro-Atlantic integration.

These issues discussed above are horizontally linked to different institutions and social categories. Consequently, the stakeholders presented in Figure 4 below have been identified. It also elaborates on the causes or effects that have affected these stakeholders, and in what way.

Figure 6: Overview of stakeholders, based on the problem definition

Name of stakeholder	**Cause(s) related to/affecting the stakeholder**	**Effect(s) related to/affecting the stakeholder**	**Manner in which the stakeholder is related to/affected by the cause(s) and/or effect(s)**
Ministry of Justice	- Legal gaps.	- Stagnation in economic and social development; - Loss of citizens' trust in justice.	Maker of policies establishing and regulating the justice system in Kosovo.
Kosovo Judicial Council	- Legal gaps; - Inadequate implementation of applicable legislation.	- Human rights violations; - Stagnation in economic and social development; - Loss of citizens' trust in justice.	A state authority responsible for ensuring the independence, professionalism and impartiality of the judicial system.

Kosovo Prosecutorial Council	- Legal gaps; - Inadequate implementation of applicable legislation.	- Human rights violations; - Stagnation in economic and social development; - Loss of citizens' trust in justice.	A state authority responsible for ensuring the independence, professionalism and impartiality of the prosecutorial system.
State Prosecutor	- Legal gaps; - Inadequate implementation of applicable legislation.	- Human rights violations; - Stagnation in economic and social development; - Loss of citizens' trust in justice.	An independent institution with authority and responsibility for criminal prosecution, as provided by law.
Courts	- Legal gaps; - Inadequate implementation of applicable legislation.	- Human rights violations; - Stagnation in economic and social development; - Loss of citizens' trust in justice.	Organizational units that must exercise judicial power in the country in an independent, fair, non-political and impartial manner.
KACA	- Legal gaps; - Inadequate implementation of	- Human rights violations;	A state body vested with oversight of assets of senior public officials and other

	applicable legislation.	- Stagnation in economic and social development; - Loss of citizens' trust in justice.	persons, as provided by special law.
CSOs	- Legal gaps; - Inadequate implementation of applicable legislation.		CSOs monitor the drafting and implementation of legislation.
Citizens		- Human rights violations; - Stagnation in economic and social development; - Loss of citizens' trust in justice.	Citizens suffer as a result of stagnation in the justice system.

The analysis of the factual situation elaborated in the chapter "Core Problem" identifies as the main problem the professionalism and integrity of judges, prosecutors and officials in high positions in the justice system. This serious and chronic problem has been consistently identified also by international reports, including the EC Country Reports and also by a number of civil society reports. These reports argue the alarming situation in the justice system, which as such, could not be addressed through proper mechanisms. The analysis concludes that the causes of this problem are legal shortcomings but also inadequate implementation of applicable legislation. According to this detailed analysis, three main effects have also been identified: the loss of citizens' trust in justice, the violation of human rights, and the negative impact on the economic and social development of Kosovo.

By using exactly the same practices of other countries and the international standards addressed in the Concept Paper, it has been concluded that the achievement of the goal -

which is to increase the integrity of the justice system and restore citizens' trust in the justice system, can be achieved only through the development of vetting and continuous evaluation of performance, integrity and wealth in the justice system. As discussed in Options 1 and 2, experience has shown that any other effort over the years has failed to provide a complete solution and has provided unsatisfactory, partial and unsustainable results. Therefore, vetting and continuous vetting-inspired evaluation is valued to be the only way to achieve complete and consistent results.

Clarifications regarding the term "vetting"

One of the items that may lead to some uncertainty regarding the content of the vetting process is precisely the meaning of the term "veting" (in English "vetting"), and its confusion with many other similar processes.

First of all, one should note that the Albanian language lacks a term equivalent to the term "vetting" in English. The term has already entered into the Albanian language as the term "veting", which is often mentioned in public discourse. However, from the discussions held in the Ministry of Justice and within the working group, it was identified that there is a variety of opinions on the term and its meaning. Therefore, for the purposes of this paper, it is important to clarify the meanings of these different terms and processes[91].

Verification of the past (**Background checks**), conducted before vetting or integrity checks, are conducted to confirm the identity and ascertain reliability and integrity of a person. They are conducted to verify the identity of the subject, employment history, the right to work in the country, and to ascertain any unserved criminal sentence. Such verifications/checks are performed by almost all employers, and are a necessary prerequisite for more rigorous verification processes. Whenever necessary, integrity checks or vetting include a range of additional checks, including financial status and any risk of vulnerability that may arise due to family and co-workers. Such checks should seek to be conducted proportionally to the suspicion whether an individual has been involved in corruption in the past, is currently involved in corruption, or is likely to be involved in corruption in the future, and the risk they may pose in the performance of their duties as a result of their involvement in such corrupt affairs.

[91] The definitions of the following terms have been adapted from the Integrity Policy Paper, compiled as part of the process of Functional Review of the Rule of Law Sector. Further citations have been removed.

Performance appraisals differ from vetting or integrity checks. Vetting and background checks seek to address integrity and vulnerabilities, while performance appraisals address competence and potential. The implications of the processes are different: failure in background check may result in an unsuitable candidate not being appointed to a position, being denied access to sensitive material, or barring the person from changing the position he or she holds. On the other hand, the consequence of poor performance appraisal is inadequate professional career development.

Integrity checking processes and criminal or civil investigations are **often combined.** Integrity checking and criminal investigation serve different purposes and have different procedural and legal features. An investigation is initiated on the basis of a requirement to ascertain whether something has occurred, while integrity checks look at the risk or likelihood that something will happen in the future. Critically, the burden of proof and the standard of proof will often be different. In jurisdictions that apply common law, criminal investigations seek to establish a fact beyond a reasonable doubt, meaning that the burden shall fall on the State. In a system of vetting and integrity checks, it may be perfectly legitimate to shift the burden of proof from the state to the judge/prosecutor seeking recruitment, or holding a position. The standard of proof can often be met in the balance of probabilities.

The recruitment process for judges and prosecutors may be testimony of a confusion between these terms and processes. Before being invited for an interview, candidates who have passed a written test undergo an assessment of personal integrity and professional skills. The results of such assessment, expressed in numbers or scores, are then calculated as part of the overall interview score. This process seems to be a mixture of background checks, which should be part of a verification process undertaken only after the completion of the recruitment or approval process in principle, based on the qualities, skills and abilities of the candidate.

Given that proper background checks at an appropriate stage in the appointment of judges are an essential step in the fight against corruption, **it is very important that these two different assessments are separated from each other.** Background checks should not be part of the process of evaluation of a candidate 's fitness to be a judge, but should be undertaken separately, and in a more systematic and rigorous manner.

Vetting, as a form of integrity control, assesses the risk against a set objective, and the operational parameters defined by that very objective. In this document, the risk is addressed from the perspective of improving the transparency, integrity and accountability of the judicial and prosecutorial systems of Kosovo, along with the trust

that citizens have in it. Research on this concept paper shows that the risk that needs to be eliminated is an individual's susceptibility to corruption. All subsequent processes should therefore aim to assess the confidence, integrity and credibility of members of the judicial and prosecutorial system.

The purpose of vetting under this policy is not to punish according to the provisions of the Criminal Code, in accordance with the procedure and protective measures established by applicable law, or to tarnish or retaliate against members of the justice system. Rather, the goal is actually to protect judges and prosecutors and other members with integrity in the justice system from influences and to enable them to make fair and law-based decisions.

1.4. Relevant international standards

For the purposes of drafting this Concept Paper, a range of international instruments have been consulted, ranging from multilateral instruments of a binding nature, to other instruments of soft law and relevant documents, drafted and sponsored by the UN, specialized agencies UN and Council of Europe.

In general, it is noted that the cornerstone of this whole framework is laid by key conventions for the protection and guarantee of human rights and freedoms. The instruments of soft law translate the principles of these conventions - as well as the commitments and obligations that Member States have made in relation to them, into concrete action. These instruments provide general guidance on what an independent judiciary and prosecutorial system should look like as a basic precondition for the rule of law and respect for human rights in a country.

In addition to their status as international standards, some of the instruments discussed below also have a direct legal effect on the legal system of Kosovo, in relation to Article 22 of the Constitution of the Republic of Kosovo.[92]

1.4.1 Multilateral and regional instruments of binding character

The cornerstone of international legislation on human rights and freedoms is laid by, inter alia, the Charter of the United Nations, the Universal Declaration of Human Rights, the

[92] In accordance with Article 22 of the Constitution, the human rights and freedoms guaranteed by, inter alia, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, are directly applicable in the Republic of Kosovo and, in case of conflict, have priority over provisions of laws and other acts of public institutions.

European Convention on Human Rights and the International Covenant on Civil and Political Rights. The **United Nations Charter**[93], affirms the commitment to create conditions that guarantee justice and as one of the goals, proclaims international cooperation in promoting and promoting respect for human rights and fundamental freedoms, regardless of race, gender, language or religion.

Universal Declaration of Human Rights[94] stipulates in Article 10 that everyone has the right to a fair and public trial before an impartial and independent tribunal to decide on his rights and obligations and on any criminal charges against him.

As for the right to a fair trial**, International Covenant on Civil and Political Rights**[95] specifies the "guarantees" to be provided to each in a criminal proceeding, including the presumption of innocence, information on the nature and cause of the charge, the provision of sufficient time to prepare the defense, the right to defend oneself or authorized representative, protection against self-incrimination, the right to appeal and review of the case by a court of higher instance and the right to judicial rehabilitation.

European Convention on Human Rights[96] obliges the guarantee of the right to a fair trial, the right to privacy and family life, as well as the right to practice the profession freely. These rights are also recognized under the Universal Declaration of Human Rights. The Constitution of the Republic of Kosovo also provides that human rights and fundamental freedoms guaranteed by the Constitution are interpreted in accordance with the jurisprudence of Strasbourg.[97]

This Convention in Article 6 provides for the right to a fair trial, according to which every person has the right to have his case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal established by law, which will decide both on disputes regarding his rights and obligations of a civil nature, as well as on the merits of any criminal charges against him. The decision must be given publicly, but the presence in the courtroom may be denied to the press and the public throughout the process or part of it, in the interests of morality, public order or national security in a democratic society, when required by the interests of minors or the protection of the privacy of the

[93] https://treaties.un.org/doc/publication/ctc/uncharter.pdf
[94] https://www.un.org/en/about-us/universal-declaration-of-human-rights
[95] https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf
[96] https://www.echr.coe.int/documents/convention_eng.pdf
[97] Constitution of the Republic of Kosovo, Article 53.

parties to the proceedings or to the extent deemed too necessary by the court, when in special circumstances publicity would harm the interests of justice.

The second paragraph of this Article also establishes the principle of presumption of innocence. Furthermore, in paragraph 3 of this article are guaranteed some minimum rights for every person accused of a criminal offense, which include: information within the shortest possible time in the language he understands, to be given time to prepare a defense, to defend himself or herself or by a lawyer of his choice or to be provided with free legal aid, to request the examination of witnesses, and to have a free interpreter if he does not understand the language used in court.

Furthermore, according to Article 8 of the European Convention on Human Rights, the right of everyone to respect for his private and family life, home and correspondence is guaranteed. The public authority may not interfere in the exercise of this right, unless this is provided by law and is necessary, in the interest of public safety, for the protection of public order, health or morals or for the protection of rights and freedoms of others.

Charter of Fundamental Rights of the European Union[98] defines the most important personal freedoms and rights in the European Union. The Charter is listed as the primary source of EU law and is a mandatory document for member states.

In the chapter that defines freedoms, this instrument in Article 7 regulates the respect of private and family life, while in article 8 the protection of data of persons. According to Article 8, paragraph 2, it is stipulated that the personal data of an entity must be processed fairly, for certain purposes and on the basis of the acceptance of the person in question or on another legitimate basis established by law.

Article 47 of the Charter provides for the right to an effective remedy and a fair trial, which enables anyone whose rights and freedoms guaranteed by Union law have been violated to have a fair trial and the public within a reasonable time before an independent and impartial tribunal established by law. Everyone is given the opportunity to be advised, defended and represented. Meanwhile, for persons who do not have sufficient resources, they will be guaranteed the right to free legal aid to the extent required to ensure effective use of the justice system.

From the above, the catalog of rights and freedoms guaranteed to everyone, including judges and prosecutors as vetting objects, must be carefully considered throughout each

[98] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN

design phase and then the implementation of the vetting reform. The experience of vetting in other countries is the best illustrator of what the vetting process inevitably affects, violates and even restricts the freedoms and rights provided by international instruments. The issue of striking a balance between achieving the goals of vetting as a general interest on the one hand and not violating human rights and freedoms where presented as very critical.

1.4.2 International instruments of soft law

1. Basic UN Principles for the Independence of the Judiciary[99]

The 1985 UN Basic Principles on the Independence of the Judiciary are designed to facilitate the implementation of fundamental rights and principles by UN member states under the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights. Ensuring and promoting the independence of the judiciary is considered an essential precondition for this. This instrument sets out the basic principles for the independence of the judiciary in the following categories: (1) independence of the judiciary, (2) freedom of expression and association, (3) qualifications, selection and training, (4) conditions of service and tenure, (5) professional secrecy and immunity, and (6) discipline, suspension and removal.

In the chapter on the principle of independence of the judiciary, it is mentioned that everyone should have the right to be tried by regular courts or tribunals, according to the procedures established by law. The substantive jurisdiction of regular courts or tribunals should not be transferred to tribunals that do not operate in accordance with the procedures established by law.

According to the principle of freedom of expression and association, members of the judiciary, like other citizens, have the right to freedom of expression, belief and association, provided that during the exercise of these rights, the judge behaves in such a way as to preserve the dignity of the institution and the independence and impartiality of the judiciary.

With regard to the issue of mandate, according to the UN Basic Principles on the Independence of the Judiciary, judges should be guaranteed a term of office until reaching retirement age, or until the expiration of a predetermined term of office.

[99] https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx

According to the chapter on discipline, suspension and removal, it is determined that the judge should have the right to a fair trial during the development of procedures aimed at reviewing his judicial and professional skills. Such proceedings should be kept confidential in the initial stages, unless the judge requires otherwise. Judges may be suspended or removed from office only on grounds of incompetence or conduct which renders them unfit to practice the profession of judge.

1. **UN Guide to the Role of Prosecutors**[100]

This instrument was drafted by the Eighth United Nations Congress on Crime Prevention, held in Cuba from 27 August to 7 September 1990. It is based on the Charter of the UN Charter and the Universal Declaration of Human Rights.

This instrument stipulates that in order to exercise the duty of prosecutor, the person must have the necessary integrity, skills and training and qualifications. As essential agents of the administration of justice, prosecutors must at all times preserve the honor and dignity of the profession.

Prosecutors, like other citizens, have the right to freedom of expression, belief and association. However, in exercising these rights, prosecutors must continually comply with the law and recognized ethical standards of their profession.

In the Chapter on Disciplinary Procedures, the UN Guide to the Role of Prosecutors, adopted in 1990, stipulates that disciplinary violations by prosecutors must be based on law and legal regulation and be conducted in accordance with due process. Prosecutors should have the right to a fair trial and appeal. Disciplinary proceedings against prosecutors should guarantee objective scrutiny and decision-making.

2. **Bangalore Principles[101] and Measures to Implement the Bangalore Principles[102]**

The Bangalore Principles of 2002 are an instrument of soft law with wide international acceptance, establishing the six basic principles of ethical conduct of judges. The six principles that set the standard for a judge's conduct are: independence, impartiality, integrity, appropriateness, equality and competence. A judge should present and promote the highest standards of judicial conduct, in order to strengthen civic trust in the

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[100] https://www.ohchr.org/en/professionalinterest/pages/roleofprosecutors.aspx

[101] https://www.unodc.org/ji/resdb/data/2006/_220_/the_bangalore_principles_of_judicial_conduct_ecosoc_resolution_200623.html?lng=en

[102] https://www.icj.org/wp-content/uploads/2015/08/JIG-Measures-effective-implementation-Bangalore-Principles-2010.pdf

judiciary. According to the principle of integrity, the Guide to Measures for the Application of Bangalore Principles sets out certain criteria for disciplinary proceedings against judges in general and at the same time of interest to the vetting procedure, which is a form of disciplinary procedure.

The Guideline states that each judiciary should establish a so-called credible and independent ethics committee to investigate, resolve and decide on complaints of unethical conduct by judges. This body should consist of a majority of judges, but it is preferable to include secular representatives as well.

Regarding the qualifications to be a judge, it is determined that the evaluation of a candidate is done on the basis of skills, integrity and education of qualifications in the field of justice. In making this assessment, the social awareness and sensitivity and other personal qualities of the candidate should also be taken into account, such as sense of ethics, patience, politeness, sincerity, composure, humility, punctuality and communication skills. A person's political and religious beliefs should not be taken into account only to the extent that they would interfere with the exercise of his duties as a judge.

With regard to the appointment of judges, measures to implement the Bangalore Principles provide that the provisions for the appointment of judges should be determined by law. Members of the judiciary and members of the community should play their respective roles in selecting suitable candidates for judicial office. It is envisaged that where an independent council or commission is established to appoint judges, its members should be selected on the basis of competence, expertise, understanding of judicial life, capacity for due process and appreciation of the importance of a culture of independence. Its non-judge members can be selected from among distinguished jurists or citizens with reputable and recognized experience selected by the appropriate appointment mechanism.

In accordance with the Bangalore Principles, judges must be guaranteed a term until retirement or the term of office must be determined in advance and precisely. A judge may be removed from office only in case of loss of capacity to act, committing a serious criminal offense, incompetence of a high degree or conduct that is contrary to the independence, impartiality and integrity of the judiciary.

As another measure for the application of the Bangalore Principles it is also emphasized that disciplinary proceedings against a judge should be initiated only in serious cases of misconduct. The applicable law should specify as clearly as possible the circumstances,

the conduct leading to the disciplinary sanctions, as well as the procedure to be followed for the imposition of these sanctions. The power to impose disciplinary measures should be conferred on an authority or tribunal independent of the legislature and the executive. This authority or tribunal should also include persons who are not judges or part of the legislative or executive branch. The judge should have the opportunity to appeal to the disciplinary authority before a court.

1.4.3 Regional – European instruments of soft law

1. **Recommendation of the Committee of Ministers of the Council of Europe CM / Rec (2010) 12, "Judges: Independence, Efficiency and Responsibilities"**[103]

The Committee of Ministers of the Council of Europe in 2010 adopted a Recommendation on the independence, efficiency and responsibilities of judges, thus setting some standards for the work of judges. One of these principles is elaborated in the third paragraph of the Recommendation and clarifies that the purpose of the independence of the judiciary, as defined by the European Convention (Article 6), is to ensure that every individual has the fundamental rights that their case be decided in a fair trial, on legal grounds and without any unnecessary influence.

Meanwhile, another principle of this recommendation is given in point 11 and refers to external independence. According to this paragraph, the external independence of judges is not a prerogative or a guaranteed privilege in the interest of judges, but is in the interest of the rule of law and citizens seeking and expecting impartial justice. That said, according to point 19, court proceedings and matters of judicial administration are matters of public interest, while according to point 20, judges, as part of society, cannot administer justice effectively if they do not have civic trust. They need to be made aware of society's expectations of the judicial system and dissatisfaction with its functioning. Therefore, the independence of judges should be seen as a guarantee of freedom, respect for human rights and impartial application of the law.

Chapter VI, which deals with the status of judges, from paragraph 44 onwards, lists some of the basic guarantees for the status of judges. Among them, the document recommends that decisions on the election and career of judges be taken on objective criteria, set by law and by the competent authorities. These decisions must be made by institutions that are independent of the executive and the legislature. In order to guarantee its independence, at least half of the members of this authority must be judges elected by

[103] https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d

their peers. However, if decisions are to be taken by another power, such as the head of state, point 47 of the document requires that the recommendation for such a decision must come from "a body composed essentially of the judiciary".

Further, point 49 stipulates that the security of the term of office and the impossibility of removal from office are key elements of the independence of judges. According to point 50, it is recommended that the permanent mandate can be terminated only due to serious violations of a disciplinary or criminal nature, clarified by law, or when the judge cannot perform judicial functions.

Also, when discussing the evaluation of judges, this recommendation states that such evaluations should be made based on objective criteria, enabling judges to express their views and having the opportunity to challenge these evaluations before an independent authority or court. Here are three very important elements:

- The interpretation of the law, the assessment of the facts and the weighing of the evidence by a judge during the examination of cases, should not be the basis for civil or disciplinary liability, except in cases of malice and gross negligence, nor the basis for criminal liability, except in cases of malice. (points 66 and 68);
- Disciplinary proceedings may be initiated if the judge has not exercised his or her duties efficiently and appropriately. These proceedings must be conducted by an independent authority or court, with all the guarantees of a fair trial, and enable the judge to have the right to appeal the decision and the sanction. Disciplinary sanctions should be proportionate (paragraph 69);
- Judges should not be held **personally responsible** in case court decisions are overturned, changed or appealed (paragraph 70).

2. Recommendation of the Committee of Ministers of the Council of Europe CM / Rec (2000) 19, "The role of the Public Prosecutor's Office in the criminal justice system"[104]

The Council of Europe, through the body of the Committee of Ministers, in 2000 adopted the Recommendation on the Role of the Public Prosecutor's Office in the Criminal Justice System. Recommended principles include the scope of the public prosecution function in the legal system. The Recommendation defines the notion of public prosecution,

[104] https://rm.coe.int/16804be55a

responsibilities and duties of the public prosecution, protection measures for public prosecutors to perform their functions.

This Recommendation stipulates that States should take measures to ensure that the recruitment, promotion and transfer of public prosecutors are carried out accordingly and following fair and impartial procedures, containing safeguards against any approach that favors interests of specific groups and discrimination on any grounds. Disciplinary proceedings against public prosecutors should be regulated by law and should guarantee a fair and objective assessment and decision, which should be subject to independence and impartial review. It is determined that Public prosecutors have access to grievance procedures, including where necessary a grievance against a tribunal if their status is affected.

Also, the Recommendation of the Committee of Ministers of the Council of Europe provides that states should take appropriate measures to ensure that public prosecutors are able to carry out their professional duties and responsibilities without undue interference or unjustified exposure to civil, criminal liability or any other responsibility. However, the public prosecutor's office should report periodically and publicly on the activities as a whole and, in particular, the manner in which they enter which its priorities were carried out.

3. Opinions no. 1 (2001) on the Standards on the Independence of the Judiciary and the Non-Exemption of Judges[105]

This opinion was drafted in 2001 by the Consultative Council of European Judges (CCJE) based on States' responses to a questionnaire, texts prepared by the CCJE Labor Party and texts prepared by the President and Vice-President of the CCJE and the CCJE specialist for this topic. The purpose of this opinion was to identify and address in detail the problems related to the independence of the judiciary.

Some of the key points that this opinion addresses are: the cause of judicial independence, the appointment and promotion of judges, appointment and advisory bodies, the mandate of judges and independence within the judiciary. These issues are in this opinion are addressed as follows:

[105] https://www.coe.int/en/web/ccje/opinion-n-1-on-independence-of-judges-and-opinion-n-2-on-funding-of-courts

In point 10 of this Opinion, it is clearly stated that "the independence of the judiciary is not a prerogative or a privilege in the interest of judges, but in the interest of the rule of law and those who seek and expect justice." This means that the judiciary must be completely independent and objective. Judges should not simply be free from any inappropriate connections, prejudices or influences but also be perceived as such by an independent observer – society as a whole should be able to trust the judiciary. The independence of the judiciary must be guaranteed by the highest legal act of a state, as set out in the basic principles of the UN on the independence of the judiciary and the European Charter on the Statute of Judges.

Appointment or promotion should be based on objective criteria. These criteria mean that the selection and career of judges is based on merit, taking into account qualifications, integrity, ability and efficiency. These criteria should be oriented towards the objective of achieving gender equality in the judiciary through guiding principles.

Regarding the appointment and advisory bodies, the CCJE has emphasized that especially in new democracies, the appointment should be made by an independent authority with considerable representation of the judiciary with a democratically elected member by other judges. According to point 45 of the Opinion, this is especially important for countries that do not have systems with a proven democratic tradition. In those countries where the temporary appointment is initially applied, it is emphasized that the body responsible for the objectivity and transparency of the method of appointment or reappointment as a full-time judge is of particular importance.

The permanent tenure of judges is crucial to the independence of the judiciary, and standards must be set in advance that provide for conduct that could result in dismissal as well as those that could result in disciplinary action being taken against them. Thus, according to the principle of non-dismissal in point 59 of the Opinion, exceptions to this principle, especially those based on disciplinary sanctions, lead to a discussion about the body, method and basis on which judges can be disciplined. According to Recommendation No. R (94) 12, Principles VI (2) and (3), should have a precise definition of violations leading to the removal of a judge and disciplinary proceedings should be in accordance with the requirements of the European Convention on Fair Trials.

With regard to independence within the judiciary, the essential point is that the judge is in the performance of his or her function, not as someone else's employee: judges are servants of the law and accountable only to the law. It is undisputed that judges do not

act on any order or instruction inside or outside the judiciary, excluding the appeal procedure provided by law (this does not include amnesty and the like). Also, the independence of each individual judge in the performance of his or her functions must exist regardless of the internal hierarchy of the court.

With regard to external independence, according to point 63 of the Opinion, non-influence from outside constitutes a general principle of wide acceptance. However, it is acknowledged that the difficulty lies in deciding what constitutes inappropriate outside influence and in striking a balance between, for example, the need to protect the litigation from influence and pressure, whether political, from the media or otherwise, and interest for an open discussion of issues of public interest and free press, on the other hand. Judges should acknowledge that they are public figures and should not be too sensitive or fragile. Furthermore, judges should not be obliged to report the merits of their cases to anyone outside the judiciary. "Reporting" on the merits of cases, even to other members of the judiciary, seems to be contrary to individual independence.

The hierarchical power given in many legal systems to superior courts in practice can undermine the individual independence of the judiciary. One solution would be to transfer all relevant powers to a High Judicial Council, which would then protect independence inside and outside the judiciary. This brings back the recommendation of the European Charter on the Statute for Judges, to which attention has already been drawn under the title of Appointment and Advisory Bodies.

In the spirit of the above, judicial inspection systems, in places where they exist, should not deal with the merits or correctness of decisions. The CCJE stressed that the use of statistical data and judicial inspection systems does not serve to prejudice the independence of judges.

3. Opinions no. 17 (2014) on the Evaluation of the Work of Judges, the Quality of Justice and Respect for Judicial Independence[106]

The Consultative Council of European Judges in 2014 drafted this opinion, through which it addresses judicial independence, outlining ways to maintain and improve the quality and efficiency of judicial systems through individual evaluation. In this Opinion, the

[106] https://rm.coe.int/16807481ea

expression “individual evaluation of judges” includes the evaluation of the professional work of individual judges and their skills and includes only incumbent judges.

Point 5 of this document states that the independence of the judiciary is a precondition for maintaining the rule of law and the basic guarantee of a fair trial. Regarding the question why there are different types of evaluation, in points 21 and 23 of this Opinion it is mentioned that this is conditioned by two factors:

- Judicial structure of a country: The decision of whether and if yes, how to evaluate judges is inextricably linked to the way in which the judicial structures of different member states have evolved.
- The culture of the country in question: The decision whether and how to evaluate judges is also related to the history and culture of a country and those of its legal system.

Point 29 states that although violations of ethical and professional rules/standards can be considered in the evaluation process, Member States must clearly distinguish between evaluation and disciplinary measures and processes. The principles of security of tenure and non-removal are key and accepted elements of the independence of the judiciary and must be respected. Therefore, a permanent appointment should not be terminated simply because of an unfavorable assessment. It should be terminated only in one case of serious violations of disciplinary or criminal provisions prescribed by law, or when the inevitable conclusion of the assessment process is that the judge is incapable or unwilling to perform his/her judicial duties with a minimum acceptable standard, judged objectively. In all cases there should be appropriate procedural safeguards for the judge being evaluated and these should be strictly observed.

When implementing a formal individual evaluation system, its basis and key elements (criteria, procedure, consequences of evaluation) should be clearly and fully defined by the primary legislation. Details can be regulated in bylaws. The formal individual assessment of judges should be based on objective criteria published by the competent judicial authority. These standards should be based on merit, taking into account qualifications, integrity, capability and efficiency.

Criteria for evaluating the professional performance of judges should be comprehensive, and should include quantitative and qualitative indicators, in order to allow a full and in-depth evaluation of the professional performance of judges. Despite the fact that the

efficiency of a judge's work can be an important factor for evaluation, the CCJE considers that relying entirely on the number of cases a judge has decided is problematic because it can lead to false incentives.

In order to assess the quality of a judge's decision, evaluators should focus on the methodology a judge applies to his/her overall work, rather than on the legal merits of individual decisions. The latter should be determined only by the appeal process. However, even this is problematic for a completely realistic assessment unless the number and manner of reversal clearly demonstrates that the judge does not have the necessary knowledge of law and procedure.

The evaluated judge should be informed who the evaluators are and in case of reasons for dismissing the evaluator should have the right to request his replacement. According to point 37 of the Opinion, in order to protect judicial independence, the assessment should be undertaken mainly by judges. Judicial Councils (where they exist) can perform this function. However, other means of evaluation may be used, for example, by members of the judiciary appointed or elected by other judges. Evaluation by the Ministry of Justice or other external bodies should be avoided and they should not be able to influence the evaluation process.

The sources of information used in the evaluation process must be reliable and sufficient. This is especially true in cases of negative evaluation. The assessed judge must have immediate access to any evidence intended to be used in an assessment against him or her so that he or she can challenge it if necessary.

The individual evaluation of judges and the court as a whole should be done separately. However, the facts discovered during the judicial review can also be taken into account in the individual assessment of the judge. Regular evaluations allow obtaining a complete overview of a judge's performance. However, they should not be carried out too often, in order to avoid an impression of constant oversight, which by its very nature may jeopardize the independence of the judiciary.

The judge should be enabled to present objections during the evaluation procedure and against the decision to an independent authority or a court. Therefore, the evaluated judge should have the opportunity to contribute to the evaluation process in a way that is helpful, for example by commenting on the preliminary draft or being heard in the evaluation process. The assessed judge should have an effective right to challenge an

unfavorable assessment, especially when it affects the "civil rights" of the judge within the meaning of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The more serious the consequences of an evaluation for a judge, the more important these rights of effective review are.

The CCJE does not support evaluation results solely through the points, figures, percentages or numbers of decisions made. All of these methods, if used without further explanation and evaluation, can create a false impression of objectivity and certainty.

In conclusion, there must be a balance between the principle of the independence of the judiciary and the process of evaluating judges. The means to achieve this balance include:

(1) There should be clear and transparent rules regarding the evaluation procedure, criteria and consequences.
(2) The evaluated judge should have the right to be heard in the proceedings, and to object to an unsatisfactory evaluation, including the right of immediate access to materials related to the evaluation.
(3) The evaluation should not be based solely on the number of cases decided, but should focus mainly on the quality of a judge's decisions and also his/her overall judicial work.
(4) Some consequences, such as dismissal due to a negative evaluation, should be avoided for all judges who have taken office, except in exceptional circumstances. In case of imbalance between these, the independence of the judiciary takes precedence.

Point 46 deserves attention, which states that reconciling the principle of independence of the judiciary with any process of individual evaluation of judges is difficult. But the right balance is crucial. After all, the independence of the judiciary must prevail at all times. Thus, according to this Opinion, the process and results of individual evaluations should, in principle, remain confidential and should not be made public. Otherwise, the independence of the judiciary may be jeopardized, because publication may discredit the judge in the eyes of the public. The publication may also lead to verbal or other attacks on the judge.

4. **Opinions no. 13 (2018) "Independence, Accountability and Ethics of Prosecutors"[107]**

Following the Recommendation of the Committee of Ministers of the Council of Europe (2000) 19, "The role of the Public Prosecutor's Office in the criminal justice system", the Consultative Council of European Prosecutors, which is a consultative body to the Committee of Ministers of the Council of Europe, issued an opinion on the independence, responsibility and ethics of prosecutors.

According to point 23 of this Opinion, the mission of the prosecutor is demanding and difficult, therefore it requires professionalism, character, courage, balance and dedication. Having these qualities should be a determining criterion in the recruitment of prosecutors and throughout their careers. However, these personal requirements are not sufficient to ensure the independence of prosecutors. The status and independence of prosecutors should be clearly established and guaranteed by law.

As a means of ensuring the independence of prosecutors, clear mechanisms should be put in place to initiate prosecution or disciplinary proceedings against prosecutors. For example, there is a special procedure established by law in some Council of Europe member states that enables the initiation of proceedings for alleged administrative or criminal offenses committed by prosecutors.

Although independent, prosecutors are accountable and must report, within the hierarchy, to the parties and in particular to the victims, to judicial and official authorities and other public bodies, to civil society and to the media. They should explain their actions or provide information to the public in a proactive manner, especially in cases that require public attention and concern. The information may take the form of an annual report (general or for a specific aspect of the crime within their jurisdiction), and contain an explanation of the causes of a failure or error in the procedure or simply refer to the current stage of an investigation or a procedure.

Point 47, which refers to the accountability of prosecutors, states that when necessary, prosecutors are subject to disciplinary proceedings that should be based on law, in case of serious breach of duty (negligence, non-observance of secrecy of duty, rules of contra-corruption, etc.), for clear and defined reasons. Procedures should be transparent and apply established criteria, conducted in front of a body independent of the executive. The

[107] https://rm.coe.int/opinion-13-ccpe-2018-2e-independence-accountability-and-ethics-of-pros/1680907e9d

prosecutors in question must be heard and allowed to defend themselves, to be protected from political influence, and to have the opportunity to exercise their right to appeal before a court. Any sanction should be necessary, appropriate and proportionate to the disciplinary violation. According to point 48, unless found to have committed a disciplinary offense or failed to perform their duties properly, prosecutors as well as judges should not be held personally responsible for selecting the course of action resulting from a personal intellectual analysis and legal.

In the accountability section, the Advisory Council Opinion says that in order to promote public confidence, prosecutors need to be independent but also feel accountable. This responsibility must be exercised in respect for individual rights and freedoms, including the presumption of innocence and the protection of privacy. Regularly published and updated guidelines and codes of ethics and professional conduct would help promote transparency, sustainability, accountability and fairness. It should be clarified that the responsibility of prosecutors is not intended to interfere with their independence.

In conclusion, according to the chapter on the Ethics of prosecutors, point 51 stipulates that respect for the rule of law requires that prosecutors and judges, behave according to the highest ethical and professional standard, during and outside office, so that society has confidence in justice. Prosecutors act on behalf of the people and the public interest. Therefore, they must always maintain personal integrity and act in accordance with the law, in a fair, impartial and objective manner, respecting and ensuring fundamental rights and freedoms. They have an obligation to be free from political and other influences.

5. Magna Carta of Judges (2010): Fundamental principles[108]

On the occasion of its 10th anniversary in 2010, the CCJE during the plenary session adopted a Magna Carta of Judges (Basic Principles) which summarizes and codifies the main conclusions of the Opinions it has already adopted, including those discussed above.

The Magna Carta sets out the general principles for the status of judges, regardless of the jurisdiction of the legal tradition. Among other things, this document generally includes principles such as the rule of law, the independence of the judiciary, the impossibility of changing the position of judges, guarantees of the independence of the judiciary, the

[108] https://rm.coe.int/2010-ccje-magna-carta-anglais/168063e431

authority guaranteeing independence, access to justice, ethics and responsibility of judges and international courts. Some of these principles are addressed as follows:

Regarding the independence of the judiciary, it is again said that it should be statutory, functional and financial. This should be guaranteed in all judicial activities, in particular during recruitment, appointment to retirement age, promotion, training, judicial immunity, discipline, payment and funding of the judiciary.

As expressed in previous CCJE Opinions, appointment and career decisions should be based on objective criteria and should be taken by the body responsible for guaranteeing independence. Disciplinary proceedings should be initiated before an independent body with the possibility of addressing them before a court. This document emphasizes the intent in case of breaches of duty by judges, where it states that judges should be held criminally liable in the event of unintentional failures in the exercise of their functions. A two-tier system must be provided.

Further, it is determined that to ensure the independence of judges, each state will establish a Judicial Council or other specific body, independent of the legislative and executive branches, endowed with broad powers over all matters relating to their status as well as organization, the functioning and image of judicial institutions. The council will consist exclusively of judges or a substantial majority of judges elected by their peers. The Judicial Council is responsible for its activities and decisions.

The Charter provides for the immutability of the position of judges, which means that a judge may not be appointed to another court or his or her duties may be changed without his or her free consent. However, exceptions are allowed when the transfer is determined within the disciplinary framework, when a lawful reorganization of the judicial system is involved involving, for example, the closure of a court or a temporary transfer is required to assist a neighboring court. In the latter case, the duration of the temporary transfer should be limited by the relevant statute.

The judiciary should be involved in all decisions that affect the practice of judicial functions (organization of courts, procedures, other laws). Emphasizes the role of the council in the judiciary in terms of organization, functioning and image of judicial institutions.

6. **Explanatory Memorandum on the Magna Carta for the Statute of Judges[109]**

This document highlights the interpretive value of the Charter as above. It further emphasizes that the Charter is not an end in itself, but a means by which individuals are guaranteed the rights, which *ipso jure* are protected by the courts, to have the necessary measures for an effective defense. The basic principles for the status of judges should be incorporated in the constitutions. The most relevant points for the vetting process addressed by the explanatory memorandum are: the responsibility of judges and the end of the term.

In the disciplinary liability of judges, the Charter begins with a reference to the principle of legality of disciplinary sanctions, stating that violations and disciplinary sanctions can only be determined by law instead of referring to judges, and no sanction can be imposed unless it is seen by law. In this regard, the Charter sets out precautionary measures for disciplinary hearings: disciplinary sanctions can be imposed only on the basis of a decision taken following a proposal or recommendation or by agreement of a court or authority, at least half of whose members must be elected judges. Decisions must be made at a full hearing, where the judge must have the right to representation. If a sanction is imposed, it should be imposed according to the principle of proportionality.

Regarding the termination of work, all the reasons for this should be listed. These are when a judge resigns, is medically certified as physically unfit for further judicial duty, reaches the age limit, comes to the end of a certain term or is dismissed in the context of disciplinary liability.

Finally, the Charter provides for the right to appeal to a higher judicial authority against any decision imposing a sanction taken by an executive authority, court or body, at least half of whose members are elected judges.

7. **Kiev Recommendations on the Independence of the Judiciary in Eastern Europe, the South Caucasus and Central Asia[110]**

In July 2010 the OSCE Office for Democratic Institutions and Human Rights (ODIHR) together with the Max Planck Institute for Comparative Public Law and International Law (MPI) published some recommendations addressing three particularly important

[109] https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta
[110] https://www.osce.org/files/f/documents/a/3/73487.pdf

topics for judicial independence. (1) The administration of the judiciary, focusing on judicial councils, self-governing judicial bodies, and the role of court presidents; (2) Selection of judges - criteria and procedures; and (3) The accountability of judges and the independence of the judiciary at trial.

Judicial administration

The administration of the courts and the judiciary must enhance impartial and independent adjudication in accordance with the rights to due process and the rule of law. Judicial administration should never be used to influence the content of judicial decision-making. The judicial administration process must be transparent. Judicial administration should be done by the judicial council or various independent bodies competent for certain aspects of judicial administration without exercising control over them by a single institute or authority. The composition of these bodies should reflect their defined tasks. Their work should be regulated by law and not by executive instructions.

- **Tips and their composition**

The Judicial Councils, according to the Kiev Recommendations, are bodies with specific tasks for the administration of the judiciary and independent competencies, in order to guarantee the independence of the judiciary.

The Judicial Council should have more members of the basic courts than those of the highest instance. Its judge members will be elected by their peers and will represent the judiciary on a large scale, including judges of the first instance. Judicial councils should not be dominated by appellate court judges. The Judicial Council must meet regularly in order to fulfill its duties. The public's ability to be present at the deliberations of the judicial council and to publish its decisions must be guaranteed in law and in practice.

Selection of judges

If there is no independent body in charge of this task, a special commission of specialists should be set up to conduct written and oral examinations during the process of selecting judges. In this case the competence of the judicial council should be limited to verifying the conduct of due process, and either appointing the candidates selected by the commission, or recommending them to the appointing authority.

The members of the special commissions for judicial selection should be appointed by the judicial council from among the legal professionals, including members of the judiciary. In cases where judicial councils, qualification commissions or qualification panels are

directly responsible for the selection of judges, members should be appointed for fixed terms. It is preferred that other groups (law professors, lawyers) be included in this composition, taking into account the relevant legal culture and experience.

In the event that due to the recruitment process, a background check is performed, it should be done with the utmost care and strictly on the basis of the rule of law. The selection authority may require a standard check on criminal record and any other disqualifying grounds from the police. The results of this review should be made available to the applicant, who should be able to appeal the findings to a court. No form of background check should be done by security services. The decision to reject a candidate on the basis of background checks must be reasoned.

Discipline

To avoid excessive concentration of power in a judiciary and perceptions of "incorporation", it is recommended to distinguish between separate and different competencies, such as selection, promotion and training, discipline, professional evaluation and budgeting. A good option is to establish independent bodies with competence for specific issues of judicial administration, which are not subject to control by a single institution or authority. The composition of these bodies should reflect their specific purpose. Their work should be regulated by law and not by executive decree.

In order to prevent claims of incorporation and to guarantee fair disciplinary proceedings, the Judicial Councils should not be competent to a) receive complaints and conduct disciplinary investigations, and at the same time b) conduct review and decide for disciplinary measures. Disciplinary decisions must be subject to appeal before the competent court. The competent bodies to conduct the review in a disciplinary case and to make decisions about disciplinary measures, should not be in the exclusive composition of judges, but should also have representation of members outside the judicial profession. Any kind of control by the executive over the Judicial Councils or other disciplinary bodies should be avoided. To ensure an independent and objective review of the complaint, court presidents should not have the authority to initiate or adopt a disciplinary measure.

Disciplinary proceedings against judges should deal with cases of allegations of professional misconduct which are flagrant and unjustifiable and create a bad reputation for the judiciary. The disciplinary responsibility of judges does not extend to the content of their decisions, which includes different legal interpretations between courts; or in cases of miscarriages of justice, or criticism of the court.

A special independent body should be set up to adjudicate cases of judicial discipline. The bodies that decide on the merits of the case must be separated from those that initiate and investigate them, and in their composition there can be no joint members exercising the two functions. In principle, disciplinary hearings for judges should be transparent: transparency should be the golden rule for disciplinary hearings of judges. These hearings will be open, except when the accused judge requests that they be closed. In this case the court decides whether the request is justified. Decisions relating to judicial discipline must be reasoned. Final decisions on disciplinary action should be published.

When professional evaluations of judges take place, they should not be used to impair independent judgment. Judges' performance appraisal should first be qualitative, with a focus on skills, including:

- professional competence (knowledge of the law, ability to conduct judgments, capacity to write reasoned decisions);
- personal competence (ability to manage workload, ability to make decisions, openness to new technology);
- social competencies (ability to mediate, respect for the parties); and
- in the case of promotion to administrative positions, the competence to lead (leadership).

These skills need to be cultivated throughout the judicial training programs as well as during the work process.

This document also stipulates that judges will not be evaluated under any circumstances for the content of their decisions (either directly or through the calculation of the number of returned decisions). The way a judge adjudicates a case should never serve as a basis for sentencing. Statistics on the efficiency of the court should be used mainly for administrative reasons and should only serve as one of the factors for the evaluation of judges. Criteria for professional evaluation should be clear, transparent and uniform. The basic criteria must be set by law. Precise criteria for periodic evaluations should be set out in further regulations, along with timing and evaluation mechanisms.

In addition to the principles and general rules, the Kiev Recommendations also address an issue related to the context of the region to which they refer. Under the heading "independent criminal trial", it is stated that the "accusatory bias" of the justice systems in most countries of Eastern Europe, the South Caucasus and Central Asia should be addressed. Acquittal judgments continue to be taken as a black mark or failure. To reduce pressure on judges to avoid acquittals, it is strongly recommended that a change be made to their professional evaluation system (where appropriate, consider changes in the

evaluation of prosecutors and investigators as well). The number of acquittals should never be an indicator of judges' evaluation. Judges should exercise real discretion in reviewing requests for early release. The second instance review of acquittals should be limited to the most exceptional circumstances.

1.4.4 Relevant documents with instructions for the vetting process

1. **"Mechanisms for regulating the rule of law in post-conflict countries: Vetting: an operational framework" by the UNHCR**[111]

In 2006 the Office of the United Nations High Commissioner for Human Rights (UNHCR) published a guide to vetting as a mechanism for judicial reform for post-conflict countries.

The guidelines provided by this document are of an operational nature and place vetting in the context of the broad reform of public institutions and propose a framework for developing an effective and legitimate staff reform program in transition countries. This paper addresses the two main types of transitional personnel reform processes: review and reappointment. In the review process, employees are checked to determine their suitability for ongoing service. While in the reappointment process, an institution is first disbanded, all employees must reapply to a new institution and there is a general competition for all positions. These two types correspond to two basic approaches to institutional reform: institutional restructuring and institutional reconstruction. The choice of type depends, in particular, on the degree of overall staff reform required. At the end of this section, a third less likely type is introduced: regular disciplinary proceedings.

