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Rreze Hoxha Zhuja



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FIVE INTEGRAL QUESTIONS ABOUT THE VETTING PROCESS

By: Rreze Hoxha Zhuja – Research Fellow at Group for Legal and Political Studies

A comprehensive vetting process as a high quality reform in the rule of law sector is indispensable and has already been acknowledged. The vetting mechanism must be established as a matter of urgency. It is unarguable that its establishment will prove a positive step. Notwithstanding, one must not ignore the essence of what this complex mechanism aims to address and how it will do it.

Kosovo has the benefit of learning from the experiences of other countries. For instance, in 2017 Albania went through the biggest judicial reform as part of the European integration process and fight against corruption and organized crime. The aim of the reform was to secure independence of judges and prosecutors, and to abolish ties between criminal groups and the political elite. Although the process was perfectly designed in terms of legal bases and standards, the Albanian authors failed to envision some challenging aspects when designing the process. The main omission in Albania's vetting process was the failure to design it as a 'step by step' process. As a consequence, over the past few years, the judicial system has been paralyzed and corruption and organized crime have been flourishing. Second, due to eligibility criteria and work experience requirements -such as for the Constitutional Court, the Supreme Court or the Inspector of Justice - the number of candidates who meet them is limited. Hence, these positions are still vacant since 2017. Moreover, Albania has been heavily criticized for offering a 'free pass' to all judges or prosecutors that resigned in time, escaping *de facto* from the vetting process. No criminal procedures were undertaken against them. For this reason, Kosovo's legal framework establishing the vetting mechanism should not be silent on the matter.

It should not be expected that Kosovo will be an exception if we don't pay attention to such details. Creating a new mechanism or applying a "vetting" reform is not sufficient to miraculously rid the judicial system of corruption and increase its efficiency. What can indeed be ensured is that vetting, as a stand-alone mechanism, will push reform effectiveness by ensuring certain criteria are abided.

Thus, what needs to be discussed is:

1. The categories of personnel who should undergo vetting;
2. The aspects that must be vetted and sources of information;
3. The establishment of the vetting mechanism;
4. The composition of the vetting mechanism;
5. The outcome of the vetting process.

This Espresso Note briefly discusses these five issues.

The categories of personnel who should undergo vetting

One way is by including all institutions which fall under the category of the rule of law sector. For example, Albania's vetting process was a thorough reform, including Albanian judges (i.e. Constitutional Court and High Court), Albanian prosecutors (including the General Prosecutor the Chief Inspector and all inspectors of the High Council of Judges), legal advisers of the Constitutional Court and of the High Court, legal advisers of the administrative courts and of the Prosecution General Office and former judges, if requested. On another example, Bosnia and Herzegovina (BiH) undertook a reappointment process in order to vet judges and prosecutors, and managed to restructure the court system entirely. In both countries judges and prosecutors

were removed from their positions as a result of this process. [By the end of August 2019, about 189 assesses had undergone the evaluation process in Albania, 69 of which were dismissed and 38 resigned.](#) In BiH, the process resulted in the removal of war criminals from their positions.

As stated above, the Government of Kosovo must learn from Albania's example – for instance by specifically providing that those refusing to undergo vetting or fulfill requested procedures will be prosecuted thereafter. Having in mind the experience of other countries, the vetting process in Kosovo should be designed to be all-inclusive. This includes: judges of the Constitutional Court, the Heads and members of the Kosovo Judicial Council (KJC) and Kosovo Prosecutorial Council (KPC), other judges and prosecutors, including the Chief State Prosecutor, legal advisers of the Constitutional Court and regular courts, legal advisers of all prosecution offices, and anyone else who intends to join the system. This process should also be applied to the Tax Administration Office, Customs, Kosovo Intelligence Agency and Kosovo Police as well.

At a first stance, the judges of the Constitutional Court, the Heads and members of the KJC and KPC must be vetted. In addition, anyone applying to become a judge or prosecutor (including the judges of the Constitutional Court), member of the KPC and KJC, or applying for a transfer, promotion or legal adviser position in the institutions mentioned above. At a second stance, all judges and prosecutors against whom a party has initiated a disciplinary complaint. At a third stance, all judges and prosecutors against whom disciplinary measures have not been initiated, and the legal advisors starting from KJC and KPC and continuing with courts and prosecution offices. Whoever refuses to be subject to vetting should be dismissed or not considered for appointment. Moreover, such an action should lay the foundation for a criminal investigation against these individuals. Hence, in order to be successful, it should have a large scope, and include managerial and professional positions.

The aspects that must be vetted and sources of information

A way to approach the evaluation process is by grouping it in three components: 1) asset assessment, 2) background assessment, and 3) proficiency assessment.

