



PARLIAMENTARY RESEARCH

ANALYSIS ON THE DRAFT CONSTITUTIONAL
AMENDMENTS FOR THE DEVELOPMENT OF THE
TRANSITIONAL EVALUATION/VETTING PROCESS





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development of participatory
democracy and the fight against
corruption by promoting transparency,
accountability and integrity at all levels
and sectors of society.

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1. INTRODUCTION

This parliamentary research deals with some main issues raised by the Ad hoc Committee for the Development of the Transitional Evaluation Process of the Assembly of the Republic of Kosovo regarding the draft constitutional amendments related to the process of re-evaluation in leadership positions in the judicial and prosecutorial system. In particular, this research aims to address what are the issues that should be addressed based on the Opinion of the Venice Commission and what are the constitutional aspects that should be taken into account by the Working Group before the draft amendments are submitted to the Constitutional Court for preliminary evaluation of constitutionality.

The analysis is based on the Constitution and current legislation of the Republic of Kosovo, findings from the Venice Opinion (June 2022) as well as the practices of other countries, especially those countries that have implemented the vetting process through constitutional amendments.

This research first provides an overview of developments related to this process and then provides a brief summary of the opinion of the Venice Commission specifying the options offered, including a brief elaboration of the recommended option. Already, the state authorities in Kosovo have built a sound and constructive dialogue of cooperation with the Venice Commission on the occasion of the revision of the legislation. Therefore, the implementation of the recommendations and suggestions of this advisory mechanism of the Council of Europe is essential for the improvement of the legislation but also to further strengthen the efforts on the necessity of Kosovo's membership in the Council of Europe.

Further, in this parliamentary research, findings and suggestions for adaptations and improvements in the draft constitutional amendments, so that the constitutional amendments are in compliance with the basic principles of the Constitution of Kosovo including the principle of separation of powers, respect for the principle of judicial independence and respect for constitutional rights and freedoms.

In the concluding part, the analysis offers some specific recommendations that derive from the main findings of the research related to the draft constitutional amendments, which will help the members of the Working Group towards finalizing the process and avoiding constitutional dilemmas related to this process.





2. BACKGROUND

The Prime Minister of the Republic of Kosovo, Mr. Albin Kurti, and the Minister of Justice Mr. Albulena Haxhiu on September 4, 2022, submitted to the Speaker of the Assembly Mr. Glauk Konjufca the document file of the Vetting process.

The Assembly of Kosovo in the session held on 09. 12. 2022 has established the Ad-hoc Committee for the Development of the Transitional Evaluation Process. The Committee was formed based on Article 45 of the Rules of Procedure of the Assembly.

The work mandate of the Committee is determined by the Decision on its establishment and it is related to the drafting of constitutional amendments regarding the evaluation process of judges and prosecutors.

The work of the Ad-hoc Committee for the Development of the Transitional Evaluation Process aims to carry out two main tasks: to build political and inter-institutional consensus and to prepare another file of documents from the one submitted by the Government to enable the implementation of this process in conformity with the recommendations of the Venice Commission.





3. CONSTITUTIONAL BASIS

Article 4

[Form of Government and Separation of Powers] 1 *Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them as provided in this Constitution.*

Article 16

[Supremacy of the Constitution] 1. *The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution.* 2. *The power to govern stems from the Constitution.* 3. *The Republic of Kosovo shall respect international law.* 4. *Every person and entity in the Republic of Kosovo is subject to the provisions of the Constitution.*

Article 84

of the Constitution on the competencies of the President provides that the President:

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

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

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

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

Article 108

of the Constitution is dedicated to the Judicial Council, which, among other things, ensures that *"the Kosovo courts are independent, professional and impartial"*, and *"is responsible for recruiting and proposing candidates for appointment and reappointment to judicial office.* It is further added that *" Proposals for appointments of judges must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall reflect principles of gender equality and the ethnic composition of the territorial jurisdiction of the respective court. All candidates must fulfill the selection criteria provided by law .*

Article 110

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





4. GENERAL COMMENTS

A Compatibility of draft constitutional amendments with the Opinion of the Venice Commission

In the following, only a general analysis will be provided if the draft constitutional amendments follow the suggestions provided in the Opinion of the Venice Commission regarding the Concept Paper on the Vetting of Judges and Prosecutors and the Draft Amendments to the Constitution (approved by the Venice Commission in the 131st plenary session in June 2022). Specific comments regarding the amendments will be provided in Part IV of this analysis.

The opinion of the Venice Commission has offered five options to implement the evaluation process of judges and prosecutors. According to the Option 1, it is preferable to preserve the existing situation and make no changes, while Option 2 recommends improving the implementation and enforcement, without legal changes. The Option 3 of the Opinion suggests the carrying out of the vetting process and further continuous performance, integrity and wealth check through legal changes, while the Option 4 foresees the carrying out of the vetting process and the continuous assessment of performance, integrity and wealth verification through constitutional changes. It is Option 5 that has been supported by the Venice Commission and suggests the implementation of the vetting process, with constitutional amendments, which enables vetting by an ad-hoc body followed by ongoing assessment of performance, integrity and assets by the KJC and KPK

What contains an important aspect that has been addressed within the Venice Commission Opinion is that the materialization of the recommended option No. 5 as such requires constitutional amendments. Among other things, the Venice Commission has stated that:

"the establishment of a Vetting mechanism through constitutional changes with a temporary mandate to be ended once the first verification period ends" and that "the original constitutional amendments were very detailed and set out a number of procedural elements that should usually be regulated in ordinary law...]. A vetting of all judges and prosecutors, bypassing or changing the powers of the KJC and the KPC for discipline and dismissal could only be undertaken if underpinned by constitutional amendments".¹

There are at least two conclusions that can be drawn from this position of the Venice Commission. The first is that even for option 5, which refers to the evaluation of the management level in the judicial and prosecutorial system, the process of constitutional amendments is necessary. Bypassing constitutional amendments is not viable for the reason that it not only violates the principle of constitutionality embodied in Article 16 of the Constitution of Kosovo but also the principle of constitutional security and the independence of the judicial system in accordance with Article 108 of the Constitution of Kosovo.