For the purposes of this concept paper, only the personnel review process will be addressed with a focus on security measures for the protection of entities subject to this process.

Review process

In a review process, a special transitional mechanism is usually set up to control public employees and determine their suitability for ongoing service. The main objective is to dismiss those who are incapable of holding public office.

[111] https://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf

During this process, the basic standards of orderly and fair process are applied.

Legal criteria for the review process:

Entities subject to review should enjoy the rights of a fair administrative process such as:

- the right to a fair trial;
- start the process within a reasonable time;
- notifying the party under investigation of the proceedings against them;
- the right to be protected, access to data relevant to the process;
- the possibility of opposition and examination, the right to be represented by counsel, and the notification of the party of the decision taken and the reasoning;
- the right to appeal to a court or other independent body;
- in principle, the burden of proof falls on the commission.

The review should be individualized and the responsibility should be personal. This process must be conducted in accordance with the principle of "equality of arms".

As in administrative proceedings in general, a standard of probability balance will be the appropriate standard of evidence in a review process, as opposed to the standard beyond reasonable doubt required in criminal proceedings. According to this standard, the review body should follow the version of events that seems most reasonable or possible, after receiving all the circumstances, evidence and facts.

At the end of the process, the persons who successfully pass the vetting process are certified and after that undergo only regular evaluation procedures.

2 UNDP Guide to Designing the Vetting Process of Senior Public Figures in Post-Conflict Societies[112]

In 2004, UNDP published a guide to help post-conflict societies design a vetting process for senior public officials. The guide is inspired by international standards and the practice of some post-conflict states. The following are some elements of the guide that are relevant to the context of the vetting of judges and prosecutors, leaving aside, as far as possible, the typical elements that refer to post-conflict societies.

[112] https://www.ictj.org/sites/default/files/ICTJ-UNDP-Global-Vetting-Operational-Guidelines-2006-English.pdf

General rules to be considered at the beginning of the process design

To design a vetting process, the basic prerequisites must first be provided. According to the UNDP Guide, such are:

1. *Political conditions: is there political authority and will?*

In terms of political conditions, the vetting process requires stability, real government authority and political will. The vetting process regulates access to positions of power and, as a result, is a very political undertaking. Individuals at risk of losing power as a result of vetting are prone to resist vetting enforcement.

2. *Institutional conditions: which public positions will be subject to vetting?*

A clear definition of the positions that will be subject to vetting is a basic precondition. The vetting of judges should be taken into account, especially on the issue of the independence of the judiciary and the separation of powers. It is also mentioned that the vetting of judges should be done by other judges ("peers") and be conducted through a regular or ad-hoc judicial review committee.

3. *Individual conditions: who are the persons who will be subject to vetting?*

Target groups must be accurately identified before starting the process. Data on the number of employees are valuable for realistic and good process planning. In addition to identification, a reliable database on the issue of the integrity of the persons to be vetted must be known. In order to enrich the database, information must be obtained pro-actively, through a range of sources. Data sources include: personnel files, court records, reports from civil society, media reports and independent research reports. Enabling the public to provide information is also a good way of providing information. With care for security and privacy issues, a list of names of persons to be vetted should be made public and widely promoted and a contact point designated to receive information from the public should be designated.

4. *Legal conditions: what is the vetting mandate?*

A clear legal basis is essential for designing the vetting process. Each vetting process will be contested and faced with political resistance. Domestic legislation must be clear, precise and in accordance with the Constitution and international standards.

5. *Operating conditions: are adequate resources available?*

The success or failure of a vetting process often depends on good preliminary analysis of institutional needs and good planning of deadlines and resources. The vetting process is complex, requiring time and staff with multi-disciplinary skills.

6. Weather conditions: what is momentum?

Selecting the momentum for vetting raises questions about sequencing and linking to other transitional processes - this is especially important in the context of newly emerging conflict societies. The momentum conditions the strategic decisions of the process design, in terms of the institutions or the target group, the type of mechanization and the composition of the vetting commission.

The UNDP Guide summarizes these elements in the form of a checklist. Only after all the boxes have been checked (✓), the design of a successful vetting process can begin.

Factors to consider before designing the vetting process (Vetting check-list):

- ❑ Is there a minimum level of stability, governmental authority and political will?
- ❑ Are the positions to be vetted clearly defined?
- ❑ Are the persons to be vetted correctly identified?
- ❑ Have the necessary temporary measures been taken in order to leave the group of persons who will be vetted?
- ❑ Is there a reliable database to assess the integrity of the persons to be vetted? If not, how will it be created?
- ❑ Is there a reliable database to assess the competence of the persons to be vetted? If not, how will it be created?
- ❑ What is the legal mandate of the vetting process?
- ❑ Is special legislation needed?
- ❑ Are the necessary human and material resources available?
- ❑ Is there an international commitment to support the vetting process, both politically and operationally?

Also, from the moment of designing the process, consideration should be given to avoiding undesirable consequences, such as:

1. Political abuse;

A vetting process can be used for partisan political purposes. Such processes can undermine rather than ensure respect for human rights and the rule of law. International

human rights standards must be fully respected in order to avoid political misuse of the process.

2. *Vacancy in governance;*

The dismissal of a large number of people can hamper the functioning of the institution and bring about a gap in governance. A vetting process will need to be implemented in stages and the need for replacements needs to be pro-actively identified to avoid potential gaps.

3. *Instability*

Dismissed officials who find no other employment and do not integrate into society can turn to crime and be factors of instability. The potential destabilizing effects of leaving should be considered in advance when designing the vetting process and the possibilities of providing temporary assistance to these persons should be considered.

So, in summary form, another "check-list" with undue consequences to be avoided:

- ❑ Is there a risk of political misuse of the process? If so, how can it be avoided?
- ❑ Is there a risk of a vacuum in government? If so, how can it be avoided?
- ❑ Is there a risk of destabilization as a result of the process? If so, how can it be avoided?

Types of vetting

The guide describes several types of vetting. The most appropriate type of vetting should be chosen depending on the institution being vetted.

1. *Vetting of all or some positions*

In general, a vetting process may be desired for all public positions, in order for all public officials to meet minimum integrity standards. For practical and operational reasons, it is reasonable to prioritize vetting of senior management positions.

2. *Review or reappointment of acting officials*

During the review process, a special “screening” mechanism is established, in order to remove those who are unfit to perform the task. In this procedure the basic standards of fair trial apply, the burden of proof lies with the body conducting the review and the equilibrium of probability will be the proper standard of proof. Such a way should be

considered in cases where regular disciplinary and appointment bodies would be overloaded or not available and when a wider reform is needed. The police vetting in Bosnia was modeled after this type.

The reappointment process, on the other hand, turns all employees into applicants and the burden of proof falls on these persons, who must prove that they are suitable for the exercise of the position in question. Persons in such a procedure do not have the right to appeal if they are not selected. However, the process of completely renaming an institution should only be considered if the institution is totally dysfunctional and radical changes will need to be made. The vetting of the judiciary in Bosnia was modeled after this.

3. Vetting of incumbent officials or external candidates

Vetting can only be limited to new appointments, including transfer or promotion, and not incumbents. Such a process is usually less politically controversial and constitutes an important measure to ensure sustainable and long-term results.

This method, however, as it does not enable the removal of persons in office with a serious lack of integrity, significantly slows down the renewal of positions and is not an appropriate form in cases where substantial reform is intended.

4. Vetting through a special or regular mechanism

Generally, a special commission, ad hoc, should be established for the purpose of vetting.

In certain circumstances, it is possible to use regular procedures to remove persons with a serious lack of integrity. Unlike special procedures, regular procedures do not result in legal uncertainty and are less costly and deterrent. Regular procedures can take the form of internal disciplinary mechanisms. Regular procedures can be used when the percentage of individuals to be affected by vetting is small, the institution continues to function, and when there is no urgent need for reform or sufficient political will.

How is a vetting process designed?

The UNDP Guide describes the basic factors of good vetting process design. Good design guarantees further success in implementation.

1. Information and consultation with the public

In order to restore trust and re-legitimize institutions, the public must be informed and trust the process. Transparency around the process and consultation on objectives will help build trust in the process. There is no exact formula for vetting. Public consultations will help design the context and specific strategies for the vetting institution. Public awareness also influences to avoid the possibility that later doubts or disputes the legality of the process. The vetting process should not only contain a public information mechanism, but also the design of the process itself should be based on extensive consultation with civil society and other stakeholders.

2. *Setting vetting priorities and selecting the type of vetting*

The vetting process should clearly set priorities. The most appropriate type of vetting should be chosen depending on the institution being vetted.

3. *Defining vetting criteria and results*

Integrity means a person acting according to relevant standards of human rights and professional conduct, including regularity with finances. Specific integrity requirements depend on the requirements of the position, the exercise of which is in question. The evaluation criteria should be derived from a detailed and realistic evaluation, in order to develop a fair and efficient process. Instruments with international standards can serve as a reference for drafting standards for integrity assessment.

Merit criteria about integrity and competence can be complemented by formal criteria, such as expressing compliance with the vetting process, participating in the interview, completing the vetting forms and submitting the required documents. Such formal criteria are of great importance in processes where access to reliable information about the person's background is limited.

The results of the vetting process for persons who do not meet the criteria must match the reasons for dismissal and the specific context. A person who is considered to have deficient integrity may be disqualified from one category of public office, from all positions in an institution or from public service in general. Disqualification can be permanent or temporary and reintegration must depend on meeting certain conditions.

If a person leaves due to lack of professional competence, then he can apply for another position or reapply for the same position once he has acquired the missing competencies. Special care should be taken with those leaving for reasons other than integrity.

4. *Mechanism development*

Usually, regular disciplinary mechanisms are not enough and a special, ad hoc commission should be established. This commission must be independent in order to ensure impartial and legitimate implementation of the process. The members of the commission should be prominent and respected personalities. The composition may also include international members with a view to enhancing the independence and legitimacy of the commission. Extensive consultation should precede the appointment of these members by an independent and supreme authority - the Constitutional Court, the President or an international organization. The appointment of members should last throughout the process.

The ad-hoc commission will need a skilled secretariat, who will prepare the necessary information and support the decision-making process. The secretariat staff should be multi-disciplinary and include project managers, IT managers, lawyers and technical level experts. The commission and the secretariat must have adequate financial and material resources. In this regard, international support is often needed.

The ad-hoc commission will most likely have to make decisions that will not be well received, which could have consequences for the safety of members. Therefore, the issue of member safety must be carefully considered and addressed.

Local ownership in the process is preferable especially when the process has international elements, as it benefits the legitimacy of the process and provides a better basis for compliance with the process and its sustainability. However, if an internationalized process takes place, then every effort should be made to involve local actors, regulating under domestic law and establishing guarantees for the smooth transformation from an extraordinary vetting process to a regular selection process and recruitment. However, vetting will face resistance. Strong international support, both politically and operationally, will be critical.

5. Adherence to International Procedural Standards

Vetting processes that do not comply with international standards may undermine rather than strengthen respect for human rights and the rule of law. According to international standards, the vetting process should be based on individual assessment and not related to membership in a group or institution.

Which standards apply depends on the type of process. In a review process, minimum standards of administrative procedure must be respected, such as initiating the procedure in a timely manner, notifying the parties that they are being reviewed, the right

of the parties to defend themselves and access to relevant information, the right to representation by a lawyer, the right to appeal to a court or other independent body, etc.

Special international standards and the Constitution guarantee the independence of the judiciary, including the separation of powers, the guaranteed duration of the mandate, the impossibility of removal from office by executive order, etc. The vetting of judges should be done by "peers", through a regular or *ad-hoc* commission.

As a result of the above, the UNDP Guide lists these critical steps during the vetting process:

- Consider the undesirable conditions and consequences as above;
- To consult the general public;
- Prioritize the institutions that will be vetted;
- Select the type of vetting that is most appropriate for the institution and the situation in question;
- Define vetting criteria;
- If necessary, establish an ad-hoc Vetting Commission;
- Adhere to international standards throughout the process design;
- Identify comprehensive institutional reforms that are essential to ensure the sustainability of vetting results.

From the above, it is proposed that the vetting process take into account the following criteria:

Proposed Vetting Criteria

1. **Individual integrity:**
   - Professional conduct;
   - Financial regularity;
   - Links with illegal organizations;

2. **Individual qualities:**
   - Citizenship, minimum age;
   - Level of education;
   - Professional qualifications, competencies and experience;
   - Physical and mental well-being;

3. **Procedural criteria:**
   - Compliance (cooperation) with the vetting process;

· Completion of forms and statements;
· Submission of required documents;
· Submission on the due date and time.

1.4.5 Conclusions regarding international standards and instruments

From what has been discussed above, it follows that the cornerstone of the vetting process is laid by the fundamental international instruments of the human rights system. In a democratic society, it is precisely these instruments that, on the one hand, determine the rights of the citizens of the country for an independent and functional judiciary, and consequently the rule of law and respect for human rights. On the other hand, these same instruments of a binding nature determine human rights from the point of view of a judge or prosecutor in the procedure, especially the right to a fair and impartial trial, together with procedural guarantees and relevant protective measures.

In the spirit of the substrate established by these instruments, the most authoritative international and regional-European organizations have come up with instruments of soft law, in order to provide guidance and recommendations. Of course, the affairs of the judiciary are the "internal affairs" of each country, therefore, in terms of legal and binding acts, these instruments are limited to providing guidance and recommendations. However, it should be borne in mind that regardless of what they are called, it is precisely these soft law instruments and relevant documents that translate the values and principles of mandatory instruments into concrete operational steps. The last section deserves special attention, with relevant documents that explicitly and precisely refer to the design of a vetting process.

In conclusion, from the international standards and instruments as above, it can be concluded that there is no exact formula for designing a vetting process. The design, and later the implementation of a vetting process in a given country, depends entirely on the social and legal context of the country, the intended purpose and objectives, the legislative and normative framework of the country, as well as the institutional structure of that country. What can be said is that a vetting process inevitably affects, violates and even restricts the freedoms and human rights enshrined in international instruments. The issue of striking a balance between achieving the goals of vetting as a general interest on the one hand, and respect for human rights and freedoms on the other, is presented as very critical.

1.5. Practices of other countries

This Concept Paper has two fold aims. First, to examine challenges of current legal, functional, and organizational system of vetting process in Kosovo justice system. Second, to readjust current vetting process in Kosovo justice system in compliance with international standards on judicial independence. In addition, this Concept Paper seeks to provide some examples of previous and current vetting process in several countries in Europe and Africa.

1.5.1 Practice of the countries of the region

1.5.1.1 Experience with the Vetting process in Albania

1. Background

The vetting process in Albania was initiated as a need to eradicate corruption and restore the people's trust in the judicial system. This makes this process special compared to other Western Balkan countries, which underwent this process as a post-conflict institutional measure. Although Albania is not in a post-conflict phase, its justice system has faltered in many respects, which prompted the need for radical reforms to restore the integrity, independence and efficiency of the judiciary as essential elements of the rule of law.

The impetus for this process was also the international factor, especially the European Union, where in 2014, on the occasion of gaining the status of candidacy for EU membership, the latter presented a number of requirements that Albania had to meet as a precondition for starting of EU membership talks. In this regard, the re-evaluation of judges and prosecutors was one of the main conditions that Albania had to meet. According to the conclusion of the Stabilization and Association Council between Albania and the EU, judicial reform in Albania remains essential for the process of its integration into the EU.

In July 2016, the Albanian Parliament unanimously approved judicial reforms designed to cleanse the justice system of corruption and political influence.

2. Modality

The vetting process in Albania has been functionalized through constitutional amendments followed by the adoption of new laws.

As an integral part of the package of constitutional changes, which aims to reform the justice system and restore citizens' trust in the Rule of Law, the Albanian Parliament approved, *inter alia,* law no. 84/2016 "*On the transitional re-evaluation of judges and prosecutors in the Republic of Albania*" (Hereinafter: Vetting Law).

The Vetting Law targets only judges and prosecutors, including Constitutional Court judges, and aims to control the professional readiness of judges and prosecutors, their moral integrity, level of independence, and restore public confidence in the institutions of this system.

3. Reassessment institutions and competencies

Based on the Constitution of Albania and the Law on Vetting, the main institutions of vetting procedures are the Independent Qualification Commission (IQC), the Special Appellate Panel (KPA), the Public Commissioners (KP) and the International Monitoring Operation (IOM).

KPC and KPA

The key bearers of the vetting process are KPC and KPA. The members of these bodies are selected by the Assembly, according to the list and recommendations of the IOM, which the latter compiles in cooperation with the President of the country. In considering cases, these two bodies are guided by the principle of objectivity and proportionality.

Members of the revaluation institution are required to complete the annual asset declaration. Failure to complete the accuracy and truthfulness of this statement constitutes grounds for dismissal.

The member of the revaluation institutions declares and avoids any conflict of interest situation, in compliance with the law "On prevention of conflict of interest". In order to ensure the credibility and confidentiality of the members of the revaluation institutions, their electronic communications are monitored by the Special Investigation Unit and their financial income is monitored by the General Directorate of Prevention of Money Laundering, according to the consent given by them for the entire duration of their term.

Independent Qualification Commission

It is the main body for carrying out the verification process. It is a collegial body composed of 12 commissioners, approved in block by decision no. 82/2017 of the Assembly of the Republic of Albania Based on the Law on Vetting, the activity of the Commission is directed by the Chairman. The commission is organized in 4 judging panels consisting of 3 members, who are appointed by lot. The mandate of the Commission is 5 years.

Appellate Panel

The Appellate Panel adjudicates in a panel of 7 judges, who are appointed by lot for each case. The panel of the Panel is chaired by the presiding judge, who is appointed by lot together with the rapporteur of the case.

The Appellate Panel reviews appeals against Commission decisions and has a 9-year term.

The Appellate Panel has jurisdiction to review also a) disciplinary violations of members of the Constitutional Court, the High Judicial Council, the High Prosecution Council, the Prosecutor General and the High Inspector of Justice; b) appeals against decisions of the High Judicial Council, the High Prosecution Council and the High Inspectorate of Justice for imposing disciplinary measures on judges, prosecutors and other inspectors.

Criteria for selection of KPC and AC members

- Must be an Albanian citizen under the age of 65;
- have completed Master studies in Albania or abroad provided that the diploma is nostrified;
- have high knowledge of English;
- have work experience of not less than 15 years as a judge, prosecutor, lawyer, law professor, officials at management level or in a recognized experience in the field of administrative law or other areas of law;
- have received a high rating for his/her professional, ethical skills and moral integrity, if he/she has been subjected to previous assessments;
- has not exercised political functions during the last 10 years;

- no criminal investigation has been initiated against him, he has not been convicted by a final decision for committing criminal offenses, for committing an intentional minor offense;
- not have been subject to other disciplinary measures provided by the legislation in force, including those deriving from the employment relationship;
- has not been a judge, prosecutor, legal advisor or legal assistant during the last two years prior to candidacy and a member of the High Level Expert Group at the Special Parliamentary Committee on Justice System Reform, or an expert appointed by political parties.

The assessment for meeting the above criteria is based on the following evidence:

a) scientific titles in the field of law; b) special experience of the candidate in certain areas of law; c) seniority in the profession; ç) study and professional experience abroad in Albania; d) average grade not less than 8 in master studies.

Public Commissioners

Public Commissioners enjoy the status of High Court Judge during their term.

This institution exercises its competencies on the basis of the principles of equality before the law, constitutionality and legality, proportionality and other principles that guarantee the right of the subjects of re-evaluation for a regular legal process. The Public Commissioners and the legal service unit handle the information on the re-evaluation procedure, in compliance with the principle of confidentiality and protection of personal data.

The competencies of this institution include, *inter alia,* non-filing of appeals against decisions of the Independent Qualification Commission which are reviewed by the Special Appellate Panel.

International Monitoring Operation

The International Monitoring Operation monitors KPC and AC and is led by the European Commission. Under this procedure, international observers have a monitoring and supportive role in the vetting process and not an executive decision-making. The function of the IOM is limited to compiling the list of candidates for recommendation for

both bodies (vetting institutions). The IOM oversees the process of establishing vetting bodies. The IOM makes a recommendation on the qualification and selection of candidates for members of the Independent Qualification Commissions, the Specialized Qualification Chamber and the two posts of Public Commissioners. This task is performed with the assistance of four short-term observers (three senior judges/prosecutors from the judiciary of the EU Member States and one from the United States Department of Justice). Following the recommendation of the IOM, the Assembly is finally responsible for appointing all members of the vetting bodies.

Second, after the establishment of vetting bodies, the IOM brings in international observers to monitor the actual conduct of the vetting process, through a long-term operation that will last until all relevant members of the judiciary in Albania, as recommended by law, are subject to this transient qualification assessment.

The IOM also provides written recommendations to Commissioners to appeal to the Special Appellate Panel against the decisions of the Independent Qualification Commission.

4. Budget

The budget of the revaluation institutions is financed from the State Budget, in which they are reflected as separate institutions. Reassessment institutions independently implement their budget, approved by the Assembly, and have the right to use secondary revenues, benefited from international projects, donations and their publications.

5. Vetting procedure

Revaluation includes: a) valuation (verification) of the property; b) verification of the past and c) assessment of professional skills.

The following will briefly explain what each of these types of assessment means and their procedure for performing them.

a) verification of assets; The object of property valuation is the declaration and control of assets, the legality of the source of their creation, the fulfillment of financial obligations, including private interests for the subject of revaluation and related persons (spouse, cohabitant, adult children and any person mentioned in the family certificate).

The procedure of verification of assets begins with the submission of the declaration by the vetting entities and their related persons to the High Inspectorate of Declaration and Control of Assets and Conflict of Interest (HIDCACI) together with other documents which justify the assets of persons in word. HIDCACI, based on asset declarations, conducts a complete control procedure in accordance with applicable law.

For the purposes of the revaluation, HIDCACI through the General Directorate for the Prevention of Money Laundering or the Ministry of Justice may request documents for assets owned by the revaluation entities and persons related to them, documents used abroad by the revaluation entities and related parties, or financial records of any financial transactions within or outside the country in accordance with the law *"On the prevention of money laundering and terrorist financing"* of revaluation entities and persons related to them. These documents or information may be used as evidence before the Commission or the Appellate Panel.

HIDCACI provides full access for international observers to seek information, consult, copy and investigate asset declarations submitted by the revaluation entity or related persons, as well as accompanying documents.

At the end of the control procedure, HIDCACI prepares a report stating that:

a) the declaration is correct in accordance with the law, legal legal sources and that there is no conflict of interest situation;
b) there is a lack of legal financial resources to justify assets;
c) concealment of property has been committed;
d) ç) a false declaration has been made;
e) the subject is in a conflict of interest situation.

This type of assessment has met with the most resistance from prosecutors and judges and has resulted in a large number of resignations.

b) Image control (past verification); consists of verifying assessment statements and other data intended to identify links to individuals involved in organized crime. If after the evaluation it is ascertained that the evaluated person has connections with criminal persons or organizations, he/she is dismissed from duty, unless he/she proves the opposite, which means that the burden of proof falls on the evaluated).

The image control procedure begins with the submission of the statement by the vetting subject to Classified Information Security Directorate. The Directorate for Classified Information Security, the State Intelligence Service (SIS) and the Internal Affairs and Complaints Control Service (IACCS) at the Ministry of Internal Affairs, establish a working group which, during the image control procedures, adheres to the requirements. *"A) accurate verification of identity in the past and present, for each individual; b) verification if there is a criminal tendency for involvement in organized crime; c) the general assessment, whether the individual can be put under pressure by the criminal structure; ç) control whether it has been, is or tries to engage secretly, only, in cooperation, or as part of a criminal organization"*.

The circumstances that are taken into account in finding that there is an inappropriate contact of the subject of evaluation with a person involved in organized crime are among others:

a) is photographed, or when a witness describes a meeting with a person involved in organized crime;
b) the subject of the reassessment or the person related to him/her has had an inaccurate communication with a person involved in organized crime;
c) the subject of the revaluation or a related person has exchanged money, favors, gifts or property with a person involved in organized crime;
d) the subject of the reassessment has close ties to a person involved in organized crime;
e) the reassessment subject participates in or is present at meetings with one or more persons involved in organized crime.

Upon completion of the information verification, the Classified Information Security Directorate submits to the KPC the report prepared by the working group. This document/report determines whether the subject of the re-evaluation has completed the declaration form for the control of the figure, accurately and truthfully, if from his declaration or elsewhere it is noticed that the subject of the re-evaluation has inappropriate contacts with the persons involved in the organized crime, as well as ascertaining as to his suitability for the continuation or not of the task.

The vetting law provides for a number of mitigating circumstances that are taken into account in finding that there is inappropriate contact with a person involved in organized crime, and circumstances that are taken into account when the statement given is incomplete or unreliable.

c) **Assessment of professional skills:** The object of the assessment of professional skills is the assessment of the ethical and professional activity of the subjects of re-evaluation in accordance with the Law on Vetting and the legislation that regulates the status of judges and prosecutors.

According to this procedure, the subject of evaluation initially fills in a form through which he/she is evaluated in the professional aspect. Other sources of evaluation are legal documents prepared by judges and prosecutors and professional skills evaluation reports.

"Legal document" for the purpose of assessing professional skills means any document prepared by the person during the exercise of professional duty, such as a court decision, request for trial, report, lawsuit, legal opinion/opinion, as well as other acts that prove professional capacities of the person.

For the purpose of assessing professional skills, assessment bodies are based on the resources provided in the legislation governing the status of judges or prosecutors.

The report for the assessment of professional skills is made by the case rapporteur based on the report of the inspectors, the information received from other sources, as well as the evaluation criteria according to the legislation in force and proposes to the Independent Qualification Commission one of these categories for the subject. reassessment:

a) "Capable", when the subject of the re-evaluation has shown acceptable quality at work, fair trial, has respected the rights of the parties or victims, is efficient and effective to an acceptable extent;

b) "Defective", when the subject of the re-evaluation has shown unacceptable quality at work, poor judgment, has not normally respected the rights of the parties or victims, is not effective. The Commission has recommended a training program at the School of Magistrates to fill these gaps within a year;

c) "Inadequate", when the subject of the re-evaluation has shown unacceptable qualities at work, poor judgment, has not normally respected the rights of the parties or victims, is not effective, to the extent that the training program at the

School of Magistrates can not resolve this issue for one year, or has not successfully passed the testing at the School of Magistrates.

6. Decision-making

The decision of the Commission is taken by open voting and by a simple majority of the members of the trial panel. Negotiations to make a decision on the subject of the re-evaluation take place behind closed doors in the presence of the international observer. The written decision shall be notified to the subject of the re-evaluation, the Public Commissioner and the international observers within 30 days after the end of the hearing.

The decision is published on the official website of the Commission.

7. Complaint

Decisions of the Commission may be appealed to the Appellate Panel by the subject of the re-evaluation and/or the Public Commissioner, 15 days from the date of notification of the decision of the Commission.

The Panel may request the collection of facts or evidence, as well as correct any procedural errors made by the Commission, taking into account the fundamental rights of the re-evaluated entity.

After reviewing the case, the Appellate Panel decides: a) to leave in force the decision of the Commission; b) changing the decision of the Commission; c) annulment of the decision of the Commission.

The decision of the Appellate Panel, for dismissal, has immediate effect *ex lege*.

8. Disciplinary measures

At the end of the process, the Commission may decide on the subjects of revaluation:

a) confirmation in office;
b) suspension from duty for a period of 1 year and the obligation to attend the training program, according to the curricula approved by the School of Magistrates;
c) dismissal;

The reasons for the dismissal of the subject of revaluation are enumerated taxatively in the Law on Vetting, as follows:

- when it turns out that he has declared more than twice the legal property during the valuation of the property, including the persons related to it;
- when it turns out that there were serious problems during the control of the figure, due to inappropriate contacts with persons involved in organized crime that makes it impossible to continue in office;
- when it turns out that he has made an insufficient declaration for the criterion of control of figure and property, when he has not been assessed as "inappropriate" in the assessment of professional skills;
- when it results as inadequate from the assessment of professional skills;
- in case it turns out that the subject of the review has violated the public trust in the justice system and is in a situation of impossibility to fill the gaps through the training program.

The subject of the revaluation has the right to resign from office at any stage of the reassessment process. The resignation is submitted in writing to the President of the Republic and is published on the official website of this institution. In case of resignation, the Commission decides to terminate the re-evaluation procedure. In the event that the subject applies in the future for the position of judge or prosecutor, the entity will enter the process of ongoing performance appraisal, integrity and wealth the same as all new recruiting candidates.

9. Summary of Opinions of the Venice Commission

Provisional Opinion no. 824/2015 of the Venice Commission on the draft constitutional amendments on the judiciary in Albania dated 21 December 2015

In the interim opinion, the Venice Commission stressed that the need for vetting stems from the presumption that there is a high level of corruption in the judiciary. This process in normal situations would not be preferred because it could cause tensions in the judiciary and the risk of its capture by political forces. However, given the situation in the country, vetting is considered necessary as long as it remains as an extraordinary and extremely temporary measure.

Venice Commission among others stressed that the composition of the Independent Qualification Commission and the status of their members should guarantee their independence and impartiality, judges and prosecutors who are subject to the vetting process should be provided with a fair trial and have the right to appeal to the an independent body, the status and conditions of appointment/removal of international observers should be determined and their competencies should be precisely described through legislation.

Final opinion no. 824/2015 of the Venice Commission on the revised draft of constitutional amendments on the judiciary in Albania dated 14 March 2016

In the final opinion, the Venice Commission reiterated that vetting is necessary to remove corruption in Albania. In this opinion the Commission submitted a number of recommendations, where among other things it suggested that the mandate of the vetting bodies be reduced, that the judges of the appellate body, at the end of their mandate should be able to automatically integrate the judiciary, and that judges and prosecutors who are subject to vetting to enjoy the right to appeal to the Constitutional Court in case of violation of their fundamental rights, with some exceptions justified and dictated by the necessity of the vetting process.

Venice Commission among others stressed that the composition of the Independent Qualification Commission and the status of their members should guarantee their independence and impartiality, the competencies of international observers should be defined and their competencies should be of a procedural nature but not to decide meritoriously.

Opinions no. 868 / 2016- *Amicus Curiae* brief

The Constitutional Court of Albania, in October 2016 has asked the Venice Commission to assess and give an opinion on the compliance of the provisions of the Law on Transitional Reassessment of Judges and Prosecutors in the Republic of Albania with international standards, including the European Convention on Human Rights (hereinafter: KEDNJ). In this regard, the Constitutional Court has asked 4 questions as follows:

1. *Given the fact that all judges of the Constitutional Court are subject to law no. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania", is their participation in the review of this issue a conflict of interest?*

Regarding this issue, the Venice Commission has emphasized that the Law on Vetting does not provide any special rules for conflict of interest that require the withdrawal of judges. Therefore, the Constitutional Court of Albania can either be excluded from the evaluation of vetting legislation or must accept the basic importance of the role of the court function in reviewing the legislation, and consequently decide on the request submitted to it. In the opinion of the Venice Commission, the Constitutional Court does not need to withdraw in cases when it decides on cases which affect any interest of its members, unless that case would address the dismissal of members of the Constitutional Court.

In the opinion, the Venice Commission also referred to 'Bangalore Principles of Judicial Conduct 2002' which provides guidance on how to address such a situation, stating that in principle a judge who is not perceived as impartial should not be allowed to attend the hearing and decide on the matter. However, the disqualification of a judge should not be sought if it is impossible to establish another panel to decide the case (*doctrine of necessity).* Similarly, if the constitutionality of the provisions governing the proceedings before the Constitutional Court and the criteria for retention of office by officials in that Court, grounds for resignation or disciplinary action are raised as a matter before that court, the withdrawal of Constitutional Court judges is not required. However, if there is reason to believe that the judge who assesses the constitutionality of the Vetting Law does not meet the criteria set out in this law, it is therefore not adequate to hold that position and as a result of the assessment could be dismissed and is obliged to resign (e.g. if he/she considers that he/she may fail to verify the past due to his/her affiliation with criminal organizations). However, given the fact that there is an assumption that members of the Constitutional Court act in good faith, they are allowed to assess the constitutionality of the relevant provisions of the Law on Vetting.

> *2. Does the Vetting Law respect the basic principles of the rule of law and the separation and balance of powers? Is the independence of the judiciary endangered by being involved in the process of re-evaluating the executive bodies?*

Regarding this question, the Venice Commission has emphasized that the appointment of the members of the Independent Commission and the Appeals Chamber is done with the same procedure as for the regular judges. Based on Article 4 paragraph 2 of the Law on Vetting, the Independent Commission and the Appeals Chamber are institutions that decide on the final evaluation of the subjects of evaluation". Consequently, the principles

that apply to judges and regular courts also apply to the Independent Commission as the first instance and the Appeals Chamber as the second instance.

The most controversial issue in this regard has been the valuation of assets, as data collection is done by the executive bodies. In this case the Venice Commission has assessed that this process is a regular procedure and in line with European standards that the evidence presented in a court is initially taken by the executive (ex. the police). Since the final assessment of their weight and authenticity is provided by the court, consequently the collection of material in this way does not constitute an intervention of the executive in the judiciary.

3. *Is the Vetting Law in line with Article 6 of the ECHR (right to a fair trial)? Is it contrary to Article 6 of the ECHR to deny the right of vetting judges and prosecutors to go to the regular courts regarding their rights under this process?*

According to the Venice Commission, the Appeals Chamber can be considered as a specialized jurisdiction, which according to the constitutional provisions can be interpreted as a specification of the scope of Article 135 of the Constitution (Courts) and in particular, of paragraph 2 (special courts). Consequently, the same contains the elements of the Court which among other things is obliged to provide a fair trial.

4. *Are the provisions of the Law on Vetting regulating the control of the figure (verification of the past) contrary to Article 8 of the ECHR (respect for the private and family life of judges and prosecutors)?*

The Venice Commission has emphasized that the right to privacy is limited by Article 17 of the Constitution (in the public interest), which in this case can be justified by the need for specific legislative interventions given the level of corruption in Albania. Incriminating links with persons and criminal organizations violate national security and consequently justify the verification of the past of persons subject to evaluation. The contentious issue in this case was whether the measures provided for in the Vetting Act for the verification of the past are disproportionately intrusive into the private life of the persons being evaluated. The Venice Commission has considered that, given that the Law on Vetting obliges the disclosure of a large segment of contacts, the same process should be carefully supervised and controlled by the Commission and can be appealed to the Appeals Chamber. Also, information obtained from the verification of the past which is based on the statement of the assessment subjects can be used only for the purpose of re-evaluation and not for self-incriminating purposes in criminal proceedings.

Regarding the evaluation of the past, the Law on Vetting stipulates that the bearers of this process are the re-evaluation institutions together with the National Security Authority (KAS). Further, the State Intelligence Service and the Complaints Service together with KAS form a working group to verify the past of the assessment subjects.
Such a process for the purposes of the re-evaluation should be done under the supervision and control of the Independent Commission and be subject to appeal to the Appeals Chamber. The Venice Commission has expressed concerns about the composition of the working group for the reassessment, given that its members are only security personnel without representation of the Independent Commission. However, it is essential that all relevant material in the working group's possession be accessible to the review institutions (the Independent Commission and the Appeals Chamber).

Further, Annex Ç of the Constitution provides review institutions with access to the government database and all files, if not classified as a state secret, including personal files, supervisor opinions, training information and the like. The bodies in possession of this data have a duty to cooperate and give access to relevant documents to the revaluation institutions.

In conclusion, despite the authorization that re-evaluation institutions have or do not have full access and control over past verification and provide access to all relevant documents and material, it is an important issue to be considered by the Constitutional Court in the case of examination of the Vetting Act. If the Court finds that the re-evaluation bodies have full control over the background verification process, the legal provisions on the background verification of the subjects subject to this process may be considered as unjustified violations in the private life of judges and prosecutors and their families in violation of Article 8 of the ECHR.

10. Court practice

European Court of Human Rights (ECHR)

Xhoxhaj v. Albania [Request no. 15227/19]

The request was submitted by A.XH. former judge in the Constitutional Court, about the re-evaluation process exercised against her. In her application, she alleged that her rights under Articles 6, 8 and 13 of the European Convention on Human Rights had been violated (hereinafter: ECHR).

Regarding the dismissal of the Applicant Mrs. A.Xhoxhaj

In 2016 the Independent Qualification Commission had found that Ms. Xhoxhaj had unjustifiable liquid assets (he had not justified the legality of the source of income used in the purchase of a 100m2 apartment) and that the same was not self-excluded from an issue which constituted a conflict of interest for him. Consequently, in accordance with the law, the burden of proof passed to her to justify the legality of her property. As a result of these violations she was fired. Against this decision, the subject of re-evaluation has filed an appeal with the Appellate Panel for revocation of the decision of the Independent Qualification Commission. The latter did not repeal the Commission decision.

In 2019 Mrs. A. Xhoxha has submitted a request to the ECHR. Mrs. Xhoxha, in her request alleged a violation of Articles 6, 8 and 13 of the ECHR as follows:

- the vetting bodies were not independent and impartial, as their members did not have the necessary professionalism and experience, and they were appointed by parliament without the involvement of the judiciary;
- the same bodies were involved in three phases: conducting the preliminary investigation, drafting and filing the "indictment" and deciding simultaneously on the substance of the "indictment";
- had been denied the right to be defended;
- had unnecessarily borne the burden of proving in relation to circumstances which had arisen decades earlier;
- the vetting act had not preceded the statute of limitations;
- had not had enough time to prepare the defense;
- The Appeals Chamber had failed to hold a public hearing;
- there have been intrusions into private life;
- He has been denied the right to effective remedies.

Regarding the Applicant's allegations under Article 6 of the ECHR

With regard to the principle of 'an independent and impartial tribunal established by law', the court held that the vetting bodies were lawfully established, due to a sufficiently clear legal basis (referring to the Constitution and the Vetting Law) and which provided for the establishment of the KPC and the AC, due to their exclusive jurisdiction and powers to carry out the transitional re-evaluation of judges, prosecutors, advisers and

legal assistants as well as the manner of their formation in the applicant's case. The court did not find the allegation of lack of independence of the KPC and the Appellate Panel grounded. **The selection of vetting bodies was in line with the legal procedure and the non-involvement of the current judges was in line with the spirit and purpose of the vetting process, in particular in trying to avoid any conflict of interest and guarantee public confidence in the process.** The duration of their mandate was acceptable given the extraordinary nature of the vetting process. The court concluded that the domestic legislation had provided guarantees for their immobility as well as for the proper functioning of the vetting bodies.

With regard to impartiality, the Court noted that there was no duplication of KPC roles: the legal obligation to initiate an investigation was automatic and was not conditional on the filing of any 'charges' of disciplinary violations against the Applicant. The preliminary findings of the cases were based on the information contained in the file when the Applicant's defense arguments had not yet been taken into account. The decision on disciplinary liability against the Applicant was grounded *inter alia,* in all submissions and evidence proposed by the complainant. According to the Court, the fact that the KPC had conducted preliminary inquiries did not constitute a reasonable doubt as to its bias. The Court concluded that there had been no violation of Article 6 of the ECHR as regards the allegation of lack of independence and impartiality of the vetting bodies.

Regarding the obligation for due process, the Court noted that the initiation of the investigation by the KPC had been in accordance with the legislation in force. The Commission's initial preliminary findings were communicated to the Applicant, which were sufficient to protect her. The court found that the KPC ruled within its jurisdiction and the decision was well reasoned.

The Court found that the Appellate Panel had exercised full jurisdiction in the proceedings before it, in accordance with the law, and had examined every cause of the Applicant's appeal, including the refusal to admit new evidence, giving sufficient reasons. for his decision. Consequently, the Court concluded that there had been no violation of Article 6 in relation to the allegation of irregularities in the proceedings.

Regarding the obligation to hold a public hearing before the Appellate Panel, the Court noted that, according to its jurisprudence, the right to a public hearing meant the right to a hearing before at least one instance. Furthermore, the Court held that, only in exceptional cases, disciplinary proceedings against judges could be conducted without

any hearing. Due to the nature of the appeal proceedings, during which the applicant had a full opportunity to present her arguments in writing, and the fact that it was not necessary to cross-examine any or other evidence requiring the hearing to be called, holding such a hearing had not been necessary. Consequently, the Court concluded that there had been no violation of Article 6 in respect of the alleged absence of a public hearing before the Appellate Panel.

Regarding the observance of the principle of legal certainty, the Court emphasized that the statute of limitations is important for the observance of legal certainty. However, the Court added that asset control, as a measure in the fight against corruption, is specific, as assets normally accumulate throughout life and domestic authorities had an obligation to assess the legality of all assets acquired by appraisers. Also, the fact that the burden of proof had passed to the applicant after the findings in the pre-trial procedure, in the vetting proceedings does not mean that the procedure itself is arbitrary. Consequently, the Court ruled that there had been no violation of Article 6 in relation to the alleged violation of the principle of legal certainty.

Regarding the Applicant's allegations under Article 8 of the ECHR

The Applicant complained that the dismissal and permanent ban on exercising the profession of judge was illegal and arbitrary.
The Court finds on this allegation that the dismissal constituted an interference with the Applicant's right to respect for her privacy, an interference which had been in accordance with domestic law and in the interest of legitimate aims under the Convention. Dismissal was perhaps the most severe disciplinary measure that could be given to a person who required highly convincing evidence of ethical and professional misconduct.

In assessing the necessity of taking this measure, the Court took into account the 'socially necessary need' in Albania to reform the justice system due to the high level of corruption in the judiciary.

With regard to the valuation of the assets, she noted that the Applicant had been asked to justify the initial legal income that had been used to purchase her assets, which she had not done for some assets. The Court referred to international principles which require judges to adhere to high standards of integrity even in the administration of their private interests off duty - beyond any reprimand from the point of view of a reasonable observer

- in order to preserve and strengthen the trust of the public and restore confidence in the integrity of the judiciary.

With regard to the assessment of professional skills, the Court considered that, based on the circumstances of the case, the vetting bodies had not provided sufficient reasons to justify the conclusion that public confidence in the judicial system had been violated due to the applicant's non-withdrawal from the constitutional trial. Furthermore, the Court noted that, for a small country like Albania, the automatic withdrawal of a judge who was related by blood to another judge who had participated in another trial in relation to one or all of the parties could not be requested of the process.

Notwithstanding this finding, the Court considered that the conclusions drawn in relation to the appraisal of the assets were serious enough under domestic law to justify the Applicant's dismissal, and that it had been proportionate.

The permanent ban on re-entering the justice system due to serious ethical violations had been compatible with guaranteeing the integrity of the judge's office and the public's trust in the justice system. This ban was also justified due to the ongoing consolidation of justice in Albania. Consequently, there had been no violation of Article 8 of the Convention.

Regarding the Applicant's allegations under Article 13 of the ECHR

The Court rejected the allegation that the Applicant was denied the right to effective remedies. This is because, Mrs. A.Xh appealed against the decision of the Independent Qualification Commission which the appeal was reviewed by the Appeals Chamber according to its competencies and the same was rejected as ungrounded. Consequently, the reason that the Appeals Chamber dismissed the appeal as unfounded does not constitute a violation of the right to an effective remedy.

1.11. Conclusions relevant to Kosovo

- Constitutional changes have left room for the definition of evaluation authorities and their competencies, methods and evaluation criteria and consequently have reduced the probability of contradictions between legal and constitutional provisions.
- Current judges and prosecutors should not be involved in the vetting process in order to avoid the possibility of conflict of interest.

- The establishment of vetting bodies according to the principles of regular courts has influenced the perception of the vetting process as an objective process.
- The involvement of the international factor in the role of the monitor has enabled the process as a whole to be more objective, and at the same time the omission of competencies of a procedural nature has affected the non-interference in the matter of the vetting process.
- The evaluation criteria and the sources of information on which the evaluation is based should be determined taxonomically, in order to avoid the possibility of arbitrariness of the vetting bodies.
- The performance of past audit/verification should be done under the effective supervision and control of the revaluation institutions. It means that the information collected by the intelligence authorities should be accessible and available to the Reassessment Institutions.
- The constitutional sanction of intrusion into private life for national reasons has enabled wider research to verify the past.
- A gradual vetting should be done which enables new capacity building and employment of new judges and prosecutors. In Albania, it has been assumed that there will be no very large dismissals of judges, therefore, in the absence of proper legislation planning which would accurately address the probabilities of the results of the vetting system, has resulted in a large number of dismissals of Judges and delays in setting up other new justice institutions have caused problems in access to courts and the efficiency of the judiciary. In the Constitutional Court alone, out of 9 judges, only three have not been dismissed or resigned.
- The vetting process has had a positive impact and has aroused interest and trust among the public. The number of denunciations has increased (by 2018, a total of 736 denunciations or complaints have been made to vetting entities, judges or prosecutors).
- The access of Albanian citizens to the ECHR has justified the impossibility of access to the Constitutional Court.
- In principle, the Constitutional Court was allowed to assess the constitutionality of the Law on Vetting, although its members were also subject to evaluation.

1.5.1.2. Experience with vetting in Northern Macedonia

1. **Background**

The judicial system of Northern Macedonia has experienced two different social systems and, in principle, has carried out three reappointments of judges. The first was the "revolutionary" one in 1944; the second was the "evolutionary" and partial designation, which lasted for two decades; and the third was the general "reforming" reappointment of judges in the former Yugoslav Republic of Macedonia in 1996. Since the declaration of independence from the former Yugoslav Federation, northern Macedonia has experienced three waves of judicial reform since 1996. Since then, there have been a number of constitutional and legal changes, but never a more substantial vetting process, despite subsequent statements and attempts to do so.