In Albania, the first component includes an overall audit of assets, following a legitimacy declaration of their source. All those subject to vetting must be able to justify assets based on legitimate sources. If the declared wealth is bigger than legitimate income, the individual is dismissed from office. The second component includes a background assessment which consists on the verification of the individuals' linkage to those involved in organized crime. If such links are proven they are dismissed from office. The third component includes a proficiency assessment evaluating judgments or investigative skills, organizational skills, ethics and personal qualities. Those evaluated as inadequate are dismissed from duty. Such measures have proved effective and Kosovo should follow.

We consider that a reform addressing the malfunctioning of the justice system, or in other words a Vetting process, is one that reviews the ethical integrity, professional standing and impartiality, wealth and assets of judges and prosecutors and other professionals.

Ethical integrity covers ethical rules of conduct and compliance with legislation governing the conduct of judges, such as the laws on KJC and KPC, laws on the judiciary, clauses on conflict of interest of the procedural laws, laws relating to the status of judge and prosecutor including those regulating remuneration, privileges, and transparency of incomes. *Background and qualifications* includes the expertise of those being vetted reflected in their official documents when deciding on cases, and their logical skills being thorough and sound. *Disparities in wealth and assets* include thorough check-ups of those vetted and their potential linkage with criminal groups and partisan communities who, in principle, intend to interfere with the fair administration of justice. Whoever would fall in contradiction with the incompatibility clauses

would be dismissed or not appointed. Only this way can one ensure the system is fundamentally changed.

Secondly, a thorough discussion needs to take place on the sources of information on which the vetting mechanism relies for evaluation. In order for such a decision to be relevant and legally binding, the sources of information must be trustworthy. Will the existing mechanisms be used or should new mechanisms be created, one should ask. The Anti-Corruption Agency is currently mandated to combat and prevent corruption, especially in the area of reporting, detecting and investigating corruption. More specifically, the Agency is the place where all senior public officials (including judges and prosecutors) are obliged to declare their property, revenues and obligations. Nevertheless, the Agency is known to have failed its mission considering the widespread corruption in the country. On the other hand, the KJC and KPC are mandated to measure the performance of judges and prosecutors, as well as undertake disciplinary procedures against them. Here as well, both councils fail to perform their duties accordingly considering that the majority of judges and prosecutor pass the evaluation processes and are not disciplined, when required. It is thus up to the government to decide the credible institutions presenting the sources of information to be vetted.

The establishment of the vetting mechanism

In order to have a reform that reviews the fundamental aspects of integrity of judges and prosecutors, and dismisses those incompatible with their status, it is highly recommended that the Vetting mechanism be established through a constitutional amendment. Ways of doing it is can include amending the articles of the Constitution which define the role and competences of the KJC and KPC, approving a number of laws, including the Vetting Law, and also consulting the Venice Commission. In Kosovo's case, a double majority is required to amend the Constitution, which represents quite a challenge in light of the domestic political context. On the other hand, albeit a less desirable option but if the above is not possible, a vetting process may be established by legislative changes which are easier to adopt. Whatever the form, the reform must ensure the review of integrity and professional standing of judges and prosecutors.

The composition of the vetting mechanism

How can we ensure that those vetting have unquestionable ethical integrity, high professional standing and are in no way linked to malpractices and political elite? One way is by establishing the first instance commission and the second instance commission. As is the case in Albania, both must be monitored by an International Monitoring Operation, composed of judges and prosecutors from EU Member States. The institutions' personnel should, in turn, be selected according to clearly-defined criteria by law, which will guarantee objectivity and impartiality. They should have no ties to political parties or organized crime, and should be of proven professional integrity, ethics, and public trust. It is important to ensure that Kosovo creates a sustainable institutional mechanism able to allow enforcement bodies to be professional and independent.

Albanian law foresees that the individual should fulfill the criteria of not being someone who has been member, collaborator nor favored by the State Security services before 1990. Most importantly, Albanian law foresees that although these two special mechanisms conduct the evaluation, the Appeal Chamber will be the last deciding instance to provide the final verdict. If an individual thinks that their individual rights were violated during the process, the Constitution of Albania guarantees their right to address the European Court of Human Rights (ECtHR), acknowledging that the second instance decision is final. Provided that Kosovars can't

file a complaint in ECtHR, a solution must be found in such regard, so that the fundamental rights of those that are being vetted are safeguarded

The outcome of the vetting process

Improving the performance of the rule of law sector in Kosovo by ensuring integrity, impartiality and efficiency in the judicial, prosecutorial and security system should be the ultimate goal of the vetting process. This will, in turn, result with an increased public trust in the justice sector, which currently is at concerning levels. How can we ensure a sustainable and permanent mechanism which will ensure the integrity of institutions? A thorough discussion must take place on the role of the KJC, KPC, and the Anti-Corruption Agency, on the vetting mechanism. The latter is a crucial part of the process, which we will address in a separate, forthcoming note.

Considering these five integral questions about the Vetting process, it remains to be seen how the new Government will approach this task and whether it will uphold its promises to fight corruption and organized crime in the country.

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