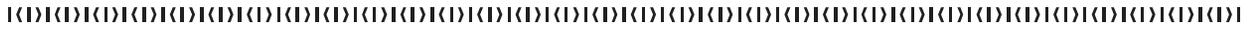
Article 108.1 of the Constitution defines that the function of the Judicial Council of Kosovo is to ensure the independence and impartiality of the judicial system of the state and from the constitutional reading it becomes clearly evident that "the Judicial Council "ensures" the independence and impartiality of the judiciary" and "the concept "ensures", as the basic function of the Council, constitutes the constitutional substance that establishes the function of the Council".² Moreover, this "implies the obligation of the Council, as a single entity, to enjoy sufficient unity of independent authority, to apply international standards independently, and to protect the judiciary from external influences" and that in the exercise of this function "no other institution has the constitutional authority to intervene".³

¹ See the Opinion of the Venice Commission on the Concept Document on the Vetting of the Judges and Prosecutors and Draft Amendments to the Constitution (approved by the Venice Commission at the 131st plenary session in June 2022).[https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2022\)005-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2022)005-e)

² Hasani, Enver, and Ivan Čukalović. "Commentary-Constitution of the Republic of Kosovo." (2013). 514

³ Hasani, Enver, and Ivan Čukalović. "Commentary-Constitution of the Republic of Kosovo." (2013). 514.





Since the materialization of Option 5 directly affects the mandate and composition of the Kosovo Judicial Council and the Kosovo Prosecutorial Council, as well as their mandate as a judge or prosecutor as a result of the vetting process, the only way to implement this re-evaluation process of these subjects is only through constitutional amendments.

Therefore, the proposal for constitutional amendment 163 that specifies the circle of subjects that are subject to the re-evaluation process (of KJC members, KPK members, presidents of all courts and all chief prosecutors, including the chief prosecutor of the Special Prosecution and the one of Appeal, as well as candidates for these positions) adequately implements the suggestions of the opinion of the Venice Commission regarding the subjects that are subject to the process of re-evaluation according to official duties (*ex officio*).

The second issue addressed in the Opinion is whether to follow a more maximalist or minimalist approach regarding the scope of constitutional amendments. It seems that the Venice Commission has favored a more minimalist approach to constitutional amendments regarding the vetting process to include only the most important criteria, institutions and issues within the framework of constitutional amendments.

In the relevant parts, the Commission stated that *"Constitutions should not contain detailed procedural provisions but only set out basic principles and establish the cornerstones of institutions, possibly but not essentially, notably their composition and main functions"*.⁴

It can be considered that the package of proposed constitutional amendments generally follows this proposal of the Venice Commission, putting in the center of the constitutional regulation only those issues and procedures which are fundamental to the process and for which a broad political consensus is required in the Assembly materialized through voting with two thirds (2/3) of all deputies of the Assembly including two thirds (2/3) of all

deputies of the Assembly holding reserved or guaranteed seats for representatives of communities that are not in the majority in the Republic of Kosovo.⁵

Judging from the current aspect of the political situation that prevails in the Assembly of the Republic of Kosovo, the scenario of carrying out the vetting for the evaluation of the management level in the judicial and prosecutorial system seems to be difficult but not impossible. Based on Article 144 of the Constitution of the Republic of Kosovo, constitutional amendments require for its adoption the approval of two thirds (2/3) of all deputies of the Assembly including two thirds (2/3) of all deputies of the Assembly holding reserved or guaranteed seats for representatives of communities that are not in the majority in the Republic of Kosovo. The deputies of the non-majority Serbian community who are represented in the Assembly in accordance with Article 64 paragraph 2 of the Constitution of Kosovo have abandoned their mandates in the Assembly of Kosovo as a result of their resignation and this development makes the process of changes to the Constitution of Kosovo difficult. Moreover, in terms of procedure, the Assembly committees not authorized entities to propose Constitutional changes. Therefore, the work of this Commission is important to align commitments with all interested parties and to offer a version of the constitutional amendments that are supported by 1/4 of the deputies (30 or more deputies). This step would allow the draft amendments to be referred to the Constitutional Court for prior assessment.

⁴ See the Opinion of the Venice Commission on the Concept Paper on the Vetting of the Judges and Prosecutors and the Draft Amendments to the Constitution (approved by the Venice Commission at the 131st plenary session in June 2022). [https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2022\)005-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2022)005-e)

⁵ Article 144 of the Constitution of Kosovo defines: 1. The Government, the President or one fourth (1/4) of the deputies of the Assembly of Kosovo as set forth in the Rules of Procedure of the Assembly may propose changes and amendments to this Constitution. 2. Any amendment shall require for its adoption the approval of two thirds (2/3) of all deputies of the Assembly including two thirds (2/3) of all deputies of the Assembly holding reserved or guaranteed seats for representatives of communities that are not in the majority in the Republic of Kosovo. 3. Amendments to this Constitution may be adopted by the Assembly only after the President of the Assembly of Kosovo has referred the proposed amendment to the Constitutional Court for a prior assessment that the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II of this Constitution. 4. Amendments to the Constitution enter into force immediately after their adoption in the Assembly of the Republic of Kosovo.