Judicial reforms in Northern Macedonia have been inspired for different reasons at different times. However, any experience of judicial reform in northern Macedonia has been driven by the failures of previous reforms, be they *de jure* or *de facto*. The main goal of these reforms was to create a judicial system independent of the other two powers and to fight corruption. These reforms were also pushed by the international factor, and in particular by the institutions of the European Union.

The description of the vetting experience in Northern Macedonia will focus on the reforms of the judicial system that this country has experienced during the three main periods of judicial reforms after the declaration of independence, respectively during the first period (1996), the second period (2005- 2006) and the third period (2018).

2. Reforms in the judicial system of 1996

The 1996 reforms were initiated by the need to establish an independent judiciary following the declaration of independence by the former Yugoslav Federation and a clear division of powers between the legislature, the executive and the judiciary.

In 1996, the Law on Courts entered into force, through which the judicial system was completely remodeled. This law has repealed specialized courts such as those for commercial matters or minor offenses and established a general reappointment process (*vetting*) of all judges in the basic courts (total 27) and those of appeal (total 3).

As for the judges of the Supreme Court, the law provided that the President of the Supreme Court and the judges of this court, who had been appointed on the basis of

previous regulations, with a permanent mandate, would continue to hold their functions. This solution, which freed the Supreme Court from vetting, was an attempt to ensure continuity in the work of the Supreme Court and to avoid any general vacuum in the judicial system.

The conditions for the appointment and dismissal of judges were set out in the Law on Courts, while the procedure was detailed in the Law on the Judicial Council.

The process of appointing judges is done in two stages. Initially, the Judicial Council was responsible for announcing calls for positions and selecting judges, while the Assembly of the Republic of Macedonia decided on their appointment.

The nomination procedure has been perceived by the public as a transparent process while the appointment process in the assembly has been criticized for lack of transparency in decision-making.

Negative implications about the appointment process have resulted, *inter alia,* as a result of pre-organized voting, where a large number of MPs abstained during voting. Moreover, in the plenary session of the Assembly, there were no discussions about the arguments against the candidates who were not elected, despite the fact that they were proposed by the Judicial Council, which made the preliminary verification of the fulfillment of the criteria for appointment to office. judicial.

3. Judicial reform in the period 2005-2006

In 2005, amendments to the Constitution were initiated, which were followed by the adoption of new laws, in order to avoid the shortcomings of the vetting process initiated in 1996, through which judges were appointed by the Assembly, which was considered political interference in judicial.

These constitutional changes had defined a new status, as well as a new structure, composition and powers for the Judicial Council. Already the new Judicial Council consisted of fifteen members, most of whom were directly elected by the judges themselves (8 out of 15 members). According to amendment XXIX, the Judicial Council "*appoints judges and lay judges, decides on the termination of judicial office, appoints and dismisses court presidents, monitors and evaluates the performance of judges; decide on the disciplinary responsibility of judges; decide on the waiver of judicial immunity; proposes two judges to the Constitutional Court ...*".

The purpose of these changes was to establish a completely autonomous and independent system of appointment, performance appraisal and dismissal of judges. So, a system that would function outside the political and institutional pressure that had been exercised in the past, especially through appointments by the legislature.

These constitutional amendments were made concrete through the adoption of two main laws: Law on the Judicial Council of the Republic of Macedonia and the Law on Courts, 2006.
The Law on the Judicial Council regulated in its entirety the procedure and criteria for evaluating judicial performance, while the conditions for removal from the position of a judge were set out in the Law on Courts; while, again, the procedure was regulated in the Law on the Judicial Council.

The Law on Courts provided for two ways to remove judges from office:

a) through the end of the judicial term and
b) through discharge

The Judicial Council decided to terminate the judicial mandate for the following reasons: at the request of the judge; in cases where the judge is no longer able to exercise the judicial function; the judge has reached retirement age; the judge has been convicted of a criminal offense and sentenced to imprisonment of at least six months; or if the judge has been elected or appointed to another public office.

With regard to the dismissal of a judge, the Law on Courts set out two reasons on the basis of which a judge could leave office:

Due to the serious disciplinary violation that makes the judge discredited to exercise the judicial function and,

a) due to unprofessional and negligent exercise of judicial function under the conditions set out in law.

Serious disciplinary violations were considered:

- serious violation of public order that discredits the judge and the court;

- serious violation of the rights of the parties in the proceedings that discredits the court and the judicial function;
- violation of the principle of non-discrimination on any grounds;
- Low performance at work for more than eight months without justification, as determined by the Judicial Council.

In addition to serious disciplinary violations, the legislator had sanctioned situations related to unprofessional and negligent conduct of the judicial function under the conditions set out in the legislation in force, which were the basis for the dismissal of the judge. These violations are as follows:

- Inefficiency of the judge as a reason for delaying the procedure through exceeding the deadlines for taking procedural actions, making a decision, publishing or preparing court decisions in more than five cases, or if within a calendar year, more than 20% of the total number of solved cases have been revoked or more than 30% of the total number of solved cases have been changed;
- Unconscious, untimely and careless exercise of judicial function;
- Unequal treatment of the parties in the procedure;
- Unauthorized disclosure of classified information;
- Public disclosure of information and data related to court cases for which there are still no final judgments;
- Intentional violation of the rules of fair trial;
- Abuse of position and/or overstepping of official duties;
- Violation of the independence of the judge and serious violation of the Code of the Court, which thus undermines the perception of the judicial function;
- If the European Court of Human Rights confirms the violation of the right to a fair trial under Article 6 of the European Convention on Human Rights or a decision adopted by the Supreme Court of the Republic of Macedonia confirming the violation of the right to a trial within a reasonable time as a result of the judge's action.

The exhaustive list of reasons for the dismissal of judges has paved the way for the dismissal of a significant number of judges. Due to serious disciplinary violations and unprofessional and negligent exercise of judicial function, the Judicial Council dismissed 80 judges within a period of five (5) years (2010-2014).

Conclusions from the reform of the period 2005-2006

This way of dismissing judges was overseen and criticized by the European Commission for interfering with the executive and political control over the work of the judiciary.

As a result of the constant criticism from the European Commission Progress Reports and GRECO Recommendations, a new Law was drafted and adopted for the Fact-Finding Council and the Initiation of Procedures for Determining the Responsibility of Judges.

This law created a new institutional body in the justice system, consisting of nine members, which included retired judges, prosecutors, lawyers and law professors.

According to the Venice Commission, the functions of this Council should be transferred back to the Judicial Council, specifying that members or bodies of the Judicial Council involved in the initial stages of disciplinary proceedings as "accusers" or "investigators" should not participate in the final decision as "judge".

In 2015 and 2016, the European Court of Human Rights, acting in relation to the cases of six judges who had allegedly dismissed illegally, had issued four judgments that violated **Article 6 – Right to a fair trial –** of the European Convention on Human Rights, in the procedures for the dismissal of the six judges. In all cases, the Court found violations of the right to a fair trial. **This is due to the fact of the participation of the President of the Supreme Court both in the process of initiating the procedure for dismissal and in deciding on the merits of the case in the voting procedure for dismissal.** This dichotomy of roles, where the same judges participate both in initiating the proceedings and the investigation of the case as well as in deciding on the merits of the case, contradicts the principle of objectivity. Such a case, according to the Court, raises objective doubts as to the impartiality of the member (in this case, the President of the Supreme Court) when deciding on the merits of the case.

In one case, the European Court of Human Rights, in addition to the controversial participation of the President of the Supreme Court, had objected to the participation of the Minister of Justice, who had participated in the investigation of the case on which the dismissal was then based.

4. **Judicial reforms of 2018**

The legislative changes of 2018 have flowed due to the need to repair the image of the judiciary and to improve the quality of justice in the country. The judges themselves agreed that the judicial system needed to be cleaned up, as current judges' assessments

did not reflect relativity. Interviews with prominent lawyers in the country confirmed the judges' perception.

These needs were particularly raised after the 2015 national security and corruption scandal, in which communications of illegally intercepted public figures were published. In one of them, for example, the President of the Judicial Council informed the Cabinet of the Prime Minister of the Government of Macedonia that the judicial elections would take place soon and which judge would be appointed and the like.

This situation had created a political crisis, which was resolved through a political agreement – known as the Pristina Agreement – with the assistance and mediation of members of the European Parliament. Meanwhile, the European Commission had prepared urgent reform priorities based on previous recommendations provided by independent rule of law expert groups that had been invited to analyze the situation. The Priebe Group of Experts was assigned to review developments related to interception of communications, the judicial and prosecutorial system, and external oversight by independent bodies, elections and the media.

In June 2015, the Priebe Group of Experts published its reports. The group had, among other things, recommended the de-politicized appointment and promotion of judges and prosecutors, which would be done according to transparent, objective and strictly merit-based criteria, and using transparent procedures set out in law and not only in internal regulations, in line with the recommendations of the Venice Commission Opinions on judicial appointments and the independence of the judiciary, as well as specific recommendations regarding the Republic of Macedonia, many of which were not implemented.
Later in 2017, this group in order to assess the progress made towards the implementation of the recommendations given in the initial report has published another report, which in particular highlights the case of the general vetting for all judges. According to this report, just because a number of judges have abused their office does not mean that judicial misconduct is universal. The minority of politically influential judges should be **subject to effective professional rules** and ethical and, there is evidence that **proves criminal responsibility,** should be criminally liable for their prohibited conduct. Consequently, induced judges should be barred from practicing law at all levels.

In May 2018, the Macedonian Parliament approved amendments to the Law on Courts and the Law on the Judicial Council, based on the Judiciary Reform Strategy 2017-2022

and the Action Plan. These amendments mainly included changes in the system for judicial evaluation and dismissal and were in line with the recommendations of the Venice Commission regarding disciplinary responsibility and evaluation of judges **(which mainly called for the strengthening of qualitative criteria in judicial evaluation; shortening the unnecessarily long list of circumstances that may trigger disciplinary sanctions; clear/indisputable definition of "guilt" as a basis for determining judicial responsibility, etc.).**

Law on Amending the Law on Courts, *inter alia,* redefines and elaborates on serious disciplinary violations that constitute grounds for dismissal and that result in disciplinary measures. According to the amendments to the new law, a serious disciplinary violation which is the basis for the dismissal of a judge are considered:

- membership in a political party;
- preventing a higher court from exercising judicial oversight;
- using the function and reputation of the court for private interests;
- serious disturbance of public order damaging the reputation of the court and their reputation established by a final court decision;
- unsatisfactory results of the evaluation in two consecutive evaluations conducted by the Judicial Council of the Republic of Macedonia, through which it is concluded that the judge is unprofessional and negligent in performing the judicial function;
- performing a function, work or other public activity in non-compliance with the exercise of judicial function;
- accepting gifts and other benefits for performing the judicial function;
- If the judge in the cases he decides on fails to apply the views of the final judgments of the European Court of Human Rights; and
- sharing (disclosure) of confidential information received during the performance of the judicial function.

Other disciplinary violations resulting in disciplinary measures:

- violation of the rules of the code of ethics for judges that undermine the perception of the judicial function;
- severe disruption of relations within the court that strongly affects the performance of the judicial function;
- failure to fulfill d mentoring tasks related to the professional training of associates;
- absence from work in violation of applicable rules;
- non-attendance of mandatory trainings;
- non-compliance with the dress code;

- failure to schedule hearings in cases assigned to them or in other ways that delay court proceedings without a reasoned cause or failure to proceed with the case which in turn causes the case to become obsolete due to the statute of limitations for criminal prosecution or further enforcement of the criminal sanction imposed for a criminal offense."

Another important change in the Law on Courts is the definition of a qualitative criterion for the performance of a judge. The judges themselves have supported the imposition of qualitative criteria for performance appraisal compared to quantitative ones, as only in this way would the quality of the judiciary as a whole be increased. The indicators of the qualitative criterion consist of the following:

- the quality of the judge's performance in terms of the number of decisions overturned due to serious violations of procedures in relation to the total number of cases resolved;
- the quality of the judge's performance in terms of the number of overturned decisions of the total number of decisions taken;
- quality of court proceedings (observance of legal deadlines for undertaking procedural actions, observance of legal deadlines for approval, announcement and decision-making, duration of court proceedings and observance of the principle of trial within a reasonable time);
- the quality of the decision rendered, which will be determined through the penetration of five cases, randomly selected from the automated case management information system and five cases selected by the judge during the evaluation period; and
- the disciplinary measure imposed.

5. Conclusions relevant to Kosovo

- Investigations should target individual responsibility;
- Subjects dismissed due to violation of the duties of a judge (depending on the previous violation of the legislation) should be prohibited from practicing the profession;
- Avoid duplication of roles of vetting bodies. This implies that it should be determined separately who initiates the procedure and investigates and who decides on the merits of the case;
- Avoid extensive incorporation of less relevant circumstances that could lead to disciplinary action;

- In performance appraisal, qualitative criteria have more weight than quantitative ones;
- Assess the personal integrity of judges.

1.5.1.3 Experience with vetting in Serbia

1. Background

Among Eastern European countries, Serbia was the last to cross the so-called "minimum threshold" of democracy, the first transfer of power from the former socialist government to a democratic government. This delay came as a result of unrest in the Balkan region. In 2009, Serbia submitted its application to join the European Union, which on March 1, 2012 was followed by the acquisition of candidate status. To join the European Union, Serbia faced the challenge of radical reform in every segment, including the judiciary. The impetus for this process was also public pressure.
Post-socialist reforms began in 2001 with the amendment of relevant laws addressing the judiciary.
In May 2006, the National Assembly adopted the first National Justice Reform Strategy 2006-2011, which was considered a positive step for Serbia's future. The focus of the strategy was to increase the independence, transparency, accountability and efficiency of the judiciary.
Although Serbia is considered a failed process since the constitutional and legal changes, its case is addressed in this document due to the relevance of the Venice Commission's opinions on changes in the judicial system in Serbia, which shed light on many aspects of vetting, and consequently serve as a guide on respecting the basic principles of the judiciary when drafting the provisions of legal acts addressing vetting.

2. Modality and reforms

To implement changes in the judiciary, in 2006 Serbia adopted a new Constitution with the aim of establishing an independent judiciary and prosecutorial system.
The 2006 Constitution sanctioned the role and powers of the High Judicial Council (HJC) and the establishment of the State Prosecutorial Council (HJC). The Constitutional Law on the Implementation of the Constitution has provided for the reappointment of all judges and public prosecutors from the transitional composition of the High Judicial Council and the State Prosecutorial Council.

During 2008, the following laws were adopted:

- Law on the Organization of Courts; Law on Territorial Jurisdiction of Courts and Public Prosecutions; Law on Judges; Law on the High Judicial Council; Law on Public Prosecutor and Law on State Prosecutorial Council.
- The Law on the Organization of Courts provided for the reduction of the number of courts from 168 to 64, which resulted in the dismissal of a large number of judges. This law has sanctioned the establishment of courts with general jurisdiction, such as: basic courts, high court and courts of appeal as well as the Supreme Court as the highest judicial institution in the country. This law has also established courts with specialized jurisdictions such as commercial, minor and administrative courts.

The reasons for this reform, since considering the increase in the number of unresolved cases in court, it did not make sense for the number of judges to be reduced.

- Further, the Law on Judges adopted on 22 December 2008 and the 2006 Constitution provided for the "general reappointment" of judges, where all incumbent judges were allowed to participate. However, new candidates were also given the opportunity to apply for open positions of judges, where initially successful candidates were appointed for a 3-year term (probationary period), with the possibility of moving to a permanent term.

This means that a system of collective reappointment has been applied to all, first-time candidates for judges and judges who have already been in office.

3. Institutions

The key bearer of the reappointment and re-evaluation process was the High Judicial Council.

Based on Articles 156 and 157 of the Constitution, the HJC is an independent and autonomous body which ensures and guarantees that the courts and judges are independent. This council has 11 members with a 5-year term. Of the elected members, 6 are judges with permanent mandates, 2 are prominent lawyers with 15 years of experience in the legal field, one is a lawyer and the other a professor of law. The others are the President of the High Court of Cassation, the President of the Authorized Committee of the Assembly and the Minister of Justice.

4. Competencies

The High Judicial Council appoints and dismisses judges and proposes the new candidate for judge to the National Assembly. This body issues acts that regulate the

implementation of the criteria set by law for the election, promotion and termination of the function of a judge.

Reappointment procedure

In 2009, the HJC announced the call for applications for the position of judges. The application time was 15 from the day of the announcement. In 2009, before the start of the general reappointment, the HJC took a decision on the establishment of criteria and standards for the assessment of skills, qualification and integrity of the reappointment of judges and court presidents, on the basis of which it also organized the reassessment and general reappointment of judges.

In this process, a total of 2483 positions were opened for judges in courts of general and specialized jurisdiction, and there were 5,030 applications, half of which came from incumbent judges. Of these only 1531 judges were reappointed. More specifically, one third of incumbent judges were not appointed and the total number of judges was reduced to a quarter.

Judges who were not reappointed were not informed of the decision. This was made known to them when the lists were announced and their name was missing from the list of appointed speakers. Following this, the HJC issued a general decision with a general reasoning for all judges who were not appointed.

5. Appeal mechanism

Based on the Constitution of Serbia, judges dissatisfied with the decision of the HJC have the right to appeal to the Constitutional Court.

Due to the large number of not appointed judges, the number of appeals to the Constitutional Court was very high (almost all judges appealed). Despite the fact that these cases were reviewed with priority by the Court, within a year only two of them have been decided. This has had a negative impact on respect for human rights, especially the right of access to court.

Regarding the decision of the HJC for reappointment, the Constitutional Court requested clarification whether the judges who were not reappointed were decided by a reasoned individual decision. The council responded by invoking the fact that the situations of the reappointed judges were the same and that identical decisions would have been taken. He therefore found it unnecessary to give an individual decision to each unnamed judge. This reasoning was inadmissible to the Constitutional Court and consequently ordered the HJC to draw up an individual decision for the unnamed judges and to justify them. As the latter did not respect this order, the Constitutional Court took a decision by which

it annulled the decision of the HJC for collective dismissal of judges, because the disputed provisions which did not respect the guarantees for a fair trial.

6. Draft-Criteria and standards for judges

This draft has provided for the evaluation on three bases: the qualification, competence and worthiness of judges and prosecutors.

Worthiness: means the ethical qualities that a judge should have and the behavior in accordance with those qualities. For judges who are already in office there is a presumption that they are worthy.

Criteria regarding the ethical qualities required of a judge include honesty, conscientiousness, equal treatment of parties, dignity, perseverance, and setting a good example. According to the draft, "good example" means that the judge should refrain from any improper action, action that gives grounds for suspicion, or any other way that would affect the weakening of the public towards the judiciary, the content of hate speech, be impartial and tolerant, have no vulgar expressions, etc. These assessments are based on the results of interviews and other methods such as testing and other psychosocial techniques. These assessments can also be made by taking the opinions of persons with whom the candidates have worked, such as judges or members of the bar. **The Venice Commission assessed this technique as difficult to implement in practice [Opinion No. 528/2009].**

Qualification: implies the theoretical and practical knowledge necessary for the performance of the duties of judges. Indicators of this criterion are: duration of studies, average grade, success in the bar exam, additional education, published papers and other circumstances that affect the knowledge of the judge. The Venice Commission considered these indicators difficult to measure and did not accurately reflect the actual qualification of the judge.

Capacity (performance): is closely related to performance at work. Capacity, according to the draft decision of the HJC, means the skills that enable the judge to effectively apply legal knowledge in the cases in which he / she decides. In other words, efficiency at work was considered and assessed on the basis of indicators: the number of cases resolved and the relationship between that number and the rate assessed. The following criteria are taken into account in job performance: unjustifiable delays in drafting decisions; unreasonable failure to schedule hearings; inadequate treatment of court participants and court staff, unreasonable delays in the proceedings as a whole were some of the indicators that were taken into account.

In addition to judges, the performance of judicial assistants was measured in performance appraisal.

The manner of evaluating performance at work has been criticized by the Venice Commission (Opinion no. **528/2009).** The Venice Commission has stressed that the quality and quantity of judges' work act against each other. Some judges may be charged with much more difficult cases to resolve, which affects a smaller number of cases for which the judge decides. On the other hand, the pressure to resolve more cases may affect the quality of judges' work.

The methodology of capacity assessment was the most controversial issue, as it was considered as an insufficient indicator for assessing the quality of the working judge/prosecutor. The Venice Commission in particular emphasized that: ***'The fact that a judge has not ruled on a large number of cases and its decisions have been appealed does not necessarily mean the incompetence and unprofessionalism of the judge. However, it is reasonable that a judge whose decisions have been annulled may create a basis which calls into question his/her competence.'*** He further stressed that the assessment should be specified on a case-by-case basis, taking into account the complexity of the cases resolved by the judges, and when they were dragged out with or without the judge's fault and not just the number of cases resolved by the judges. That is, there is no "one rule fits all".

The evaluation of the assistants' performance has been criticized by the Venice Commission for lacking objective criteria for calculation and for the assistant's contribution to the reasoning of the court decision.

7. Opinions of the Venice Commission

<u>Opinions no. 405/2006</u>

Regarding the reappointment of all judges and prosecutors, the Venice Commission has stated that such a rapid and comprehensive process is acceptable only if it provides sufficient assurance that it will be performed fairly. This means that this procedure must be based on clear and transparent criteria and that only the past conduct of the judge in conflict with the role of an independent judge can be a reason for reappointment.

The procedure should be fair and carried out by an independent and impartial body and ensure a fair process for all stakeholders. The possibility of appealing to an independent court should be provided.

<u>Opinion No. 464/2007 on the Draft Law on Judges and the Organization of Courts</u>

The Venice Commission has once again reiterated the fact that the need for reappointment of judges is not entirely clear and the provisions of the draft law do not

sufficiently ensure the fair implementation of the process. According to the Commission, this draft law simply sets out the re-appointment procedure for all judges, both incumbents and first-time applicants. Consequently, the current judges were not given more specific treatment during the reappointment procedure. The same for the position they held should apply as persons who have not served in this capacity before the entry into force of the draft law. This in fact means that this process is not a process of "renaming"

The Commission has seen the issue of reappointment of current judges as problematic because the same has no constitutional basis and has stated that:

"*The removal of judges from office without the imposition of precautionary measures would not be in accordance with the principles of a society where there is the rule of law. Under the Law, as drafted, it is possible that an existing judge who is neither incompetent nor guilty of misconduct and who applies for reappointment will move in favor of the other applicant. That would be an unacceptable result.*"

Further, the competent bodies for initiating this procedure should be specified. It is also recommended that in addition to the judge having the right to be notified of the reasons for initiating dismissal proceedings against him or her, it is recommended to specify whether only the judge undergoing the proceedings has the right to make a statement in this regard cases or even persons authorized by him (e.g. legal representative). Against decisions on disciplinary measures against judges, the appeal should be addressed to the independent Court established by law and not to other bodies, such as the HJC.

8. Opinion of the European Commission

The European Commission has commented on the vetting process as a non-transparent process which has jeopardized the principle of "independent judiciary". The councils have acted in a transitional composition, which has influenced adequate representation by professionals and has allowed political influence, especially through the way the members of the Council are selected. The opinions of the Venice Commission on objective performance appraisal criteria were not taken into account. The right to appeal was restricted to access to the Constitutional Court only and a uniform court system was established.

9. Conclusions (relevant to Kosovo)

- The legal basis for the termination of the mandate of judges must be defined in accordance with the principles of the rule of law. In this regard, international standards and basic principles of the judicial system should be taken into account, especially when it comes to the dismissal of judges with permanent mandates.

- There were shortages of administrative staff in the reassessment procedure. Consequently, the need and experience of the support staff in developing the vetting process must be calculated and assessed in advance.
- The vetting process should be conducted in a transparent manner, especially with regard to the selection of vetting mechanisms and the reasons for the dismissal of assessment subjects.
- Regarding the right to be notified of the reasons for initiating dismissal proceedings against the re-evaluation subjects, it is recommended to specify who has the right to give a statement on this issue, only the re-evaluated subject or even the persons authorized by him (e.g. legal representative).
- Timelines for each vetting phase should be set in accordance with the real possibilities of developing procedures.
- The right to appeal to not appointed judges was limited to recourse to the Constitutional Court, which did not have the capacity to fully review decisions. Consequently, a mechanism must be provided that acts as a second instance and which contains all the attributes of a regular court.
- Criteria for evaluating judges should be specified and measurable in practice.
- It should be determined what are the responsible mechanisms within the councils to perform the performance appraisal as well as to determine how the qualitative and quantitative evaluation of the judge's work will be done. The responsible body that will perform this analysis/evaluation within the Judicial Council should be determined/established.
- The reasons for vetting were not clear and the relevant laws (for the organization of courts) did not reflect the reality and there was no concrete reasoning why the reduction of the number of judges was foreseen.
- The selection of members of the High Judicial Council by the Assembly, which was considered to be influenced, has been criticized. Consequently, a process or at least precautionary measures must be put in place to avoid the interference of the legislative and executive branches of government in the judiciary.
- 'Vetting' in the form of a collective reappointment has been criticized by the Venice Commission for opening the door to the dismissal of judges who have not committed any offenses. As such it is considered an unfair process.

1.5.2. The practice of Eastern European countries

1.5.2.1 Experience with Vetting in Moldova

1. Background

Moldova has faced high levels of corruption for many years and has been assessed by international organizations as making insufficient progress in preventing corruption in relation to members of parliament as well as in the justice system of judges and prosecutors. Judicial independence has been one of the priorities on the reform agenda of all Moldovan governments since 2009. For these reasons, Moldova initiated a reform of the justice system through legal and constitutional changes to improve the independence, accountability, and efficiency of the judiciary.

Vetting process – legal changes

Through legal changes Moldova decided to start the vetting process through several different steps. One of the first proposals was to reduce the number of judges in the Supreme Court from 33 to 17. To identify judges who would continue to hold positions in the Supreme Court after the reorganization, the law established a special body *ad-hoc* extra judicial called the Evaluation Committee that will evaluate and select the judges of the Supreme Court.

This Evaluation Committee consists of 20 members: 2 members elected by Parliament, 2 by the Presidency, 2 by the Government, 2 by the Superior Council of Judges, 2 from the Superior Council of the Prosecution, 4 from the Civil Society, 6 from the Minister of Justice (foreign experts based on the proposals of Moldova's international partner organizations).

If the judge rejects the assessment or does not participate in the assessment based on the date set by the Committee, he must resign.

The evaluation of Judges is done in two stages:

1. Integrity/lifestyle, and
2. Activity/assessment of personal qualities.

The Committee then draws up a report determining whether or not the judge has passed the assessment. Judges who pass the test continue to work in the Supreme Court and if their number will be greater than 17, only the 17 judges with the most points will stay in

the Supreme Court while the others will be placed in other courts but will hold the salary as judges in the Supreme Court.

Negative evaluation can be challenged by the judge of the case with an appeal to the Secretariat of the Evaluation Committee. The complaint is evaluated by another evaluation board that did not participate in the initial evaluation phase, but on the data collected by the Evaluation Committee.

The report issued by the Second Evaluation Committee (Board) may be reviewed by a judge's appeal to the Superior Council of Judges within 14 days in a public session and the Council may reject the evaluation report and return it to the Evaluation Commission.

The Evaluation Committee will give the final evaluation by verifying the findings of the Superior Council and decide whether to keep the board report or approve a new report. This report may not be rejected by the Superior Council.

In the event that without appeal or after the unsuccessful annulment of the report where the judge was assessed negatively, he/she is offered a vacancy in other courts without a competition procedure. However, in case of refusal of transfer, he can resign and has no right to run for judge again for 10 years.

If the number of 17 judges remains unfilled, a competition will be opened for the filling of these positions by the Evaluation Committee. The evaluation of the candidates is done by the Evaluation Board and the report is sent to the Superior Council which can reject the report of the Board. The final decision rests with the Evaluation Committee.

The same evaluation procedure will be applied to the President and Deputy President of the Court of Appeals and the Basic Courts. A similar procedure applies to prosecutors in the Anti-Corruption Prosecution Office, the Attorney General and his deputies, the Chief Prosecutors of Basic Prosecutions, the Office of the Prosecutor for Combating Organized Crime, the district prosecutor's office and the regional prosecutors.

Disciplinary responsibility and evaluation of judges' performance

Moldova has regulated by law the reasons for the disciplinary liability of judges, the categories of disciplinary offenses committed by judges, the duties of the institutions involved in the disciplinary proceedings, and the procedure for reviewing, approving and appealing decisions in disciplinary matters relating to judges.

Disciplinary violations include:

- Violation of the time of completion of procedural actions;
- Failure to perform, delayed or inappropriate performance of a job task without a reasonable justification;
- Using the position of judge to seek or accept the resolution of personal or other interests, or to take unfair advantage.

The Law establishes the Disciplinary Board that will examine the disciplinary procedure of judges and consists of 5 judges and 4 members of civil society.

The procedure before the Disciplinary Board can be initiated by: the person whose rights have been violated, a member of the Superior Council of Judges, the Board for the evaluation of the performance of Judges and the National Center against Corruption.

Disciplinary matters are reviewed by the Disciplinary Board which adopts a decision on the disciplinary responsibility of the judge in question. The Board may decide on:

a. finding a disciplinary violation and enforcing one of the disciplinary sanctions (a. Warning b. Reprimand c. Salary reduction d. Dismissal);
b. termination of disciplinary proceedings in case the deadline for disciplinary liability has expired;
c. termination of the procedure in case no disciplinary violation has been committed;
d. termination of the procedure in case of revocation of the submitted notice.

The decision of the Disciplinary Board can be appealed to the Superior Council of Judges which can keep the same decision or accept the appeal and change the decision. This decision of the Superior Council can be appealed to the Supreme Court.

These legal changes envisaged by Moldova have been sent for review to the Venice Commission which made the following recommendations:

- For this proposed law to be in accordance with the Constitution, all decisions regarding the transfer, promotion and removal of judges must be taken by the Superior Council of Judges. The Superior Council should be entrusted with the power to make decisions based on the recommendations contained in the Evaluation Commission report. The decision of the Superior Council should be public and fully reasoned and should be automatically prompted by the report of the evaluation committee.
- The draft law should not provide for an appeal against the evaluation report from one board of the Evaluation Committee to the other board, but, the draft

law should provide for an appeal before a judicial body against the decisions of the Superior Council of Judges. This judicial body should be designed outside the group of Supreme Court judges. The criteria for the election of its members and the procedure to be followed should be defined in law.

- The evaluation criteria to be used during the evaluation process in relation to the integrity, professionalism and lifestyle of judges should be clearly indicated and defined by law.
- The Evaluation Committee should consist of a substantial number of members with legal background (if not half).
- If a judge fails in evaluation, he/she should not be offered another position even in the lower courts.
- The reverse burden of proof that the appraisal judge removes the Evaluation Commission's suspicion should be removed

After receiving recommendations from the Venice Commission, Moldova took several other legislative steps and urgently sought the opinion of the Venice Commission on amendments to the law on the Superior Council of Judges.

The Law on the Superior Council of Judges in Moldova stipulates that this Council consists of 12 members, of which six judges, three university professors and three ex-officio members who are the Chairman of the Superior Council, the Minister of Justice and the Basic Prosecutor, all with mandates 4 years old. The procedure for the organization and functioning of this Council is determined by the Constitution to be regulated by a special law.

Under the new proposal, Moldova will increase the number of Superior Council members from 12 to 15, one of whom will be a judge and the other two lay members.

Regarding the number of members of the Superior Council, the Venice Commission emphasizes that a balanced composition should be achieved and referring to Recommendation CM/Rec (2010) 12 of the Council of Ministers of the European Council: *"No less than half of the members of such councils should be judges elected by their colleagues from all levels of the judiciary and with respect for pluralism within the judiciary."*

Regarding the selection of the members of the Superior Council, the seven judge members are elected by the Basic Assembly of Judges by secret ballot, of which four from the basic courts, two from the Courts of Appeal and one from the Supreme Court. Such a composition is welcomed by the Venice Commission based on the idea that such a

composition increases the representation of the lower courts as well as increases pluralism.

The other five members of the Council are proposed to be appointed by Parliament by a majority vote of the elected deputies. However, the majority of MPs present is considered a low threshold and recommends that a 2/3 majority be required for the election of Council members. However, the Commission also notes that the requirement for a higher majority (for example two-thirds) could block the procedure for appointing lay members due to the failure to reach such a majority in Moldova's circumstances.

The vetting process - constitutional changes

In addition to the legal changes that Moldova has undertaken for the vetting process, the government has recently envisioned some constitutional changes that contribute to this process.

The Constitution of Moldova provided that judges be appointed for 5 years and after this period they can be appointed until retirement. According to the proposal for amendment, this probationary period of 5 years is removed. Such a thing is welcomed by the Venice Commission.

Appointment of judges

According to the Moldovan Constitution, judges are appointed by the President of Moldova on the proposal of the Superior Council of Judges. Under the constitutional amendment, the President will have the right to reject the nomination proposed by the Superior Council only once. The Venice Commission envisages that the nomination of judges by the Superior Council and the appointment by the President together with the possibility of rejection only once is valid and represents a reflection of the balance of roles between the Superior Council and the political role of the President of the state.

Appointment of Supreme Court judges

According to the Moldovan Constitution, judges of the Supreme Court are appointed by Parliament on the proposal of the Superior Council, while the constitutional amendment proposes that this article be removed altogether so that the selection of all judges at all levels of the courts is made by the President on the proposal of the Council. Superior. Even in the opinion of the Venice Commission, the involvement of the Parliament leads

to the politicization of the appointment of judges and therefore sees this change as positive.

The Venice Commission particularly welcomes:

- abolition of probationary periods for judges;
- appointment of judges of the Supreme Court of Justice by the president (with a one-time veto);
- the statement in the Constitution that at least half of the members of the Council would be judges elected by their colleagues and that the members of the Superior Council should represent all courts of law levels.

Meanwhile, the additional changes recommended by the Commission were as follows:

- the number of members of the Superior Council of Judges should be determined by the Constitution;
- the method of electing lay members by Parliament or by a qualified majority with an anti-blocking mechanism or by a proportional method should be specified in the Constitution but should also be provided by law. Furthermore, authorities may consider outsourcing non-government-controlled bodies, such as the Chamber of Advocates or law schools, to nominate candidates;
- the requirement that lay members of the Superior Council who should not be "politically affiliated" may be replaced by the phrase "are not members of political parties";
- in special circumstances of Moldova, it may be advisable to state explicitly in the Constitution that exceptional cases where the law may provide for judges to be suspended or removed involve corrupt conduct.

2. Conclusions - relevant to the case of Kosovo

- If the vetting process is done with legal changes, it must be done in full compliance with the Constitution.
- The probationary period of judges should be removed.
- The members of the Council that makes the selection and evaluation of judges should be half with a legal background and as representative as possible at all levels of the courts.
- If the Constitution provides for a Council responsible for the transfer, promotion and removal of judges, then it should be the same Council that decides during the vetting procedure in the event of legal changes.
- Judges' evaluation reports from any other body may be used as a basis for the Council's decision.

- The evaluation criteria that will be used during the evaluation process in the vetting process must be clearly listed and defined to be defined by law.
- Judges should not have the opposite burden of proof to testify in the vetting process.

1.5.2.2. Experience with Vetting in Ukraine

1. Background

During 2013 and 2014, many uprisings were organized against the government led by then-President Viktor Yanukovych, which originated in the latter's decision to withdraw Ukraine from the Association Agreement provided for with the European Union in November 2013. These protests, dubbed the "Dignity Revolution" or "Euromaidan" in Ukraine, called for European integration as part of Ukraine's foreign policy and a reduction in corruption.

The new government elected in early 2014 launched a comprehensive institutional reform project that included the creation of four new anti-corruption bodies: (a) The National Anti-Corruption Bureau (NABU), which investigates cases of high-level corruption; (b) the Specialized Anti-Corruption Prosecution Office (SAPO), an independent unit within the Office of the Attorney General that oversees NABU investigations and pursues its affairs; (c) the National Agency for the Prevention of Corruption (NAPC), which administers the asset declaration system and participates in the development of anti-corruption policies; and (d) the Agency for Asset Repair and Management (ARMA), which focuses on recovering stolen assets.

After much debate, the Government adopted the Law "On Government Cleansing" which included a wide list of officials to be verified (vetted), including: The Prime Minister and Deputy Prime Minister, the Chairman of the National Bank, the Chairman of the State Committee for Television and Radio; Attorney General; and Chiefs of External Intelligence Service, State Guard Administration, and tax and customs agencies; officers, heads of state-owned enterprises in connection with the military-industrial complex and the Ministry of Interior. The Law "On Government Cleansing" also includes judicial positions such as members of the High Council of Justice, members of the High Qualification Commission of Judges of Ukraine, professional judges, Head of the Judicial Administration of the State of Ukraine. Individuals who are part of one of these lustration categories are prohibited from holding public office for five or ten years.

Reform of 2017

Ukraine has launched a comprehensive judicial reform that includes the adoption of laws: "On Ensuring the Right to a Fair Trial" (February 2015), "On the Judicial System and the Status of Judges" (June 2016), "On the High Council of Judges" (December 2016), "On the Constitutional Court" (July 2017) and new procedural legislation. The 2016 Law on the Judicial System and the Status of Judges provides for the establishment of a High Anti-Corruption Court (HACC). Given that corruption is considered one of Ukraine's main problems, and that even the judiciary itself has been considered weak, politicized and corrupt for many years, 6 international organizations including the EU and foreign donors have made it repeatedly calls on Ukraine to set up an Anti-Corruption Court (HACC). This was also formalized as a commitment in the Memorandum of Understanding between Ukraine and the IMF in March 2017.

One of the biggest concerns regarding the established Court was compliance with constitutional provisions. The Constitution of Ukraine allows the establishment of "Specialized High Courts" but prohibits extraordinary and special courts. The Consultative Council of European Judges (CCJE) stated in Opinion no. 15 that "since specialist judges must meet complexity or specific requirements in specific legal areas is a separate issue from the establishment of special, ad hoc or extraordinary courts as dictated by individual or specific circumstances. This is a potential risk for these courts not to provide all the safeguards provided for in Article 6 of the ECHR. Meanwhile, on the other hand, the case of the European Court of Human Rights can be mentioned *Fruni against Slovakia* where the Court states that Article 6 § 1 of the European Convention on Human Rights on the right to a fair trial by an independent and impartial tribunal established by law cannot be read in the sense that it prohibits the establishment of special criminal courts/specialized courts if they have a basis in law. The court did not enter into discussions on the differentiation between specialized and special courts, but it had no objections to the concept of the Slovak court in question which at that time had criminal jurisdiction *ratione personae* over certain public officials and *ratione materiae* over corruption, organized crime and other serious violations. The court said that "the fight against corruption and organized crime may require measures, procedures and institutions of a specialized nature".

Those who argue that the HACC may be a separate or extraordinary court mainly refer to the HACC jurisdiction which, at least in part, is determined by referring to certain categories of officials, for the fact that the HACC would be separate from the basic courts

and subject to a number of specific provisions and deviations from the procedure for appointing HACC judges from the ordinary procedure.

Jurisdiction of HACC

HACC is competent not only for corrupt acts *stricto sensu* but also for related crimes such as abuse of power or official position, illicit enrichment and money laundering. Regarding the cases that are in process at the moment when HACC starts functioning, these cases are expected to continue to take place before the courts where the procedure has started.

Anti-corruption court system and appeal channels

The anti-corruption court system consists of the HACC and the Anti-Corruption Chamber of the Criminal Court of Cassation of the Supreme Court (Anti-Corruption Chamber). An Appeals Chamber is established within the HACC, whose judges have jurisdiction to review HACC decisions that may be appealed. Review of the decisions of these Appeals Chamber decisions within the HACC falls within the competence of the Anti-Corruption Chamber at the Supreme Court.

Status of judges for anti-corruption

Advanced security measures have been envisaged for anti-corruption courts and judges, which have been welcomed by the Venice Commission, given that those judges will have to decide on high-profile corruption cases. The Commission has even proposed to consider special payment schemes for these judges, but not to deviate too much from the general rules.

Legislative procedure

According to the Constitution of Ukraine, the courts are established, reorganized and dissolved by law, and the draft law on those matters must be submitted to the legislature by the President of Ukraine after consultation with the HJC. Some observers argue that this provision has been violated since the bill was introduced in Parliament by MPs and not by the President of Ukraine.

Scope of competence of specialized judges

The Venice Commission in its opinion has assessed that the competencies of specialized judges according to the draft law are not clear enough. The draft refers to "corruption crimes" and "administrative offenses related to corruption". It seems necessary to define

more clearly which violations would fall into those concepts. For example, the term "corruption crimes" may refer to criminal offenses in office under the Criminal Code, so a specification of these powers is necessary.

Selection and protection of specialized judges

It is of the utmost importance that judges specializing in high-level corruption cases be resolved in a transparent process based on objective criteria. It is also critical that such judges be adequately protected from outside influences, e.g. political influences, or influence and from any possible attack on their independence and security.

Recommendations of the Venice Commission

- The main components of this draft law should be maintained, namely the establishment of an independent HACC and the appeal level whose judges have a flawless reputation and are selected on the basis of competition in a transparent manner. Temporarily, international organizations and donors active in providing support for anti-corruption programs in Ukraine should be given a crucial role in the body competent to select specialized anti-corruption judges, similar to the role envisaged for them in the draft law.

  The jurisdiction of the HACC and the appellate court should correspond to that of the National Anti-Corruption Bureau (NABU) and the Special Anti-Corruption Prosecution Office (SAPO), depending on the requirement that the jurisdiction of the courts be precisely defined by law.

- Additional safeguards should be introduced to ensure that the decision-making body in the judicial appointment procedure is sufficiently independent of the executive and the legislature. This can be achieved, for example, by giving a non-political agency such as the High Qualification Commission of Judges the right to nominate members to that body, in addition to members nominated by international donors. However, the procedure for involving international organizations and donors in the selection procedure needs to be regulated in more detail in order to ensure a high degree of transparency and compliance with the Constitution.

Changes in 2019

In 2019 changes in the legal framework in Ukraine were introduced in the regulation of the Supreme Court and self-governing judicial bodies.

Law no. 193-IX presented major changes in three main areas:

a. new rules on the structure and role of the High Council of Judges and on the composition and status of the High Qualification Commission of Judges,
b. rules for reducing the number of judges in the Supreme Court,
c. rules for disciplinary measures.

The Law on Government Cleansing also included persons who in the period 2013-2019 held positions of Chairperson and Deputy Chairperson of the Judges Qualification Commission

The Venice Commission stated some conclusions regarding these changes:

- He welcomed the removal of the articles so that lustration would not be used for officials who are not welcomed by previous governments after the democratic change of governments.
- He stressed that for a major reform to be successful, it is not enough to "do it well" in essence. The adaptation procedure is as important as the substance. Proper consultation with all stakeholders is essential to make a credible reform and ensure that it is acceptable even to those who oppose it, in order to survive government change over time.
- The Venice Commission delegation learned that key stakeholders in the Judiciary, such as the Supreme Court, the High Judicial Council, the High Qualification Commission or the Bar, complained that they had not been consulted on the draft law and the comments they made on their own initiative as soon as the draft law became accessible, were not discussed in detail during parliamentary proceedings.
- The preparation and adoption of the bill was part of a broader legislative program of the newly elected President of Ukraine, who introduced more than 100 bills in a single day. It is inevitable that in such a broad legislative program some draft laws will contain inconsistencies.

Stability of the legal framework and the judicial system

The Venice Commission recalls that, according to the Rule of Law Checklist, the clarity, predictability, consistency and coherence of the legislative framework, as well as the consistency of legislation, are key concerns for any rule of law based on the principles of the rule of law.

Reform of the High Judicial Council and the Qualification Council of Judges

The Venice Commission recommends that the structure of the judiciary be coherent and simple. In Ukraine there is a special system of judicial bodies consisting of the High Judicial Council (HJC) which is a constitutional body and the High Council for the Qualification of Judges (HJC) which is established by law and is considered a historical relic for because the HJC was difficult to reform due to constitutional restrictions. The draft law stipulates that the HJCC is "a collegial public body of judicial governance operating on a permanent basis in the Ukrainian justice system." It would be preferable if this article clearly defined the position of the HJC in relation to the HJC, especially since it is subordinate to the HCJ.

According to the Draft Law, a new form of the HJC formation procedure is proposed that will consist of 12 members with 4-year mandates selected by the HJC in a competitive process and a subordination of the HJC with the HJC is established, which is welcomed by the Venice Commission. With the entry into force of one of the previous laws, all members of the HJC have left and this has led to the termination of all evaluations of judges in the first and second instance, which brings major problems for citizens. The draft law proposes the establishment of two commissions within the HJC: The Selection Board for the appointment of members of the HJC and the Ethics and Integrity Commission that oversees the conduct of the HJC and the HJC. Both commissions consist of 3 international and 3 national members.

2. Composition of the HJC

User of the HJC are selected by a Selection Board consisting of 3 members from the Council of Judges and 3 international experts proposed by international organizations that Ukraine cooperates in the field of combating corruption. The Venice Commission in its opinion has foreseen that temporarily, international organizations and donors will be given an essential role in the selection of judges who will deal with anti-corruption cases, until the expected results are achieved. A big problem in these changes proposed by the Commission is the fact that these changes are very early, in the middle of a period when judges are being tested in the first and second instance. The members of the HJC should at least continue to work until they are replaced.

The law also provides for the introduction of an Integrity and Ethics Board, which functions in the HJC to ensure transparency and accountability of HJC and HJC members. The Integrity and Ethics Board is a kind of oversight body over both bodies, which assesses the compliance of their members with the principles of integrity and ethical standards of a judge as an integral component of professional ethics.

Reducing the number of Supreme Court Judges and selecting judges

The proposed amendment envisions reducing the maximum number of judges in the Supreme Court from 200 to 100. The Venice Commission estimates that the number of judges in the Supreme Courts varies from country to country and there is no ideal number. For each country, the right number depends on procedural laws, legal culture, quality of work at the lowest levels and the general trust of the people in the justice system. Low trust in the judicial system can lead to a higher number of complaints. However, in the case of Ukraine there was no justification for such a proposal and no impact assessment was made. Judges in the Supreme Court will be evaluated based on criteria of professional competence, ethics and integrity. Reducing the number of judges will cause an even higher number of unresolved cases and jeopardize the functioning of the Supreme Court. Due to the current heavy caseload (approximately 70,000 cases), the Court will not be able to provide properly reasoned trials within a reasonable time under Article 6 of the ECHR. Both the Venice Commission and the Consultative Council of European Judges (CCJE) have argued that in order not to jeopardize the independence of the judiciary, assessments and disciplinary measures and processes should be clearly differentiated. In fact, CCJE Opinion no. 17 provides: "Some consequences, such as dismissal due to a negative assessment, should be avoided for all judges who have been given permanent terms, except in exceptional circumstances."

3. Conclusions relevant to Kosovo

- Legal changes to be made in accordance with the Constitution because in Ukraine the Constitutional Court has assessed as unconstitutional some of the proposed laws;
- Judicial bodies should have a structure as simple as possible and in harmony with each other;
- Vetting should be done by maximally coordinating the institutions among themselves;
- During the vetting procedure not to leave many vacancies that worsen the situation especially when the country has a high number of unresolved cases;
- The persons/judges who will do the vetting should have security measures;

- The vetting process should not be done in a fragmented form and issuing many laws but should be done in a comprehensive form with as few laws as possible.

1.5.2.3 Experience with Vetting in Armenia

1. Background

The so-called "Velvet Revolution" culminated in the peaceful change of power in Armenia in 2018. The new government inherited a state steeped in corruption, with a weak rule of law and a high level of poverty.

As the new government had the necessary constitutional majority, major and broad vetting initiatives were announced to assess the suitability of incumbent judges. The purpose of the vetting process was an effective and fair judiciary, through the discovery of judges' links to the previous regime and its authoritarian legacy. The government quickly abandoned its superlative goals and chose to engage in dialogue with civil society and international stakeholders about what vetting should look like. With the development of a broad and comprehensive public consultation process, the Government managed to design a better defined vetting process.

2. Modality

In order to develop the vetting process, following the relevant constitutional changes, Armenia drafted a package of laws to complement the procedure of verification of declared assets of judges, disciplinary responsibility and periodic evaluation. The legal package also set out a scheme for the early retirement of Constitutional Court judges.

3. Vetting Bodies

The legal package proposed changing the existing institutional structure and especially the composition and functions of disciplinary bodies. According to the constitutional definition of Armenia, the administration of the judiciary is done by the Supreme Judicial Council. The General Assembly of Judges is another body composed of all judges and functions in specialized commissions. One of these commissions is the Disciplinary Commission, which has the power to raise disciplinary cases against judges before the Council, which is also the last instance in terms of disciplinary matters.

The vetting reform has foreseen changes in the composition and functions of exactly these specialized committees of the Assembly. The power to raise disciplinary matters before the Council is vested in three committees: Committee on Ethics and Discipline of the General Assembly of Judges, the Minister of Justice and the Committee on Prevention of Corruption (with special subject matter competence, regarding the declaration of assets of judges). The novelty of the legal reform was that in the composition of the Ethics and Discipline Committee of the General Assembly of Judges, prominent lawyers were nominated, nominated by civil society organizations.

The Committee on Ethics and Discipline of the General Assembly of Judges may initiate disciplinary matters on the basis of complaints, press information, etc. In principle, it serves as a "filter" of impermissible cases and for this purpose may conduct preliminary investigations on the factual basis of allegations of ethical violations. Decision-making belongs to the Supreme Judicial Council. For this purpose, review sessions are held. Decisions are taken by qualified majority. This mechanism evaluates and checks the integrity of those taking office for the first time.

The Commission for the Prevention of Corruption reviews the financial statements of judges and may initiate disciplinary proceedings before the Supreme Judicial Council if it finds irregularities in the statement. In considering this aspect of the law in question, the Venice Commission mentioned that the control of financial statements can be done by an internal body of the Council or by an external body, as is the case of this Commission[113]. While the first model is indicative of the independence of the judiciary, it lacks transparency. Therefore, according to the model of performing this function by an external body, the review of the financial statements of judges is done in the same way as that of the statements of other public officials. This mechanism analyzes the assets and controls the property status of those who are already incumbent judges, at the time the reform began.

Recognition of the competence of the Minister of Justice to initiate disciplinary proceedings against a judge before the Supreme Judicial Council was initially viewed with reservation by the Venice Commission. However, since the Minister has powers only for initiation and not decision-making, this competence has been assessed as acceptable.

The review has an adversarial character and the judge in the procedure is offered all the procedural guarantees as a party in the criminal procedure. On the other hand, the law

[113] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)024-e

guarantees the independence of the Supreme Judicial Council, through provisions that provide for the appointment of members and the duration of their term. This system is in line with a previous opinion of the Venice Commission, which ruled that disciplinary proceedings should be conducted by an independent authority or court that guarantees the right to a fair trial.

4. The burden of proof

Initially, vets submit, along with other documents, the completed integrity assessment questionnaire. The questionnaire provides information about the person's property, education, employment, data if he has ever committed a criminal, administrative or disciplinary violation. In addition, the Commission will collect information from various databases, competent bodies, traditional media and social networks.

The Commission for Prevention of Corruption is legally recognized access to cadastral registration, credit bureaus, Central Bank of Armenia, in order to provide data about the person and his family. The Commission does not have access to data under the Banking Secrecy Law. It has been mentioned that the extension of this 'research' to the family members and relatives of the person was done with the aim of discovering whether the property was registered in someone else's name, to hide the traces of corruption.

The Venice Commission has assessed that enabling the access of this Commission to "generalized" financial data and about transactions in large values of the judge, do not infringe on his privacy. However, it would be superfluous for the Commission to have access to very detailed information on even the smallest transactions of a judge. In this case, the privacy of the judge or his family could be compromised. Information of this level can be provided only in criminal proceedings, where the necessary procedural guarantees exist.

The Commission for the Prevention of Corruption will draft recommendations which it will present to the Council. Otherwise, if from this analysis of documents criminal violations are investigated, then the Commission notifies the competent criminal prosecution authorities of the possible existence of elements of committing a criminal offense. Similarly, if administrative violations are investigated, appropriate administrative violation proceedings will be initiated.

5. Complaint

The decision of the Council cannot be appealed before the regular courts. The review of complaints is done by the Council itself, according to a so-called special procedure.

The Venice Commission has criticized this "appeal mechanism", for which it has assessed that it does not allow an appeal in the full sense of the word, since in fact, the case is opened for reconsideration by the same body that once decided, based on the new circumstances that may have been introduced. The notion of appeal according to the Venice Commission, in essence means the control by another body of the legality and merits of a decision, based on the same facts.

The Venice Commission has noted that such a situation easily violates the provisions of the European Convention on Human Rights and seriously violates the right to a fair trial under Article 6 of the Convention, which explicitly guarantees access to a court. In this case, it would have to be considered whether the Supreme Judicial Council constitutes a court in the context of the exercise of the right under Article 6 of the Convention. In a similar case of Ramos Nunes de Carvalho v. Portugal, the ECHR found that the Portuguese High Judicial Council was an administrative body and that in order to exercise the right guaranteed under Article 6 of the Convention, the dissatisfied party would have to it was enabled to be further controlled by a judicial body with full jurisdiction. Therefore, even if the law proclaims the Judicial Council as a court, the ECHR may find that that body does not meet the requirements to be a judicial body and, consequently, does not comply with Article 6 of the Convention on the Right to Appeal before a Court under the Law.

6. Conclusions relevant to Kosovo

- The Venice Commission criticized negatively the competence of the Ethics Commission to interpret the rules of conduct and the rules of ethics. According to such a scenario, it falls to the Commission to make assessments of conduct and ethics according to the rules that it has interpreted itself at the request of judges, in the proceedings against these same judges. The Venice Commission proposed to create a separate position of ethics adviser, provided that this person does not participate in the examination of allegations regarding the violation of the rule that he has interpreted himself.
- The Venice Commission mentioned that the control of financial statements can be done by an internal body of the Supreme Judicial Council or by an external body, as is the case of the Commission for the Prevention of Corruption. While the first model is indicative of the independence of the judiciary, it lacks transparency. Therefore, according to the model of performing this function by an external body, the review of the financial statements of judges is done in the same way as that of the statements of other public officials.

- According to the Opinion of the Venice Commission, there is no definitive answer as to what body should carry out the financial audit. This depends entirely on the history, traditions, administrative structure and factual situation of the extent of corruption within the particular state system. If there is a rationale, then special investigative bodies and specialized prosecutors can be established to fight corruption in the judiciary.
- In the matter of designing a vetting reform, according to the Venice Commission, the important question is not who has the competence to initiate disciplinary proceedings, but to whom the decision-making regarding the disciplinary responsibility of the judge belongs.
- According to the Venice Commission, the model according to which decision-making is reserved for the Supreme Judicial Council is acceptable. This model is consistent with the definition of the Venice Commission that an independent authority or court should conduct disciplinary proceedings that guarantees the right to a fair trial.
- According to the assessment of the Venice Commission, in the disciplinary procedure there should be a mechanism for appealing the decision and a second instance review of the complaint. This is a fundamental requirement of the right to a fair trial, according to Article 6 of the European Convention on Human Rights. However, this body does not necessarily have to be a court in the first sense per se, but functionally a mechanism exercising second instance jurisdiction over the matter.

1.5.2.4 Experience with Vetting in Poland

1. Background

With the fall of the communist regime in Central and Eastern Europe in the late 1980s and early 1990s, the new states embarked on a long and arduous odyssey towards building strong democratic systems. In order to bring about justice and at the same time political and social restructuring on the values of democracy, the countries of the former Communist Bloc, including Poland, initiated so-called "lustration" processes. Poland first initiated the lustration process in 1997 and then in 2006. Generally, lustration as a concept was a vetting process, which meant a process of evaluating and examining the image of certain abusive and corrupt persons, who had worked and collaborated with the fallen regime, in order to remove them from influential public positions through a procedure right. So the lustration process in Poland became known as "communist lustration" and, in essence, was a process of transitional justice. The object of verification

was only if the public official had been a collaborator of the secret services. The polishing process first took place in 1997, and then was "updated" in 2006.

In addition to the system established by special lustration laws that did not produce the intended results, in 2017 Poland undertook a complementary reform, with the aim of re-verifying the suitability of judges through disciplinary proceedings. Three enacted laws dealing with elements related to the issue continue to be the subject of constant criticism by the Venice Commission and the European Court of Justice.

2. Modality

The first lustration initiative was taken in 1992 in the form of an Assembly resolution. The Constitutional Court declared this act unconstitutional. He found that issues affecting human rights could not be resolved by an act that is not subject to legislative procedure. Also, because the resolution was too general and did not provide sufficient detail, the Court found that it violated legal certainty and the rule of law.

Law on Lustration 1997

The first Lustration Law was enacted in 1997 and was drafted in the spirit of Council of Europe Assembly Resolution 1096, which called for secession from the legacy of former totalitarian communist systems. In this 1996 Resolution, it was emphasized that the key to a peaceful coexistence and successful transition is to strike a delicate balance between bringing justice, without seeking revenge. The purpose of the law was to avoid blackmail that could be done to persons in public office due to being vulnerable as a result of their past and connections with the secret services. Apparently, the 1997 law complied with the standards for the protection of human rights under the Polish Constitution and international instruments ratified by Poland.

The law obliged the acting public officials who were on duty, born before 01.08.1972, to formally declare whether they were officials, employees or collaborators of the secret services in the years 1944-1990. It is estimated that the scope of this law has affected over 27,000 people. Such a large number of subjects can be assessed as a problematic factor in achieving the intended results.

The law came under constitutional review shortly after its entry into force, alleging that the process was arbitrary in nature and violated human rights and freedoms. According to the decision of the Constitutional Court, lustration as a process was legitimate and constitutional. According to this decision, a lustration process, developed on the basis of

a legally defined mechanism, in order to verify the connections with the past of current and future public officials, which entail high responsibilities and require civic trust, is not unconstitutional.

Matyjek v. Poland

Decision dated 30.06.2006 on the admissibility of the appeal[114]

The system of the lustration process under the 1997 law was also challenged before the ECHR, in the prominent case of Matyjek v. Poland. The interpretations and reasoning of the ECHR in the decision issued in 2006, were reflected in the "updated" lustration process, with the issuance of a second special law in 2006. In addition, this decision attracted even more attention because for the first time before the ECHR as an object of consideration was a process of lustration of an Eastern European state.

Matyjek, a lawmaker fired for allegedly making false statements about his connections to the secret service, was fired and banned from holding public office for 10 years. He alleged a violation of Article 6 of the Convention because he was not allowed access to the case file and was not allowed to keep notes during the hearing.

On the other hand, the Government of Poland challenged the jurisdiction of the court, claiming that Article 6 of the Convention did not apply in this case, since the lustration procedure was neither related to the determination of its civil rights and obligations, nor to the imposition of a criminal charges. The Government also objected stating that in case the Convention was applicable, however the lawsuit was inadmissible because Mr. Matyjek had not exhausted the courts in the country, with regard to Article 35. 1 of the Convention.

The court started the analysis first by examining whether the case constituted a criminal charge against the complainant. He emphasized that the term "criminal charge" under Article 6 of the Convention was autonomous and was determined on the basis of three criteria according to the jurisprudence of the Court, namely the Ozturk case and the Engel case, come to:

1. Classification of the procedure according to the domestic law;
2. The nature of the violation;
3. The nature and severity of the sanction to which the applicant was subject.

[114] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-75941%22]}

The criteria are not cumulative. The first criterion has a formal and relative value and is only the starting point of the analysis. The other two criteria are alternative; it suffices for one accomplice to qualify a case as criminal within the meaning of the Convention.

Lustration in Poland was regulated by a special law, which did not categorize itself as either criminal or civil. Polish jurisprudence referred to this law as "another law that forms the basis of criminal liability". The Court found, however, that there was a close link between the lustration procedure and the criminal field, especially as the Law on Lustration referred to the application of the provisions of the Code of Criminal Procedure to matters which it did not regulate itself. At the same time, the Public Interest Commissioner was given the same powers as the State Prosecutor's Code of Criminal Procedure. The Court also noted that procedurally, a lustration procedure is similar to the procedure before a criminal court. As such, the lustration procedure has typical features and connotations of criminal procedure.

Regarding the second criterion, the Court noted that the sanction was followed by lying in a statement that he was legally obliged to give. Also, the violation of the obligation to tell the truth in such statements and circumstances, is recognized as a violation of domestic law and results in a sanction, in some cases a sanction of a criminal nature. It was also assessed that the first meaning of "false statement" is analogous to the criminal offense of "false declaration", which even outside the context of the lustration procedure, would be the basis for the investigation and further prosecution.

In assessing the third criterion, that of the nature of the sanction, it was noted that the sanction as such is not typically criminal - that is, it is not a fine or imprisonment. However, the prohibition of practicing the profession and public function for 10 years, has a serious impact on the person and his ability to continue professional life. Therefore, by nature this sanction has elements of punishment.

Consequently, the Court ruled that Article 6 of the Convention was applicable. The applicability of Article 6 of the Convention means that the right to a fair trial, in the context of a lustration procedure with similar characteristics as in the case of Poland, implies the obligation to provide procedural guarantees typical of a criminal proceeding. Such guarantees, which must be maintained throughout the development of the lustration procedure are, inter alia, the presumption of innocence, equality of arms and the right to appeal. In this decision, the court considered only the issue of the admissibility of the appeal, without prejudice to merit issues.

Decision dated 24.09.2007 on merits[115]

A year later, the ECHR ruled on the merits of the case, whether there had been a violation of Article 6 of the Convention or not. Mr. Matyjek in his complaint, challenged the lustration itself as a process, which according to him was unequal, secret in nature and unfair in terms of access to case file and conduct of reviews. Consequently, he claimed that the principle of equality of arms had not been respected and that he had not been able to defend himself. Furthermore, he alleged that he had been placed at a disadvantage vis-it-vis the Commissioner for Public Interest; the state had access to all the archives and had the technical and financial possibilities to review the necessary materials and decide which ones would be included as case files. Most of the documents were secret and the removal of the classification of these documents as secret was in itself arbitrary. The complainant also alleged a violation of Article 6 on the ground that he had not been allowed to challenge the evidence presented against him, nor to call an independent expert for review. He also complained that he had not been allowed to take his notes with him during the examination,

In response, the Polish Government stated that the "difficulties" that the complainant might have had during the proceedings were due to the fact that some of the case documents were classified as a state secret, in relation to the applicable law. Also, due to the confidential nature of the case, the written reasoning of the lustration decision could not be served and access could only be granted through the secret register.

In reasoning its decision and invoking its case law, the ECHR reiterated that with regard to the principle of equality of arms, which is an element of the broader concept of fair trial, each party should be given a reasonable opportunity to present the case, under conditions that do not put him at a disadvantage in front of the opponent.

The Court stressed that, unless according to the specific facts of the case, it cannot be assumed that there continues to be a continuing public interest in imposing restrictions on access to materials that were classified as confidential by a previous regime. The lustration procedures are by nature oriented to extract facts dating back to the communist period and are not related to the current functions and operations of the secret services. Lustration procedures inevitably depend on the scrutiny of documents related to the operations of former communist secret agencies. If the party to whom these materials

[115] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-80219%22]}

refer is denied access to them, then it is severely impossible for him to oppose the version presented by the secret services.

The court acknowledges that there may be cases where the state interest requires the confidentiality of certain documents, even those from previous regimes. However, such cases are exceptional and not the norm, given the fact that considerable time has passed since those documents were created. The burden of proof is on the Government to prove the existence of such an interest.

The ECHR reiterates that the active participation of the accused during the criminal proceedings should include the right of the accused to take notes that will be used to prepare his defense, regardless of whether he is defended by a lawyer.

In its 2007 Decision, the ECHR ruled that due to the confidentiality of the documents and restrictions placed on the lustrated person to access the case file, as well as the privileged position of the Public Interest Commissioner in the lustration procedure, the complainant had been violated his right to a fair trial under Article 6 of the Convention.

Law on Lustration 2006

As a result of new circumstances in 2006, the new Lustration Law was passed, repealing the 1997 Law. The lustration process was expected to be subject to 20 categories of public positions. While the first reform had affected about 27,000 people, the new reform was projected to affect 400,000 to 700,000 people. Persons who had passed the lustration test under the 1997 law also had to undergo verification again. Putting under the magnifying glass of such a wide spectrum of officials not only public, was widely criticized by human rights organizations and was seen as endangering the values of human rights and democracy in Poland. The new law was especially criticized for restricting the right to work. It was assessed that freedom of expression, media independence and autonomy of academic institutions were also restricted, especially due to the inclusion of journalists and university teachers as groups that would be subject to vetting.

The severity of this law aroused resentment and raised questions about the motivation for reform. In public it was seen as political revenge, unfounded on democratic principles. On the other hand, it was argued that only such radical reforms could make the transition from a non-democratic to a democratic system. The law was referred to the Constitutional Court for alleged flagrant violation of Article 2 of the Constitution, which dealt with democracy and the rule of law in the country. The constitutional review itself encountered many vicissitudes, with the exclusion from decision-making of two judges

who themselves were suspected of having links to the previous system. According to the Court's decision, 39 articles of the law were declared unconstitutional. 10 out of 11 judges gave dissenting opinions.

3. Vetting bodies

Law on Lustration 1997

The veracity of the statements was verified by a special independent office called the "Public Interest Spokesperson". This body was mandated only to verify the veracity of the authorial statements of the persons in the proceedings and did not carry out any other form of investigation of their past. Decisions were taken in court proceedings, conducted by the so-called Lustration Court.

Law on Lustration 2006

With the new law, the Public Interest Spokesperson was replaced by the Lustration Bureau of the National Memorial Institute. The Court of Lustration was abolished and jurisdiction passed to the district courts, which were regular courts.

4. Scope of data collected

Law on Lustration 1997

Under the 1997 Lustration Act, senior elected public officials provided a written affidavit regarding their cooperation or not with the secret police in the past. The process, designed under the 1997 law, in a way "amnestied" those who told the truth and did not provide sanctions against them. Punishment was provided for so-called lustration liars. If after verifying the statement by the Commissioner for Public Interest it turned out that the official had lied, he was punished.

Law on Lustration 2006

According to this law, persons who would be subject to the process were required to submit written evidence if they had cooperated with state security bodies from 1944-1990. Failure to submit the testimony equated the person with a lustration liar.

The vetting body was given public access to communist secret service documents, in addition to "sensitive data". The burden fell on the person being vetted to challenge the authenticity of these documents in court - in civil proceedings. Recourse to criminal

proceedings and the guarantees of this procedure were not provided, including the procedural guarantee of presumption of innocence.

It was not clear which ones qualified as "sensitive data". The Constitutional Court found that allowing public access to certain personal data could lead to unfounded discrimination and restrict the right to privacy. Therefore, data such as the genetic code, data on addictions, political beliefs, membership in political parties, philosophical views, criminal past and data on other administrative sanctions should be considered as "sensitive data". This information could only be made public with the consent of the person.

The publications of the Lustration Bureau, a division of the National Memorial Institute, were also intended to serve as a source of data. This bureau would collect and publish catalogs with personal data of persons who were informants and collaborators, eavesdroppers, secret police agents and employees, and senior Communist Party officials. The publication was banned by a decision of the Constitutional Court. The court found that there was no legal basis authorizing the creation and maintenance of this list, which as such contributed to the violation of fundamental constitutional rights.

5. Sanctions

Law on Lustration 1997

The law did not provide for criminal or quasi-criminal consequences for former self-declared accomplices. The law did not prevent persons who declared their connections with the bodies of the previous system from exercising public functions. Although formally amnestied, in terms of elected positions, it was up to the voters to "punish" former collaborators by voting.

The law provided for sanctions for false declarants, lustration "liars". False declaration disqualified the person from suitability for public office, as non-fulfillment of the condition to have high character, good reputation and high moral standards. The false declaration was decided by a court decision. The person was also barred from holding public office for 10 years. Thus, the sanction did not derive from being a former collaborator of the per se system, but came as a result of making a false statement - which was interpreted as a person's inadequacy in terms of the moral standards required by the relevant laws for the exercise of public functions.

Law on Lustration 2006

Unlike the system established by the law of 1997, according to the law of 2006, the declaration of cooperation with the previous system or the non-submission of the written declaration, had as a consequence the sanction of banning the exercise of public functions for 10 years.

In the spirit of the reasoning in Matyjek v. Poland and the decision of the Constitutional Court of Poland of 2008, such sanctions were constitutional insofar as they referred to a reasonable time frame and coincided with the degree of gravity of the human rights violation that this person could have done, being an associate or functionary of the former system. It was pointed out that the responsibility should not be individualized and everyone should be penalized. The sanction of banning the exercise of public functions for 10 years could be imposed only on persons who have ordered the commission of actions that have constituted a serious violation of human rights, have undertaken those actions themselves or have relied on high degree.

6. Complaint

In both cases, the vetting body was given ample access to communist secret service documents. The burden fell on the person who was being vetted to challenge the authenticity of these documents in court. Both laws provided for a second instance court that was initially under the jurisdiction of the Lustration Court as a separate court. Under the 2006 law, this jurisdiction passed to the regular district courts.

7. Disciplinary proceedings under the 2017 legal reform

Extensive enterprises under the 1997 and 2006 laws did not deliver the intended results. The system was not cleaned. Recently, the Polish authorities have undertaken a comprehensive legal reform, aimed at cleaning up and increasing the competence of the judiciary.

The proposed changes in the context of recruitment, promotion and disciplinary proceedings against judges were harshly criticized by the ECJ Advocate General[116]. Although the reform did not have a clear context of lustration or vetting, elements that had been critical are also found in the context of vetting, so they deserve attention.

In principle, the EU has no general competence with regard to matters of disciplinary responsibility of judges. However, in exercising its competence to organize the judiciary, member states must comply with their obligations under EU law. Member States should

[116] https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210075en.pdf

therefore ensure that effective legal protection is guaranteed, so that decisions taken against judges in disciplinary proceedings can be reviewed by an appeals mechanism.

Recently, in an Opinion dated 06.05.2021, the Advocate General of the ECJ reasoned that the Court should rule that the Polish reform constitutes a violation of EU law. In the Opinion of the Advocate General it was assessed that the principle of judicial independence is violated in case the content of a court decision is taken for review for the purposes of a disciplinary procedure. According to this opinion, disciplinary measures should be taken against a judge who commits the most serious forms of professional misconduct and not on the basis of the content of a court decision, through the review of facts, evaluation of evidence or interpretation of the law. Such an approach is contrary to the values and principles established under Article 267 of the Treaty on the Functioning of the EU.

8. Vetting result

By the end of 2013, over 299,000 declarations had been registered with the Lustration Bureau. In 2,785 of them, persons had declared links to the secret services. By 2013, the Bureau had verified over 10,700 statements. As of 2013, the courts had issued 183 judgments in lustration proceedings, of which 135 had been found to have made false statements. Extensive enterprises under the 1997 and 2006 laws did not deliver the intended results.

9. Conclusions relevant to Kosovo

- From Polish practice, it is seen that a vetting process is inevitably a process that restricts human rights. This restriction proved to be justified in post-communist states because it was necessary for the transition from undemocratic to democratic systems; the restriction of human rights was justified by the threat that would otherwise be made to the establishment of a democratic society.
- According to the 1992 decision of the Polish Constitutional Court, the vetting process can only be done by law or constitutional amendments. The instrument used must specify the whole procedure correctly because otherwise, it constitutes a violation of the Constitution.
- Rasti Matyjek v. Poland is an important reference in terms of designing a vetting process in line with the requirements of the European Convention on Human Rights. If a vetting process meets the criteria set out in this Decision and is therefore classified as a criminal case within the meaning of Article 6 of the

Convention, then minimum guarantees typical of a criminal proceeding must be provided throughout the proceedings.

- According to the meritorious decision of the ECHR in Matyjek v. Poland, to the point of violation of the right to a fair trial, i.e. the element of equality of arms, comes in the case when the position of the person subject to vetting is more unfavorable than that of the state. The person is put at a disadvantage vis-a-vis the state when the latter has access to and access to information from the database to a greater extent and under more appropriate conditions than the person being vetted.
- Since vetting as a process is naturally a matter of dispute, both laws in Poland have been the subject of several reviews before the Constitutional Court. In none of the cases did the court stop the process by declaring the law as unconstitutional, but interpreted some provisions more extensively, while repealing other provisions. The prolongation of the process as a result of the constitutional contest, as well as a certain fragmentation of the legal basis as a result of the decisions of the Constitutional Court, brought even greater problems in the implementation and procedure of almost non-operable institutes.
- The recent criticism of the judiciary by the EU and the Advocate General of the ECJ deserves special attention. Review of judges' decisions for the purposes of a disciplinary proceeding is contrary to the values and principles established under Article 267 of the Treaty on the Functioning of the EU.

1.5.3 Other practices

1.5.3.1 Experience with Vetting in Kenya

1. Background

Vetting was undertaken as a mechanism of institutional reform in Kenya as a result of disagreements with the results of the 2007 presidential election. These disagreements brought fierce tensions and led to unprecedented violence and instability. In order to establish lasting peace, stability and justice through the rule of law and respect for human rights, a program of deep reform was initiated. In the case of Kenya, a successful vetting process would restore confidence in the judiciary and contribute to strengthening the governance system.

Kenya has been a signatory to a number of international human rights instruments. However, despite the adherence and applicability of these international and regional instruments, distrust and irregularities in the judiciary prevailed. During the years 1960-

1998, eight different committees or commissions were established for the purpose of analyzing the situation in the judiciary and making proposals for reform. Most of the reports from these bodies were not taken into account.

A vetting process was initially developed in 2003. It became known as the "radical operation" because of the results it produced. It was identified that 5 out of 9 judges of the Court of Appeals, 18 out of 36 judges of the Supreme Court and 82 out of 254 magistrates were involved in judicial corruption and perpetrators of ethical violations. Before they were notified according to the procedures set for these results, their names were leaked to the media. The Chief State Prosecutor had stated that due to the public trial that had already been done on these names, these judges should resign or be suspended immediately, without further proceedings. Despite this radical undertaking, it was estimated that popular trust in the judiciary, however, was not restored.

The 2007 vetting reform was designed on the premise that the vetting process is *sui generis*; as such it cannot be equated or modeled on procedures such as impeachment, disciplinary proceedings, civil or criminal trials, or job interviews and security clearance interviews. A vetting process should be modeled and oriented by the objectives and values set by the Constitution and the Law.

The general as well as the situational context differs from the case of Kosovo. However, the Kenyan practice can serve as inspiration due to similarities such as: the vetting process of judges, a process aimed at restoring popular trust in the judiciary, as well as a process focused on assessing and verifying the suitability of the judge figure for exercise duty, especially in terms of impartiality and purity from corrupt affairs.

2. Modality

The profound and complete reform of the governance system in Kenya was initiated through the promulgation of the new Constitution in 2010. The aim was to address the very worrying issue of lack of popular trust in the judiciary through the new constitutional regulation. The preliminary analysis had noted that judges were appointed by the President on the recommendation of the Judicial Service Commission (JSC). It was noted that the evaluation and verification of the figure of candidates for judges by the SSC was non-transparent, based on measurable and publicly known criteria and non-competitive. It was noted by the Task Force that although this assessment and verification of the figure constituted a kind of vetting, but as such it was not institutionalized in the structures of the SSC.

In the transitional provisions, the Constitution provided that all judges and magistrates (equivalent to judges of the first instance according to our system) on the day of entry into force of this constitution, be subject to vetting in order to assess the suitability of the figure of them to continue exercising the duty. Chapter 6, Article 23 of the Constitution stated that this process would take place in spite of existing constitutional guarantees for judges. This constitutional provision stipulated that the decision to remove a judge by vetting could not be challenged.

3. Vetting bodies

Composition

According to the law, Vetting in Kenya is done by the Vetting Board. This Board is mandated to vet judges in accordance with the Constitutional provisions and the Law. The law guarantees the independence of the Vetting Board. So, this Board, established by the action of the special law, constitutes a special structure that acts as independent from the existing institutions and pillars of power.

The law stipulates that Board members must have a university degree, at least 15 years of work experience in their field and demonstrate high moral values and integrity. The law does not define the professional profile of Board members. It envisages that they can be judges of higher instances, prominent academics, lawyers working in the judiciary or other legal activity in the public, private or other sphere. The board consists of nine members: six Kenyans, of whom three are jurists and three non-jurists, as well as three foreign members, retired judges who have served in the high courts of the Commonwealth states.

The law stipulates that adequate financial and material resources be made available to the Board and the Secretariat. As the Board will have to decide on sensitive issues, the safety of members must also be taken into account.

Competencies

The primary functions of the Board are to vet and investigate. The term "vetting" is defined in law as the process by which a judge's suitability to remain in office is determined.

Vetting Law built the vetting system on three pillars:

1. The Vetting Board has the authority to collect any information it deems relevant for the purposes of the process, including the production and access to all types of documents, including those with financial and banking records.

2. The Vetting Board has the authority to conduct interviews with individuals, groups or members of organizations and associations.

3. The Vetting Board has the power to conduct "investigations" for the purpose of performing its functions.

The vetting board had no authority to conduct investigations nor direct authorization to access police documents. He could provide them by submitting the request to the police, without coercion.

Procedures

The board conducts interviews with judges and reviews data about them. Information obtained from interviews and other records is kept confidential. Judges who are put on the magnifying glass should be notified of this. Judges in question should be aware of all allegations against them, be able to challenge them and be able to question persons who testify against them. For these purposes, the judge may hire a lawyer, whom he/she covers at his/her own expense.

The announcement that a decision had been made to remove a judge in question was made public. The basis on which the decision was issued was mentioned, but without giving details about private and confidential data. However, the law does not stipulate whether, together with the notification, the public should be notified of the reasons for the decision. Also, it is not mentioned whether the public should be informed even when deciding that a judge is suitable for the exercise of duty.

Board review sessions are closed, unless the vetting person requests an open hearing. This provision deserves attention, since under Kenyan law, other court proceedings are, in principle, conducted in the presence of the public. The purpose here must have been to preserve the identity of the judicial officer, in accordance with the principle of the presumption of innocence.

In order to increase work efficiency, the Law provided that the Board should establish three committees or panels with three members each (one from each category of members), who could undertake activities in parallel. The position of the Board was that even when acting in partial formations, the panels would make recommendations to the Board, which in full composition would make decisions.

The law stipulated that the vetting process must be completed no later than 1 year from the day of commencement, with the possibility of extending the term from the approval of the Assembly for another year.

The law precisely defined the "personal scope": judges are subject to vetting, which is known correctly in numbers from the beginning. The law also determined the order: the vetting would start with the judges of the Court of Appeals, then the judges of the High Court, the Officer of the High Court, the Chief Administrator of the court, the Chief Magistrates and finally the magistrates. All of them had already "survived" the 2003 vetting.

Although there was a possibility for the work of the commission to take place, the Board decided that in the vetting process of the Judges of Appeal, it should act in full composition. It was decided because of the novelty of the process and the need to build a common approach to the legal and procedural issues that would arise and the need to establish a uniform way of implementing the eligibility criteria.

Basis of decision making

Criteria

The law generally stipulates that in the decision-making process, the Board must be guided by the principles and standards of independence of the judiciary, justice and international best practices. Suitability could not be determined by mechanical methods, nor could a general and common formula be applied.

More precisely, the assessment of the suitability of the figure of the judge should be determined according to:

- records from previous work, including public statements and attitudes of the judge, data from any judicial or investigative proceedings where he or she may have been involved;

- information and complaints from the Kenyan Law Firm, the Anti-Corruption Commission, the Chief State Prosecutor, the Judicial Service Commission and other identified bodies.

In making this assessment, the Board should consider professional competencies, written and spoken communication skills, integrity, impartiality, temperament, good judgment,

professional legal and life experience and commitment to serve the country, and society. Each of these categories is further broken down into constituent elements.

For example, regarding the question of temperament in Decision no. 4, dated 21.09.2012, the Board reviewed several complaints about the temperament of a judge. It was estimated that although her temperament leaves much to be desired, what she exhibits is a degree of impatience that is not uncommon in courts anywhere in the world. It was found that there was no evidence that she had problems with temperament, such as unreasonable outbursts, expressions of bullying or contempt.

Judicial decisions as evidence for review of suitability

The role of the Board was not that of an appellate court that would assess the factual and legal accuracy of the decisions issued by the judge, nor of the philosophical legal convictions that the judge followed in his work. The board had to evaluate and observe in case a decision presented strange and deficient rationality, so as to present a lack of fairness and impartiality. This issue was presented as problematic, considering that it was about judges who had long experience and inevitably participated in trials that had aroused debate.

In Decision no. 4, dated 21.09.2012, a judge was charged with accepting a bribe. The allegation was based on the fact that in one case the real estate appraisal had found that a provision of the relevant law was unconstitutional, while in another case, it had decided on the same provision. Rumors circulated that he had taken a bribe for this, but there was no evidence. The judge denied the allegations. The Board ruled that these allegations did not constitute grounds for questioning the integrity of the judge. The two court cases in question were not interlinked and there were no elements of conflict of interest between them. None of the court decisions were deemed to have had any effect on undermining popular trust in the judiciary. In this Decision, the Board expressly stated that it was not appropriate for the Board to perform the function of an appellate court reviewing the accuracy of the judge's findings, especially given the fact that the first decision mentioned had already been appealed as such.

The same judge was charged in a sensitive criminal case in which both the accused and one of the victims were police officers. The persons were charged with "Aggravated Murder", while the judge in the verdict had found them guilty of "Murder" and had sentenced them to a term of 10 years. The judge was now accused of being biased, reclassifying the offense and imposing a more lenient sentence. The case was also pending before the Court of Appeals. In considering these allegations, the Board took the

judgment into account. He found it difficult to follow the line of argument and reasoning of the judge where he discussed self-defense and provocation. In response to these allegations, the judge acknowledged that he may have erred. However, the Board found that it could not retry the case and the factual and legal aspects of the case. The evidence presented did not prove the existence of injustice or other motivation on the part of the judge.

A judge was charged with ordering the exhumation of a person from one place and reburial in another, without following the procedures laid down to order the exhumation. Her response was that it had been necessary for this to be done as soon as possible because of the urgency of the case and that the will of the deceased in the will had been to bury those where he was now reburied. Despite these reasons, the Board decided that legal procedures should be followed, especially given sensitive cultural issues.

Dissatisfaction was expressed against the same judge over the issue of determining the value of damages. In one case, she had decided that a worker who had lost limbs in the performance of his duties should be compensated in a modest amount, while in another case, five times that amount had been given to a public figure. in a case of reputation damage. However, it was assessed that the decisions were based on well-reasoned reasoning.

In another case, a judge was asked about the acquittal of a well-known political figure of aggravated murder. The judge denied having been aware of the identity of the accused and explained that the forensic evidence had left him no other option.

4. Documents

The obligation to provide relevant documents about qualifications, competence and integrity falls on the person subject to vetting. This basic information is provided in a format predetermined by the Vetting Board. Although this Board has the power to investigate, the law does not provide for the establishment of independent bodies for this purpose.

The Board based on the following documents:

1. A questionnaire;
2. Declaration of assets;
3. Board Complaints/Claims;
4. The judge's response to the Board’s complaints/claims;

5. Transcripts of interviews with the judge in question and the Judicial Service Commission;
6. Any other material on the judge's past work, including decisions made.

The interviews enabled the Board to assess the judge's temperament, learn about his or her general experiences, and assess his or her communication skills.

4. Complaint

The judge may file objections to the Board's allegations and appeals during the course of the proceedings. According to the constitutional definition, the decision of the Board was final and could not be appealed in another instance. The dissatisfied party could file a complaint before the same Board only in two cases: the presentation of new facts and circumstances of which the judge was not aware and errors in the case file on which it was decided.

The intention of the legislator was to avoid the prolongation and procrastination of the vetting process due to complaints, in order to carry out the vetting reform as soon as possible and to reach the 1-year constitutional deadline.

5. Conclusions relevant to Kosovo

- The issue of constitutionality and legality of the process was not challenged due to the defined constitutional and legal basis of the process.
- Building the process on the basis of a very general constitutional provision, provided space for flexibility and creativity in the design of vetting bodies and procedures.
- Although proclaimed a sui-generis body, in functional terms, the Vetting Board can be described as a quasi-judicial body. Quasi-judicial features raised legitimate questions about the one-tier nature of the process.
- The precisely defined temporal and personal scope enabled real and successful planning of the process.
- The relationship between the Vetting Board and the Judicial Service Commission, which in principle and exclusively by vetting had exclusive competence in the matter of recruitment, appointment, promotion and dismissal of judges, was accompanied by tensions. Due to the organic work relationship, tensions and lack of cooperation may have affected the results of the vetting process.
- The law stipulated that state institutions, including the Kenyan Justice Society, the Ombudsman, the Advocates Disciplinary Committee, the Advocates' Disciplinary

Appeals Committee, the Chief State Prosecutor, the Kenyan State Commission for Human Rights and Equality, should provide input and information for the purpose of preparing the case by the Vetting Board. None of these institutions contributed and this was assessed as inadmissibility of the process by those who should be its stakeholders.

- It was informally reported that the Police did not cooperate with the Vetting Board either, not responding to the requests submitted to it for the provision of information and material within the competence of the Police.
- Kenya's practice can serve as a reference for delimiting the fine line for the use of judge decisions as a basis for proving inadequacy, without going beyond acting as a court of appeal.
- The objective of the vetting had been to restore popular trust in the judiciary and eventually strengthen the democratic system of government. It was assessed that vetting as a single measure, does not achieve these objectives and needs coordination and programming of the wider reform.

Chapter 2: Objectives

Chapter 1 defines the main problem/issue, its causes and effects. It also lists the policies, relevant legislation, standards and experiences of other countries, and identifies relevant stakeholders. This chapter provides on objectives that are intended to be achieved through this policy.

A strategic objective of this policy is to enhance the integrity of justice institutions, and increase citizens' trust in justice, through vetting and other mechanisms derived from the Government Program 2021-2025, as described in the figure below.

Vetting will be a key instrument for verifying integrity, professionalism and assets of the vetting subjects. Vetting will also be a mechanism to bring out judges, prosecutors and administrative and support staff who have integrity, are professional and regular. Vetting will be conducted in accordance with the international standards elaborated in Chapter 1, as well as the best practices of countries that have conducted vetting before Kosovo. An operational objective within this strategic goal is the development of a legal framework for conducting the vetting process in the justice system. This shall be achieved with the measures elaborated and proposed in Chapter 3 of this Concept Paper.

The goals this enhanced integrity checking of judges and prosecutors aims to achieve are as follows:

1. Judicial and prosecutorial activities of the highest integrity are ensured by a continuous implementation of the legal and regulatory framework for judges and prosecutors, in line with international standards.
2. The integrity and recovery capabilities of the justice system are maintained by regular integrity checks for judges, prosecutors and support staff.
3. The administration of justice is reliable, because judges and prosecutors with superior leadership and managerial skills are part of the judiciary.
4. Objective, fair and transparent procedures for the appointment of KJC and KPC members transform into highly experienced and reputable representatives among their judicial peers.

Figure 5: Relevant Government Objectives

Policy Aim	**Name of relevant planning document (source)**
Policy aim – Carrying out the vetting process in a fair, impartial and comprehensive manner.	Pursuant to this Concept Paper.
Strategic Objective – Improve integrity of justice institutions, through vetting and other mechanisms.	Program of the Government of the Republic of Kosovo 2021-2025.
Specific Objective – Restoring citizens' trust in the justice system.	Pursuant to this Concept Paper.

Chapter 3: Options

In this chapter, the Concept Paper addresses five key options regarding the need to conduct vetting for judges and prosecutors in Kosovo, to include also senior officials in the justice system:

1. Option 1 – *No changes, providing for the maintenance of the status quo*;
2. Option 2 – *Improved implementation and enforcement, without legal changes*, which pushes forward the idea that the current situation can be sufficiently improved only with better implementation of the existing legal framework;
3. Option 3 – *Carry out vetting with legislative changes*, whether with new laws or amendment of existing ones;
4. Option 4 – *Carry out an ad hoc vetting, and further continuous performance, integrity and wealth check, by an external mechanism, through constitutional changes, 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 3.1: No-change Option

'No change' option [117] implies that neither implementing nor legislative measures will be taken to address the main problem as explained above.

According to the law, prosecutors and judges must exercise their functions independently and impartially, and those functions are guaranteed by the Prosecutorial Council, respectively the Kosovo Judicial Council, who recruit, nominate, promote, transfer and discipline prosecutors, respectively judges. Furthermore, current legislation stipulates that accountability and transparency are fundamental values, which should guide justice practitioners in their performance of duties, with full responsibility, a high level of professionalism, transparency and efficiency. At the same time, according to the law, they must have a high moral and professional character.

However, 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. The same may apply for some of the employees in senior positions in the system. This is argued by citizens in general, civil society and even numerous

[117] The text elaborating this alternative was taken and adapted from the Document "Modalities of Accountability, with the introduction of Vetting in the Justice System in Kosovo", November 2020.

international actors. Thus, irregularities in the system receive all the attention, leaving out of focus the professional individuals with integrity.

Today, the justice system in Kosovo is considered one of the weakest links of statehood, one which is easily susceptible to influence by politicians and other groups of interest. Recalling that the judiciary is vested with a power to hold all others who violate the law to account, this poor performance of the justice system is also considered to contribute to the distortion of democracy in the country.

There is also an obvious weakness in terms of real-time performance of a number of judges and prosecutors, which is reflected in the lack of proper compilation of indictments, the number of cases in which prosecutors' request the postponement of court sessions due to their own failure in preparation, and not only. Another argument that further dilutes the accountability of the judiciary is the infringement of legal and procedural deadlines in investigative procedures, and from the time of appearance before court.

Despite the problems identified, 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. To illustrate, in the last three years, the performance appraisal mechanism has never found any judge to be unsatisfactory in performance. So, despite the obvious circumstances and differences in integrity and professionalism among judges, they are not differentiated in the assessment. On the other hand, when one looks at all the reports of abuse and poor work done not that rarely within the judiciary, it may be concluded that the existing mechanisms do not provide a clear picture and meritocratic appraisal of the performance and work of judges and prosecutors. The issue of discipline is no better, where disciplinary proceedings against judges and prosecutors rarely result in sanctions, and even when that happens, the sanctions are very lenient.