B Respect for freedoms and constitutional rights

The Constitution of Kosovo makes mandatory the preliminary evaluation of draft constitutional amendments prior to their voting in accordance with Article 144 of the Constitution of Kosovo.

The Government, the President or one fourth (1/4) of the deputies of the Assembly of Kosovo as set forth in the Rules of Procedure of the Assembly may propose changes and amendments to this Constitution. 2. Any amendment shall require for its adoption the approval of two thirds (2/3) of all deputies of the Assembly including two thirds (2/3) of all deputies of the Assembly holding reserved or guaranteed seats for representatives of communities that are not in the majority in the Republic of Kosovo. 3. Amendments to this Constitution may be adopted by the Assembly only after the President of the Assembly of Kosovo has referred the proposed amendment to the Constitutional Court for a prior assessment that the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II of this Constitution.

The Constitutional Court of Kosovo has already made its position clear that it will follow a broader interpretation of the review of draft constitutional amendments to assess whether these draft amendments do not diminish the constitutional guarantees of fundamental freedoms and rights that are defined by Chapter 2 of the Constitution of Kosovo.

In the case K.O. 29/12 and K.O. 48/12, the Constitutional Court stated that "as regards the evaluation of the constitutionality of any proposed amendment to the Constitution, according to Article 144.3, such amendment must be considered in the light of Chapter II [Rights and Fundamental Freedoms] of the Constitution, which according to its own Article 21 consists of fundamental human rights and freedoms, which are the basis of the legal order of the Republic of Kosovo".⁶

The Constitutional Court has underlined that even Chapter III [Rights of Communities and their Members] and other rights may be applicable in this process "since the specific rights defined are an extension of the human rights and freedoms defined in Chapter II of the Constitution, in particular, of those rights defined in Article 24 [Equality before the Law]".

Due to the position of constitutional rights as a value defined by Article 7 of the Constitution, it is important that, within the framework of the proposed constitutional amendments, the proposal of a new amendment is considered, as follows:

"The reassessment will be carried out on the basis of the principles of the regular process, as well as respecting the fundamental rights of the subject of assessment".

This proposal of the constitutional amendment is based not only on the logic of strengthening the guarantees of the constitutional rights of the subjects of reassessment, but also finds support in the Opinion on the Concept Document for the Vetting Process in which the Venice Commission stated that "interference in constitutional rights must be strictly proportional".⁷

The Constitution of Kosovo, within the framework of Article 55, has defined the principle of proportionality, defining, among others, that:

"fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfilment of the purpose of the limitation in an open and

democratic society. 3. Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided".

The principle of proportionality constitutes a legal construction that is of great importance in the case of the drafting process of draft constitutional amendments related to the vetting process. This legal instrument aims to reconcile competing interests in human rights conflicts with public interest conflicts and to find a solution that respects human rights and the private interests of the individual and, at the same time, takes care of the promotion of public interests and the protection of public order.

In particular, the test of proportionality aims to assess the purpose of the restriction, the nature and volume of the restriction, the relationship between the restriction and the purpose intended to be achieved, as well as to examine the

⁶ See the Judgment of the Constitutional Court of Kosovo in the case K.O. 29/12 and K.O. 48/12 Proposed constitutional amendments, submitted by the President of the Assembly of the Republic of Kosovo on 23 March 2012 and 4 May 2012.

⁷ Hatton and others v. The United Kingdom - 36022/97 [2003] ECHR 338 (8 July 2003)





possibility of achieving that purpose with less restriction. The test of proportionality has found wide use in the jurisprudence of the Constitutional Court of Kosovo and the ECtHR, such as in the case of *Hatton and others v. the United Kingdom*, where the private and family life of the applicants under Article 8 of the ECHR had to be balanced against the economic rights and the well-being of the community, or in the case of *Markovic and others v. Italy*, where the ECtHR stated that the right to a fair trial under Article 6 (1) of the ECHR can be limited provided that there is "a reasonable relationship of proportionality between the means used and the aim sought to be achieved".⁸

The right to privacy

Vetting often also includes interference with the right to private life of the assessment subjects, which is protected, among other things, according to Article 8 of the ECHR. According to the jurisprudence of the European Court of Human Rights (ECtHR), the collection and storage of personal information by a government agency, as well as the transfer of data records between agencies, fall within the scope of Article 8 of the ECHR.⁹ The Court has made it clear¹⁰ that the person who is dismissed, transferred etc. from public employment, can complain about a violation of Article 8 of the ECHR¹¹. Interference with the right to private life is acceptable only if it is covered by the limitations contained in Article 8 (2) of the ECHR¹² and if it is proportionate to the purpose pursued.

The Constitution of Kosovo pays special attention to the right to respect family life and privacy. According to Article 36 of the Constitution:

1. Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication...] 3. Secrecy of correspondence, telephony and other communication is an inviolable right. This right may only be limited temporarily by court decision if it is necessary for criminal proceedings or defence of the country as defined by law. 4. Every person enjoys the right of protection of personal data. Collection, preservation, access, correction and use of personal data are regulated by law.

In order to guarantee the implementation of the constitutional standards of proportionality of the limitation of the right to privacy and inviolability of family life, it is necessary to establish, through the constitutional provisions, that the constitutional rights related to the right to respect private life and the burden of proof will be partially limited. These constitutional requirements apply both to the personnel of the bodies that will be involved in the development of the reassessment and to the subjects that are subject to the reassessment procedure following the spirit of Option No. 5 of the Opinion of the Venice Commission.

As ECtHR stated in the case *Xhoxhaj v. Albania*, "the members of the reassessment institutions will have the obligation to declare their assets annually, which will be made public, their financial accounts will be systematically monitored and the privacy of their communications regarding work will be limited. They bear disciplinary responsibility in accordance with the law, which has provided for the declaration of conflict of interest and their dismissal."¹³

8 *Markovic and others v. Italy*, Judgment on merits, App. No. 1398/03, 2006]

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

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

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

12 This provision states as follows: "2. There shall be no interference by a public authority with the exercise of this right, except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic wellbeing 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."

13 The case *XOXHAJ v. ALBANIA* (Application No. 15227/19). <https://kpa.al/wp-content/uploads/2021/06/Vendimi-Xhoxhaj-k.-Shqipërisë-Shqip.pdf>





The right to a fair legal process

In the framework of constitutional freedoms and rights, when drafting draft constitutional amendments and the relevant legislation for the reassessment process, special attention should be paid to the full implementation of the right to a fair trial as defined by Article 31 of the Constitution of Kosovo and Article 6 of the ECHR.

In ECtHR's practice and in cases involving the premature termination of the judge's mandate, attention has been drawn to a number of cases that fall within the scope of Article 6 of the ECHR, which include, but are not limited to, the nature of the bodies that develop the reassessment procedure, the right to appeal against the decisions of the reassessment bodies, the right to be heard, the burden of proof and other issues which, if not addressed in accordance with the requirements of Article 31 of the Constitution of Kosovo, may not pass the filter of constitutionality.

The right to a fair legal process as guaranteed by Article 6/1 of the Convention includes the right of parties of judicial proceedings to submit any submissions that they consider important for their case. The purpose of these constitutional guarantees is to guarantee not theoretical or imaginary rights, but practical and effective rights, which can only be seen to be effective if the submissions are really "heard", that is, properly considered by the judicial authorities.

The ECtHR has already defined a range of legal criteria in the context of the application of Article 6 paragraph 1 of the ECHR based on the judgment Vilho Eskelinen and others for all types of legal disputes concerning civil servants and judges, including those that have to do with recruitment/ appointment (see *Juričić v. Croatia*, No. 58222/09, 26 July 2011), career/promotion (see *Dzhidzheva-Trendafilova v. Bulgaria* (dec.), No. 12628/09, 9 October 2012), transfer (see *Ohneberg v. Austria*, No. 10781/08, § 25, 18 September 2012) and termination of service (see *Olujić*, regarding the disciplinary dismissal of the President of the Supreme Court, and *Nazsiz*, cited above, regarding the disciplinary dismissal of a public prosecutor).

It should be recalled that the ECtHR has developed the Vilho Eskelinen test according to which it is up to "the respondent government to demonstrate, firstly, that a civil-servant applicant does not have a right of access to a court under national law and secondly, that the exclusion of the rights from Article 6 for the civil servant is justified" (para. 62).¹⁴

¹⁴ <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%3B%22001-80249%22%7D>





5. SPECIFIC COMMENTS

Amendment No. 27

After paragraph 4 of Article 104, a new paragraph is added as follows:

- 4a. *Serious non-compliance with duties from paragraph 4 of this Article includes cases where the judge has been assessed with poor unsatisfactory performance, or has been found to have unjustifiable assets, or to have vulnerable integrity, or has committed serious disciplinary violations, as regulated by law.*

Given that the dismissal of judges and prosecutors can only be based on the existing constitutional grounds: conviction of a serious criminal offense or serious neglect of duties by judges (Article 104, paragraph 4 of the Constitution) and prosecutors (Article 109 (6) of Constitution), it seems that the proposed amendment No. 27 only aims to further specify what "serious neglect of duties" includes for purposes of dismissal.

This constitutional amendment does not appear to diminish international standards for the appointment and dismissal of judges and does not change the current system of election and dismissal of judges. The proposed amendment only further clarifies the constitutional scope of "serious neglect of duties" as one of the reasons for the dismissal of judges, defined by the Constitution.

Regarding this, the Venice Commission does not have any expressed position except for the finding that "these two constitutional amendments would also facilitate the dismissal of judges or prosecutors who make irregular declarations of assets. Their dismissal can be initiated by the Anti-Corruption Agency (and decided by KJC and KPC, possibly after checking their integrity). This would not depend on a vetting of all judges and prosecutors".

However, it should be recalled that the issue of performance evaluation has only been addressed by existing laws. Thus, Law No. 06/L-055 on Kosovo Judicial Council, Article

27 stipulates that "The evaluation of the performance assessment committee of the judge is the basis for...] initiating the dismissal procedure of the judge...".¹⁵ Therefore, it is not clear why the amendment of the Constitution is required to define "performance assessment" as a criterion for dismissal, when considering the fact that the Law on Kosovo Judicial Council has already specified this criterion that constitutes the basis for dismissal. So, the question is what is the motive for making such constitutional determinations when this issue is well defined by law.

The same legal dilemma also exists with regard to unjustifiable assets, since such an act is criminalized according to the legislation in force. According to Article 430 paragraph 2 of the Criminal Code of Kosovo "any person, obligated by law to file a declaration of property, income, gifts, other material benefits or financial obligations, who falsifies or omits data or required information on the required declaration shall be punished by a fine and imprisonment of six (6) months to five (5) years." So, the false declaration of property constitutes a criminal offense punishable according to the legislation in force and the Constitution has already provided for the measure of dismissal of judges or prosecutors in case of committing a criminal offense proven by a final court decision.

¹⁵ Law No. 06/L-055 on Kosovo Judicial Council, Article 27.





Amendment no. 28

After paragraph 6 of Article 109, a new paragraph is added as follows:

- 6a. *Serious non-compliance with duties from paragraph 6 of this article includes cases where the prosecutor has been assessed with insufficient performance, or has been found to have unjustifiable wealth, or to have vulnerable integrity, or has committed serious disciplinary violations, as regulated by law.*

This draft amendment is essentially the same as the previous draft amendment with the only exception that this rule is intended to apply to prosecutors. As such, the findings given in the above paragraph may also apply to this draft constitutional amendment and for reasons of this nature will not be elaborated again in this part.