Failure to intervene in any way against the current situation can only allow further continuous and gradual degradation in the integrity of judges and prosecutors in the system, but also of senior-ranking officials. Along with these, it allows a continuous decline of citizens' trust in justice, and other negative effects. Such a situation is both demotivating and unfair to those individuals in the system who have integrity, do good work, and are responsible.

Chapter 3.2: Option to improve enforcement and execution without legal changes

This option addresses the possibility of improving the current situation through the full and proper fulfillment 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.

First of all, one should recall that the current verification units within the KJC and KPC operate without a proper legal basis. Articles 20 and 27 of the Law no. 06/L-055 on the KJC refer to the requirement that judges have personal integrity and that the integrity assessment procedure "shall be carried out through verification of the data submitted by the candidate, data from relevant public records for evaluation, including the standard verification of records for the criminal past." Similarly, Law No. 06/L-056 on the KPC, in its Articles 19 and 20, refers to the requirement that prosecutors have personal integrity. Article 20 (5) refers to "verification of the data submitted by the candidate, data from the relevant public registries for assessment, including the standard verification of registries for the criminal past." However, none of these laws contain any provisions that would regulate the establishment and operations, scope and duties of verification units. In the drafts submitted by the Ministry, Article 21 of the Draft Law on the KPC provided for the establishment of a "verification unit", but it was subsequently removed by the Assembly. The situation has not improved to date, despite KJC or KPC regulations on the recruitment, testing, appointment and reappointment of judges and prosecutors. Both of these regulations fail to provide an appropriate legal or regulating basis for defining the functions, competencies and responsibilities of verification units. For this reason, the lack of a proper legal basis for Verification Units in both Councils greatly limits the eligibility of the Second Option.

However, it should be noted that both of these units do face a lack of human capacity. This aspect of their operation could be improved through other forms of strengthening, which would not require legal intervention.

In the KJC, the verification process is implemented by a unit consisting of a total of seven staff members – the chairperson, four investigators, an administrative assistant and an

assessment assistant. The staff of this Unit was also involved in the 2010 Vetting, being members of the Independent Judicial and Prosecutorial Commission (IJPC). Meanwhile, the KPC has only one verification officer. While the KPC official was vetted by INTERPOL before 2010, current officials in the KJC unit have not been subject to any assessment.

With added human capacities, especially in the KPC, current verification units could significantly improve their performance. Human capacities could be increased in number - by increasing the number of officials engaged, or by investing in the professional skill development of current officials, with continued training. Capacity building in these two units would have additional budgetary implications, therefore it is required to allocate additional resources for this purpose. At the same time, as it has been a long time since (not all) underwent an external vetting, all current staff need to undergo a re-verification in order to re-legitimize and gain credibility to perform the tasks required to achieve the purpose of this policy. This is not currently possible under the legal framework, as the staff of these units does not have a clearly defined status.

Beyond the need for vetting these officials, their capacity building is more than necessary. Such measures are also foreseen in the Draft Rule of Law Strategy. It is to avail listing all such activities here, but it is worth mentioning that most of them are training activities, investing in infrastructure to enable their work, as well as increasing the budget for the same purpose.

However, only investments in budget and capacity building will not be able to address the main issue in the functioning of these units. This problem is 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. But, most importantly, these units lack the legal and regulating authority to do this work on a regular basis.

In addition, without a new legal framework, even high-ranking officials within the justice system, who have a significant role in the proper functioning of the system, remain unvetted. Regarding the positions of the judiciary administration that fall within the scope of this Concept Paper, according to Judgment no. KO203/19, the Constitutional Court has found that Law no. 06/L-114 on Public Officials does not apply in relation to these positions. Consequently, the issue of recruitment and discipline of these positions remains unregulated, as neither the provisions nor the relevant regulation of the

mentioned law apply. Until the completion and amendment of Law no. 06/L-114 on Public Officials by the Assembly, according to the enacting clause of this Judgment, the provisions of this Law apply only insofar as they do not affect the functional and organizational independence of the Independent Institutions.

Despite the fact that with the legislation in force, the Judicial Council and the Prosecutorial Council have the opportunity to adjust the implementation of their duties through the adoption of sub-legal acts, the will to do so in the case of verification units has been lacking.

Through this option it is impossible to fully and substantially address the problems identified in this Concept Paper. Consequently, this option enables only superficial refinement of existing mechanisms, without providing opportunities for real change. In a way, this option would be effective, due to the lower cost compared to options 3, 4 and 5, but its effectiveness would be negligible, compared to other options and the goals of this policy.

Chapter 3.3: Development of the vetting process and continuous evaluation of performance, integrity and wealth check through legal changes

This option elaborates the possibility of developing the vetting process and at the same time the possibility of building mechanisms for continuous evaluation of performance, integrity and wealth for judges and prosecutors, as well as senior officials[118] through a special law.

This process will come in response to the need to change the current situation in the justice system, where most of the measures taken so far to improve this situation have largely proved unsuccessful. Thus, the development of vetting and the construction of a mechanism for continuous evaluation are aimed at restoring citizens' trust in the judiciary, as well as improving independence, impartiality, accountability and efficiency in the justice system. At the same time, this process will serve to highlight and evaluate fairly the judges, prosecutors and administrative support officers who have integrity, are professional and efficient.

[118] Directors of KJC and KPC Secretariats, court administrators, prosecution offices, Director of the Judicial Inspection Unit and the Director of the Prosecution Performance Review Unit.

In terms of norms, the vetting process and that of ongoing evaluation, provided by this option, are differentiated. The construction of the vetting process will be enabled through a special law which will be called the Law on Vetting and amendments and additions that will be extended to other relevant laws, as explained below in this Concept Paper. Meanwhile, changes in legislation regarding the continuous evaluation of performance, integrity and wealth, as a follow-up vetting process, will come later, either through new legal acts or through changes to existing ones.

However, what needs to be taken care of within this option is compliance with the frameworks set out in the Constitution. In this case, the competencies of the councils to ensure the independence and impartiality of the judicial and prosecutorial system and thus, the compliance with the constitutional provisions regarding who makes the decisions for the career of judges and prosecutors must be respected. Therefore, despite the changes in the legislation, the nomination and dismissal of judges and prosecutors under this option should continue to be done by the constitutional mechanisms. Thus, the proposal for dismissal is made by the Judicial Council, i.e. 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.

In addition, the dismissal of judges and prosecutors can only be decided for two reasons: committing a serious criminal offense and serious neglect of duties by judges and prosecutors. The reasons for dismissal on the basis of a negative assessment in the vetting process will be detailed by law. However, in the context of the analysis in this Concept Paper, dismissal, which may result as a requirement from the vetting or ongoing evaluation process, should be placed under the umbrella of reason for dismissal – gross neglect of duties.

The constitutional provisions stipulating on the reasons for the dismissal of judges seem likely to be construed in conjunction with the constitutional provisions on the mandate of judges. As such, they leave room for *"serious neglect of duties"*, as a reason for dismissal of judges, to be defined by law. The same applies to prosecutors.

Although in the narrow sense, one may think that this dismissal basis cannot accommodate the issue of integrity checks, as a vetting objective, it should be recalled that already exists, in a way, currently. Under the existing legal framework, personal integrity checks are included in the performance appraisal of judges and prosecutors.

Therefore, the concept of integrity assessment is not unknown even during the exercise of duty. However, it is not clear how it is assessed in practice.

It should be noted that pursuant to the Constitution, the judicial system in the country must be independent, fair, apolitical and impartial. In this case, anyone who does not uphold such principles in the exercise of his/her duties as a judge or prosecutor, should be considered to have committed a breach of duty.

Within this option, a possible model for the design of the vetting process and the general modalities of building the mechanism for continuous evaluation of performance, integrity and wealth, are addressed.

At this point, the general contours regarding the vetting process will be addressed, to then proceed with the elaboration of the mechanism of continuous evaluation of performance, integrity and wealth as a mechanism and subsequent vetting process.

1. VETING PROCESS

The vetting process, as noted, is an *ad hoc* 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.

Below, in addition to this option, more attention will be paid to the vetting process of judges and prosecutors, given the sensitivity of these functions. The same rules and procedures as for the vetting of judges and prosecutors will apply appropriately to senior management positions, but with some differences and specifics which extend in three directions. Initially, compared to the vetting of judges and prosecutors, for officials i) performance appraisal will have a different nature and other criteria; ii) The KJC/KPC itself will dismiss the officials in the last instance; and iii) the instance for appeal in cases of dismissal will be the Independent Oversight Board.[119] It is emphasized that vetting for officials in senior management positions is done because of the competencies and the degree of real influence they have in the justice system.

Regarding judges and prosecutors, **the key pillars regarding the vetting process** for judges and prosecutors would look like the following:

[119] Article 101 of the Constitution of the Republic of Kosovo.

a) Vetting mechanism and procedure

- **Competent body for vetting:** It will be created for each system (judicial and prosecutorial) by a vetting mechanism from which vetting will take place for judges, namely prosecutors, as well as officials in senior management positions.

  As a result, upon the establishment of the relevant Vetting Mechanisms, the KJC/KPC Performance Evaluation Commission and the Performance Review Unit will be abolished.

  Mechanisms provide a physical, infrastructural and budgetary independence. This will be provided by law.

  Relevant vetting mechanisms have the power to coordinate and enable the collection and processing of data, through which the evaluations of candidates subject to vetting will be compiled.

  Both, the relevant vetting mechanisms will exercise their powers on the basis of the principles of equality before the law, constitutionality and legality, proportionality and other principles that guarantee the right of vetting entities.

  - **Recruitment and verification of members of the mechanisms** – It should be recalled that based on the constitutional provisions, the members of these mechanisms will be elected according to a Special Law. In this regard, in order to ensure the quality, professionalism and impartiality of the mechanisms, it is envisaged that the selection process of their members be transparent, comprehensive and rigorous. It is important that in the case of recruitment, there is an involvement of actors outside the current judicial and prosecutorial structures.

The procedure through which the selection of the members of the mechanisms is foreseen will be done according to the special law, in which process, there will be involvement of the respective international mechanisms. Agreements will be reached with international bodies or organizations to seek their assistance in the selection, including verification, of members of the respective mechanisms. A similar pattern can currently be seen in Kosovo in the modalities found for the selection of Senior Management Positions, procedures in which the interview and recommendation comes from bodies of international

composition (example with the Embassy of the United Kingdom in Kosovo). Monitoring participation will be required from international partners throughout the vetting period.

After the completion of the verification process, the recommendation will be issued for the names that are proposed to be chosen by the competent bodies. The names of the people recommended for election should be public, along with the reasons for their recommendation.

Using the experience of other countries addressed above and in the spirit of international standards, another element to ensure the independence and impartiality of the work of the mechanisms is the duration of their mandate. Members of the vetting mechanism will have a mandate that will last as long as the vetting process.

It is essential to undertake the verification process for candidates for members of the mechanisms, as those who vet judges and prosecutors must themselves be verified entities. Thus, there is a guarantee that the process will not be vulnerable to the detriment of judges and prosecutors who are subject to vetting.

- **Decision-making in the vetting process** – It is reiterated that, 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. Consequently, in the event that the data cast doubt on the integrity or appropriateness of the vetted judge/prosecutor, the Councils should initiate disciplinary proceedings and take disciplinary action that is appropriate and suitable to the nature or intensity of the 'flaws' found. The proposal to dismiss a judge or prosecutor is not excluded here either. The standards of the dismissal proposal must be accompanied by a reasoned decision on a well-verified factual basis.

  The subject of vetting has the right to be represented by a lawyer during the procedure that is subject to vetting, and in case he/she does not have the financial means, to be assigned an ex-officio lawyer at his/her request.

  In the impossibility of making a final decision by the respective mechanisms themselves, the transparency and publicity of the evaluations of the mechanisms is the essential way to guarantee the observance and effectiveness of the evaluations issued by the mechanisms.

In the situation when from the findings of the mechanisms, it results that there are elements of the criminal offense, the mechanisms should refer the matter to the competent bodies.

- **Structure of mechanisms** – Each of the two mechanisms, structurally, will consist of a Secretariat and two evaluation panels. Both panels are identical to each other in terms of competence.

The panels will evaluate the information regarding professional skills and performance, integrity and wealth, collected for the vetting subject, and will decide on the evaluation addressed to the relevant bodies. The composition of the panels will be regulated and determined by the relevant law. All recruitment criteria will be set out in the Law on Vetting.

Within each of the Secretariats of the mechanisms, there will be a Director General and three units: i) Unit for assessment of professional skills and performance, ii) Unit for assessment of assets, and iii) Unit for assessment of integrity. The units will consist of the Director, the professional staff conducting the investigation and the administrative staff.

In addition to the units, there will be 10 professional officers, including the Director of the Unit, and 5 administrative officers.

Figure 8: Structure for the mechanism for vetting of judges

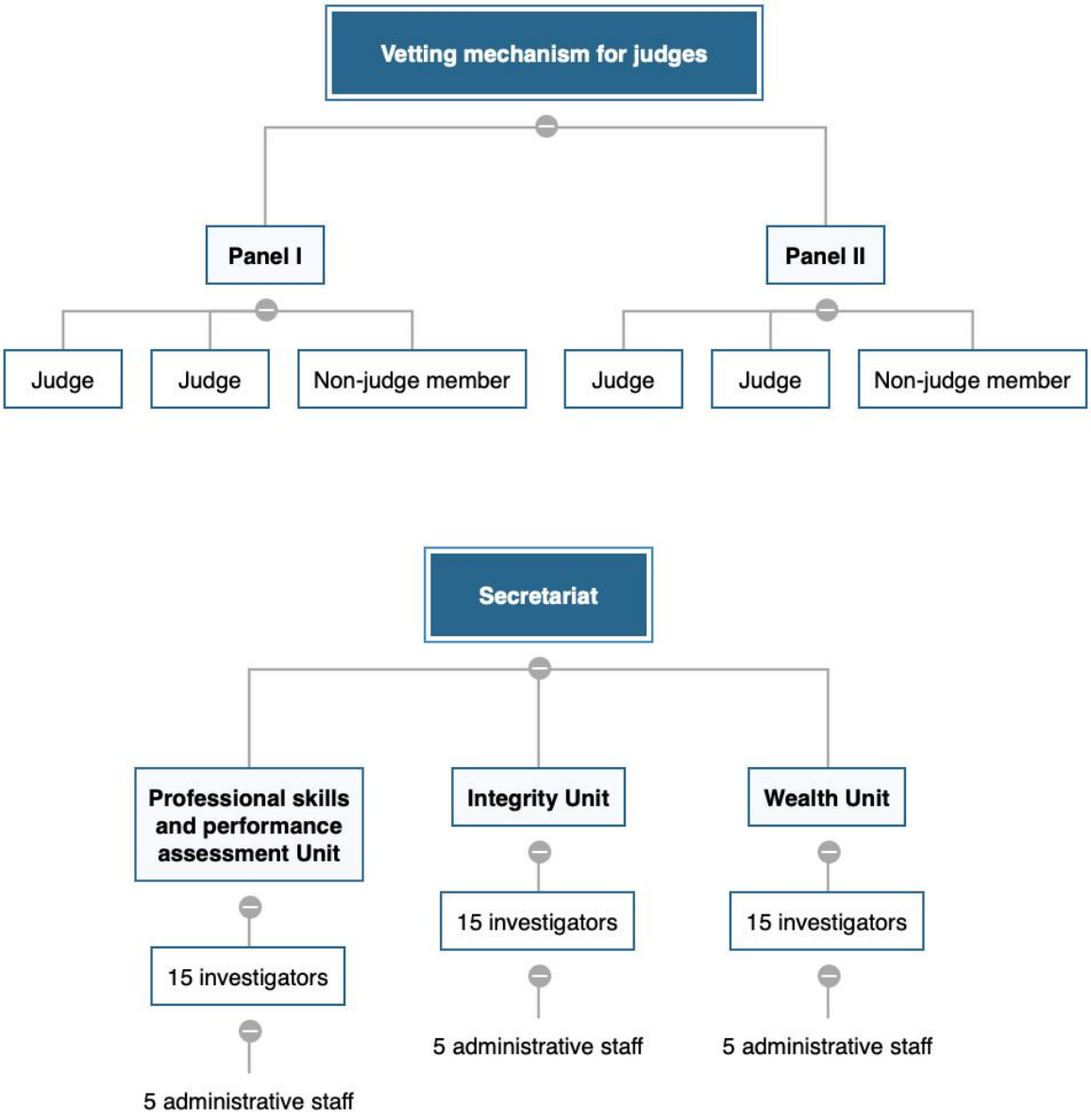
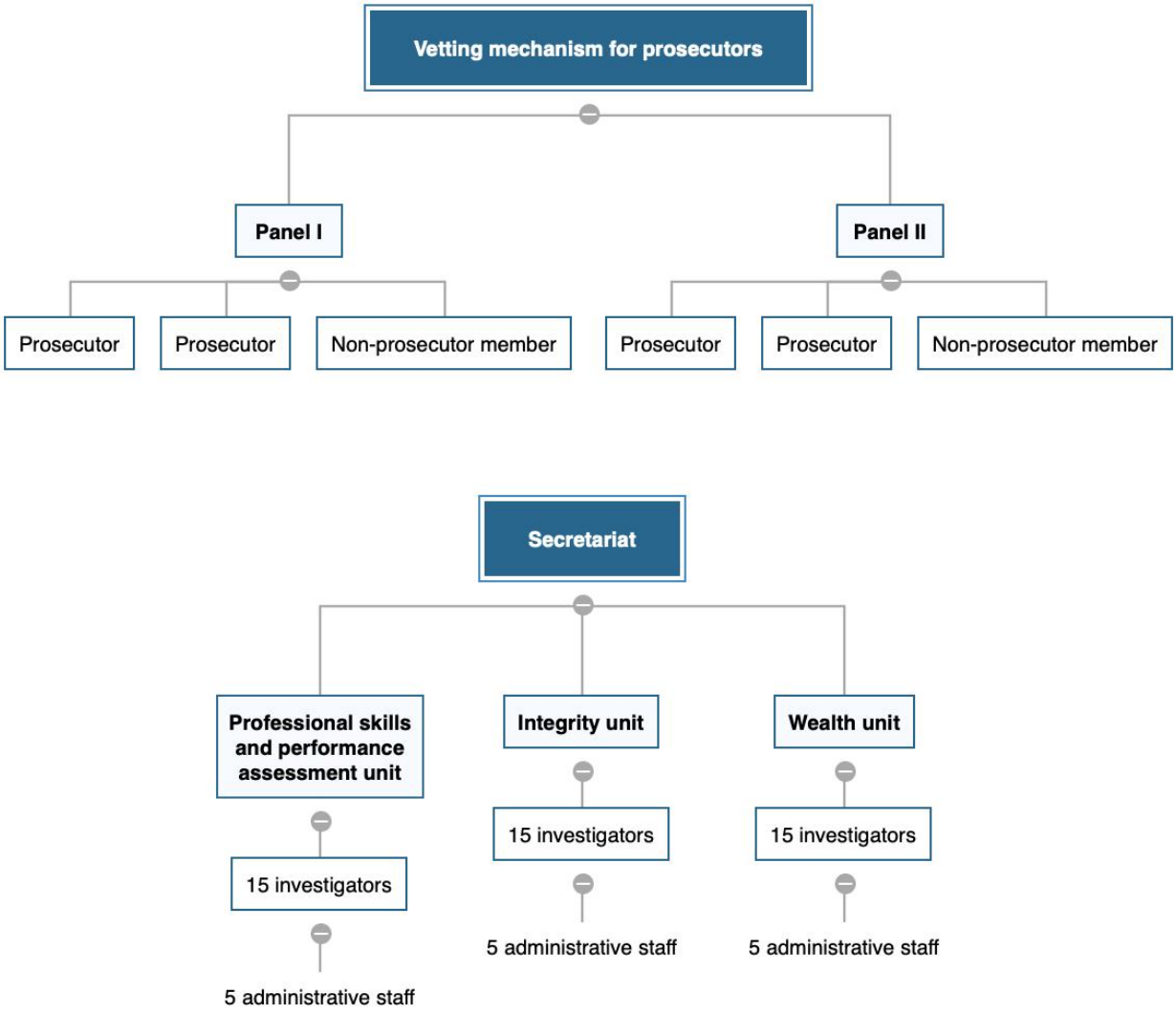


Figure 8: Structure for the mechanism for vetting of prosecutors



b) The range of data to be collected

Relevant provisions will stipulate on three categories of data to be collected and reviewed during the vetting process of judges and prosecutors. With regard to the data collection, first the vetting subjects will submit to the relevant panels the completed form for each category of data, according to the specifics defined by law. Then, with regard to the issues

specified in the form, the relevant panel will verify the accuracy of the data and compare them with the findings collected by the units.

The data collected in the case of vetting include:

i) data on professional duties and performance: Performance data to be evaluated will be limited. During the performance appraisal care should be taken so that the substantive issues of a decision or retrial are not to be considered[120]. The Panel must assess and note cases where a decision 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". When it comes to performance review, all the factors and circumstances of the case must be carefully considered, as well as the grounds of the allegations on facts and evidence. Furthermore, based on the data collected it will be understood whether the judge/prosecutor is professionally capable of exercising his or her duties.

One of the limitations made clear by the Kiev Recommendations (elaborated above), is that the number of rulings remanded by a higher court cannot serve as a criterion of performance appraisal.

ii) data on assets: Data verified in terms of wealth will include all assets in accordance with the relevant Law on Declaration of Assets. The object of the verification of assets is the declaration and control of assets, the legality of the source of their generation, as well as the fulfillment of financial obligations. Wealth will be assessed in terms of whether the position as a judge/prosecutor has been misused to bring financial benefits to oneself or to a third party. The Law on Vetting will detail the modalities regarding the wealth check.

iii) other integrity-related information – starting with information on political connections/affiliations or other interest groups of the candidate, which affect their decision-making, and other information collected from the field. It is important that within this category to gather information on addictions that the vetting subject may have or other integrity-related deviations which could affect

[120] In terms of marking this dividing line, we can use the Kenyan practice discussed above. According to Kenyan practice, the role of the vetting body was not that of an appellate court which would assess the factual and legal accuracy of the decisions issued by the judge, nor of the philosophical legal convictions that the judge followed in his work.

the ability to judge, or which would make the vetting subject unworthy to exercise his or her function.

The law should clearly specify which data may be collected, the procedure of their collection, administration and processing, which should be in accordance with the legislation in force on the protection of personal data; the obligation for proportionality between the restriction of the right to privacy and family life should be sanctioned, which may come as a result of searching and verifying personal data and other information with the legitimate aim intended to be achieved through the collection of this data; the duration of the data collection procedure and the circumstances when it should be terminated should be specified; the party's (subject in the procedure) right to appeal should be provided, either in the material or the procedural aspect of the collection of this data, and the destruction of personal data according to the relevant legislation on personal data protection should be provided.

In any case, the collection of this data and information and subsequent interventions will be done in accordance with Article 8 of the European Convention on Human Rights and the judicial jurisprudence in matters such as vetting or lustration.

c) Persons subject to vetting

As mentioned above, all judges and prosecutors will go through the vetting process[121]. A category of officials in senior management positions within the system will also be subject to vetting.

First, it is highly important that the process begins with the vetting of the members of the Kosovo Judicial Council and Kosovo Prosecutorial Council. It is also important that at the same time the Supreme Court is functionalized with vetted judges who would address potential appeals of vetting subjects.

It is important to maintain the functionality of the Councils while their members are being subject to vetting. Therefore, an appropriate formula to ensure the vetting of KJC and KPC members is foreseen as follows:

[121] This does not exclude judges, prosecutors and officials in senior management positions of new courts and prosecution offices which may be created during the period of the vetting process.

- As soon as the two mechanisms (secretariat and panels) are operationalized, the exploratory phase will start along with the **first wave** of vetting for all members of the KJC/KPC. Simultaneously, this phase would begin for at least five members of the Supreme Court and the Chief State Prosecutor. They will be subject to vetting by the respective mechanisms for judges and prosecutors.

  Also, in parallel with the vetting of the members of the councils by the respective mechanisms, a vetting procedure for the future members of the councils would be carried out, in due observation of selection process as provided by the Constitution. If found to be fit for purpose, candidates will be able to take a seat as members of the respective Council in case of dismissals as a result of the vetting process, or when the term of Council members ends.

  Upon completion of the vetting for the subjects within the first wave, the relevant mechanism will present to the competent body the results of vetting for one or two subjects simultaneously. The results will be presented in the form of a dismissal recommendation, or certifying the 'suitability' of the vetting subject - whichever is operationally deemed appropriate. The mechanisms should act strategically and with an appropriate Plan, with regard to recommendations for dismissal, so as not to jeopardize the quorum (⅔ of members) for further decisions in the councils, including those on dismissal proposals. In cases of receiving a finding on the suitability of the judge/prosecutor, this would only be a confirmation of the continuation of the exercise of the function.

  If there are proposals for dismissal, one should wait for the epilogue regarding the dismissals, until after the end of the appeal proceedings. As elaborated below, the whole procedure from the proposal for dismissal to the second instance ruling is expected to last 75 days in total.

  Once the vetting of the members of the councils and the Panel of the Supreme Court reviewing the dismissal appeals before the Supreme Court is completed, it will be possible to move on to **the second stage of** vetting, which would initially include the whole Supreme Court, and replacement of potentially dismissed judges may occur. In parallel, prosecutors in the Office of the Chief State Prosecutor will be subject to vetting.

After that, the judges of the Court of Appeals, the prosecutors of the Appellate Prosecution Office, and the prosecutors of the Special Prosecution Office will be subject to vetting, whereas potential dismissal proposals can be submitted at once for up to 3 judges/prosecutors, so as not to completely halt the functioning of these institutions. This phase would also include Court Presidents and Chief Prosecutors.

In case the findings of the Mechanism lead to recommendations for dismissal of judges and prosecutors at the above mentioned levels, it should be waited for the completion of the procedures of their dismissal to continue afterwards with the election and vetting of candidates for such positions. In the second phase, vetting would cover also officials in senior management positions within the system, such as: administrators of courts and prosecution offices, directors of secretariats, as well as the Director of the Judicial Inspection Unit.

During the second phase, the recruitment process for new judges and prosecutors will take place, in preparation for the third vetting phase, so that the daily functions are not undermined.

- **In the third phase,** the vetting would cover supervisory judges of basic court branches, and then judges and prosecutors of basic courts and prosecution offices. In case of vacant positions remaining after the vetting in the third phase, an additional recruitment process will be opened for the appointment of new judges/prosecutors.

  The vetting procedure for a candidate will take place in the following three moments:

  i) in order: Vetting in order, elaborated above in this Concept Paper, is the most important categorization within the vetting process and all judges and prosecutors will be subject to such vetting.

  ii) on candidates for recruitment: this category will be evaluated during the recruitment process for judges/prosecutors, as long as the vetting process lasts, which will include the stage of assessment of integrity, professional achievement and wealth control as a prerequisite to be part of the system. Their recruitment will be done according to strict criteria inspired by the vetting process, as far as is applicable.

iii) Judges/prosecutors seeking promotion: it is considered to be of utmost necessity to analyze the integrity, performance and wealth of these persons before assuming new duties. A judge or prosecutor who is running for promotion and has undergone vetting recently prior to promotion, a period which will be specified by law, will not need to be re-checked; and

iv) vetting by reason: vetting could be initiated if facts or circumstances arise that call into question the suitability of a judge or prosecutor, or a senior management official, to continue in the exercise of his function.

d) Measures that may be undertaken

From the moment of initiating the vetting, the subject will be notified that his case is being processed. The law will ensure respect for the subject's right to a fair trial, stipulating that he/she will have access to his/her case material, ie to the findings and information collected by the Mechanisms. The vetting subject will have the right to challenge these findings and present evidence, and witnesses, as well as to question witnesses who testify against him or her, before the relevant Mechanism presents its evaluation to the respective Council. The time period when the evidence must be presented to the party and the time limit for the preparation of the response will be determined by law. The party in the procedure has the right to request the rejection of the evidence the taking of which is in contradiction with the provisions applicable in the vetting procedure, as well as if the same does not prove any relevant fact in the procedure.

In order to analyze the measures that can be taken within this process, it should be first stated that not every finding of a negative nature constitutes a basis for dismissal or needs to be sanctioned. Some information that may be discovered during the vetting process may simply serve to identify a judge/prosecutor's sensitivity/susceptibility to a particular item. For this reason, the Law should clearly provide on a categorization of data or records which may constitute a basis for imposing any measure on the candidate.

i) proposal for dismissal

In accordance with the international instruments analyzed above, the dismissal proposal should only come as a result of the most serious neglect of duty. In the language of the Constitution of the Republic of Kosovo, there is a provision on "*serious neglect of duties*". It is necessary that the Vetting Law provide to elaborate thoroughly exactly the meaning of this term, and list the serious violations that would constitute this neglect.

Finding serious deficiencies in a judge's integrity, such as links to criminal groups, exchanging favors/gifts with them, political bias evidenced by the court rulings/prosecution he/she has rendered, or performance so poor as to jeopardize the rights of the litigating parties, or unjustifiable assets, etc., may be some of these violations.

In order to avoid the challenges encountered in Albania, due to the lack of proper planning, procedures and deadlines must be planned in detail. Thus, the thought is that from the moment the Mechanism recommends the dismissal of a judge/prosecutor found to be lacking in integrity or having other serious deficiencies, the relevant body would have 15 days to analyze the Mechanism's report, and render decision on the proposal for dismissal. In case the body votes in favor of the dismissal proposal, the President would then decide on the dismissal of the judge/prosecutor within 15 days. To allow the dismissed person adequate preparation of his/her defense, he/she would be given 15 days for appeal, similar to other court proceedings, and if he/she chooses to exercise such right to appeal, the Supreme Court, as a second instance body, would render a decision within 30 days.

These tentative deadlines[122] are reflected in the figure below.

Activity	The body's decision on the vetting subject upon the evaluation of the mechanism	Deadline for appeal to the Supreme Court	The deadline within which the Supreme Court must render final decision	The decision of the President regarding the dismissal	**Total Days**
Time-frame	15 days	15 days	30 days	15 days	**75 days**

ii) proposal for other measures

In addition to resigning, the mechanisms may recommend other measures for judges and prosecutors who have undergone vetting, if they are considered to have deficiencies only in performance, but which are not at a sufficient level to seek dismissal. Other measures that may be recommended are: compulsory training measure, including return to initial

[122] The possibility and need to change the legal provisions to accommodate these or other set deadlines for the vetting process will be taken into consideration.

training, and demotion measure. The rationale for proposing such measures is to guarantee the highest professional standard for judges and prosecutors.

e) Other effects on judges and prosecutors during the vetting process

Resignation - Vetting subjects have the right to resign throughout the vetting process. However, in case of re-application for the position of a judge or prosecutor, the subject will undergo the vetting process, the same as all candidates for recruitment.

Consequences of not passing the vetting process - In case the vetting results is negative and the same proposes the dismissal of the judge or prosecutor, they will be barred from applying for the position of a judge and prosecutor, regardless of which position they were dismissed from.

Rejection of the subject to be vetted - The cooperation of the subject under vetting is crucial for the successful development of the vetting. Refusal of the subject to cooperate in vetting will result in dismissal from the position as well as prohibition to apply for the position of a judge or prosecutor.

2. BUILDING MECHANISMS FOR CONTINUOUS EVALUATION

Competent decision-making/evaluation body - Once the vetting process is finalized, both vetting mechanisms will be restructured accordingly and transformed into mechanisms for continuous integrity, wealth and performance check within the KJC and KPC respectively. The continuous check will be done on a regular basis for judges, prosecutors, and officials in senior management positions in the justice system.

The building of permanent mechanisms will be preceded by a preliminary analysis to specify the modalities of organization and operation, using the lessons learned from the vetting process.

Members of the two mechanisms will have a specific mandate and make an annual declaration of assets, which will keep them in some sort of control over the benefits throughout their term.

Competent body for appeals - For judges and prosecutors, the Supreme Court will serve as a second instance. In a panel of three (3) members, a decision will be made regarding the appeals filed against the dismissal decision. On the other hand, for the officials dismissed from senior management positions, the Independent Supervisory Council will serve as the second instance.

Subjects under evaluation - The continuous performance, integrity and wealth check will take place in the following moments:

> ***i) candidates for recruitment:*** this category will be evaluated during the recruitment process as judges/prosecutors and officials in senior management positions, as prerequisites for being part of the system.
>
> ***ii) judges/prosecutors seeking promotion:*** it is considered to be of utmost necessity to analyze the integrity, performance and wealth of these persons before assuming new duties. A judge or prosecutor who is running for promotion and has undergone vetting/check two years prior to promotion will not need to be re-checked; and
>
> ***iii) periodically, throughout their career:*** Judges and prosecutors, as well as officials in senior management positions will be checked in accordance with relevant legislation, so that the judicial/prosecutorial system is screened on a regular basis.
>
> ***iv) by reason:*** the integrity, wealth and performance check may be initiated if facts or circumstances arise that call into question the suitability of the judge or prosecutor to continue the exercise of his function.

Data to be collected - the categories of data to be collected and analyzed in the case of continuous evaluation will be subject to a more detailed analysis, following the lessons learned from the vetting process. The nature and level of data collected will be in line with international standards and the Constitution and will be proportionate to the needs of the integrity, performance and wealth check carried out periodically.

Measures that may be taken - the procedure as well as the measures recommended by each of the two mechanisms, in case deficiencies or violations in performance are identified, integrity or wealth after the evaluation of the candidate, are appropriately the same as the measures during the vetting process.

Decisions regarding measures belong to the relevant councils. On the other hand, on the occasion of the recommendation for dismissal of judges and prosecutors, the Councils will propose the dismissal, which will be done by the President.

Chapter 3.4: Fourth option - Carry out the vetting process and the continuous performance, integrity and wealth check with Constitutional amendments

A fourth option of carrying out the vetting process and the continuous performance, integrity and wealth check is by introducing constitutional and legal changes. This option allows for flexibility in designing the vetting process, by amending the relevant constitutional provisions, which currently limit the modalities associated with this process. Therefore, for the vetting to take place according to this option, the Constitution must be amended.

This option discusses the development of the vetting, and then the continuous performance, integrity and wealth check. To this end, this option envisages the establishment of a new mechanism by Constitution. Upon completion of the vetting for all subjects listed below, this mechanism will undergo changes to conduct the continuous performance, integrity and wealth check for vetting subjects on a regular basis.

Even in this option, judges and prosecutors, as well as officials holding senior management positions within the system, would be subjects of vetting, including: Administrators of courts and prosecution offices, Directors of KJC/KPC Secretariats and the Director of the Judicial Inspection Unit. This process would be implemented on the basis of international standards and best practices of countries that have conducted the vetting process.

1. Constitutional Amendments

For the carrying out of a proper vetting process, constitutional changes need to be made to accommodate a host of issues. The amendment of the Constitution will follow the constitutional procedure.

Through the new constitutional provisions, it will be foreseen that the newly created Vetting Mechanism will change once the vetting for all the subjects is completed. Consequently, after the completion of the vetting, the Vetting Mechanism will be transformed into a Mechanism for continuous performance, integrity and wealth check.

The scope and competencies of the same will be further regulated by law. The following text provides an overview of how the Vetting Mechanism and Performance, Integrity and Wealth Check Mechanism are intended to function.

In the framework of amending the existing constitutional provisions, it follows that Articles 104(1) and 109(7) regulating the nomination and dismissal proposals, as well as Article 84 on the powers of the President, namely paragraphs (15), (16), (17) and (18), require amendments, so that the power of filing proposals for nomination/dismissal be vested to the independent mechanism for the vetting period and the continuous performance, integrity and wealth check period. This proposal is referred to the President, who will then have the right to dismiss the relevant subject. This way, the dismissal of judges and prosecutors will be left directly to the mechanism established with new provisions, without having to go through the councils.

Other constitutional changes will focus on the reasons for dismissal of subjects, restriction of the right to privacy, vetting in the recruitment of judges and prosecutors, the powers of the President and other related issues.

Also, in order to establish legal certainty, Articles 104(4) and 109(6) must be amended as well. These two provisions define two reasons for dismissal of a judge or prosecutor, which are a serious criminal offense and serious neglect of duties. With the amendment of the Constitution, the grounds for dismissal of vetting subjects would be extended by adding reasons related to the findings arising from vetting. Detailed reasons for dismissal on the basis of a negative score in the vetting process will be provided by the relevant vetting law.

Further, the powers of the President to appoint, reappoint and dismiss judges and prosecutors should be foreseen. These competencies would be mostly formal, but also underpin the certainty and legitimacy of the vetting process. Hence, the dismissal of a subject would be decided in cooperation between the mechanism and the President, to also ensure checks and balances in the process.

2. VETTING MECHANISM

The mechanism (see below the figure and its structure) as a whole is expected to consist of: a) The mechanism for the carrying out of the vetting process, (first instance); b) Secretariat and investigative units; and c) Appellate Panel (second instance).

a) General structure of vetting mechanism

The vetting mechanism is envisaged to be an independent mechanism consisting of five panels, three for judges and two for prosecutors. The panels for judges will consist of three members, two judges and one non-judge member. The panels for prosecutors will consist of three members, two prosecutors and one non-prosecutor member. Members of the mechanism should be granted immunity in accordance with the immunity of judges. The mechanism will have a chairperson who will be elected by rotation from the ranks of judges or prosecutors of the panels. Judges and prosecutors who are the part of the panels will return to their positions after the end of their term as members of these panels.

b) Secretariat and investigative units

The composition of the Mechanism will include the Secretariat, which provides all the administrative and logistical support for the entire Mechanism. The Secretariat will be composed of three units: a) Professional skills and performance unit; b) Wealth unit and; c) Integrity Unit. It is anticipated that each of these units will have 25 professional investigators and 5 members of the administrative staff. These units will collect and process relevant information for every vetting subject, which will be sent to panels for review and decision. All members of this body will also be subject to prior vetting.

c) Appellate Panel

In the composition of the Vetting Mechanism, it is foreseen that there will also be an Appellate Panel, which will consist of five judges. The members of this mechanism will be vetted in advance by an external body with an international presence. When the restructuring phase of the Mechanism and the reduction of staff starts taking place, the Appellate Panel will be abolished and the powers to review the appeals of the vetting subjects will be transferred to the Supreme Court.

The purpose of establishing the Appellate Panel is for vetting subjects to have the opportunity to appeal the decisions of the Mechanism of the first instance, on the grounds determined through constitutional and legal changes. The grounds of appeal must be adapted to those of a regular court procedure, so that the subject who claims that his rights have been violated, can exercise the right to effective legal remedies, according to the conditions set out in Article 13 of the European Convention for Human Rights.

The procedure developed in the first and second instance must be in line with the European Convention on Human Rights, and in particular with Article 6 of the Convention. In both instances, the vetting subject has the right to be represented by a

lawyer, and in the absence of financial means, at his request to be assigned an ex-officio lawyer.

The law will determine the specifics of the vetting bodies, including the disciplinary procedure against its members and the procedure for their dismissal.

3. MECHANISM FOR PERFORMANCE, INTEGRITY AND WEALTH CHECK

Once all subjects have been vetted by the Vetting Mechanism, it is considered that the proper filtering of the justice system has already been achieved, and only persons with high integrity and professional ethics remain part of this system. In order to maintain the balance between the need for this standard in the justice system and the measures taken in this regard, it is envisaged to restructure the Vetting Mechanism into a Mechanism for performance, integrity and wealth check. Through this restructuring, it is envisaged to reduce the constituent parts of the Mechanism and the number of their members.

a) Panels

The panels are expected to remain within the Mechanism for performance, integrity and wealth check, reduced in number, as it is considered that the workload will be much smaller compared to that of the Vetting Mechanism.

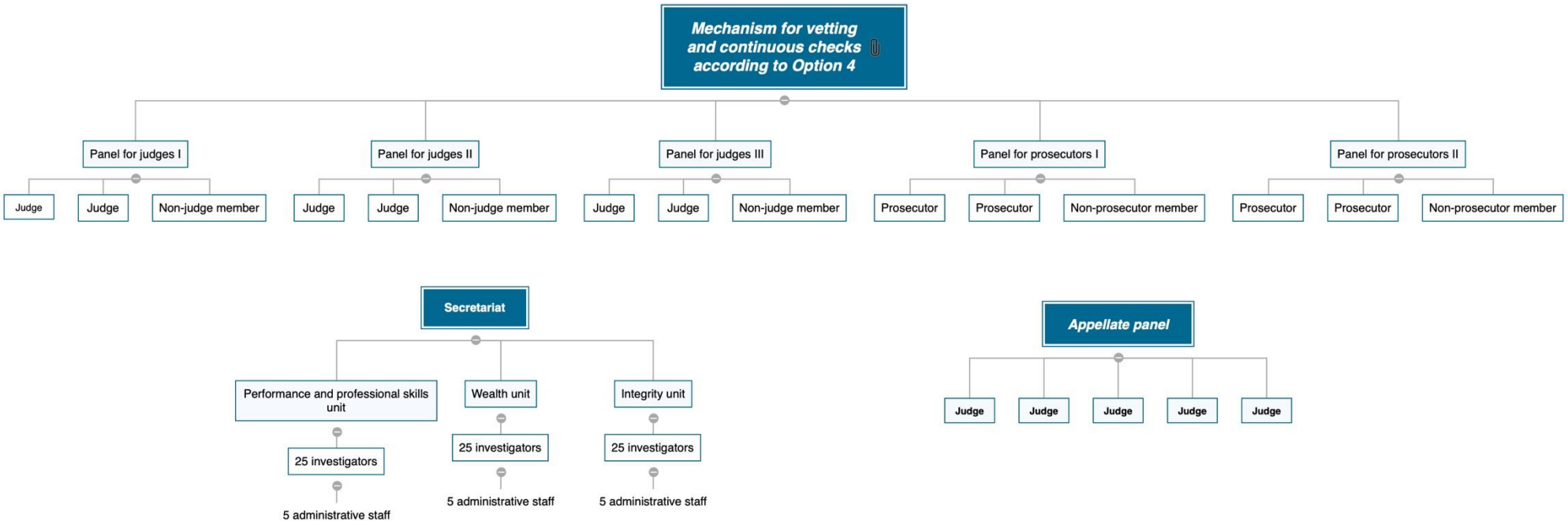
a) Secretariat and investigative units

The administrative staff of the Secretariat will be reduced in number. The number of investigators within the units will also be reduced, as the evaluation will be conducted at regular intervals and with a reduced data base. Consequently, the collection and verification of data of subjects under evaluation will be more superficial compared to those collected by the Vetting Mechanism. In this way it is intended to reduce the resources for checking the suitability of judges and prosecutors as well as interfering with the rights of assessment subjects. This is because it is estimated that the need for such a check will be significantly reduced once the vetting process is complete.

a) Appeal

Another change in the Mechanism for performance, integrity, and wealth check is that there will not be an appellate panel, but such powers will be transferred to the Supreme Court.

Figure 9: Vetting Mechanism and Mechanism for continuous integrity, wealth, and performance check according to Option 4



4. Procedure of selecting the members of the 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 public call for applications to become a member of the Vetting Mechanism will be announced by the Office of the President. The criteria for candidates will be determined by law. 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. The specifics of this process will be provided for in the new amended provisions.

5. The Procedure for Vetting and performance, integrity and wealth check

The panels of the Mechanism will, on the occasion of receiving reports from the units, evaluate the vetting subjects. The evaluation panel will conclude the report with a positive or negative score for the subjects. In the event of a positive score, vetting subjects (judges and prosecutors, as well as senior officials in the justice system) continue to hold their positions (they are confirmed in office). If the subjects receive a negative score, a certain sanction will be proposed for them.

The Panel shall refer the proposal for dismissal of the vetting subject to the President, who shall dismiss the judge/prosecutor proposed for dismissal. On the other hand, the proposal for dismissal of officials in senior management positions will be submitted to the KJC/KPC by the Mechanism.

In cases when a vacancy is announced for the position of judge and prosecutor, the candidate will first go through the vetting process by the Mechanism. Only after the vetting by the Mechanism is complete, will the candidates for judges and prosecutors be proposed to the Council for their recruitment, and then for appointment by the President. If the candidate is scored negatively by the mechanism, he cannot continue the recruitment process. The same will apply to senior management positions.

The collection of reports, the evaluation process, the proposal of the sanction as well as the vetting procedure in the recruitment phase will be determined by law.

6. Scope of data collected

Relevant constitutional and legal provisions will stipulate on three categories of records to be collected and reviewed during the vetting process. These include:

i) data on wealth - The object of the verification of assets may be the declaration and control of assets, the legality of the source of their generation, as well as the fulfillment of financial obligations, including the private interests for the vetted person.

ii) data on professional duties: concerns the evaluation of the ethical and professional activity of the re-evaluation subjects. Performance data to be evaluated are limited. Evaluation should not go into the merits of rulings. It is considered that in this regard, one should not extend beyond what is provided in the current Regulations for the performance appraisal of judges/prosecutors, which generally set a maximum threshold for the assessment of the quality of decisions rendered by the judge/prosecutor, and other professional skills. Also, one of the limitations made clear by the Kiev Recommendations (elaborated above), is that the number of rulings remanded by a higher court cannot serve as a criterion of performance appraisal.

iii) other personality-related information - includes information on political connections/affiliations of the candidate, information collected from the field, information on addictions which could affect the ability to judge, or other personality-related deviations diagnosed professionally affecting the integrity of the candidate. The collection, use and storage of information on the candidate and the duration of information storage will be determined by law, ensuring proportionality in relation to the right to family life and the right to privacy.