Taking into account the above-mentioned comments, the Venice Commission Opinion, and the legislation in force in Kosovo, it appears that Amendment No. 27 and 28 do not seem to be necessary for approval at this stage and as far as guarantees and legal provisions for performance evaluation, integrity, and unjust enrichment remain unchanged. There is a universally recognized rule in constitutional drafting that constitutional norms should be as general as possible, while their individualization is implemented through laws approved by the Assembly. Constitutions should not regulate in detail those matters which are regulated or can be regulated by laws. These proposed draft amendments contain more specific rules, which in many other jurisdictions/states mainly take the form of ordinary legislation implementing a constitutional norm rather than a specific constitutional rule. Moreover, if these proposed constitutional amendments were to proceed, then the dilemma would arise whether Article 118 of the Constitution of Kosovo, which provides for the same constitutional criteria for the dismissal of constitutional judges, should be amended: *"Judges of the Constitutional Court may be dismissed by the President of the Republic of Kosovo with the proposal of two thirds (2/3) of judges of the Constitutional Court, only for the commission of serious crimes or serious neglect of duties"*.

Amendment no. 29

After article 162, the following new articles are added:

Article 163

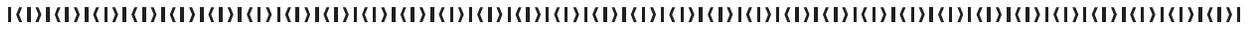
Integrity check

- 1 *Regardless of other provisions of this Constitution, the control of the integrity of the members of the Judicial Council of Kosovo, the members of the Prosecution Council of Kosovo, the presidents of all courts and all chief prosecutors, including the chief prosecutor of the Special Prosecution and the one of Appeal, as well as the candidates for these the position is made by the Integrity Control Authority.*
- 2 *The mandate of the Integrity Control Authority is two years from the election of all members of the Authority. The mandate of the Authority can be extended for a maximum of one (1) more year, if decided by law approved by 2/3 of the votes of all the deputies of the Assembly.*
- 3 *The integrity check, from paragraphs 1 and 2 of this Article, is done only once for the subject of assessment and includes the control of property and inappropriate influences that have occurred or may occur in the exercise of duties that violate the subject's integrity.*
- 4 *Complaint procedures against integrity control are not counted in the terms defined in paragraph 1 of this Article.*

Amendment proposal 29 has specified that the integrity check will be done to the members of the Judicial Council of Kosovo, the members of the Prosecution Council of Kosovo, the presidents of all courts and all chief prosecutors, including the chief prosecutor of the Special Prosecution and that of the Appeal, as well as the candidates for these positions.

These draft amendments follow the spirit of the Venice Commission Opinion para. 128 where, among other things, it is determined that *"constitutional changes should be taken into account only to support the control of the integrity of the members of the KJC and KPK, presidents of courts and chief prosecutors"*. Although the Commission has not provided other details, the conclusion that the constitutional amendments should focus only on the assessment of the





integrity of the heads of the judicial and prosecutorial system and that the establishment of institutional bodies (such as the Integrity Control Authority) to develop a such procedure should be done with constitutional instruments, that is, with constitutional amendments.

The Commission has not stopped to assess whether the Assembly of Kosovo will be able to fulfill its role of constitutional changes in the absence of broad political consensus or whether the non-majority communities in Kosovo will support draft constitutional changes for a partial veto of the judicial and prosecutorial system. These constitute political circumstances and of course such issues must be chosen with political means respecting the spirit of the Constitution of Kosovo.

This amendment addresses the suggestion of the Venice Commission for the temporary character of the ad hoc body (Integrity Control Authority), which ends after the end of the first verification period and where the verification process would then be transferred to the Judicial Council of Kosovo (KJK) and the Prosecution Council of Kosovo (KPK).

Since draft amendment no. 29 within the framework of Article 163.2 regulates the Integrity Control Authority, it would be more adequate in terms of the constitutional regulation technique for this paragraph to be moved to Article 163, which deals with the mandate of the Integrity Control Authority.

Also, it should be taken into account that the Constitution of Kosovo has a total of 162 articles, while the draft constitutional amendments have foreseen new additional articles after article 162, this article which is essentially the last article of the Constitution that regulates the entry into force of the Constitution of Kosovo. This rather important constitutional aspect must be analysed once again before the draft amendments are sent to the Constitutional Court of Kosovo for evaluation to assess whether another mode of constitutional regulation can be found in order not to change the nomenclature of the articles of the Constitution of Kosovo. In terms of legal technique, formulations such as "After article 161, the following new articles are added: 161 A..." to avoid situations of constitutional uncertainty regarding the reference of constitutional articles.