With regard to the data collection, first the vetting subjects will submit to the mechanism the completed form for each category of data, according to the specifics defined by law. Then, with regard to the issues specified in the form, the relevant panel will verify the accuracy of the data and compare them with the findings collected by the units.

The law should clearly specify which data may be collected, the procedure of their collection, administration and processing, which should be in accordance with the legislation in force on the protection of personal data; the obligation for proportionality between the restriction of the right to privacy and family life should be sanctioned, which may come as a result of searching and verifying personal data and other information with the legitimate aim intended to be achieved through the collection of this data; the

duration of the data collection procedure and the circumstances when it should be terminated should be specified; the party's (subject in the procedure) right to appeal should be provided, either in the material or the procedural aspect of the collection of this data, and the destruction of personal data according to the relevant legislation on personal data protection should be provided.

In any case, the collection of this data and information and subsequent interventions will be done in accordance with Article 8 of the European Convention on Human Rights and the judicial jurisprudence in matters such as vetting or lustration.

From the moment of drafting constitutional and legal amendments, the subject will be notified that, in the procedure carried out against him/her, he/she has prior access to his/her case material, to prepare the defense, to challenge the findings, and to propose evidence that go in his/her favor. The party in the procedure may present witnesses, as well as question witnesses who testify against him or her. The time period when the evidence must be presented to the party and the time limit for the preparation of the response will be determined by law. The party in the procedure has the right to request the rejection of the evidence the taking of which is in contradiction with the provisions applicable in the vetting procedure, as well as if the same does not prove any relevant fact in the procedure.

7. Vetting Subjects

Initially, all judges and prosecutors will be subject to vetting. **The first phase** will include: council members; The President of the Supreme Court and the judges of the Supreme Court; Chief State Prosecutor; and prosecutors in the Office of the Chief State Prosecutor. **The second phase** will include: the President of the Court of Appeals and the judges of the Court of Appeals, the Chief Prosecutor of the Appellate Prosecution Office and the prosecutors in the Appellate Prosecution Office; the Chief Prosecutor of the Special Prosecution Office and prosecutors of the Special Prosecution Office; Presidents of basic courts and Chief Prosecutors of basic prosecution offices; The Directors of the Secretariats of the KJC and the KPC, the administrators of courts and prosecution offices, and the Director of the Judicial Inspection Unit. **The third phase** will include supervisory judges, basic court judges and basic prosecution prosecutors. Throughout all phases there will be recruitment, hence vetting of new candidates for judges and prosecutors.

It is noted that all judges, prosecutors and officials in senior management positions will go through the vetting procedure only once. Upon completion of the vetting process, the continuous performance, integrity and wealth check will take place in the following moments:

i) candidates for recruitment: as judges/prosecutors and officials in senior management positions: this category will be vetted as part of the process of their recruitment, which would include an integrity check, evaluation of professional achievements and asset evaluation, as prerequisites for being part of the system. Of course, in the vetting of these candidates, what will be checked is their professional achievements and not their performance;

ii) judges/prosecutors seeking promotion*:* it is considered to be of utmost necessity to analyze the integrity, performance and wealth of these persons before assuming new duties; and

iii) periodically, throughout their career: Judges and prosecutors will be vetted in accordance with relevant legislation, so that the judicial/prosecutorial system is screened on a regular basis.

iv) by reason: the integrity, wealth and performance check may be initiated at any time, whether during vetting or continuous check, if facts or circumstances arise that call into question the suitability of the judge or prosecutor to continue the exercise of his function. So, in this case, the judge or prosecutor is subject to vetting, and the performance, integrity and wealth check respectively, without waiting for the turn according to regular planning.

8. Sanctions

Two types of measures are foreseen for vetting subjects who score negatively: i) proposal for dismissal and ii) proposal for other measures**:**

Dismissal measure: The dismissal of a judge or prosecutor should only come as a result of the most serious neglect of duty. This is in line with the international instruments analyzed above.

Finding serious deficiencies in a judge's integrity, such as links to criminal groups, exchanging favors/gifts with them, political bias evidenced by the court

rulings/prosecution he/she has rendered, or performance so poor as to jeopardize the rights of the litigating parties, or unjustifiable assets, etc., may be some of these violations. It is necessary for the Vetting Law to detail these and other violations and deficiencies for which a judge or prosecutor may be dismissed.

If the dismissal measure is chosen, the dismissal epilogue should not be prejudiced until the appeal phase is completed.

It is emphasized that the procedures and deadlines after making the decision for dismissal should be planned well, realistically and in detail. Thus, it is thought that from the moment the Mechanism decides on dismissal, the subject against whom the dismissal is decided may, within fifteen (15) days from the receipt of the decision, file an appeal. The Appellate Panel will decide on the appeal within thirty (30) days. Thereafter, if the dismissal is confirmed, the President may dismiss the judge or prosecutor within fifteen (15) days.

The dismissal measure may also be imposed on officials in senior management positions, if such a measure is proportionate to the findings of the Vetting Mechanism. The Law on Vetting will detail the modalities in this regard.

***Other measures for minor deficiencies /violations*:** When deficiencies are identified only in performance, which are considered to be surmountable, mandatory training for judges/prosecutors may be imposed, including initial training, or even demotion. The rationale for proposing these measures is to guarantee the highest professional standard for judges and prosecutors.

9. Other effects on judges and prosecutors during the vetting process

Resignation - Vetting subjects have the right to resign throughout the process. However, in case of re-application for the position of a judge or prosecutor, the subject will undergo the vetting process, the same as all candidates for recruitment.

Rejection of the subject to be vetted - The cooperation of the subject under vetting is crucial for the successful development of the vetting. Refusal of the subject to cooperate in vetting will result in dismissal from the position as well as prohibition to apply for the position of a judge, prosecutor.

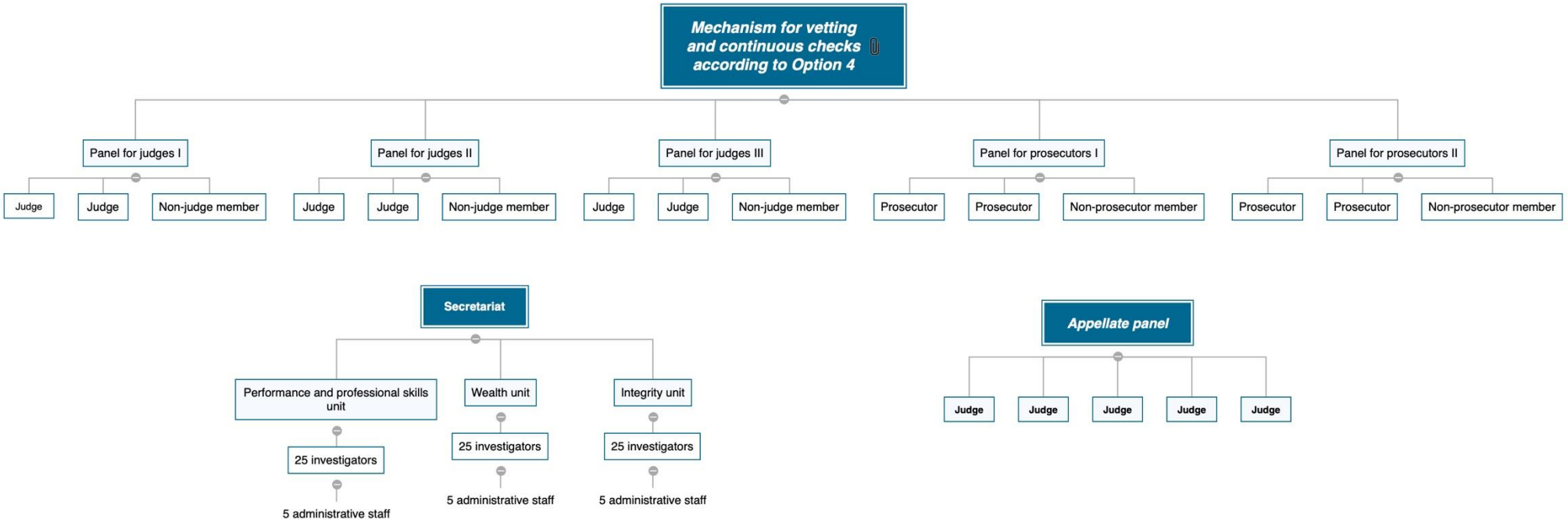
Consequences of not passing the vetting process - In case the vetting results in the dismissal of the judge or prosecutor, they will be barred from applying for the position of a judge and prosecutor, regardless of which position they were dismissed from.

The vetting procedure with take place according to the timelines set out below:

Activity	The deadline for appeal before the vetting body, from the day of the decision	The deadline within which the appellate body must make a final decision	The decision of the President regarding the dismissal, after the final decision	**Days in total**
Timeline	15 days	30 days	15 days	**60** days

Note: The timelines provided in this table apply to vetting only. For continuous performance, integrity and wealth check, additional timelines may be scheduled after the vetting process is completed.

- *Figure 10: Vetting mechanism and continuous check under Option 4*



Chapter 3.5. Option five: 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

The fifth option envisages the undertaking of vetting by an external and independent body and then, the continuous performance, integrity and wealth check by mechanisms built within the councils. Subjects of vetting will be all judges, prosecutors, as well as officials in senior management positions within the justice system, such as: administrators of courts and prosecutor's offices, Directors of KJC/KPC Secretariats and the Director of the Judicial Inspection Unit in the KJC. The following is the general structural scheme according to this option, which will be further elaborated.

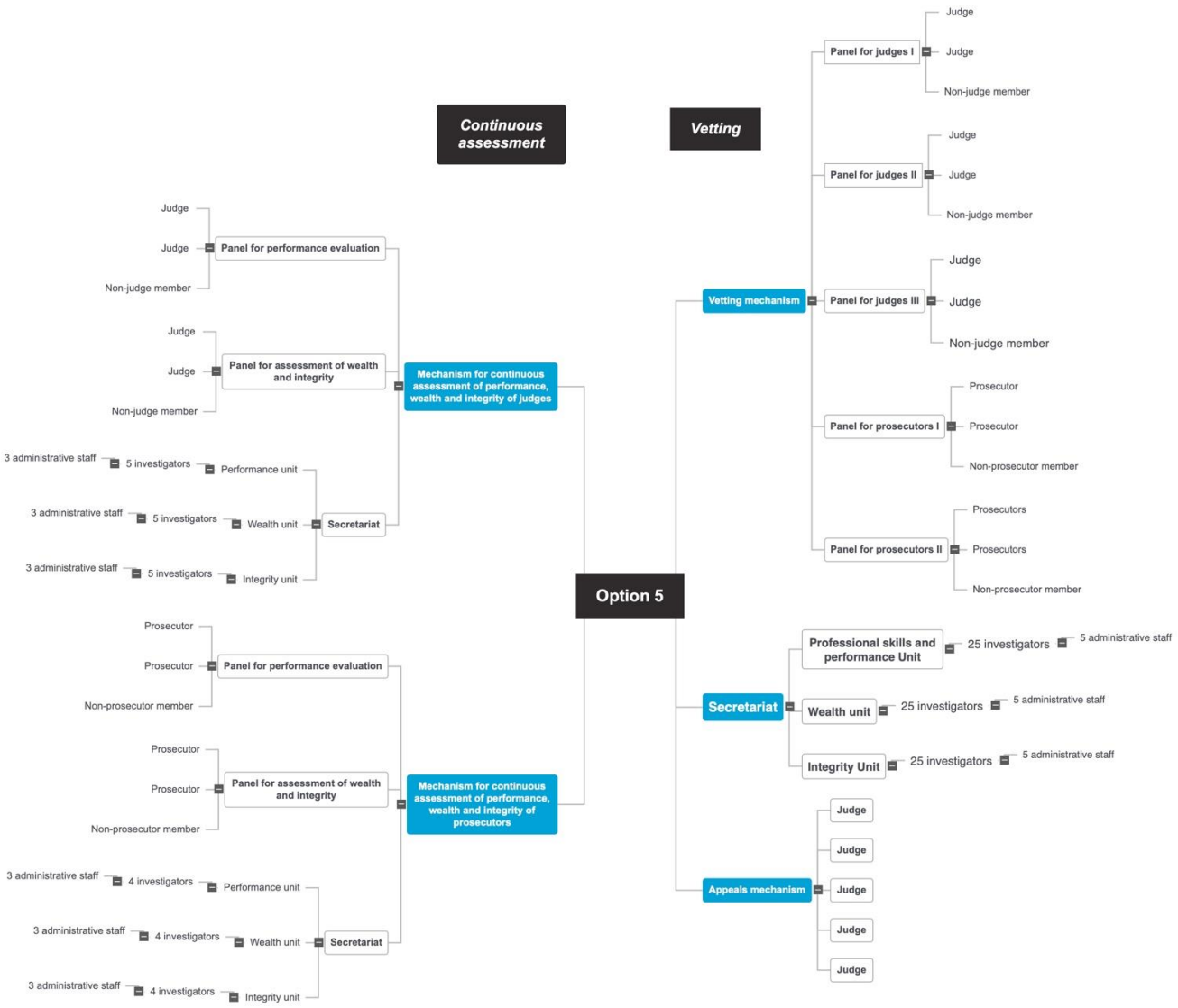
Similar to Option 3 and 4, it is envisaged to build a system through which the vetting of all subjects identified as above, who will be in office at the time of starting the process, is initially developed[123]. Once the vetting is completed, the institutional structure created for that purpose will serve as the basis for building a regular system of continuous check. Thus, the so-called mechanism for carrying out vetting - initially an independent mechanism, will be transformed into two mechanisms for continuous performance, integrity and wealth check of judges, respectively prosecutors, which will be integrated within the KJC and KPC respectively. In this form, a sustainable system will be built which, as such, will also produce sustainable results. As a result, in order to avoid duplication of work and technical bureaucracy, the KJC/KPC Performance Evaluation Commission and the Performance Review Unit will be abolished within each Council.

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.

Figure 11 outlines the general system to be created by implementing Option 5, as details are explained further in this chapter.

[123] This does not exclude judges, prosecutors and officials in senior management positions of new courts and prosecution offices which may be created during the period of the vetting process.

Figure 11: Vetting mechanism and continuous performance, wealth, and integrity check under Option 5



1. VETTING WITH CONSTITUTIONAL CHANGES

Vetting, according to Option 5, will be implemented on the basis of international standards and best practices of countries that have carried out the vetting process.

The vetting process will be conducted by the constitutional mechanism according to the composition, competencies and all authorizations provided in Option 4 (implementation of vetting with Constitutional amendments); however, the same will be elaborated below, for the sake of clarity.

The carrying out of the vetting process with constitutional changes offers flexibility in designing the vetting process, by changing the relevant articles, which currently limit the modalities related to this process. Thus, according to this type of vetting, the Constitution would be amended.

a) Constitutional amendments

For the carrying out of a proper vetting process, constitutional changes need to be made to accommodate a host of issues. The amendment of the Constitution will follow the constitutional procedure.

Initially, the constitutional provisions should provide for the establishment of a mechanism that will conduct the vetting process which, as such, will be abolished upon completion of the vetting.[124]

Based on this model, the proposal for the dismissal of judges and prosecutors, during the vetting process, will be left directly to the mechanism, without having to go through the councils. Thus, the mechanism will direct the proposal for dismissal to the President, who will then have the right to dismiss the relevant subject. This way, the dismissal of judges and prosecutors is decided in cooperation between the mechanism and the President, to also ensure control and balance of the process.

[124] The scope and competencies of the mechanism will be further regulated by law.

Other constitutional changes will focus on the reasons for dismissal of subjects, restriction of the right to privacy, vetting in the recruitment of judges and prosecutors, the powers of the President and other related issues.

It follows that Articles 104(1) and 109(7) governing the proposal for appointment and dismissal, as well as Article 84 on the powers of the President, should be supplemented, paragraphs (15), (16), (17) and (18) respectively.

Also, in order to create legal certainty, Articles 104(4) and 109(6) must be supplemented. These two provisions define two reasons for dismissal of a judge or prosecutor, which are *serious criminal offense* and *serious neglect of duties*. The amendment of the Constitution envisages the expansion of the basis for dismissal of vetting subjects, adding a reason for dismissal, which is related to the findings of vetting, when the conditions for dismissal of the subject are met. Detailed reasons for dismissal on the basis of a negative assessment in the vetting process will be provided by the relevant vetting law.

b) Order of vetting

As noted above, the vetting subjects will be all judges and prosecutors and officials in senior positions in the justice system. However, the vetting process will categorize several subjects against which vetting will take place, and consequently will be divided into several stages. **The first phase** will include: council members; The President of the Supreme Court and the judges of the Supreme Court; Chief State Prosecutor; and prosecutors in the Office of the Chief State Prosecutor. **The second phase** will include: the President of the Court of Appeals and the judges of the Court of Appeals, the Chief Prosecutor of the Appellate Prosecution Office and the prosecutors in the Appellate Prosecution Office; the Chief Prosecutor of the Special Prosecution Office and prosecutors of the Special Prosecution Office; Presidents of basic courts and Chief Prosecutors of basic prosecution offices; The Directors of the Secretariats of the KJC and the KPC, the administrators of courts and prosecution offices, and the Director of the Judicial Inspection Unit. **The third phase** will include supervisory judges, basic court judges and basic prosecution prosecutors. Throughout all phases there will be recruitment, hence vetting of new candidates for judges and prosecutors. This Concept Paper, under implementation plan for Option 5 below, further details the order and timing of the vetting process.

It is noted that all judges, prosecutors and officials in senior management positions will go through the vetting procedure only once.

c) The general organizational structure of the Vetting Mechanism

Under this Option and as a result of constitutional amendments, an independent mechanism will be established. The vetting mechanism is, structurally, foreseen to have the following composition: a) The mechanism for the carrying out of the vetting process (first instance); b) Secretariat and investigative units; and c) Appellate Panel (second instance).

The schematic representation of the vetting system according to Option 5 is presented in Figure 10 below.

The mechanism for the carrying out of the vetting process

As explained above, the constitutional amendments will pave the way for the establishment of the Mechanism for the carrying out of the vetting process.

The mechanism for the carrying out of the vetting process is expected to consist of five panels. Of these, three panels will undertake the vetting of judges, while two will undertake the vetting of prosecutors. The number of panels has been set proportionally with the number of subjects from each profile, so that the vetting ends at the same time for both the judicial and the prosecutorial system.

The three panels for judges will be the same in composition and will work in parallel. The panels will be composed of three members, of which two will be judges and one non-judge. Similarly, the two panels for prosecutors, which will also conduct their work at the same time, will each consist of three members. Of these, two will be prosecutors, while one member will be a non-prosecutor. In accordance with international standards and the comments received during the public consultation, it is envisaged that the members of the panels, who will be neither judges nor prosecutors, will be professionals in the field of justice, distinguished and of high integrity, and who have not held political positions for a certain time before applying for this position. These and other recruitment criteria will be set out in the Vetting Law.

The work of the mechanism as a whole will be led by a Chairperson, who will be elected by rotation from the ranks of all members of the mechanism. Since at this stage we cannot speak with arithmetic precision, in case the practical needs prove otherwise, the number of panels and their members can be changed and adjusted during the drafting of constitutional and legal amendments.

Using the experience of other countries addressed above and in the spirit of international standards, another element to ensure the independence and impartiality of the work of the mechanisms is the duration of their mandate. Members of the vetting mechanism will have a mandate which will last as long as the vetting process.

Secretariat and investigative units

The composition of the Mechanism will include the Secretariat, which provides all the administrative and logistical support for the entire Mechanism when carrying out the vetting.

In accordance with the three segments in which the vetting will be focused, the Secretariat will be composed of three units: a) Professional skills and performance unit; b) Wealth unit and; c) Integrity Unit. It is anticipated that each of these units will have 25 professional investigators and 5 members of the administrative staff. Operational units will have the important task of collecting and processing data and information from the relevant segment for the subject under review. Reports on the findings of professional investigators will be sent to the panel before which the vetting procedure is conducted against that person.

Due to the nature of the work they will do, in addition to being recruited on the basis of high criteria, all members of the Secretariat will also be subject prior vetting.

Appellate Panel

When carrying out vetting, the general vetting mechanism according to Option 5, will also include the second instance. The Appellate Panel shall be established within the meaning of the Tribunal and to serve the right of the subject to an effective remedy, in accordance with the provisions of Articles 6 and 13 of the ECHR and the jurisprudence of the ECHR. Decisions issued by the Mechanism for the carrying out of vetting in its

capacity as a first instance, may be appealed by the dissatisfied subject to the Appellate Panel. The grounds for appeal must be adapted to those of a regular court proceeding. The Appellate Panel will be composed of five judges. These judges will be subject to prior vetting by an external body with international presence. Other details regarding the Appellate Panel and the second instance procedure will be determined through constitutional and legal changes.

d) The selection procedure of Mechanism members

The key moment for undertaking the vetting according to Option 5 is undoubtedly the selection of the members of the structures as above, which together constitute the Vetting Mechanism.
The process of selecting the members of the Mechanism, including the Bodies for carrying out vetting and the Appellate Panel, will take place in cooperation between the Assembly and the President. In order to maintain the balance of power, it is envisaged that the public call for applications to become a member of the Vetting Mechanism will be announced by the Office of the President. The criteria for candidates will be determined by law. The Office of the President will enter into an agreement with an international institution/organization, to conduct the vetting of candidates for members of the mechanisms. The nominated names who pass the vetting, along with the reasons for the nominations, will be proposed to the President. After approval by the President, the names of the members of these mechanisms will be sent to the Assembly for voting.

Although this option provides for the amendment of the Constitution, this model is envisaged in the spirit of separation of powers and typical competencies of each institution for a parliamentary democracy, such as Kosovo.

The members of the mechanisms themselves will be vetted in advance by a body with international assistance. It is essential to undertake the verification process for candidates for members of the mechanisms, as those who vet judges and prosecutors must themselves be verified subjects. Thus, there is a guarantee that the process will not be vulnerable to the detriment of judges and prosecutors who are subject to vetting. Other details, including the selection procedure and details about the selection, the ensuring elements such as oversight and the accountability mechanisms of the process, will be determined by law.

e) Vetting procedure

According to the above description about the process sequence, the vetting process will initially take place, the timing of which is detailed in the Implementation Plan for Option 5. This implementation plan also details the order for conducting vetting in the judicial and prosecutorial systems.

Therefore, according to the structure described above, the panels will be the ones which will review the cases meritoriously. All panels work in parallel. In other words, five subjects could be reviewed at the same time - three from the judicial system and two from the prosecutorial system.

The collection of data and information on the case under review will be done by the units. The findings of the units are summarized in the form of a report. The relevant evaluation panel, consisting of three members, will review the case on its own merits.

If, generally, from the evaluation of the three segments, the subject results as appropriate, orderly and fit for his work, then the panel issues a positive decision. In this case, that subject is confirmed in the position he is already exercising. If, during the review of the case, the panel notices violations or other deficiencies, then a certain sanction will be proposed for the subject. Decisions will be well reasoned. In principle and without compromising the privacy of the subject, the decisions will be public.

From the moment of initiating the vetting, the subject will be notified that his case is being processed. The law will ensure respect for the subject's right to a fair trial, stipulating that he/she will have access to his/her case material, ie to the findings and information based on which the panel decides. The vetting subject will have the right to challenge these findings and present evidence, and witnesses, as well as to question witnesses who testify against him or her. The time period when the evidence must be presented to the party and the time limit for the preparation of the response will be determined by law. The party in the procedure has the right to request the rejection of the evidence the taking of which is in contradiction with the provisions applicable in the vetting procedure, as well as if the same does not prove any relevant fact in the procedure.

The vetting subject is also guaranteed the right to appeal, which he can file before the Appellate Panel. As stated, the grounds for appeal must be adapted to those of a regular court proceeding.

In both instances, the vetting subject has the right to be represented by a lawyer, and if he/she does not have the financial means, an ex-officio lawyer will be assigned at his/her request. The procedure carried out in the first and second instance will be in line with the European Convention on Human Rights, and in particular with Article 6 of the Convention.

The vetting procedure according to the above description will take place in these four moments:

i) in order: Vetting in order, elaborated above in this Concept Paper, is the most important categorization within the vetting process and all judges and prosecutors will be subject to vetting.

ii) on candidates for recruitment: this category will be evaluated during the recruitment process for judges/prosecutors, as long as the vetting process lasts, which will include the stage of assessment of integrity, professional achievement and wealth control as a prerequisite to be part of the system.

Given that in case some of the subjects will be dismissed from the duties they hold due to the results of the vetting; it is foreseen to fill the vacancies at the first opportunity. In this case, the relevant Councils will take certain actions in their competence to recruit new judges and prosecutors. New recruits will also be subject to vetting by the Mechanism for carrying out vetting. Of course, the vetting of new recruits will differ from the vetting of subjects that are already in office. Details of this will be set out in the law.

Only after receiving a positive evaluation, these candidates will be proposed to the relevant Council, to be proposed to the President according to the regular procedure. If the candidate is evaluated negatively by the mechanism, then he cannot continue the recruitment process. The same will apply to senior management positions.

iii) Judges/prosecutors seeking promotion: it is considered to be of utmost necessity to analyze the integrity, performance and wealth of these persons before assuming new duties. A judge or prosecutor who is running for promotion and has undergone vetting recently prior to promotion, a period which will be specified by law, will not need to be re-checked; and

iv) vetting by reason: vetting could be initiated if facts or circumstances arise that call into question the suitability of a judge or prosecutor, or a senior management official, to continue in the exercise of his or her function.

f) Scope of data collected

In the case of vetting of judges and prosecutors, there are three categories of data which are collected and reviewed and on which it is decided. First, upon initiating the vetting of a judge/prosecutor, he/she will be required to submit to the mechanism the completed form for each category of data, according to the specifics defined by law. Then, with regard to the issues specified in the form, the relevant panel will verify the accuracy of the data and compare them with the findings collected by the units.

During the vetting process of a subject, the following data will be collected:

i) data on professional skills and performance - Performance data to be evaluated will be limited. Care should be taken during the performance appraisal so that the substantive issues of a decision or retrial are not to be considered. The Panel must assess and note cases where a decision 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". When it comes to performance review, all the factors and circumstances of the case must be carefully considered, as well as the grounds of the allegations on facts and evidence. The new KJC and KPC regulations provide a solid and appropriate basis for measuring the performance of judges and prosecutors. The performance measurement criteria are in principle contained therein. The main shortcoming remains their implementation in practice which, as discussed above, shows to be extremely generous with the candidates. Furthermore, based on the data collected it will be understood whether the judge/prosecutor is professionally capable of exercising his or her duties.

It is considered that one should not extend beyond what is provided in the current Regulations for the performance appraisal of judges/prosecutors, which generally set a

maximum threshold for the assessment of the quality of decisions rendered by the judge/prosecutor, and other professional skills. Also, one of the limitations made clear by the Kiev Recommendations (elaborated above), is that the number of rulings remanded by a higher court cannot serve as a criterion of performance appraisal.

ii) ***data on wealth*** - Data verified in terms of wealth will include all assets in accordance with the relevant Law on Declaration of Assets. The object of the verification of assets is the declaration and control of assets, the legality of the source of their generation, as well as the fulfillment of financial obligations. Wealth will be assessed in terms of whether the position as a judge/prosecutor has been misused to bring financial benefits to oneself or to a third party. The Law on Vetting will detail the modalities regarding the wealth check.

iii) other personality-related information - Personality-related information that will be collected and evaluated on the vetting subject includes: information on political connections/affiliations or other interest groups of the candidate, which affect their decision-making; information on addictions that the vetting subject may have or other personality-related deviations which could affect the ability to judge, or which would make the vetting subject unworthy to exercise his or her function; other information collected from the field.

The scope of data collected for vetting of officials in senior management positions will be specified by law. Also, data will be collected and evaluated for them in terms of their performance, integrity and wealth.

In the situation when from the findings of the mechanism, it turns out that there are elements of a criminal offense, the mechanism shall refer the matter to the competent bodies.

The law should clearly specify which data may be collected, the procedure of their collection, administration and processing, which should be in accordance with the legislation in force on the protection of personal data; the obligation for proportionality between the restriction of the right to privacy and family life should be sanctioned, which may come as a result of searching and verifying personal data and other information with the legitimate aim intended to be achieved through the collection of this data; the duration of the data collection procedure and the circumstances when it should be terminated should be specified; the party's (subject in the procedure) right to appeal should be provided, either in the material or the procedural aspect of the collection of this

data, and the destruction of personal data according to the relevant legislation on personal data protection should be provided.

In any case, the collection of this data and information and subsequent interventions will be done in accordance with Article 8 of the European Convention on Human Rights and the judicial jurisprudence in matters such as vetting or lustration.

g) Sanctions

Judges and prosecutors who have been assessed negatively by the Vetting Mechanism, depending on the nature and intensity of the violations/deficiencies identified, may be imposed:

Dismissal measure: The dismissal of a judge or prosecutor should only come as a result of the most serious neglect of duty. This is in line with the international instruments analyzed above.

Finding serious deficiencies in a judge's integrity, such as links to criminal groups, exchanging favors/gifts with them, political bias evidenced by the court rulings/prosecution he/she has rendered, or performance so poor as to jeopardize the rights of the litigating parties, or unjustifiable assets, etc., may be some of these violations. It is necessary for the Vetting Law to detail these and other violations and deficiencies for which a judge or prosecutor may be dismissed.

If the dismissal measure is chosen, the dismissal epilogue should not be prejudiced until the appeal phase is completed.

It is emphasized that the procedures and deadlines after making the decision for dismissal should be planned well, realistically and in detail. Thus, it is thought that from the moment the Mechanism decides on dismissal, the subject against whom the dismissal is decided may, within fifteen (15) days from the receipt of the decision, file an appeal. The Appellate Panel will decide on the appeal within thirty (30) days. Thereafter, if the dismissal is confirmed, the President may dismiss the judge or prosecutor within fifteen (15) days.

The tentative timelines for dismissal of a judge or prosecutor are set out below:

Activity	Timeline for appealing the decision for dismissal	Decision of the Appellate Panel on the appeal	President's decision regarding the dismissal of the judge/prosecutor	**Days in total**
Timeline	15 days	30 days	15 days	**60** days

Note: The timelines provided in this table apply to vetting only. For continuous performance, integrity and wealth check, additional timelines may be scheduled after the vetting process is completed.

The dismissal measure may also be imposed on officials in senior management positions, if such a measure is proportionate to the findings of the Vetting Mechanism. The Law on Vetting will detail the modalities in this regard.

Other measures for minor deficiencies/violations: When deficiencies are identified only in performance, which are considered to be surmountable, mandatory training for judges/prosecutors may be imposed, including initial training, or even demotion. The rationale for proposing these measures is to guarantee the highest professional standard for judges and prosecutors.

h) Other effects on judges and prosecutors during the vetting process

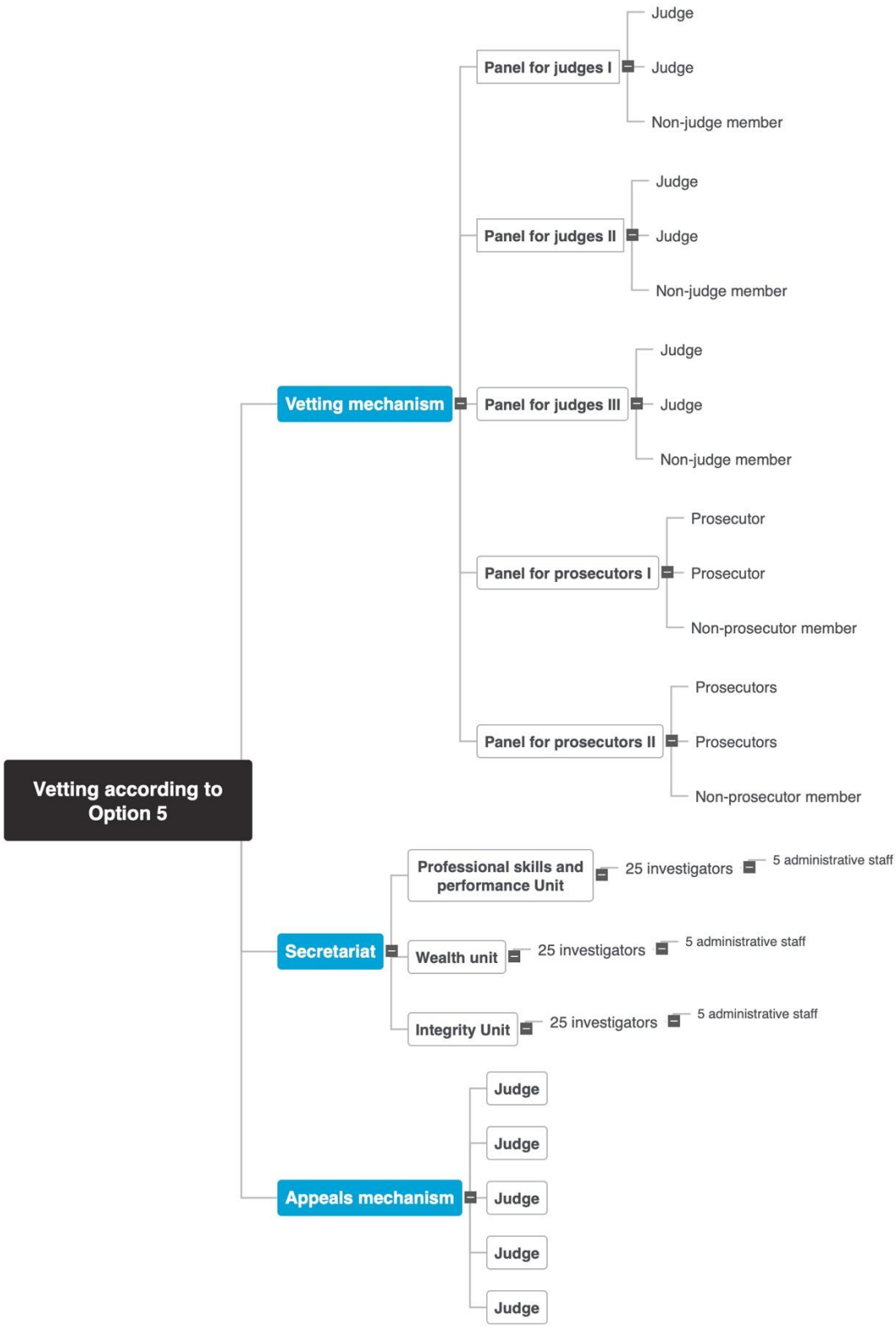
Resignation - Vetting subjects have the right to resign throughout the process. However, in case of re-application for the position of a judge or prosecutor, the subject will undergo the vetting process, the same as all candidates for recruitment.

Rejection of the subject to be vetted - The cooperation of the subject under vetting is crucial for the successful development of the vetting. Refusal of the subject to

cooperate in vetting will result in dismissal from the position as well as prohibition to apply for the position of a judge, prosecutor.

Consequences of not passing the vetting process - In case the vetting results in the dismissal of the judge or prosecutor, they will be barred from applying for the position of a judge and prosecutor, regardless of which position they were dismissed from.

Figure 12: Vetting mechanism according to Option 5



2. CONTINUOUS PERFORMANCE, WEALTH AND INTEGRITY CHECK

The Constitutional Vetting Mechanism will complete its work with the full vetting of judges, prosecutors and officials in senior management positions. Thus, the Councils will be composed of members and officials already vetted and, henceforth, it is considered that the Councils will be ready to continue to guarantee performance and integrity on an ongoing basis.

Considering that the objective of the first phase is achieved through vetting, ie the filtering of the justice system, in order to continue maintaining the same level and building a sustainable system, the second phase will continue, which will be a continuous performance, wealth and integrity check. This will be done taking into account the experience and results of the vetting, as well as further analyzes that will be conducted in the meantime. The aim is to establish appropriate mechanisms within the councils for continuous evaluation.

The changes foreseen within this phase are enabled through the drafting of the relevant legislation.

Mechanisms for Continuous Performance, Wealth and Integrity Check of Judges and Prosecutors

When, in accordance with the detailed plans in the Implementation Plan for Option 5, the vetting of judges, prosecutors and senior positions in the judiciary is completed as above, the Mechanism for the carrying out of the Vetting Process will have fulfilled its mandate. Based on the institutional structure and other capacities of this mechanism, two mechanisms will be created - one will serve to conduct continuous checks for judges, the other for prosecutors. Thus, from an independent mechanism, two regular mechanisms will be established within the KJC, and the KPC respectively. More precisely, the panels for judges will take the form of a mechanism for continuous evaluation of judges that will be an integral entity of the KJC. Panels for prosecutors will take the form of a mechanism for continuous evaluation of prosecutors, which will be integrated within the KPC. Details of the transformation of the initial mechanism and further integration of the new mechanisms into Councils will be set out in the constitutional amendments and relevant laws.

The mechanisms will have functional independence within their competencies and duties according to the law. Relevant mechanisms will exclusively conduct the continuous evaluation process for current judges and prosecutors, as well as for potential candidates for judges and prosecutors.

In the composition of each of these two mechanisms will be two panels and a secretariat. Within each mechanism will function the following: 1. Performance Check Panel and 2. Wealth and Integrity Check Panel. Both panels will consist of two judge members, respectively two prosecutor members and one non-judge member respectively one non-prosecutor member.

What distinguishes these mechanisms is the secretariat, as the administrative staff of each of the respective Secretariats will vary in number. Given that the number of judges is greater, then the number of administrative officials will be greater for the mechanism within the KJC, than that within the KPC.

Within the Secretariat of the Mechanism within the KJC will function the following: 1. Performance Unit; 2. Wealth Unit; and 3. Integrity Unit. The three units will be composed of 5 investigative officers and 3 administrative staff per unit. The same units will constitute the mechanism within the KPC, but with 4 investigative officers and 3 administrative staff per unit.

The final evaluations of the mechanisms will be sent to the KJC and KPC respectively. The findings will be used to make a decision on the judge, and the prosecutor respectively, be it in terms of promotion, mandatory training, proposal for appointment, or proposal for dismissal.

As dictated by the current Constitution, the nomination and dismissal of judges and prosecutors at this stage will be done by the relevant constitutional mechanisms, that is, the nomination for dismissal as a judge by the relevant Council and the dismissal by the President. Whereas, the Supreme Court will act as a second instance based on 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 shall be final and shall have binding legal effect on the parties.

a) Structure of the competent mechanism:

Thanks to the model presented under this Option, mechanisms for continuous evaluation will be formed within the KJC and KPC, divided into several panels as follows:

i) Performance appraisal panel

This panel would replace the work of the current commissions for measuring the performance of judges and prosecutors respectively.

The panel will consist of a majority of judges, ie prosecutors, but also will have the presence of non-judge members and non-prosecutor members respectively, to ensure a kind of accountability. These non-judge and non-prosecutor members will be professionals in the field of justice, distinguished and of high integrity, who have not held political positions for a certain period before running for office. The Panel will consist of two judge members, and prosecutors respectively, and one non-judge member, non-prosecutor member respectively. The Panel does not issue binding decisions, but "assessments" on the quality of performance of judges/prosecutors.

Care should be taken in determining the performance of this panel to ensure that performance check is carried out so that the substantive issues of a decision or retrial are not to be considered. [125] The relevant panel compiles its own assessments of the performance and professionalism of the judge or prosecutor. In the framework of this assessment, when necessary, the panel also recommends the measures to be taken against the candidate. This assessment is then followed by the assessments of the Wealth and Integrity Assessment Panel and all together are made available to the respective Decision-Making Council.

ii) Wealth and Integrity Check Panel

[125] In terms of marking this dividing line, we can use the Kenyan practice discussed above. According to Kenyan practice, the role of the vetting body was not that of an appellate court which would assess the factual and legal accuracy of the decisions issued by the judge, nor of the philosophical legal convictions that the judge followed in his work. The continuous evaluation mechanism must assess and note cases where a decision presents strange and deficient rationale, so as to result in a lack of fairness and impartiality. This assessment, if it is alleged that in the drafted documents, the judge or prosecutor has shown a lack of professionalism, cannot be done by applying a "general formula". When it comes to professionalism review, all the factors and circumstances of the case must be carefully considered, as well as the grounds of the allegations on facts and evidence.

- This panel would have the power to investigate in detail the candidate's wealth and integrity and analyze suspicions of potential misconduct. The panel, in the form of a wealth check, would then forward the panel to the relevant decision-making bodies. The Panel will consist of two judge members and prosecutor members respectively, and one non-judge member and non-prosecutor member respectively. It will have the expertise and resources needed to conduct wealth and integrity checks.

  Panel members emerge from the vetting mechanism, who will then be evaluated on a regular basis. To ensure independence and inviolability in the performance of this task, members of these bodies are recommended to have a mandate defined by law.

iii) Secretariat

The Secretariat is an administrative body of the mechanism, which consists of 3 units: 1. professional skills and performance Unit 2. Wealth Unit and 3. Integrity Unit. The units consist of professional investigative officers and administrative support staff, who have been part of the vetting mechanism and the same have previously been vetted, as envisaged in the first phase. Relevant units will serve the respective panels, depending on the field of evaluation of the panels, ie they will investigate, extract information on the candidate and will assist according to the needs of the panels. These units will consist of 5 investigative officers and 3 administrative staff for the KJC, and 4 investigative officers and 3 administrative staff for the KPC.

b) Scope of data collected

The relevant provisions will define three categories of data which are collected and reviewed during the evaluation process of judges and prosecutors. These include:

i) performance data: performance data to be evaluated will be limited. As mentioned above, evaluation should not go into the merits of rulings. It is considered that in this regard, one should not extend beyond what is provided in the current Regulations for the performance appraisal of judges/prosecutors, which generally set a maximum threshold for the assessment of the quality of decisions rendered by the judge/prosecutor, and other professional skills. Also, one of the limitations made clear by the Kiev Recommendations (elaborated above), is that the number of rulings remanded by a higher court cannot serve as a criterion of performance appraisal.

ii) data on assets: which will include all assets in accordance with the relevant Law on Declaration of Assets;

iii) other integrity related information*:* including information on the candidate's political affiliations and information collected from the field. The collection, use and storage of information on the candidate and the duration of information storage will be determined by law, ensuring proportionality in relation to the right to family life and the right to privacy.

However, the time period as well as the types of data for which a judge or prosecutor is evaluated will differ from vetting with constitutional changes. Thus, the categories of data, the nature and level of data to be collected, will be subject to a more detailed analysis, in accordance with international standards and the constitution and will be proportionate to the needs of the continuous check.

c) Subjects who will undergo continuous check

Upon completion of the vetting process, the **continuous performance, integrity and wealth check** will take place in the following moments:

i) candidates for recruitment: as judges/prosecutors and officials in senior management positions: this category will be vetted as part of the process of their recruitment, which would include an integrity check, evaluation of professional achievements and asset evaluation, as prerequisites for being part of the system. Of course, in the vetting of these candidates, what will be checked is their professional achievements and not their performance;

ii) judges/prosecutors seeking promotion: it is considered to be of utmost necessity to analyze the integrity, performance and wealth of these persons before assuming new duties; and

iii) periodically, throughout their career: Judges and prosecutors will be vetted in turns on a periodic basis, in accordance with relevant legislation, so that the judicial/prosecutorial system is screened on a regular basis.

iv) by reason: the integrity, wealth and performance check may be initiated at any time, whether during vetting or continuous check, if facts or circumstances arise that call into

question the suitability of the judge or prosecutor to continue the exercise of his function. So, in this case, the judge or prosecutor is subject to vetting, and the performance, integrity and wealth check respectively, without waiting for the turn according to regular planning.

Continuous performance, integrity and wealth check, on a regular basis will be also conducted for administrators, Directors of KJC/KPC Secretariats, as well as the Director of the Judicial Inspection Unit in the KJC, in the manner and procedure specified by law.

d) Measures that may be taken

In order to analyze the measures that can be taken within this process, it should be first stated that not every finding of a negative nature constitutes a basis for dismissal or needs to be sanctioned. Some information that may be discovered during the vetting process may simply serve to identify a judge/prosecutor's sensitivity/susceptibility to a particular item. For this reason, the Law should clearly provide on a categorization of data or records which may constitute a basis for imposing any measure on the candidate.

If deemed necessary, the panels may propose two types of measures for judges/prosecutors who fail to pass the vetting process, which are the proposal for dismissal and the proposal for other measures**:**

i) proposal for dismissal

In accordance with the international instruments analyzed above, the dismissal proposal should only come as a result of the most serious neglect of duty. In the language of the Constitution of the Republic of Kosovo, there is a provision on "serious neglect of duties". It is necessary that the Vetting Law provide to elaborate thoroughly exactly the meaning of this term, and list the serious violations that would constitute this neglect.