The composition of the "Integrity Control Authority" as well as the "College of Appeals" and the qualifying criteria

Article 164

Integrity Control Authority

- 1 *In order to carry out the integrity control process from Article 163, the Integrity Control Authority is established. The composition, selection, organization, function, powers and immunity of the Authority are regulated by law and in accordance with this Constitution*
- 2 *The Authority consists of evaluation panels and the Appeals College.*
- 3 *All members of the Authority exercise their responsibilities based on the principles of accountability, integrity and transparency in order to create an independent and professional justice system.*
- 4 *The members of the evaluation panels are eminent jurists of the highest integrity. The composition and other criteria are regulated by law.*
- 5 *The Appeals College decides on appeals against the decisions of the evaluation panel and on other issues defined by law. The members of the Appellate Panel are eminent jurists of the highest integrity. The composition and other criteria for members of the College are determined by law.*
- 6 *The Authority for Integrity Control is led by the President, who is elected from among the members, judges or prosecutors. The method of selection, mandate and authorizations are determined by law.*

The proposed article regulates in general constitutional terms the "Integrity Control Authority" as well as the "College of Appeals" as a second level body. This article does not specify what the composition of the evaluation panels is, what the number of these evaluation panels will be. For example, in the annex of the Constitution of Albania, it is defined that "The Independent Qualification Commission consists of four permanent judicial bodies with three members each".¹⁶

¹⁶ See the Constitution of Albania,





The proposed article only defines that *“the members of the evaluation panels are distinguished jurists, with the highest integrity”* but does not specify what the professional training of these members of the “Integrity Control Authority” and the “College of Appeals” should be as it does not establish any prohibition that candidates for members of these two bodies cannot be judges, prosecutors or legal advisers during the last two years before the candidacy. The wording that the members must be distinguished jurists and of high integrity should be quantified in the constitutional provision, e.g. according to Albania’s model, these members must have *“not less than 15 years of experience as a judge, prosecutor, law lecturer, lawyer, notary, high-level lawyer in the public administration, or in other legal professions related to the justice system”*.

This proposed constitutional article should also stipulate that *“candidates must not have held political positions in the public administration and leadership positions in political parties during the last 10 years prior to candidacy”*.

This constitutional ban would be in function of ensuring the independence and integrity of the Integrity Control Authority and the Appellate College during the exercise of their function. These constitutional determinations must be made with the Constitution, while other concretizations related to membership can be further detailed with legal provisions.

Another ambiguity seems to result in paragraph 6, where it is determined that *“The Authority for Integrity Control is led by the Chairman, who is elected from among the members, judges or prosecutors. The method of selection, his mandate and authorizations are determined by law”*. Since paragraph 1 of this article states that the composition of the “Integrity Control Authority” as well as the “College of Appeals” and their composition will be determined by law, it does not seem very clear whether the composition of this body will include judges and prosecutors, as it defines this paragraph. This issue should be defined more clearly within this proposed article.

Last but not least, this article should also contain a paragraph which would determine, among other things, that the members of the KIA and the CA will be obliged to sign a written statement, according to the law, to authorize the annual audit of their assets, the systematic monitoring of accounts and financial transactions, as well as special restrictions on the right to confidentiality of communications throughout their tenure in office,

and that their asset declarations will to be made public. This constitutional solution would further strengthen the independence and integrity of the integrity assessment bodies, as well as increase the legitimacy and transparency of this body. Therefore, it is very important that this determination is made with constitutional provisions and at the constitutional level.

Election and dismissal of members of the Authority for Integrity Control

Article 165

Election and dismissal of members of the Authority for Integrity Control

- 1 The Office of the President of Kosovo organizes the open and transparent process of recruiting members of the evaluation panels and the Appeals Board.
- 2 The procedure of recruitment and verification of members from paragraph 1 of this Article, including the possibility of cooperation with institutions, organizations or other international bodies or bodies in this process, are determined by law.
- 3 The members from paragraph 1 of this Article are voted in bloc and are elected with the votes of 2/3 of all deputies of the Assembly of the Republic of Kosovo.
- 4 The member of the Authority is dismissed after the proposal of the Appeals College with the votes of 2/3 of all the deputies of the Assembly. The procedure for dismissal is determined by law.

In case of dismissal of the member of the Authority, the procedure of recruitment, verification and election for the appointment of the new member is carried out, according to the procedure provided by this Constitution and by law.

It seems that this proposal follows to some extent the spirit of the Annex to the Constitution of Albania regarding the modalities of the election of the members of the Authority for Integrity Assessment.

In this context, it can be suggested that instead of “Office of the President” the term “President of the Republic of Kosovo”





should be used because the President is a constitutional authority and all preparatory actions for the collection and processing of applications must be processed by the President of the Republic. This is also due to the special constitutional function of the President of the Republic in guaranteeing the functioning of the constitutional bodies.

Although the Venice Commission has not provided many details regarding the content of these draft amendments, for the purposes of constitutional security it would be useful for this article to specify that interested candidates must present the applications and all accompanying statements to the President and upon completion of the application process, the President compiles a list of candidates who meet the formal criteria for each position and a list of candidates who do not meet the formal criteria.

It does not seem very clear in which context the term “verification” was put in paragraph 2 of the proposed article, since this article is entirely dedicated to the process of election and dismissal of KIA and CA members. Therefore, this issue must also be evaluated to ensure a consistent flow of constitutional norms.

Even paragraph 2 of the proposed article itself contains obvious ambiguities as it emphasizes “*the possibility of cooperation with institutions, organizations or other international bodies or with international composition*”. It does not seem very clear from a constitutional point of view what the “opportunity for cooperation” is and whether this will include monitoring the process, preliminary evaluation of candidacies before proceeding to the Assembly for approval or any other role. Of course, the idea of including an international body is shot only because it is very important that a more defined modality of this body be clarified with constitutional provisions. For this purpose, the experience of the Albanian Constitution can be followed, which has given this body a monitoring and recommending role in this whole process.

Although paragraph 3 stipulates that “*Members from paragraph 1 of this Article are voted in bloc and are elected with the votes of 2/3 of all deputies of the Assembly of the Republic of Kosovo*” it is not constitutionally clear whether the candidacies proposed by the President of the Republic will they are subjected to a filter by an ad hoc parliamentary committee before being processed for voting in the plenary session. The establishment of an ad hoc parliamentary commission for the purpose of reviewing and voting on candidacies for integrity assessment bodies is necessary, which would act as a mediating and filtering body until the materialization of the procedure in a plenary session.

In order to ensure the inclusion of the opposition in this process, it is recommended that this constitutional article contain rules related to the inclusion of the opposition in the composition of this Commission. This is the case with the Constitution of Albania, which has provided that “the Assembly creates within ten days two ad hoc selection commissions equally divided between the majority and the parliamentary minority”. For other issues of the decision-making process in this Commission, the Rules of Procedure of the Assembly of Kosovo can be applied analogously.

Representation of non-majority communities in KIA/KA

It seems that the draft amendment and the relevant articles have not addressed the issue of the inclusion of non-majority communities in this process, nor in terms of the procedure for the formation of the Integrity Assessment Authority/Appeals Panel. Article 108 of the Constitution of Kosovo, among other things, has determined that representatives of non-majority communities must also be part of the Council. For this purpose, the drafters of the constitutional amendments must take into account the requirements stemming from the Constitution of Kosovo as well as the evaluations that the Constitutional Court of Kosovo may have regarding the representation of non-majority communities in this mechanism. This multi-ethnicity is reflected in the Constitution of the Republic of Kosovo, as for example Article 1 states that the Republic of Kosovo is a state of its own citizens.

Article 166

Powers of the Integrity Control Panel

- 1 The Integrity Control Panel checks the integrity of those to whom the control is applied according to paragraph 1 of Article 163, according to the manner and procedure defined by law.
- 2 For the exercise of powers from paragraph 1, the Integrity Control Panel is based on the data provided by the control subject itself, those provided by public institutions and other data defined by law.





- 3 Depending on the result of the integrity check, the control panel confirms the passage of the integrity check for the subject from paragraph 1 of Article 163, or proposes dismissal or imposes the sanctions provided by law.
- 4 Regardless of Article 84 of this Constitution, in case of a proposal for dismissal from the Authority, the President of the Republic of Kosovo dismisses the entity that does not pass the integrity check, according to the procedure provided by this Constitution and by law.

It is clear from the reading of the proposed articles that the integrity control will include the control of the assets and the control of the image of the subject re-evaluated according to paragraph 1 of the proposed article 163. The purpose is that the subject of reevaluation must convincingly explain the legal source of assets and income. This article can be expanded further and define that *"legal assets are considered incomes that have been declared and for which tax obligations have been paid. Other elements of legal property are determined by law"*.

This article does not explain in more substantive terms the elements of integrity, while this becomes clearer in the sense of the proposed article 163 para. 3 that defines "control of wealth and inappropriate influences that have occurred or may occur in the exercise of duties that violate the integrity of the subject".

The wording *"improper influences"* does not seem sufficiently defined from a constitutional point of view. If the model of the Constitution of Albania is borrowed, then the emphasis here is placed on inappropriate contacts with persons involved in organized crime and in this regard the Albanian legislation has provided that *"the subjects of the reassessment submit a statement and undergo an image check, with aimed at identifying those who have inappropriate contacts with persons involved in organized crime"*.¹⁷ Moreover, if not by the Constitution, then it is very important that the Law defines the time frame within which the evaluation of the image control is done.

Money. 3 of the proposed article further stipulates that "The control panel confirms the passage of the integrity check for the subject from paragraph 1 of Article 163, or proposes dismissal or imposes the sanctions provided for by law".

Perhaps instead of the term "Panel" the proposed constitutional article should use the term "Integrity Control Authority" because the decisions are assumed to be taken by the Authority and on behalf of the Authority and not the Panels within it. Moreover, not only the Panel but also the Appeals College has the right to impose these measures on entities that fail to pass the integrity check. In fact, the decisions of the Panels are appealable to the Court of Appeal and its decisions are final and not subject to judicial review.

While this paragraph mentions "dismissal", it also refers to the imposition of other sanctions, which makes the constitutional modalities of the measure/sanction unclear. For the purposes of the constitutional definition, it is very important to specify which sanction we are talking about so that the constitutional rules precede the further legal specification and the entities that will be subject to the assessment know in advance the types of sanctions that can be imposed in this process. In the Republic of Albania, for example, it is foreseen that "the Commission or the Board of Appeal at the end of the examination of the case, decides the disciplinary measures, the suspension of the subject of the re-evaluation from duty for one year, accompanied by compulsory education, or his dismissal from duty".

The proposed constitutional amendment also raises dilemmas for two constitutional issues that require attention for treatment. The first issue is that if the Assembly of Kosovo approves the constitutional amendments according to Recommendation no. 5 of the Opinion of the Venice Commission, then the modalities established for the dismissal of judges according to Article 104 of the Constitution of Kosovo for the assessment entities that are subject to integrity control cease to apply. Based on this logic, the involvement of the President of the Republic in the procedure of dismissal of assessment subjects in the integrity control according to the proposed article is completely unstable and does not coincide with the exceptional character of the Integrity Control Authority. This is also the case with Albania, where the decisions of the Commission or the Appeal are final and are not subject to any other state authority, with the exception of referring the case to the European Court of Human Rights.

The second issue is that if the Assembly of Kosovo proceeds with the implementation of Recommendation no. 5 of the Opinion of the Venice Commission in the constitutional context, then the constitutional amendments should

¹⁷ Constitution of Albania, Annex Transitional reassessment of judges and prosecutors, article DH (image control).





clarify whether the dismissal of the evaluating subject by the Integrity Evaluation Authority and the Appeals College applies only to the management position within the institution involved in the integrity evaluation or even to the position of judge or prosecutor as a basic function. This is a very important aspect that requires clear definition in the constitutional amendment.