Finding serious deficiencies in a judge's integrity, such as links to criminal groups, exchanging favors/gifts with them, political bias evidenced by the court rulings/prosecution he/she has rendered, or performance so poor as to jeopardize the rights of the litigating parties, or unjustifiable assets, etc., may be some of these violations.

Judges and prosecutors dismissed as a result of the continuous check process are barred from re-applying for the functions of both judge and prosecutor, regardless of the position they have been dismissed from.

If the administrators of courts and prosecutors' offices, the Directors of the KJC/KPC Secretariats and the Director of the KJC Judicial Inspection Unit are found to be inadequate after continuous check, they will be dismissed by the councils and replaced by newly elected officials in basis of the competition. Their recruitment will be done according to strict criteria inspired by the vetting process, as far as is applicable.

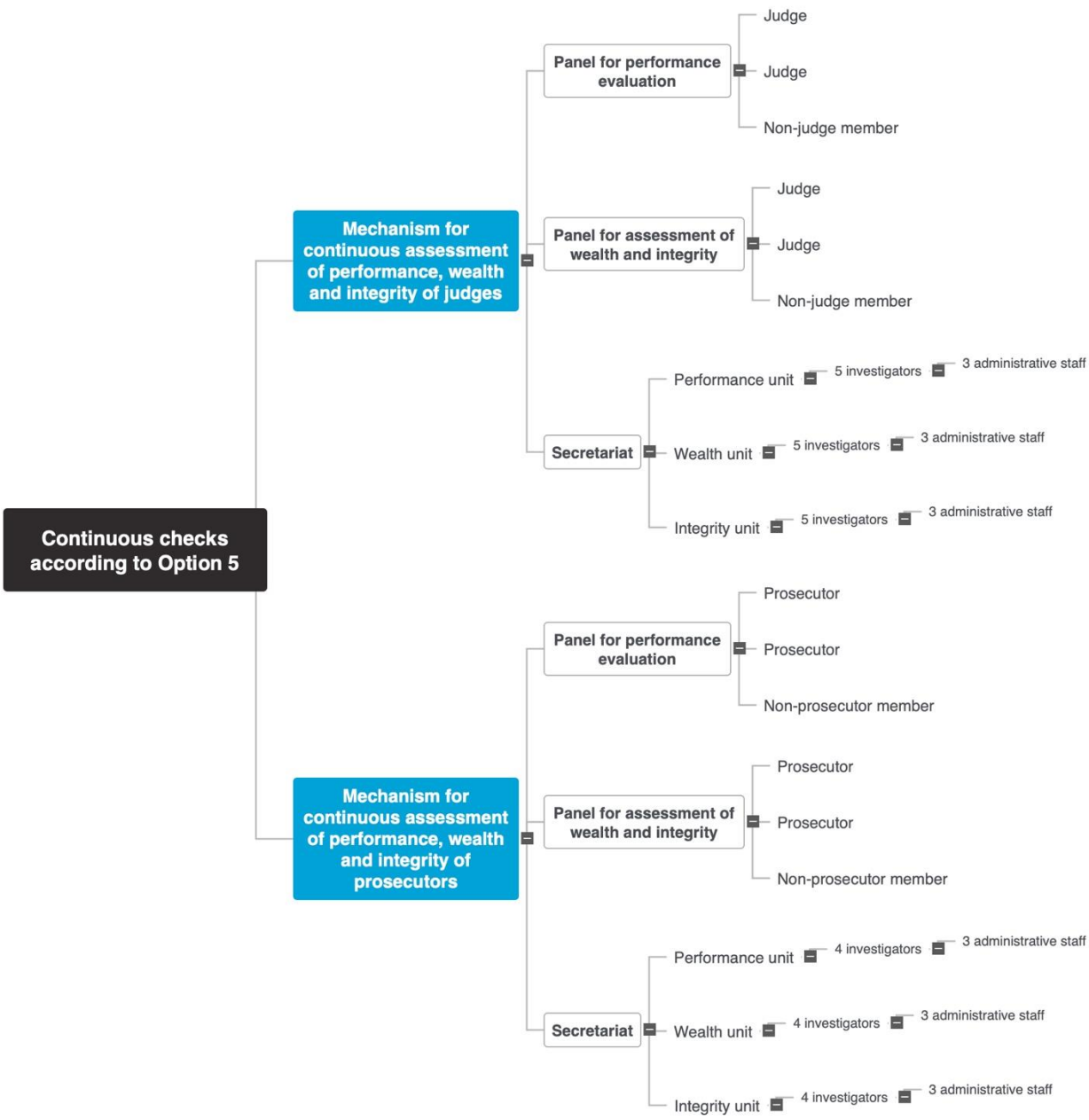
ii) proposal for other measures

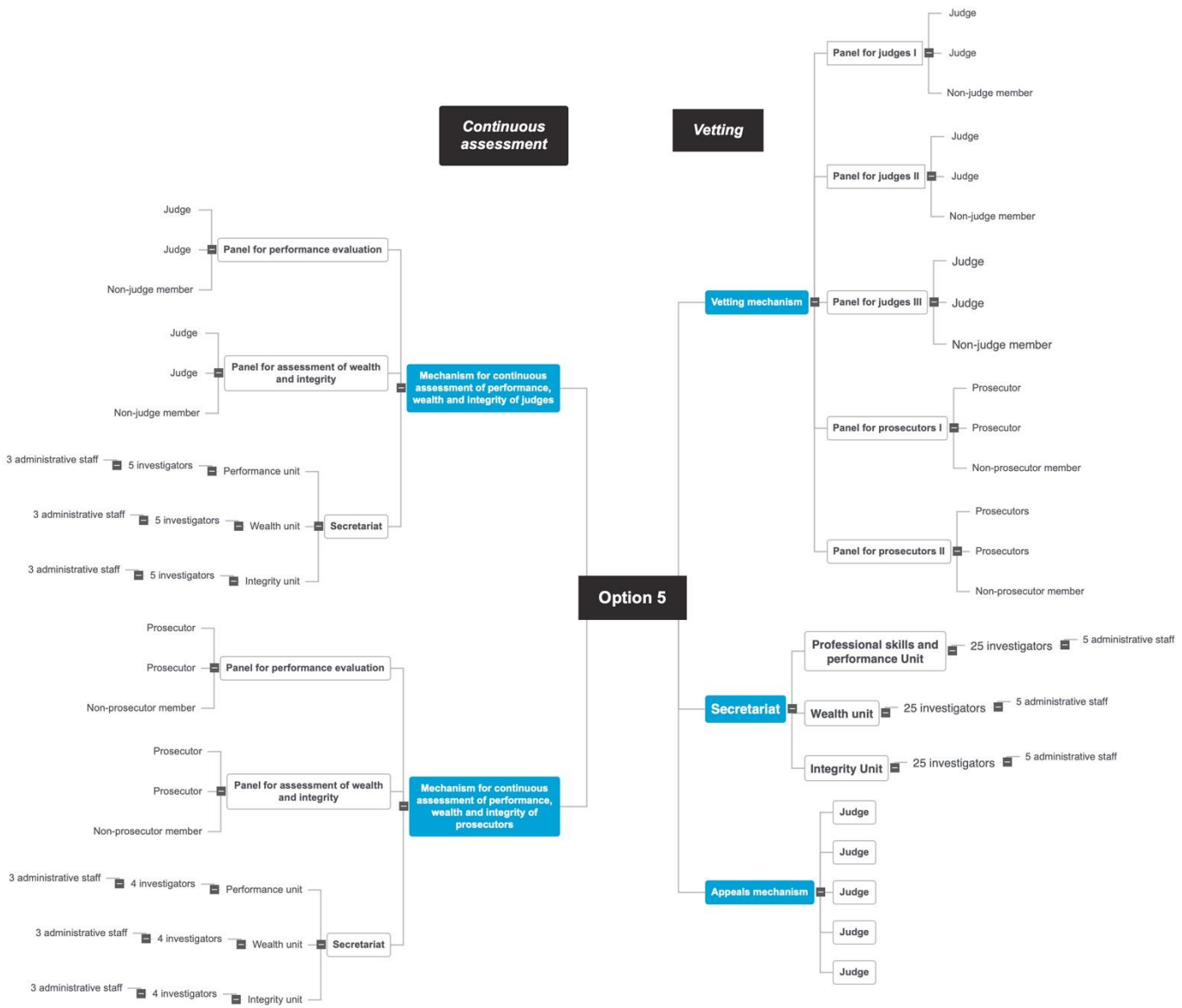
The imposition of these measures may be envisaged in cases when candidates scored poorly in some aspects of his performance, but which may not constitute sufficient grounds to compel his dismissal. Such measures may include mandatory training for judges/prosecutors who are found to have deficiencies only in performance, or even return to initial training.

For judges and prosecutors, the Supreme Court, as mentioned above, would serve as a second instance court, in which a three-member panel would review the appeals filed against the dismissal decision. Meanwhile, for the senior officials dismissed from senior management positions, the Independent Supervisory Council would serve as a second instance.

The section on continuous check, although planned in detail, will vary depending on the results of an in-depth analysis, which will be compiled in the coming years. Therefore, since the continuous check will start after a 5 year vetting period, it can be changed and adjusted based on the needs we may have at that time.

Figure 13: Mechanism for continuous performance, wealth and integrity check under Option 5




Option 5
Continuous assessment
Mechanism for continuous assessment of performance, wealth and integrity of judges
Panel for performance evaluation
Judge
Judge
Non-judge member
Panel for assessment of wealth and integrity
Judge
Judge
Non-judge member
Secretariat
Performance unit
3 administrative staff
5 investigators
Wealth unit
3 administrative staff
5 investigators
Integrity unit
3 administrative staff
5 investigators
Mechanism for continuous assessment of performance, wealth and integrity of prosecutors
Panel for performance evaluation
Prosecutor
Prosecutor
Non-prosecutor member
Panel for assessment of wealth and integrity
Prosecutor
Prosecutor
Non-prosecutor member
Secretariat
Performance unit
3 administrative staff
4 investigators
Wealth unit
3 administrative staff
4 investigators
Integrity unit
3 administrative staff
4 investigators
Vetting
Vetting mechanism
Panel for judges I
Judge
Judge
Non-judge member
Panel for judges II
Judge
Judge
Non-judge member
Panel for judges III
Judge
Judge
Non-judge member
Panel for prosecutors I
Prosecutor
Prosecutor
Non-prosecutor member
Panel for prosecutors II
Prosecutors
Prosecutors
Non-prosecutor member
Secretariat
Professional skills and performance Unit
25 investigators
5 administrative staff
Wealth unit
25 investigators
5 administrative staff
Integrity Unit
25 investigators
5 administrative staff
Appeals mechanism
Judge
Judge
Judge
Judge
Judge

Chapter 4: Identification and assessment of future impacts

The table below presents the most important impacts that have been identified, at this stage. Annexes 1 to 4 present the assessment of all impacts in line with the tools for identifying economic, social, environmental and fundamental rights impacts. The four appendices also show the assessment of the significance of different impacts and the preferred level of analysis.

Image 6. The most significant impacts identified for the impact category

Categories of impacts	**Relevant impacts identified**
Economic Impact	Local and international reports, in particular the European Commission country reports, have consistently identified the problems of slow and inefficient judiciary, corruption, and the lack of rule of law as some of the main obstacles to economic development in Kosovo. In its latest country report, the European Commission has assessed that increasing the professionalism and capacity of judges and prosecutors should be a top priority for the judiciary in Kosovo.[126] Meanwhile, the 2020 report of the State Department on the investment climate in Kosovo, estimates that high-profile corruption remains the main obstacle to foreign investment in Kosovo, while adjudication of corruption cases by Kosovo courts remains relatively lower compared to the countries in the region.[127] In this regard, increasing the efficiency and quality of work of the judiciary is a key parameter that will have a positive impact on improving the conditions for operation of existing businesses, as well as attracting new investments. A professional judiciary, with integrity and efficiency, that increases legal certainty for existing businesses currently operating in Kosovo, will also

[126]European Commission Country Report for 2020. Accessed on 13.06.2021 at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/kosovo_report_2020.pdf
[127]USSD 2020 report on the investment climate in Kosovo. Accessed on 13.06.2021 at: https://www.state.gov/reports/2020-investment-climate-statements/kosovo/

	impact the attraction of new investments, especially direct foreign investments, which will have a direct impact on economic development of the Republic of Kosovo. In particular, increasing efficiency in addressing and resolving high-profile corruption cases, through integrity trials and away from political influence, will significantly improve the foreign investment climate in Kosovo, as well as increase confidence of citizens and local businesses in the justice system. Increasing the confidence of citizens, including employees, can also have a positive impact in addressing the informal economy issue in Kosovo. A judiciary with integrity and efficiency will serve as an incentive for citizens, especially employees in the informal economy, to report informal economic activities in Kosovo, thus reducing informality, which will have a direct impact on the country's economic growth. One potential negative impact that the vetting process may have on economic development is the suspension of new investments for the duration of the process. This is due to the fact that, based on the experiences of other countries, there may be a potential reduction in the number of judges and prosecutors, which would affect the work and efficiency of the judiciary, thereby increasing legal uncertainty.
Social Impact	The integrity, independence and impartiality of the judiciary are preconditions for a fair and effective access to justice and for the protection of human rights. Discrimination and corrupt practices often prevent citizens, especially marginalized groups, from equal opportunities and protection of their rights.[128] According to local and international reports, citizens' trust in justice institutions is low.[129]

[128] United Nations Development Program, A transparent and accountable judiciary to deliver justice for all, 2016

[129] Commission Staff working Document, Kosovo 2019 Report, Brussels, 29.5.2019, në : https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-kosovo-report.pdf

	The conduct of the vetting process is essential for achieving the strategic objective which is to improve the integrity and professionalism of justice institutions. Such improvement will consequently affect the increase of citizens' trust in justice, which according to the elaborations in the section of the Main Problem, causes and effects, is based on local and international reports. The vetting process aims to avoid these shortcomings, which will result in increasing the integrity and efficiency of the institutions of the justice system, enabling efficient fight against corruption and restoration of citizens' trust in these institutions. Regarding corruption, the European Commission Report on Kosovo of 2020 states that Kosovo is at an early stage in its fight against corruption.[130] In this regard, increasing the professionalism and improving the integrity of judges and prosecutors will also have a positive impact on strengthening the rule of law, as well as reducing corruption at all levels. The proposed measures can have positive social impacts as their indirect goal is to ensure more effective implementation of human rights, and consequently the prevention and fight against crime, greater security for citizens and more efficient access in justice for them. The vetting process will have a potential impact on the professional education and training of incumbent judges and prosecutors as well as first-time applicants. This is intended to be achieved through training in cases where shortcomings in the performance of judges and prosecutors are identified. The main role of prosecutors is to prosecute perpetrators of criminal offenses while that of judges (in criminal proceedings) is to impose a sanction on perpetrators. The sentencing, among other things, is done for the purpose of satisfying the victims of crime. In a society where these key justice institutions are

[130]European Commission Country Report for 2020. Accessed on 13.06.2021 at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/kosovo_report_2020.pdf

	inefficient, biased and affected by corruption, victims of crime are directly affected by the lack of proper functioning of the judiciary and prosecution according to the rule of law principles. The aim of the vetting in the justice system is to overcome these shortcomings, by removing judges and prosecutors who have acted contrary to the principles of a fair, independent, impartial and efficient judiciary. To ensure quality, professionalism and impartiality of the mechanism, it is envisaged that the process of selecting members of this mechanism be transparent and rigorous. The names of persons recommended to be elected should be public, together with the reasons for their recommendation. The work of the mechanism is accompanied by increased transparency throughout all stages of procedures. Their assessments, as far as possible and without affecting the fundamental rights of the candidate, are public. The vetting process will potentially improve the accountability and transparency of the judiciary, which will increase the objectivity and trust of citizens in the judiciary. The vetting process will have a direct impact on the employment relationship of judges and prosecutors. This is due to the early termination of the employment relationship; in case they are not confirmed in their positions. Therefore, this process should be in line with the fundamental human rights set out in the Constitution, applicable law, conventions and other international standards, and will provide for safeguards for a fair and objective process according to the principles of a regular court process. As a result of vetting, judges and prosecutors who are already professional, orderly and with integrity will be affirmed these qualities and a more favorable working environment will be created. The highlighting of such individuals who are already in

	the system, will directly affect the increase of civic trust in the justice system. A possible negative effect of vetting, based on the practice of other countries that have conducted similar processes, is the drastic reduction in the number of judges and prosecutors. This has an impact in deepening of the problem of inefficiency of the judiciary and the prosecution, causing longer delays in proceedings and will temporarily affect the right of access justice. This may result in the suspension of the enjoyment of some of the fundamental human rights.
Environmental Impact	It is considered that the vetting process will not have a direct impact on the environment. However, given that the vetting process is expected to build a fairer, impartial, and more independent justice system, it might foster better prosecution and punishment of environmental crimes. This way, this policy will possibly have an impact on protection of nature, biodiversity and national inheritance.
Impacts on fundamental rights	From the practice of other countries elaborated above, it is noticed that a vetting process inevitably affects, violates and even restricts human rights and freedoms provided by international instruments. The issue of striking a balance between achieving the goals of vetting as a general interest on the one hand, and respect for human rights and freedoms on the other, is presented as very critical. The standards set by the international instruments mentioned, as well as by the jurisprudence of the European Court of Human Rights, serve as a guidelines towards achieving this balance. The impact of the vetting process on fundamental rights in general is analyzed below, from the point of view of the party in the vetting procedure (I), as well as, from the point of view of the

	society that ultimately benefits from the conduct of the vetting process (II).[131]
Gender impact	The interventions proposed under the Options above, equally and adequately, produce results for both men and women. From the data of 2021, in the Justice System actually serve 132 female judges and 259 male judges, and 77 female prosecutors and 98 male prosecutors. From these data we can see that the number of male prosecutors, especially male judges, is significantly higher than the number of female prosecutors/judges. Therefore, a more emphasized gender impact can be assessed depending on the results that the vetting process would have on gender representation in the institutions that will be subject to vetting. Based on the experiences from other countries that have gone through a vetting process, especially Albania, the number of male judges and prosecutors who have left the system, after the vetting process was initiated, has been significantly higher than that of female judges and prosecutors[132]. However, any parameter for conducting such measurement at the moment is prejudicial to the results of implementation rather than an accurate measurement of gender impact.
Budget Implications	Options 2, 3, 4 and 5 will have additional costs which will be calculated by the working group after finalizing the options
Impacts o social equality	There are no indications that certain groups are unequaly affected compared to others. The proposed interventions according to any of the options do not overload a certain group with requirements for their implementation.

[131]Taking into account the general context and other specifics, the analysis of the impact on fundamental rights was conducted taking into account, especially, the findings of the ECtHR in the case of Xhoxhaj v. Albania.
(discussed below)
[132] https://balkaninsight.com/2020/07/22/gender-gap-ëhy-men-are-failing-albanias-judicial-vetting/

Impacts on young people	It is not expected to have a direct impact on young people.
Impacts on administrative workload	It is not expected to have a direct impact on the administrative workload.
Impact in SME-s	It is not expected to have a direct impact on SMEs, except for the aspect that the business climate will be even more conducive with the conduct of the vetting process in Kosovo.

Impacts on fundamental rights

I. Impact on the fundamental rights of parties in the vetting procedure

A. The right to a fair trial

A more detailed analysis of the impact that the vetting process has on the right to a fair trial, as defined in Article 6, paragraph 1 of the European Convention, is preceded by the categorization of the process as "criminal" or "civil", in relation to the wording of Article 6. Depending on this, the elements of the right to a fair trial are also identified and measured accordingly, in terms of the above Options.

Article 6

1. *Every person has the right to have his case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal established by law, which will decide both on disputes concerning the rights and obligations* ***of a civil nature****, as well as on the merits of* ***any criminal charges*** *against him.*
2. *(…)*

Both types of proceedings constitute autonomous terms, the meaning of which derives from the jurisprudence of the ECtHR itself. According to "Engel Criteria"[133] , to determine whether the trial is being conducted based on a *criminal charge*, three criteria must be met. This analysis is also elaborated above by the case of Matyjek v. Poland.[134] The first criterion is the legal classification of the process according to the law of the country. The second criterion is the nature of the violation according to which the procedure is

[133]Engel and others v. The Netherlands (8 June 1976), par. 82. Available on: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57478%22]}
[134]Matyjek v. Poland (Decision on Admissibility) (30 May 2006). Available on: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-75941%22]}

conducted, while the third criterion has to do with the degree of severity of the sanction that can be imposed on the person in the procedure. The second and third criterion are alternative and not necessarily cumulative.

For example, in Matyjek v. Poland, the ECtHR found that Article 6 of the Convention was applicable in its criminal sense to the lustration process in Poland. To reach this conclusion, the Court noted that the Code of Criminal Procedure of Poland was applicable in the proceedings, the nature of the violation for which the person was "accused", i.e. false declaration, had similarities with the criminal offense of false declaration, as well as the sanction of the ban on holding a public office for 10 years, was severe in its nature and consequences. The applicability of Article 6 of the Convention meant that the right to a fair trial, in the context of a lustration procedure with similar characteristics as in the case of Poland, meant the obligation to provide procedural safeguards typical for a criminal proceeding. Such safeguards, which must be maintained throughout the lustration procedure, were, inter alia, the presumption of innocence, equality of arms and the right to appeal.

The test according to the "Engel Criteria" was developed as a first step in the ECHR Decision in the case of Xhoxhaj against Albania. In this case, as the above criteria were not met, it was found that the Convention was applicable in the meaning of a civil proceeding. One of the elements that led to this conclusion was the fact that during the vetting procedure, as defined in the Constitutional Annex, the burden of proof shifts from the vetting body to the party in the proceedings. The shifting of the burden of proof is explicitly prohibited and excluded from any criminal proceedings. In such circumstances, the position of the party in the proceedings does not resemble that of the accused person, nor does the position of the vetting body resemble that of the prosecution in a criminal proceeding. For example, if during the vetting process the shifting of the burden of proof is foreseen, then a priori the procedure should provide “safeguards” according to the meaning of the vetting process pursuant to the autonomous notion of the ECHR as a civil process.

With regard to the severity of the sanction, which in the case of Albania meant the permanent prohibition of the exercise of the duty of judge, the Court found that the purpose of the prohibition from returning to the justice system did not mean individual punishment through dismissal, but in the sense of its intention, was oriented towards ensuring and maintaining public trust in the judiciary. Unlike Matyjek v. Poland, as indicated above, the Court held that the fact that the ban is permanent does not mean that

the sanction is punitive in nature.[135] Based on these positions of the ECtHR, the measures proposed under the Options above cannot be said to be punitive in nature. Thus, the vetting process designed according to the Options above, is closer to the notion of civil process, based on the definition of the ECHR.

In further elaborating the impact of the vetting process on human rights, according to any of the above Options, we will analyze elements which according to the jurisprudence of the ECtHR constitute the essence of guaranteeing this right. As will be seen below, in addition to the general principles, other elements also characterize the process in the application of Article 6 of the Convention in a criminal sense and others when the process is categorized as a civil process. Depending on the case, appropriate "safeguards" should be provided to ensure human rights compliance throughout all proceedings.

a) Judgment by a court or Tribunal established by law

The conduct of proceedings by a court or tribunal established by law is a fundamental element of complying with the right to a fair trial. The conduct of the proceedings by a regular court, which is already part of the judicial system and structure of a country, is self-evident. Thus, it follows from the case law of the ECtHR that it is almost certain that the procedure conducted by a regular court, in principle, guarantees the right to a fair trial. Such would be the case for conducting the vetting process according to Option 3 (both sub-options) and according to the second stage regarding Option 5.

On the other hand, the Strasbourg jurisprudence often addresses the notion of a "Tribunal established by law". To determine whether a mechanism other than the court qualifies as a "tribunal established by law", the so-called "Vilho Eskelinen" test is applied.[136]. A tribunal means the body that in essence performs a judicial function, i.e. decides cases within its competence, on the basis of legal rules and implements a procedure prescribed by law. To qualify as a tribunal, this body must meet other requirements, such as independence, especially from the executive. The tribunal must also be characterized by the decision-making power and legal effect of the decisions it issues. According to the wording of Article 6 of the Convention, this tribunal does not have to be integrated into the standard court machinery. It can be established for a specific purpose and administered outside the ordinary judicial system.[137] Consequently, the modeling of the

[135] Ibid.
[136]Vilho Eskelinen and others against Finalnd (19 April 2007). Available on: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-80249%22]}
[137]Xhoxhaj against Albania (31 May 2021), par. 284. Available on: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-208053%22]}

established institutional structure conducting vetting under Option 4 and the first phase of Option 5 will have to be very careful so that the vetting mechanism meets the criteria of a "Tribunal established by law", based on the Vilho Eskelinen test.

b) Independent and impartial trial

In addition to the conduct of proceedings by a court or tribunal established by law, in order to comply with the right to a fair trial, the court or tribunal in question must be independent and impartial. "Independence", which is presented as a requirement especially in tribunals, means independence vis-a-vis vis other branches of the government (executive and legislative), as well as vis-a-vis the parties. These aspects need to be handled very carefully in terms of the mechanisms established under Option 4 and the first phase of Option 5. Independence is understood as independence in terms of staff and institutional independence, and as such is a prerequisite for impartial decision-making. To analyze whether such a body is independent and impartial, the manner of appointment and mandate of members of this Tribunal serve as a guide.

It was exactly the limited mandate of members of the vetting body (5 years for the members of the first instance and 8 years for the members of the second instance), a point on which the application of the former judge Xhoxhaj was based in the lawsuit before the ECHR against Albania. In this case, the court did not deem the defined and time-barred mandate of the members of the vetting bodies as problematic.[138] Although the term of office was relatively short, this is understandable given the extraordinary nature of the vetting process. Moreover, when analyzing the mandate, the ECtHR does not focus only on duration, but puts an emphasis especially on the inability to dismiss its members, as a key element of their independence.[139] In the case of Albania, although the Law on Vetting did not explicitly state that members of the bodies were non-dismissible, the law nevertheless provided the necessary safeguards for their non-dismissibility and independence. These elements should be taken into account in determining the mandate of members of the vetting bodies under Option 3 (decentralized model), Option 4 and the first phase of Option 5, in order to ensure and guarantee the independence of the vetting bodies.

The allegations in this lawsuit against Albania in the Xhoxhaj case were also based on the fact that the vetting mechanisms were composed of neither judges nor prosecutors, i.e. had a completely non-judicial composition, despite the fact that international standards

[138]Ibid, par. 298.
[139]Id.

call for bodies with substantial judicial representation in "disciplinary" issues. As the entire vetting reform targeted all sitting judges and prosecutors, the Court found that the vetting process of judges and prosecutors in Albania was sui generis and should be distinguished from any common disciplinary proceedings against judges and prosecutors.[140] As a result, this composition of the bodies was not seen as problematic or to the detriment of the independence of bodies.

c) Fair and public trial

According to Article 6 of the Convention, the court or tribunal conducting the proceedings must conduct an adequate examination of the allegations, arguments and evidence put forward by either party to the proceedings, without prejudging a priori their relevance.[141] Furthermore, the trial panel is obliged to clearly state, in the decision, the reasons on which it bases the decision.[142]

Conducting a public trial within the meaning of Article 6. 1 of the Convention implies the right to a public trial in at least one instance of the proceedings.[143] The lack of public hearing in the second or third instance may be justified by the specific nature of the proceedings, provided that a public hearing has been conducted in the first instance.[144] However, in terms of disciplinary proceedings against judges, taking into account the sanction in question and the consequences it has on the life, career and financial well-being of the person, a public hearing should be held. Exemption from holding a public hearing should be an extraordinary measure.[145] These elements should be considered especially in the process design according to Option 4 and the first phase of Option 5. In the process conducted according to Option 3, they are almost certain and self-evident.

d) Equality of arms

According to the merit based Decision in Matyjek v. Poland[146] , The ECtHR reiterated that with regard to the principle of equality of arms, which is an element of the broader

[140]Id., para. 299,412.
[141]Id., para. 325.
[142]Fischer v. Austria (26 April 1995), par. 44. Available on: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57916%22]}
[143]Salomonsson v. Sweden (12 November 2002), par. 36. Available on: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60736%22]}
[144]Ramos Nunes de Carvalho e Sá v. Portugal (6 November 2018), par. 210. Available on: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-187507%22]}
[145] Ibid.
[146]Matyjek v. Poland (Decision on merits) (24 September 21007). Available on: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-80219%22]}

concept of fair trial in the criminal context of this right, each party should be given a reasonable opportunity to present its case, under conditions that do not put him/her at a disadvantage vis-a-vis the opponent. The active participation of the accused during the criminal proceedings should include the right of the accused to take notes that will be used to prepare his/her defense, regardless of whether he/she is defended by a lawyer. Translated in the circumstances of the Matyjek v. Poland case, the ECtHR ruled that due to the confidentiality of the documents and restrictions placed on the lustrated person in accessing the case file, as well as the privileged position of the Public Interest Commissioner in the lustration procedure, the applicant had been deprived of his right to a fair trial under Article 6 of the Convention. Compliance of this right should be considered especially in the process design according to Option 4 and the first phase of Option 5.

e) Right to appeal

Appeal is another essential element of the compliance with the right to a fair trial. Dilemmas arise especially when the trial panel is e mechanism different from the regular courts. In the case of Ramos Nunes de Carvalho and Sá v. Portugal[147] , The ECtHR found that the Portuguese High Judicial Council was an administrative body and that in order to comply with the right guaranteed under Article 6 of the Convention, the dissatisfied party should have been allowed further control by a judicial body with full jurisdiction. As can be seen from the Armenian practice above, the notion of appeal implies control by another body of the legality and merits of a decision, based on the same facts.

In order to comply with the right to appeal, the second instance, in addition to having full jurisdiction, must also be independent. Elaborated in the context of the Appeals Chamber at the Constitutional Court in the case of Xhoxhaj v. Albania, the ECtHR also found that this body was independent, since the following conditions were met: (i) it decided on merits of the case independently; (ii) had complete discretion in deciding on its organizational structure and staff; (iii) no instructions are received from the executive and (iv) proposes the annual budget to be allocated by the Parliament, without the possibility of intervention by the executive.[148]

[147]Ramos Nunes de Carvalho e Sá v. Portugal (6 November 2018), par. 210.
[148]Xhoxhaj v. Albania (31 May 2021), par. 314.

The criteria mentioned above should be taken into account in designing the appeal mechanism under Option 4 and the first phase of Option 5. In the other Options this mechanism remains the Supreme Court, which already meets the above criteria.

B. The right to respect private and family life

According to the Bangalore Principles elaborated above, judges, who by the nature of their work are considered guarantors of the rule of law, must follow an extremely high standard of integrity even in private life, outside the walls of the court, in order to maintain and increase public confidence in the integrity of the judiciary.[149]

The right to privacy is defined according to the European Convention as follows:

Article 8

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
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.*

In the case of Xhoxhaj v. Albania, the ECtHR initiated an analysis under Article 8 on the basis of the Court's decision in the Denisov case.[150] In this case, the Court had confirmed that employment-related disputes are not excluded *per se* from the scope of the term "private life" under Article 8 of the Concentration. There are typical aspects of private life that are affected by dismissal and similar measures. These aspects affect (i) the inner circle of the person; (ii) the person's ability to establish and develop relationships with others; and (iii) the person's social and professional reputation. In this sense, according to the decision in the Denisov case, there are two ways in which these aspects are affected: either because of the reasoning and motivation behind the implementation of such measures, or because of the consequences that the implementation of those measures has on private life. In the case of Xhoxhaj, the analysis regarding Article 8 was conducted taking into account the consequences that the dismissal according to the vetting would have,

[149]Ibid, par. 407.
[150]Denisov v. Ukraine (25 September 2018). Available on: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-186216%22]}

provided that these consequences are very serious and have a high impact on the private life of the former judge.[151]

In reviewing this point of application of Ms. Xhoxhaj, ECHR found that the creation of assets according to the circumstances of the case, cannot be considered an aspect of private life; the amount of assets or the life she led was not the cause for the disciplinary sanction, but the inability for her to prove the legality of the source of such income. Proving the legitimacy of the source of income was rightly seen as a precondition for ensuring public confidence in her integrity. Therefore, conducting an audit of her assets through the vetting process constituted a lawful and reasoned intervention under Article 8. 2 of the Convention.[152]

The application of Article 8 was also analyzed in relation to the third element as indicated above and the consequences that the vetting process and the decision in the vetting process had on the reputation of Ms. Xhoxhaj. Considering that she was consequently widely stigmatized in public as unfit for the judicial profession, the Court found that her right under Article 8 of the Convention was applicable.[153]

Sensitive remarks and issues regarding the right guaranteed by Article 8 of the European Convention deserve the attention of each of the Options. The changes, whether constitutional or legal, will be fully based on the Convention and the developed jurisprudence of the ECHR, where in particular the collection of information and other measures to conduct vetting against an official will be fully proportionate to the achievement of the legitimate aim. In this regard, the restrictions of rights, allowed by Article 8 (2) of Kosovo will be used, because corruption and political influence highly widespread in the justice system, directly affects public safety, national security, protection of order, health and morals, but especially in the economic welfare and protection of the rights and freedoms of others (where it is worth emphasizing especially the right to a fair and impartial trial provided in Article 6 of the Convention and Article 31 of the Constitution). The extremely prevalent presence of corruption and political influence in the justice system is confirmed by international and domestic reports[154]; it has hindered and continues to hinder Kosovo's economic development and has influenced actions or omissions that have resulted and continue to result in human rights violations in Kosovo.

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[151]Ibid, par. 116.
[152]Xhoxhaj v. Albania (31 May 2021), par. 362.
[153]Ibid, par. 364.
[154] See the Reports mentioned in Chapter 1 of this Concept Paper.

II. Impact on fundamental rights in general

1. Overall benefits of the vetting process

As pointed out by the Venice Commission, the vetting of judges and prosecutors was not only reasonable, but also necessary to protect the country from corruption which, if not addressed, could destroy the entire judicial system.[155] Furthermore, as stated in the decision of the Constitutional Court of Albania, the restrictions imposed by the Law on Vetting are justified by the public interest in reducing the level of corruption and restoring civic trust in the judiciary, which is directly related to the country's security, public order, and the protection of fundamental rights and freedoms.[156] Considering this and taking into account the contextual similarities regarding the need for vetting in Kosovo, also based on the description provided in the Definition of the problem, then actions under Option 1 or 2 can by no means be seen as solution.

2. Legal certainty

The vetting system could potentially have implications for weakening the principle of legal certainty.[157] According to this principle, which is embodied in both domestic and international law, the legal system should allow all those who are subject to the law to regulate their behavior in accordance with legal rules and to protect them from the arbitrary use of state power. The principle of legal certainty requires that the laws be sufficiently precise to allow the person - if necessary, to anticipate, to a reasonable degree in the circumstances, the consequences that a particular action may bring. Therefore, according to legal certainty, laws and decisions should be made public, clear, retroactivity of laws and decisions should be limited and legitimate interests should be protected. These aspects need to be considered when drafting the relevant acts under Options 3, 4 and 5.

A. Legal certainty and retroactivity

In the case of Xhoxhaj v. Albania, Ms. Xhoxhaj had claimed that the vetting process, as conducted in Albania, violated legal certainty. One of the points on which this claim was

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[155] Opinion of the Venice Commission (15 January 2016) (CDL-AD (2012016) 009) par. 52. Available on: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)009-e. Quoted in Xhoxhaj against Albania, para. 96,392.

[156] Xhoxhaj v. Albania, par. 175, 392.

[157] UNDP, Vetting Public Employees in Post-conflict Settings, 2006, https://www.ictj.org/sites/default/files/ICTJ-UNDP-Global-Vetting-Operational-Guidelines-2006-English.pdf

based was the issue of retroactivity. In order to assess the origin of the property, the vetting body investigated documents and events that had occurred long before - in the case of Ms. Xhoxhaj, since the '90s.

The ECtHR had assessed that the statute of limitations serves important purposes, especially for the purposes of legal certainty, the validity of decisions and especially to protect the accused parties from allegations that they find difficult to challenge, and from injustice that may come consequently if the court decides about the events that have occurred in the distant past, on the basis of evidence that may have become less credible due to the elapse of time. Thus, statute of limitations is common in various legal systems, in terms of criminal, disciplinary and other violations.[158]

However, the ECtHR found that setting strict statute of limitations for property valuation limits the ability of state authorities to assess the legality of the origin of general assets acquired by the vetted person over the course of a professional career. Consequently, the valuation of assets in the context of vetting was assessed by the ECtHR as different from valuations in ordinary disciplinary proceedings. Given the purpose of restoring and strengthening civic trust in the judiciary, undertaking asset valuation through the vetting procedure can be done with a higher degree of flexibility in terms of statute of limitations. The Court emphasizes that such a stance makes sense especially in the case of Albania, where it is known that there has not been prior, nor regular, proper assessment of the declared assets. Evaluating assets on the basis of previous asset declarations does not affect legal certainty.[159] Thus, good retroactive action based on law, not only does not violate legal certainty, but is necessary for conducting verifications, especially about the origin of assets. In determining the starting point in time, the practical aspects of access to data and documents should be taken into account to justify and prove the origin of the assets of the person being vetted, both by the mechanism and by the vetted subject (depending on who is assigned to bear the burden of proof). Given the contextual similarities, these elements should be taken into account in determining the time span of normative acts, especially the special law that will define the procedural aspects, according to Options 3, 4 and 5.

B. Legal certainty and escalation of measures

[158] Xhoxhaj v. Albania, par. 349.
[159] Gogitidze and others v. Georgia (15 May 2015), par. 122. Available on: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-154398%22]}

In the case of *Xhoxhaj v. Albania, the* applicant also alleged that legal certainty was violated due to the lack of escalation of the sanction and, consequently, the disproportion of the sanction.

The court found that in principle, this allegation was substantiated: the lack of escalation of sanctions was not in line with the principle of proportionality.[160] However, the ECtHR reiterated that vetting proceedings are sui generis in nature, although they may appear to have similarities to ordinary disciplinary proceedings. In the case of Albania, it is emphasized that vetting was undertaken in response to the high level of corruption in the judiciary, in order to remove corrupt elements and preserve the sound part of the system. In such cases, due to exceptional circumstances that preceded the enactment of the Vetting Law, the ECtHR found that a more limited range of sanctioning measures is consistent with the idea of vetting.[161] The measures proposed under Options 3, 4 and 5 follow the same spirit and as such, guarantee legal certainty even if more measures are not envisaged.

It was also argued by the applicant that the measure of permanent disqualification from acting as a judge also violated the legal certainty and well-known safeguards of practicing this profession. The ECtHR reiterated that judges, especially those in positions of high state responsibility, exercise part of the sovereign power of the state. Prohibiting a person from exercising a profession of a judge permanently on the basis of very serious ethical violations is neither inconsistent nor disproportionate to the legitimate aim of the state to ensure the integrity of judiciary and civic trust in the justice system.[162] The final dismissal measure according to Options 3, 4 and 5 follows the same spirit.

Chapter 4.1: Challenges with data collection

The working group for drafting this Concept Paper consists of various relevant stakeholders both within the institutions of Kosovo and outside it. As a result, no challenges were encountered in collecting the data needed to perform the analyzes in this Concept Paper.

[160] Oleksandër Volkov v. Ukraine (27 Maj 2013), par. 182. Available on: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-115871%22]}
[161] Xhoxhaj v. Albania, par. 412.
[162]Ibid, par. 413.

Chapter 5: Communication and consultation

The conduct of the vetting process is a process followed by a great interest whether from members of the justice system, civil society organizations that assist and monitor its work, donors or development partners, and the general public.

As a result, the Ministry of Justice has included the main partners interested in the process in the working group, who have had the opportunity to contribute directly to the drafting and analysis of this document. In addition, the Ministry held a public meeting with all stakeholders as well as the Minister of Justice and other members of her cabinet and the MoJ management provided information to the public on the work and elements addressed in the Document, while addressing them in the media.

The members of the working group established by the Ministry of Justice, have presented their comments during the meetings of the working group and majority of them have submitted them via email.

The views of Kosovo Prosecutorial System

The representative of KPC has elaborated on the vetting of 2010 in Kosovo and has emphasised that any kind of continuous control of integrity and verification in the justice system should be done in compliance with international standards, which guarantee the independence of the judiciary and the prosecution.

Also, the position of the KPC is that all actors of the rule of law should be subject to control, without exception, judicial system, police, TAK, KIA, including their administration.

Prosecutorial institutions have already passed the transition phase and has established mechanisms in accordance with international standards from which continuous accountability must be required. They differ from other countries given that it was established with the initial support of UNMIK, then by EULEX, as well as Kosovo's key international partners. According to them, the implementation of vetting in countries such as Albania, Armenia, Moldova, Romania, Northern Macedonia and Serbia has been difficult and it has yielded more negative results, leading to a lack of advancement of the judicial system in general.

In this regard, prosecutorial institutions support Option 3 of the Concept Paper, which according to them is in line with the findings of the Functional Review Process. This Option is also supported by the Kosovo Prosecutors Association, however, it should be treated more carefully, so as not to compromise the process as politically influenced. According to KPC, options that include external mechanism, would cause the accumulation of unresolved cases and would cause a problem on numerous vacant places with justice system, which are lengthy given the high criteria for recruiting new applicants. Such positions are: Office of the chief state prosecutor and the Appellate Prosecutor.
Options 4 and 5, according to them, enable intervention of the executive and the legislature in the judiciary and the prosecutor, which must be independent. Neither Options 1 and 2 address the identified issues.
Furthermore, Association of Prosecutors has expressed that ad-hoc vetting conducted by an external mechanism creates the practice of a politicized vetting. According to them, provisions of the Constitution of the Republic of Kosovo represent a guarantee that the vetting process will be fair.

The views of the Kosovo Judicial System

The Kosovo Judicial Council is of the opinion that the second sub-option of option 3 could be more effective in vetting judges and prosecutors. According to the KJC, the aspect of assessing the personal integrity of judges, based on current laws, is not sufficiently regulated and there is a basis for legal changes and additions to create a clear and complete basis for this assessment, as part of the assessment of the personal integrity of the judges should necessarily also be the verification of the data provided related to the issue of property. Furthermore, the integrity assessment must be verified within a certain period of time (regular assessment) and in cases where there is a suspicion that the integrity of the judge is being violated (casual or extraordinary assessment).

The integrity control mechanism can be done through the creation of a new mechanism within the KJC, which in cooperation with the Office for Evaluation and Verification of Judges would exclusively deal with the verification of the personal integrity of judges, not excluding the verification of assets for the purpose of integrity assessment. In order to carry out this process of integrity control, legal changes must be made.

If it is considered that it would be more appropriate for the declaration of assets to be done in any other way or body, then through legal changes this could be done in the KJC, which would create a special mechanism for verifying the assets of declared, or that the declaration be made again to the Anti-Corruption Agency (ACA) at which additional

functional mechanisms could be established that would be valid for the verification of assets of all senior public officials, including judges, changes which could be done as part of the process of functional review of the Justice System. But, it is important to note that there should be no different treatment of judges in relation to other senior officials regarding the process of verifying their assets. The intention to create special mechanisms for verification of assets of judges and prosecutors, they consider that it contradicts the provisions of property control based on Law no. 04 / L-050. On the other hand, KDI considers that this position of the KJC is not reasonable. The importance of the judicial and prosecutorial system as well as the disputed integrity of these two (2) systems, unequivocally build the legitimacy for more specific treatment of judges and prosecutors. Furthermore, KDI estimates that the KJC in this case cannot be invoked in the Law on Declaration of Assets, as this law serves only in the field of declaration of assets of all senior officials and cannot be considered as a "constitution" for all the problems that are evidenced in public institutions, in this case in the institutions of the justice system.[163]

Also, according to the KJC, the participation of the KIA in the verification process should be excluded, as this contradicts the current constitutional regulation, basic laws, as well as international instruments and standards that guarantee the independence of the judiciary.

> The KJC has come up with the following recommendations:
> 1. Preserve the independence of the judiciary, so that all state institutions should refrain from actions that violate the independence of the judiciary;
> 2. The need for functional review;
> 3. Laws included in the functional review (Law on KJC; Law on Courts and Law on Disciplinary Responsibility of Judges and Prosecutors);
> 4. Amending the Law on the KJC, in order to create a legal basis for the organization and functioning of the Office for Evaluation and Verification of Judges;
> 5. Amending the Law on the KJC, in order to create a legal basis for the creation of a new mechanism within the KJC, which in cooperation with the OEVJ would only deal with verifying the personal integrity of judges and asset verification for the purpose of integrity assessment;
> 6. Amendment of the Law on Courts, regarding the organizational structure of the courts (Administrative Court and Special Chamber);

[163] Comments from the Public Consultation from KDI, p. 11-12.

7. Amending the Law on Disciplinary Responsibility of Judges and Prosecutors, regarding the responsibilities of the competent authorities, procedures and disciplinary measures;
8. The judicial system should be involved in the review process;

The views of GLPS organization

The GLPS organization is of the opinion that in option 4, the scope and competencies of the special vetting mechanism should be defined by a constitutional amendment. Among others as explicit provisions should be:
1. Constitutional authorization for the establishment and composition of an ongoing mechanism that will be the bearer of the vetting process;
2. Constitutional authority to conduct vetting of vetting subjects including the authority to dismiss a subject that does not pass the vetting process;
3. Clause for termination of the permanent mandate of a judge and prosecutor and other subjects that have a permanent mandate.
4. Determining the subjects of vetting by not being limited only to judges of the Constitutional Court, judges and prosecutors but also leaving the possibility to determine by law the categories of other officials who are considered to have to go through the vetting process.
5. Criteria on which vetting will be performed including: assessment of integrity, professionalism and wealth. The weight of each criterion must be determined by law.
6. Appealing mechanism and full jurisdiction to decide on the complaints of vetting subjects.

Also, in option 4 regarding the measures envisaged for judges / prosecutors who do not pass the vetting process, GLPS considers that the vetting process should serve as a filter for cleaning the system. Having said that, all those who do not pass this process should leave the system therefore the proposal for other measures besides being nonsense has no value. We recall that through the vetting process as a dominant element will be the assessment of the integrity of vetting subjects, especially their links with criminal and partisan circles and their impact on the exercise of public office provided by law.

Meanwhile, regarding the units that conduct vetting, GLPS proposes that: The vetting mechanism should be composed of two levels:

I. The second instance composed of internationals that would serve as an instance of appeal in cases where procedural safeguards have been violated, and,
II. The first instance that would serve as the mechanism of the first instance to review the compatibility of the figure of judges and prosecutors and as the only

instance that judges the factual aspects related to the figure of judges and prosecutors; composed of prominent local lawyers, judges and prosecutors.

Upon completion of the first draft of the Concept Paper, it was sent to preliminary consultation and public consultation for all institutions, organizations and other partners who have not had the opportunity to be part of the group, and this was a good platform to offer their contribution to further enrich the analyzes that have been conducted. Finally, it is planned to develop the communication activities on this new policy, in line with the recommended option, in order to ensure that the conduct of the vetting process is fair and transparent.

Image 14. Summary of communication and consultation activities performed on a concept paper

The consultation process aims at: - Consultation with stakeholders on the content of the Concept Paper, and in particular on the options considered and their impact.						
The main goal	Target group	Activity	Communication /notification	Indicative deadline	Necessary budget	Responsible person
Open meeting for all stakeholders	All stakeholders	Public meeting (online)	Through e-mail and social networks	May 17, 2021	/	Egzon Osmanaj, DEIPK, MoJ
Preliminary written consultation	Institutions of the Republic of Kosovo	Internal consultation	Via e-mail	15 to 30 June 2021	/	Lulzim Beqiri, DEIPK, MoJ
Public consultation in writing	All stakeholders	Publication of the consultation on the portal for public	Through the portal	29 July to 19 August 2021	/	Lulzim Beqiri, DEIPK, MoJ

		consultation				
Public consultation	All stakeholders	Roundtable / Workshop to discuss the comments received in the public consultation	Via e-mail	29 August 2021		Lulzim Beqiri, DEIPK, MoJ

The public meeting for the Concept Paper was held on May 17, 2021 through the Zoom platform.

The main findings from this meeting were:

- There is a lack of ongoing mechanisms for monitoring the work of prosecutors and judges;
- The need to implement vetting in accordance with the best standards;
- During the implementation of vetting, all adequate measures must be taken so that the process is successful and the system does not remain hostage of ongoing and unfinished reforms;
- Vetting must also be ongoing, otherwise there will be no consistency, and
- The analysis for this Concept Paper should take into account the previous analyzes prepared on this topic, in different formats.

Chapter 6: Comparison of options

To address the problems analyzed in this paper, five concrete options have been proposed, some of which envisage different modalities within themselves. In this section they will be compared to each other, using multi-criteria analysis, based on the developed 'EEE' methodology. This methodology takes into account three criteria: efficiency, effectiveness, ethics. Based on these three criteria, a rating was made from 1 to 5 for each option, where 5 indicates the highest level of meeting the criterion.

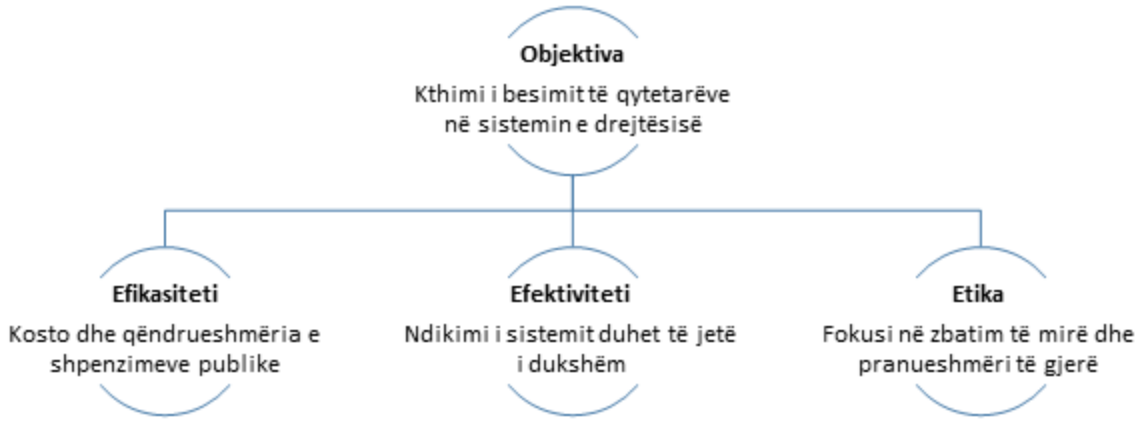

Figure 15: The three criteria that have been considered for option comparison

Therefore, additional care is needed to ensure that any system chosen is effective, efficient, and ethical. Private entities in the past have focused on efficiency (cost) and effectiveness (impact) as a performance model. In public sector settings it is essential to consider ethics as an additional factor, which is ensured through good governance and system design.

First, in order to understand how efficient the different options are, the calculation of the cost of each option was done, based on the developed options, taking into account the categories of expenditures for the years 2021-2025 of the implementation of the Concept Paper.

Options cost table for 5 years

Option 2

Option 2	**2021**	**2022**	**2023**	**2024**	**2025**
Wages and Salaries		469,007.09	471,352.13	473,708.89	476,077.43
Goods and Services	Administrative Cost	189,080.00	148,380.00	148,380.00	148,380.00
Utilities					
Capital		125,000.00	0.00	0.00	0.00
Total		**783,087.09**	**619,732.13**	**622,088.89**	**624,457.43**
Total for 5 years: 2,649,365.53					

Option 3

Option 3	**2021**	**2022**	**2023**	**2024**	**2025**
Wages and Salaries		2,994,736.80	3,009,710.48	3,024,759.04	3,039,882.83
Goods and Services (including subcategory: Contracting Services for Initial Vetting Unit with International involvement)	Administrative cost	3,897,460.00	526,560.00	526,560.00	526,560.00
Utilities		30,000.00	30,000.00	30,000.00	30,000.00
Capital		400,000.00	0.00	0.00	0.00
Total		**7,322,196.8**	**3,566,270.484**	**3,581,319.04**	**3,596,442.83**
Total for 5 years: 18,066,229.15					

Option 4

Option 4	**2021**	**2022**	**2023**	**2024**	**2025**
Wages and Salaries		3,154,852.80	3,170,627.06	3,186,480.20	3,202,412.60

Goods and Services (including subcategory: Contracting Services for Initial Vetting Unit with International involvement)	Administrative cost	3,870,740.00	417,640.00	417,640.00	417,640.00
Utilities		30,000.00	30,000.00	30,000.00	30,000.00
Capital		400,000.00	0.00	0.00	0.00
Total		**7,455,592.80**	**3,618,267.06**	**3,634,120.20**	**3,650,052.60**
Total for 5 years: 18,358,032.66					

Option 5

Option 5	**2021**	**2022**	**2023**	**2024**	**2025**
Wages and Salaries		3,154,852.80	3,170,627.06	3,186,480.20	3,202,412.60
Goods and Services (including subcategory: Contracting Services for Initial Vetting Unit with International involvement)	Administrative cost	3,870,740.00	417,640.00	417,640.00	417,640.00
Utilities		30,000.00	30,000.00	30,000.00	30,000.00
Capital		400,000.00	0.00	0.00	0.00
Total		**7,455,592.80**	**3,618,267.06**	**3,634,120.20**	**3,650,052.60**
Total for 5 years: 18,358,032.66					

The first option - *the option without changes,* provides for the continuation of the situation without making any changes either in human resources or the legal framework. The advantages of this option are completely limited, not to say non-existent. The only

advantage of this option is the low cost as it does not envisage any additional cost. This option would be ineffective as all the problems identified under this document would continue to exist. Among these, the continuing vulnerability of the judicial and prosecutorial system to external actors should be singled out, which, among other things, ultimately results in citizens' lack of trust in justice. Consequently, the continuation of the functioning of the judicial and prosecutorial systems as they are, in addition to not eliminating the existing problems, is estimated to worsen the situation even further. Although changes in justice are foreseen and continue to occur continuously, especially with the Functional Review process, this process has already made it clear that the best way to address system accountability and integrity is a genuine and ongoing vetting system. For this reason, the no changes or status quo option is seen as the least appropriate or recommended option.

Figure 16: Scoring Option 1 according to multi-criteria analysis

The second option - *improving implementation and enforcement without legal changes* is one of the options that propose an intervention in the current situation, although a limited one, as this option does not provide for changes of a legal nature. As elaborated in the context of this option above, the current verification units within the Councils enjoy fairly limited legal powers. Their current basis is the Internal Regulations of the Councils and they, to some extent regulate their functioning from within.
However, the lack of a legal basis that would enable these entities to collect data *beyond public records* is the biggest drawback under this option. In absence of legal or regulatory

interventions, these restrictions on their work would continue to exist. In short, units will continue to collect only background information on subjects, that is accessible in public records. Besides, it is not done on a regular basis. It should also be recalled that these units are completely dependent on the Councils and do not enjoy independence in decision-making as well as have no additional incentives for the sensitive work they perform.

Also, it should be noted that these units are units that only conduct basic verifications, which differs conceptually from the concept of vetting as presented in this document. Although this option is considered efficient due to the much lower cost compared to other options proposing change in the current system, its effectiveness is very low in relation to the objective of this Concept Paper and the expectations of public opinion. For this reason, the second option is an option which could bring slightly more positive results than the first, albeit a very limited one.

Figure 17: Scoring Option 2 according to multi-criteria analysis

Option Three - *The option of conducting vetting through legal changes* is one of the options that provide for more drastic changes to address the problems identified in the document. This option envisages the conduct of an ongoing vetting process while maintaining the powers of the Councils 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.

The third option envisages the best possible outcomes that can be achieved through the improvement of the legal framework. However, 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. That said, this is also one of the weakest points of this option.

Another disadvantage of this option is the inability to finally elect the members of the vetting mechanism, without the involvement of the current Councils. Although this option envisages very active involvement of international mechanisms in their selection process, also conditioning it with extreme transparency and publicity, the final decision for all members of the mechanism remains with the Councils themselves, whose members in that point are not vetted.

Another disadvantage of this option is the slow start that this option is expected to have, due to the need for gradual vetting of members of the Councils and judges of the Supreme Court. As elaborated above, to enable the quorum and day-to-day function of the Councils to be maintained, the vetting findings of the Council members should be voted on in order. At the same time, the selection and vetting procedures for the future members of the Councils, who will occupy potential seats as members who may lose their membership in the Council as a result of the vetting process, should be very carefully conducted. Despite attempts to plan in detail and simultaneously the entire process, it is possible to have delays in one or the other. As a result of these potential setbacks, the start of the vetting process for other judges and prosecutors may be delayed.

Investing in such an option, although expected to have a more challenging start and perhaps slower results, is 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. The staff involved within these institutions would continue to perfect their professionalism and their knowledge would guarantee an institutional memory for future generations.
However, the cost of this option in relation to the effectiveness and expectations of public opinion and stakeholders involved is very high.

Figure 18: Scoring Option 3 according to multi-criteria analysis

Option four - *Conducting vetting through constitutional changes:*
Option 4 envisages that through constitutional changes to establish a special mechanism, which will conduct the initial vetting and then will make the continuous performance, integrity and wealth check. By amending the Constitution, legislators are given the opportunity to design a mechanism, of course in accordance with international standards, which best suits the real needs for vetting and the measures to be taken, in relation to the identified problems. This option eliminates the dilemmas of compatibility of legal options with the Constitution. The advantage of this option is the fact that a new mechanism will be created, consisting of professionals with high integrity, who are vetted in advance. This reduces the possibility of compromising the process. The new mechanism would serve as the only address which the civil society, the general public and international partners would regularly monitor on the undertaken activities. So Option 4 ensures that there will be greater transparency and accountability.

Another weakness, which needs to be further examined, is the fact that with the new permanent constitutional mechanism, the Councils are deprived of their current competencies in the longer term (until other possible constitutional changes). This can create a situation where the role of councils is minimized and raises questions about compliance with the purpose of their creation and operation. Also, there is a risk in terms of the sustainability of a permanent mechanism outside the councils, because after some

stages or years, there may be a need for officials within this mechanism to move from their position to pursue another career, which means developing a new process of recruitment which after a while may not have the proper attention, or impact, as in the beginning, and as a result create an unsustainable and less accountable mechanism in the long run. At the same time, the establishment of a permanent mechanism for performance, wealth and integrity check outside the relevant councils may not be in full compliance with the international standards elaborated above. Consequently, this option, although it may be effective, it has its ethics compromised in the long run.

Figure 19: Scoring Option 4 according to multi-criteria analysis

Fifth option - *Conducting the vetting process through two stages*
The fifth option is the option of conducting the vetting process in two stages: first the initial vetting through the external mechanism that is created by constitutional changes (foreseen in Option 4), and then the continuous performance, integrity and wealth check through the mechanisms within the Councils (in line with the continuous check in Option 3).

For the initial vetting with constitutional changes, it can be concluded that the advantages elaborated in Option 4 above apply based on the first phase, and given that the new constitutional mechanism under Option 5 will only do the initial vetting and not the

ongoing performance, integrity, and wealth check, it eliminates all uncertainties and risks for the long-term minimization of the role of the Councils in the process.

Continuous performance, integrity, and wealth check, after the initial vetting, will be done within the framework of the Councils. This option seems even more appropriate than Option 3, because this competence will be transferred to the panels of the Councils only after all candidates (judges, prosecutors and senior officials) are subjected to the initial vetting. Thus it can be assumed that the initial vetting is successful, and then the continuous performance, integrity, and wealth check has no risk of compromise as it will be done and decisions will be conducted by officials and persons who at that stage are already vetted.

These facts make Option 5 more ethical than all other options. This Option is expected to be quite effective, but throughout the years of its implementation, in order to ensure the intended effect, it needs a proper involvement and continuous monitoring by civil society and the general public.

Despite the high budget cost, 'value for money' is believed to be achieved and the justice system in the Republic of Kosovo will, through this option, be a professional system with integrity that duly serves the public.

Figure 20: Scoring Option 5 according to multi-criteria analysis

Chapter 6.1: Implementation plans for different options

Image 21. Implementation plan for Option 2

Policy purpose	Conducting the vetting process in a fair, impartial and comprehensive manner.								Expected cost figure
Strategic objective	Improving the integrity of justice institutions, through vetting and other mechanisms.								
	Output, activities, year and responsible organization / department								
Specific Objective 1 - Restoring citizens' trust in the justice system	**Output**	**Activity**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Responsible institution / department**	
	Output 1.1 Enhanced verification units	Activity 1.1.1 - Triple the budget for goods and services of the Verification Unit in the KJC	x					KJC, Assembly	
		Activity 1.1.2 - Triple the budget for goods and services of the Verification Unit in KPC	x					KPC, Assembly	
		Activity 1.1.3 - Recruitment of 15 officers in the Verification Unit in the KJC	x					KJC	

	Activity 1.1.4 - Recruitment of 10 officers in the Verification Unit in KPC	x					KPC	
	Activity 1.1.5 - Training of officials in the Verification Unit in the KJC according to the profile	x	x	x	x	x	KJC	
	Activity 1.1.6 - Training of officials in the Verification Unit in KPC according to the profile	x	x	x	x	x	KPC	
	Activity 1.1.7 - Additional training of ACA officials for verification of assets of judges and prosecutors	x		x			ACA	
	Activity 1.1.8 – Recruitment of 6 additional officers to support the KJC Performance Evaluation Committee	x					KJC	
	Activity 1.1.9 – Recruitment of 6 additional officials to support the KPC Performance Evaluation Committee	x					KPC	
	Activity 1.1.10 - Training of additional officials to support the KJC Performance Evaluation Committee	x					KJC	

	Activity 1.1.11 - Training of additional officials to support the Performance Evaluation Committee in KPC	x					KPC	
	Activity 1.1.12 - Development of joint work arrangements between KJC and KPC verification units, including the sharing of information and consistent work practices in both units		x	x			KJC/KPC	
	Activity 1.1.13 - Drafting an Integrity Plan for judges		x				KJC	
	Activity 1.1.14 - Drafting an Integrity Plan for prosecutors		x				KPC	
Output	**Activity**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Responsible institution / department**	
Output 1.2 Verified members of the judicial system	Activity 1.2.1 - Verification of candidates for judges during recruitment		x	x	x	x	KJC	
	Activity 1.2.2 - Verification of judge candidates for promotion		x	x	x	x	KJC	
	Activity 1.2.3 - Verification of all judges in accordance with the performance evaluation process		x	x	x	x	KJC	

Output	Activity	Year 1	Year 2	Year 3	Year 4	Year 5	Responsible institution / department	
Output 1.3 Verified members of the prosecutorial system	Activity 1.3.1 - Verification of candidates for prosecutors during recruitment		x	x	x	x	KPC	
	Activity 1.3.2 - Verification of prosecutor candidates for promotion		x	x	x	x	KPC	
	Activity 1.3.3 - Verification of all prosecutors in accordance with the performance evaluation process		x	x	x	x	KPC	
							Total:	

Image 22. Implementation plan for Option 3

Policy purpose	Conducting the vetting process in a fair, impartial and comprehensive manner.	Expected cost figure
Strategic objective	Improving the integrity of justice institutions, through vetting and other mechanisms.	

	Output, activities, year and responsible organization / department								
Specific Objective 1 - Restoring citizens' trust in the justice system	**Output**	**Activity**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Responsible institution / department**	
	Output 1.1 Vetting legislation adopted	Activity 1.1.1 - Drafting and consulting the Law on Vetting	x					MoJ, KJC, KPC	
		Activity 1.1.2 - Proceeding the Law on Vetting for approval	x					MoJ	
		Activity 1.1.3 - Drafting and consulting the relevant laws related to the Law on Vetting	x					MoJ, KJC, KPC, JA	
	Output	**Activity**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Responsible institution / department**	

Output 1.2 Vetting Mechanism established	Activity 1.2.1 – Capacity building of necessary resources for the initial vetting unit		x				Assembly	
	Activity 1.2.2 - Appointment of members of the initial vetting unit with international involvement		x				International partners	
	Activity 1.2.3 – Nomination of 6 members in the new vetting mechanism at KJC (both panels)		x				KJC	
	Activity 1.2.4 – Vetting of proposed members of the new vetting mechanism at KJC		x				Initial Vetting Unit	
	Activity 1.2.5 - Nomination of 6 members in the new vetting mechanism in the KPC (both panels)		x				KPC	
	Activity 1.2.6 - Vetting of the proposed members of the new vetting mechanism in KPC		x				KPC	

	Activity 1.2.7 – Capacity building of necessary resources for the Vetting Mechanism Secretariat at KJC and KPC		x				Assembly, KJC, KPC	
	Activity 1.2.8 - Recruitment of 61 officials in the Vetting Mechanism Secretariat at KJC		X				KJC	
	Activity 1.2.9 - Recruitment of 46 officials in the Vetting Mechanism Secretariat at KPC		x				KPC	
	Activity 1.2.10 - Vetting of the proposed members of the Secretariat		x				Initial vetting unit	
	Activity 1.2.11 - Training of members of the panels at KJC		x	x			KJC	
	Activity 1.2.12 - Training of members of the panels at KPC		x	x			KPC	
	Activity 1.2.13 - Training of the members of the Secretariat at KJC and KPC		X	x			KJC/KPC	
Output	**Activity**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Responsible institution / department**	
Output 1.3 Vetted members of the judicial system	Activity 1.3.1 - Vetting of KJC members		x	X			Vetting mechanism at KJC	
	Activity 1.3.2 - Verification of at least 5 Supreme Court judges		x	X			Vetting mechanism at KPC	
	Activity 1.3.3 - Opening the call for new members of the KJC		x	X			Vetting mechanism at KJC	

	Activity 1.3.4 - Vetting of candidates for KJC members		x	X			Vetting mechanism at KJC	
	Activity 1.3.5 - Vetting of other judges of the Supreme Court			x			Vetting mechanism at KJC	
	Activity 1.3.6 - Vetting of candidates for Judges of the Supreme Court			x			Vetting mechanism at KJC	
	Activity 1.3.7 - Vetting of Judges of the Court of Appeals			x			Vetting mechanism at KJC	
	Activity 1.3.8 - Vetting of candidates for Judges of the Court of Appeals			x	x		Vetting mechanism at KJC	
	Activity 1.3.9 - Vetting of the Director of the KJC Secretariat, court administrators and the Director of the Judicial Inspection Unit			x	x		Vetting mechanism at KJC	
	Activity 1.3.10 - Development of the recruitment phase of new judges			x	x		KJC	
	Activity 1.3.11 - Vetting of proposed candidates for judge			x	x		Vetting mechanism at KJC	
	Activity 1.3.12 - Vetting of Court Presidents and supervisory judges				x		Vetting mechanism at KJC	
	Activity 1.3.13 – Vetting of judges of basic courts				x	x	Vetting mechanism at KJC	
Output	**Activity**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Responsible institution / department**	
Output 1.4 Vetted	Activity 1.4.1 - Vetting of KPC members		X	X			Vetting mechanism at KPC	

members of the prosecutorial system	Activity 1.4.2 - Vetting of the Chief State Prosecutor		X	X			Vetting mechanism at KPC	
	Activity 1.4.3 - Opening the call for new members of KPC		X	X			KPC	
	Activity 1.4.4 - Vetting of candidates for members of KPC		X	X			Vetting mechanism at KPC	
	Activity 1.4.5 - Vetting of prosecutors in the Office of the Chief State Prosecutor		X	x			Vetting mechanism at KPC	
	Activity 1.4.6 - Vetting of candidates for prosecutor in the Office of the Chief State Prosecutor			x			Vetting mechanism at KPC	
	Activity 1.4.7 - Vetting of prosecutors of the Appellate Prosecution Office			x			Vetting mechanism at KPC	
	Activity 1.4.8 - Vetting of candidates for Appellate Prosecutor			x			Vetting mechanism at KPC	
	Activity 1.4.9 – Vetting of prosecutors of Special Prosecution Office			x			Vetting mechanism at KPC	
	Activity 1.4.10 - Vetting of the Director of the KPC Secretariat and Prosecution Administrators			x			Vetting mechanism at KPC	
	Activity 1.4.11 - Development of the recruitment phase of new prosecutors			X	x		KPC	
	Activity 1.4.12 - Vetting of proposed candidates for prosecutors			x	x		Vetting mechanism at KPC	
	Activity 1.4.13 - Verification of Chief Prosecutors			x	x		Vetting mechanism at KPC	

	Activity 1.4.14 - Verification of prosecutors of basic prosecution offices				x	x	Vetting mechanism at KPC	
Output	**Activity**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Responsible institution/department**	
Output 1.5 Mechanisms for continuous evaluation established	Activity 1.5.1 - Transformation into regular mechanisms for continuous evaluation of judges and prosecutors					x	Assembly, Government, KJC, KPC	
							Total:	

Image 23. Implementation plans for Option 4

Policy Purpose	Conducting the vetting process in a fair, impartial and comprehensive manner.								Expected Cost Figure
Strategic objective	Improving the integrity of justice institutions, through vetting and other mechanisms.								
	Output, activities, year and responsible organization/department								
Specific Objective 1 - Restoring citizens' trust in the justice system	**Output**	**Activity**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Responsible institution/department**	
	Output 1.1 Adopted Constitutional amendments and vetting legislation	Activity 1.1.1 - Drafting and consulting constitutional amendments	x					MoJ, KJC, KPC	
		Activity 1.1.2 - Proceeding constitutional amendments for approval	x					Government	

	Activity 1.1.3 - Drafting and consulting the Law on Vetting	x	x				MoJ, KJC, KPC	
	Activity 1.1.4 - Proceeding the Law for approval		x				MoJ	
	Activity 1.1.5 - Drafting and consulting relevant laws related to the Law on Vetting		x				MoJ, KJC, KPC	
	Activity 1.1.6 - Proceeding relevant laws related to the Law on Vetting		x				MoJ	
Output	**Activity**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Responsible institution/department**	
Output 1.2 Established vetting mechanisms	Activity 1.2.1 – Capacity building of necessary resources for the initial Constitutional Vetting Unit		x				Assembly	
	Activity 1.2.2 - Nomination of members of the initial Constitutional Vetting Unit		x				Presidency/ Assembly	
	Activity 1.2.3 - Capacity building of necessary resources for the		x				Assembly	

Constitutional Vetting Mechanism							
Activity 1.2.4 - Recruitment of 15 members at the panels of Constitutional Vetting Mechanism		x				Presidency, Assembly	
Activity 1.2.5 - Recruitment of 5 members of the Panel of Appeals in the Constitutional Vetting Mechanism		x				Presidency, Assembly	
Activity 1.2.6 - Vetting of the nominated members of the Panels of the Constitutional Vetting Mechanism		x				Initial Constitutional Vetting Unit	
Activity 1.2.7 - Vetting of the nominated members of the Panel of Appeals of the Mechanism		x				Initial Constitutional Vetting Unit	
Activity 1.2.8 – Capacity building of necessary resources for the Secretariat of the Constitutional Vetting Mechanism		x				Assembly	
Activity 1.2.9 - Recruitment of 91 officials in the Secretariat of the Constitutional Vetting Mechanism		x				Constitutional Vetting Mechanism / Secretariat	

	Activity 1.2.10 - Vetting of the nominated officials of the Secretariat of the Constitutional Vetting Mechanism		x				Initial Constitutional Vetting Unit	
	Activity 1.2.11 - Training of members of the panels of the Constitutional Mechanism		x	x			Initial Constitutional Vetting Unit	
	Activity 1.2.12 - Training of members of the Panel of Appeals of the Mechanism		x	x			Initial Constitutional Vetting Unit	
	Activity 1.2.13 - Training of the members of the Secretariat			x			Initial Constitutional Vetting Unit	
	Activity	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Responsible institution/department**	
Output	Activity 1.3.1 - Vetting of KJC members			x			Constitutional Vetting Mechanism	
Output 1.3 Vetted Members of the judicial system	Activity 1.3.2 - Vetting of at least 5 Supreme Court judges			x			Constitutional Vetting Mechanism	
	Activity 1.3.3 - Vetting of other Supreme Court judges			x			Constitutional Vetting Mechanism	

	Activity 1.3.4 - Vetting of candidates for Judges of the Supreme Court			x			Constitutional Vetting Mechanism	
	Activity 1.3.5 - Vetting of Judges of the Court of Appeals			x	x		Constitutional Vetting Mechanism	
	Activity 1.3.6 - Vetting of candidates for Judges of the Court of Appeals			x	x		Constitutional Vetting Mechanism	
	Activity 1.3.7 - Vetting of the Director of the KJC Secretariat, court administrators and the Director of the Judicial Inspection Unit			x	x		Constitutional Vetting Mechanism	
	Activity 1.3.8 - Development of the recruitment phase of new judges				x		KJC, Constitutional Vetting Mechanism	
	Activity 1.3.9 - Vetting of nominated candidates for judge				x		Constitutional Vetting Mechanism	
	Activity 1.3.10 - Vetting of Court Presidents and supervisory judges				x		Constitutional Vetting Mechanism	

	Activity 1.3.11 - Vetting of judges of basic courts				x	x	Constitutional Vetting Mechanism	
	Activity	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Responsible institution/department**	
	Activity 1.4.1 - Vetting of KPC members			x			Constitutional Vetting Mechanism	
	Activity 1.4.2 - Vetting of the Chief State Prosecutor			x			Constitutional Vetting Mechanism	
Output	Activity 1.4.3 - Vetting of prosecutors in the Chief State Prosecutor's Office			x			Constitutional Vetting Mechanism	
Output 1.4 Vetted Members of the prosecutorial system	Activity 1.4.4 - Vetting of candidates for prosecutor in the Chief State Prosecutor's Office			x			Constitutional Vetting Mechanism	
	Activity 1.4.5 - Vetting of prosecutors of the Appellate Prosecution Office			x			Constitutional Vetting Mechanism	

Activity 1.4.6 - Vetting of candidates for Appellate Prosecutor			x			Constitutional Vetting Mechanism	
Activity 1.4.7 – Vetting of prosecutors of Special Prosecution Office			x			Constitutional Vetting Mechanism	
Activity 1.4.8 - Vetting of the Director of the KPC Secretariat and Prosecution Administrators			x			Constitutional Vetting Mechanism	
Activity 1.4.9 - Development of the recruitment phase of new prosecutors			x	x		Constitutional Vetting Mechanism	
Activity 1.4. 10 - Vetting of nominated candidates for prosecutors			x	x		KPC, Constitutional Vetting Mechanism	
Activity 1.4.11 - Vetting of Chief Prosecutors			x	x		Constitutional Vetting Mechanism	
Activity 1.4.11 - Vetting of prosecutors of basic prosecution offices				x	x	Constitutional Vetting Mechanism	

Total:	

Image 24: Implementation plan for Option 5

Policy Purpose	Conducting the vetting process in a fair, impartial and comprehensive manner.	Expected Cost Figure
Strategic objective	Improving the integrity of justice institutions, through vetting and other mechanisms.	
	Output, activities, year and responsible organization/department	

	Output	Activity	Year 1	Year 2	Year 3	Year 4	Year 5	Responsible institution/department	
Specific Objective 1 - Restoring citizens' trust in the justice system	**Output 1.1 Constitutional Amendments and Adopted Vetting Law**	Activity 1.1.1 - Drafting and consulting constitutional amendments	x					MoJ, KJC, KPC	
		Activity 1.1.2 - Proceeding constitutional amendments for approval	x					Government	
		Activity 1.1.3 - Drafting and consulting the Law on Vetting	x	x				MoJ, KJC, KPC	
		Activity 1.1.4 - Proceeding the Law for approval		x				MoJ	
		Activity 1.1.5 - Drafting and consulting relevant laws related to the Law on Vetting		x				MoJ, KJC, KPC	
		Activity 1.1.6 - Proceeding relevant laws related to the Law on Vetting		x				MoJ	

Output	Activity	Year 1	Year 2	Year 3	Year 4	Year 5	Responsible institution/department	
Output 1.2 Established vetting mechanisms	Activity 1.2.1 – Capacity building of necessary resources for the Initial Constitutional Vetting Body		x				Assembly	
	Activity 1.2.2 - Nomination of members of the Initial Constitutional Vetting Body with international involvement		x				Presidency/Assembly	
	Activity 1.2.3 – Capacity building of necessary resources for the Initial Constitutional Vetting Body		x				Assembly	
	Activity 1.2.4 - Recruitment of 15 members at the Constitutional Vetting Mechanism Panels		x				Presidency/Assembly	
	Activity 1.2.5 – Recruitment of 5 members at the panel of appeals in		x				Presidency, Assembly	

	the Constitutional Vetting Mechanism							
	Activity 1.2.6 - Vetting of the nominated members of the Panels of the Constitutional Vetting Mechanism		x				Initial Constitutional Vetting Body	
	Activity 1.2.7 - Vetting of the nominated members of the panel of appeals in the Constitutional Vetting Mechanism		x				Initial Constitutional Vetting Body	
	Activity 1.2.8 – Capacity building of necessary resources for the Secretariat of the Constitutional Vetting Mechanism		x				Assembly	
	Activity 1.2.9 - Recruitment of 91 officials in the Secretariat of the Constitutional Vetting Mechanism		x				Constitutional Vetting Mechanism/ Secretariat	
	Activity 1.2.10 - Vetting of the nominated officials of the Secretariat of the Constitutional Vetting Mechanism		x				Initial Constitutional Vetting Body	

	Activity 1.2.11 - Training of members of the panels of the Constitutional Mechanism		x	x			Initial Constitutional Vetting Body	
	Activity 1.2.12 - Training of members of the panel of appeals of the Mechanism			x	x		Initial Constitutional Vetting Body	
	Activity 1.2.13 - Training of the members of the Secretariat				x		Initial Constitutional Vetting Body	
Output	**Activity**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Responsible institution/department**	
Output 1.3 Vetted Members of the judicial system	Activity 1.3.1 - Vetting of KJC members			x			Constitutional Vetting Mechanism	
	Activity 1.3.2 - Vetting of at least 5 Supreme Court judges			x			Constitutional Vetting Mechanism	
	Activity 1.3.3 - Vetting of other Supreme Court judges			x			Constitutional Vetting Mechanism	
	Activity 1.3.4 - Vetting of candidates for Judges of the Supreme Court			x			Constitutional Vetting Mechanism	

	Activity 1.3.5 - Vetting of Judges of the Court of Appeals			x	x		Constitutional Vetting Mechanism	
	Activity 1.3.6 - Vetting of candidates for Judges of the Court of Appeals			x	x		Constitutional Vetting Mechanism	
	Activity 1.3.7 - Vetting of the Director of the KJC Secretariat, court administrators and the Director of the Judicial Inspection Unit			x	x		Constitutional Vetting Mechanism	
	Activity 1.3.8 - Development of the recruitment phase of new judges				x		KJC, Constitutional Vetting Mechanism	
	Activity 1.3.9 - Vetting of nominated candidates for judge				x		Constitutional Vetting Mechanism	
	Activity 1.3.10 - Vetting of Court Presidents and supervisory judges				x		Constitutional Vetting Mechanism	

	Activity 1.3.11 - Vetting of judges of basic courts				x	x	Constitutional Vetting Mechanism	

Output	Activity	Year 1	Year 2	Year 3	Year 4	Year 5	Responsible institution/department	
Output 1.4 Vetted Members of the prosecutorial system	Activity 1.4.1 - Vetting of KPC members			x			Constitutional Vetting Mechanism	
	Activity 1.4.2 - Vetting of the Chief State Prosecutor			x			Constitutional Vetting Mechanism	
	Activity 1.4.3 - Vetting of prosecutors in the Chief State Prosecutor's Office			x			Constitutional Vetting Mechanism	
	Activity 1.4.4 - Vetting of candidates for prosecutors in the Chief State Prosecutor's Office			x			Constitutional Vetting Mechanism	

Activity 1.4.5 - Vetting of prosecutors of the Appellate Prosecution Office			x			Constitutional Vetting Mechanism	
Activity 1.4.6 - Verification of candidates for Appellate Prosecutor			x			Constitutional Vetting Mechanism	
Activity 1.4.7 - Vetting of prosecutors of Special Prosecution Office			x			Constitutional Vetting Mechanism	
Activity 1.4.8 - Vetting of the Director of the KPC Secretariat and Administrators of Prosecution Offices			x			Constitutional Vetting Mechanism	
Activity 1.4.9 – Carrying out the recruitment phase of new prosecutors			x	x		KPC, Constitutional Vetting Mechanism	
Activity 1.4.10 - Vetting of candidates proposed for prosecutors			x	x		Constitutional Vetting Mechanism	
Activity 1.4.11 - Vetting of Chief Prosecutors			x	x		Constitutional Vetting Mechanism	

	Activity 1.4.11 - Vetting of prosecutors of basic prosecution offices				x	x	Constitutional Vetting Mechanism	

Output	Activity	Year 1	Year 2	Year 3	Year 4	Year 5	Responsible institution/department	
Output 1.5 Continuous verification mechanisms Established	Activity 1.5.1 - Transformation into regular mechanisms for continuous verification of judges and prosecutors					x	Assembly, Government, KJC, KPC	
							Total:	

Chapter 7: Conclusions and next steps

Based on the analysis made in this Concept Paper and taking into account the comparison of the reviewed options, in order to eliminate the identified problems and meet certain objectives, the Government is recommended to approve Option 5, namely the implementation of the vetting process with constitutional changes, which enables vetting to be carried out by an ad-hoc body and then the ongoing assessment of performance, integrity and wealth to be carried out within the KJC and KPC. The implementation plan of the recommended option, is option 5, is presented in Chapter 6 of this document.
The second option recommended by the working group, after Option 5, is Option 3 – which is the development of the vetting process through legal changes.

Chapter 7.1: Provisions for monitoring and evaluation

Monitoring of the implementation of this Option, considering that it includes institutions from the three powers: the legislature, the executive, and the judiciary, will be done by all three. Regarding the implementation of the Concept Paper, annual reports will be prepared in order to inform the above-mentioned institutions. Ex-post evaluation according to the defined methodology, of the constitutional amendments and the future vetting law, will be done in the 5th year of implementation of the Concept Paper.

Appendix 1: Economic impact assessment form

Categories of economic impacts	The main impact	Is this impact expected to occur?		Number of organizations, companies and / or individuals affected	Expected benefit or cost of impact	Preferred level of analysis
		Yes	No	High/low	High/low	
Jobs[164]	Will the current number of jobs increase?					
	Will the current number of jobs decrease?					
	Will it affect the level of payment?					
	Will it affect the facilitation of finding a job?					
Doing business	Will it affect access to finance for business?					
	Will certain products leave the market?					
	Will certain products be allowed to the market?					

[164]When it affects jobs, there will also be social impacts.

	Will businesses be forced to close?					
	Will it create new businesses?					
Administrative requirements	Will businesses be forced to meet new information obligations?					
	Have the obligations to provide information to businesses been simplified?					
Trade	Are current import flows expected to change?					
	Are current export flows expected to change?					
Transportation	Will it have an effect on the mode of transport of passengers and/or goods?					
	Will it affect any change on the time needed to transport passengers and/or goods?					
Investments	Are companies expected to invest in new activities?					
	Are companies expected to cancel or postpone investments?					

	Will investments from the diaspora increase?					
	Will investments from the diaspora decrease?					
	Will direct foreign investments increase?					
	Will direct foreign investments decrease?					
Competitiveness	Will the business price of products, such as electricity, increase?					
	Will the business price of products, such as electricity, decrease?					
	Are innovations and research likely to be promoted?					
	Are innovations and research likely to be hampered?					
Impact in SME-s	Are the affected companies mainly SMEs?					
Prices and competition	Will the number of goods and services available to business or consumers increase?					

	Will the number of goods and services available to business or consumers decrease?					
	Will prices for existing goods and services increase?					
	Will prices for existing goods and services decrease?					
Regional economic impact	Will any particular business sector be affected?					
	Is this sector concentrated in a certain region?					
Overall economic development	Will future economic growth be affected?					
	Can it have any effect on the inflation rate?					

Appendix 2: Economic impact assessment form

Categories of social impacts	**The main impact**	**Is this impact expected to occur?**		**Number of organizations, companies and / or individuals affected**	**Expected benefit or cost of impact**	**Preferred level of analysis**
		Yes	**No**	**High/low**	**High/low**	
Jobs[165]	Will the current number of jobs increase?		X			
	Will the current number of jobs decrease?		X			
	Are jobs affected in a particular business sector?		X			
	Will it affect the level of payment?		X			
	Will it affect the facilitation of finding a job?		X			
Regional economic impact	Are social impacts concentrated in a particular region or city?		X			
	Are workers' rights affected?	X				

[165]When it affects jobs, there will also be economic impacts.

Working conditions	Are standards for working in hazardous conditions foreseen or repealed?		X			
	Will it have an impact on the way the social dialog is conducted between employees and employers?		X			
Social inclusion	Will it have an impact on poverty?	X				
	Is access to social protection schemes affected?		X			
	Will prices for existing goods and services decrease?		X			
	Will it have an impact on the financing or organization of social protection schemes?		X			
Education	Will it have an impact on primary education?		X			
	Will it have an impact on secondary education?		X			
	Will it have an impact on higher education?		X			

	Will it have an impact on vocational education?	X				
	Will it have an impact on worker education and lifelong learning?	X				
	Will it have an impact on the organization or structure of education system?		X			
	Will it have an impact on academic freedom and self-governance?		X			
Culture	Does the option affect cultural diversity?		X			
	Does the option affect financing of cultural organizations?		X			
	Does the option affect the opportunities for people to benefit from or participate in cultural activities?		X			
	Does the option affect preservation of cultural organizations?		X			

Governance	Does the option affect the ability of citizens to participate in the democratic process?	X				
	Is every person treated equally?		X			
	Will the public be better informed about certain issues?	X				
	Does the option affect the way political parties function?		X			
	Will it have any effect on the civil society?		X			
Public health and safety[166]	Will it have any impact on people's lives, such as life expectancy or mortality rate?		X			
	Will it have an impact on the quality of food?		X			
	Will the health risk due to harmful substances increase or decrease?		X			
	Will there be health effects due to changes in noise levels or air, water and/or soil quality?		X			

[166]When it has an impact on public health and safety, then it regularly has environmental impacts.

	Will there be health effects due to changes in energy use?		X			
	Will there be health effects due to changes in waste disposal?		X			
	Will it have an impact on people's lifestyles, such as levels of interest in sports, changes in nutrition, or changes in tobacco or alcohol use?		X			
	Are there specific groups that face much higher risks than others (determined by factors, such as age, gender, disability, social group or region)?		X			
Crime and security	Are chances of catching criminals affected?	X				
	Is the potential gain from the crime affected?	X				
	Will it affect the level of corruption?	X				
	Is law enforcement capacity affected?	X				
	Is there any effect on the rights and safety of victims of crime?	X				

Appendix 3: Environemt impact assessment form

Categories of social impacts	**The main impact**	**Is this impact expected to occur?**		**Number of organizations, companies and / or individuals affected**	**Expected benefit or cost of impact**	**Preferred level of analysis**
		Yes	**No**	**High/low**	**High/low**	
Stable climate and environment	Will it have an impact on greenhouse gas emissions (carbon dioxide, methane, etc.)?					
	Will fuel consumption be affected?					
	Will the variety of resources used for energy production change?					
	Will there be any price changes for environmentally friendly products?					
	Will certain activities become less polluting?					
Air quality	Will it have an impact on air pollution emissions?					
Air quality	Does the option affect freshwater quality?					

	Does the option affect underground water quality?					
	Does the option affect freshwater sources?					
Soil quality and land use	Will it have an impact on soil quality (in relation to acidification, pollution, use of pesticides or herbicides)?					
	Will it have an impact on the land erosion?					
	Will land be lost (through construction, etc.)?					
	Will land be gained (through decontamination, etc.)?					
	Will there be any change in land use (eg from forest use to agricultural or urban use)?					
Waste and recycling	Will the amount of waste generated change?					
	Will the ways in which waste is treated change?					

	Will it have an impact on the possibility of waste recycling?					
Use of resources	Does the option affect the use of renewable resources (fish stocks, hydropower, solar energy, etc.)?					
	Does the option affect the use of resources that are not renewable (groundwater, minerals, coal, etc.)?					
Extent of environmental hazards	Will there be any effect on the likelihood of hazards, such as fires, explosions or accidents?					
	Will it affect preparedness in case of natural disasters?					
	Is the protection of society from natural disasters affected?					
Biodiversity, flora and fauna	Will it have an impact on protected or endangered species or the areas where they live?					
	Will size or connections between nature areas be affected?					

	Will it affect the number of species in a given area?					
Animal welfare	Will animal treatment be affected?					
	Will animal health be affected?					
	Will the quality and safety of animal feed be affected?					

Appendix 4: Economic impact assessment form

The Category of impact on fundamental rights	**The main impact**	**Is this impact expected to occur?**		**Number of organizations, companies and / or individuals affected**	**Expected benefit or cost of impact**	**Preferred level of analysis**
		Yes	**No**	**High/low**	**High/low**	
Dignity	Does the option affect people's dignity, their right to life or a person's integrity?	X				
Freedom	Does the option affect individuals right to freedom?		X			
	Does the option affect individuals right to privacy?	X				

	Does the option affect the right to marry or start a family?		X			
	Does the option affect the legal, economic or social protection of individuals or the family?	X				
	Does the option affect freedom of thought, conscience or religion?		X			
	Does the option affect freedom of expression?		X			
	Does the option affect freedom of assembly and association?	X				
Personal data	Does the option include the processing of personal data?	X				
	Are the individual's rights of access, redress and objection guaranteed?	X				
	Is the way in which personal data is processed clear and well protected?	X				
Asylum	Does this option affect the right to asylum?		X			
	Are property rights affected?	X				

Property rights	Does the option affect freedom of doing business?	X				
Equal treatment[167]	Does the option protect the principle of equality before the law?	X				
	Are certain groups likely to be harmed directly or indirectly by discrimination (e.g. discrimination based on gender, race, color, ethnicity, political or other opinion, age or sexual orientation)?	X				
	Does the option affect the rights of persons with disabilities?		X			
Rights of children	Does the option affect rights of children?		X			
Good administration	Will administrative procedures become more complicated?		X			
	Is the way in which the administration makes decisions influenced (transparency,		X			

[167]Gender equality is addressed in *the Gender Impact Assessment*

	procedural deadlines, the right to access a file, etc.)?					
	On criminal law and the penalties provided: are the rights of the defendant affected?		X			
	Is access to justice affected?	X				