Article 168

Right of appeal to the Appeals College

- 1 *The subject of control has the right to appeal against the decision or proposal for dismissal of the Panel to the Appeals College, in the manner defined by law.*
- 2 *The decision of the Appeals College is final, takes effect immediately and cannot be appealed in the regular courts.*
- 3 *The right to appeal according to paragraph 1 of this Article does not exclude the application of Article 113, paragraph 7.*

Among other things, the proposed amendment does not allow the submission of an appeal against the decision of the Appeals College in cases of dismissal of the evaluated subjects. The Constitution of Kosovo in article 32 has defined that "every person has the right to use legal remedies against judicial and administrative decisions that violate his/her rights or interests in the manner defined by law" while article 54 has defined that "everyone enjoys the right to judicial protection in case of violation or denial of any right guaranteed by this Constitution or by law, as well as the right to effective legal remedies if it is established that such a right has been violated".

In the question of whether this proposed article constitutes a denial of the right to a legal remedy according to Article 32 of the Constitution of Kosovo, it can be noted that the ECHR has already built a broad scope of Article 13 of the ECHR regarding the right to effective legal remedies determining inter alia that the national authorities only need to ensure that there is a domestic legal remedy that allows the competent national authority to address the issue on its merits according to a complaint and to be able to make the appropriate correction.

In view of the proposed draft amendments, it results that the assessment subjects have the right to submit an appeal against the decisions of the Integrity Assessment Authority to the Appeals College as a second instance body. Moreover, the draft constitutional amendment guarantees the right to submit an individual complaint in accordance with Article 113 para. 7 of the Constitution of Kosovo, which constitutes an indisputable and effective legal tool according to the experience of the GJKK and the ECHR.

That the right to appeal against decisions in the second instance in vetting cases fulfills the requirements of Article 13 of the ECHR has been confirmed in the case of **Besnik Cani k. Albania (ECtHR decision)** where the applicant (*a former prosecutor dismissed by the Appellate Panel in vetting proceedings*) claimed, among other things, that he had no effective legal remedies before a national authority before which he could challenge his alleged dismissal of illegally by the Appeals Panel and thus argued that there was a violation of Article 13 of the Convention.

The respondent, the Government, referred to the case of **Xhoxhaj v. Albania** and submitted that the Appellate Panel had exercised its full jurisdiction in assessing all the factual and legal arguments presented by the appellant. The Albanian government had further argued that adding a third level of jurisdiction to the vetting procedures would have complicated and prolonged the process.

The ECtHR in relation to the claim of violation of effective legal remedies had argued that the Appeals College is the court of last resort in relation to the verification procedures, concluding that the complaint is clearly unfounded and should be rejected in accordance with Article 35 and 4 of the Convention. And found no violation of Article 13 of the ECHR.

Article 169

Constitutional amendments enter into force immediately after their approval in the Assembly of the Republic of Kosovo."

Article 169 proposed with proposed amendment 29 is unnecessary because this is already defined by Article 144 paragraph 4 of the Constitution. Therefore, this proposed article should be removed from the Commission because if an issue has been regulated by constitutional provisions, there is no need to address it again with a constitutional amendment.





CONCLUSIONS

- 1 As addressed above, draft constitutional amendments no. 27 and no. 28 aim to further break down the constitutional scope of "serious breach of duty" of judges and prosecutors. Since performance evaluation, unjustified wealth and inappropriate behavior are regulated by sectoral laws, it is not necessary to change the Constitution to address this goal.
- 2 Special attention should be paid to the numerical designation of draft constitutional amendments. The Constitution of Kosovo has a total of 162 articles, while the draft constitutional amendments have foreseen new additional articles after article 162, which constitutes the last article of the Constitution that regulates the entry into force of the Constitution of Kosovo.
- 3 Due to the limitations in the exercise of the constitutional rights of the assessment subjects, it is recommended to draft a new paragraph in the draft amendment 163 as follows *"The revaluation will be carried out on the basis of the principles of the regular process, as well as respecting the fundamental rights of the subject of the evaluation"*.
- 4 The draft constitutional amendments have not addressed the issue of the inclusion of non-majority communities in this process, nor in terms of the procedure for the formation of the Integrity Assessment Authority/Appeal College. It is recommended that upon the finalization of the draft amendments, adequate constitutional guarantees for the inclusion of non-majority communities in these bodies are offered.
- 5 The draft constitutional amendments have provided for the imposition of the measure of "dismissal" and other sanctions against entities that do not pass the integrity test. For the purposes of constitutional security, it is very important to specify which sanction is in question so that the constitutional rules precede further legal specification. For example, suspension for one year from the duty of the evaluating subject accompanied by 1 year training may be an option of such a measure.
- 6 The involvement of the President of the Republic in the procedure for the dismissal of assessment subjects in the integrity control according to the proposed article should be reviewed due to the special character of the Integrity Control Authority/College of Appeals and the change in the constitutional mechanism for the dismissal of assessment subjects.
- 7 Amendment 168 paragraph 3 that does not allow the filing of an appeal against the decision of the Appeals College in cases of dismissal of the evaluated subjects, with the exception of the referral to the Constitutional Court of Kosovo in accordance with article 113 paragraph. 7 of the Constitution of Kosovo is in accordance with the requirements of Article 13 of the ECHR and with the precedents already established by the European Court of Human Rights since the right to appeal to the Appeals College contains all the features of an effective legal remedy enabling the correction of an injustice of a procedural and material nature.
- 8 Article 169 proposed with proposed amendment 29 is unnecessary because this is already defined by Article 144 paragraph 4 of the Constitution. Therefore, this proposed article should be removed from the Commission because if an issue has been regulated by constitutional provisions, there is no need to address it again with a constitutional amendment.



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