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Commission Opinion on the  
draft amendments to the  
Law on the Prosecutorial  
Council of Kosovo?

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## HOW TO READ THE VENICE COMMISSION OPINION ON THE DRAFT AMENDMENTS TO THE LAW ON THE PROSECUTORIAL COUNCIL OF KOSOVO?

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For one thing we should all agree: *The prosecutorial system in Kosovo strongly lacks professionalism and integrity.* It has been a systematic priority of all governments to improve its efficiency, however, results remain vague despite numerous reforms undertaken. The latest reform includes the ‘*Functional Review of the Rule of Law Sector*’, which resulted with a national Strategy for the Rule of Law, adopted this summer. The Strategy puts, as its first strategic objective, the strengthening of the judicial and prosecutorial system. Its action plan foresees that both, Kosovo Judicial (KJC) and Kosovo Prosecutorial Council (KPC) will undergo fundamental changes that aim to strengthen the composition of both councils with the active participation of non-judge and non-prosecutor members, and with due regard to gender and ethnic equality. More specifically, the strategy enumerates as its first action the amendment of the law on the KJC so that one of its member’s that is elected by the parliament should come from the Bar Association, whom must be compensated as well. On the other hand, it also recommends for several amendments to the law on the KPC with the main goal to reduce the number of prosecutorial members serving in the council. Considering that the composition and the membership of KJC is entrenched in the Constitution, and that of KPC is not, the Ministry of Justice has already presented a draft on the amendment of the law on KPC to achieve these changes required. The draft has been sent to the Venice Commission for an Opinion. Prior to discussing this [Opinion](#), one must explain that the draft law foresees two core amendments:

1) Downsizing the number of KPC members from 13 to 7 members, including the removal of the Chief Prosecutor form the KPC membership, and the appointment procedures, and,

2) Dismissal of the current members and their immediate replacement.

With the existing law, out of 13 members currently appointed, 9 are selected by the prosecutors themselves (one from each basic prosecution, one from the appellate prosecution, and the last one from the special prosecution), 3 are voted by the parliament (one form civil society, one from the academia and one from the Bar Association), and the 13<sup>th</sup> being the Chief State Prosecutor who’s mandate is given by law.

Apart from reducing the number of KPC members, there are fundamental changes proposed to the selection process of new members as well. More specifically, with the new amendments proposed, out of 7 members, 4 will be voted by the parliament, amongst which 3 have non-prosecutorial background and one 1 of them will be a prosecutor. The remaining 3 members will be selected by an Electoral Commission (EC), including 1 non-prosecutorial member, 1 from the Office of the Chief State Prosecutor, and 1 member from the KPC Secretariat. And as stated above, the Chief State Prosecutor is proposed to be excluded from the council.

The second proposal foresees that with the approval of this law and the appointment of the first 4 members from the simple majority in the parliament, the mandate of all 13 existing members will seize immediately, regardless that some of them just started their mandate. Meanwhile, until the last 3 members coming from the system are elected, the other 4 will have the same power as the full KPC.

Reading between the proposals, one could say that they represent a tough reform and maybe not a very well thought one. The proposed appointment procedure risks creating a politicized prosecutorial system which responds to the ruling majority in addressing the flaws of the current system, namely, a system which functions in the culture of corporatism. Now, let's be clear on one thing: *no one is trying to argue against the need for a fundamental reform at the KPC level. But, is this the right way?*

In this note, two points will be addressed in light of the Venice Commission Opinion on the draft amendments to the law:

1. Is the appointment procedure of the KPC members providing too much power to the ruling majority in the parliament?
2. Would the dismissal of current members and their replacement endanger legal certainty in the country?

As stated above, currently, the majority of the KPC members come from the system itself. The decision-making power relies on them. The new proposal is changing that! Although among 7 members, only 3 members will not be prosecutors, and 4 will; out of 4, only 3 will come from the system and the 4<sup>th</sup> although a prosecutor-will be voted in the parliament. Having said that, one can conclude that this member is not coming from the system, and as the Venice Commission referred to it, he/she represents a "lay member" which is contrary to the "prosecutorial" members elected by their peers.

Now, going back to their previous opinions where in question was the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, [the Venice Commission emphasized](#) that in order to ensure that prosecutors are protected from political interference, the prosecutorial council composition must be selected by their peers and they should represent a "substantive part" of the council, reinstating that a majority is not always necessary. Nevertheless, the opinion underlined the necessity to avoid politicization, considering that such politicization was foreseen to be the situation in the case of Bosnia. Yet again, the necessity to avoid corporatism (how the Venice Commission referred to how the KPC functioned so far) was recognized as valid. So the discussion was focused on proposing solutions to address such a situation in a small and very politically polarized society. The solution offered was that the composition of the KPC should be "pluralistic enough" that no one can govern alone. And to picture the way to do it, the Venice Commission offered some examples explored by them on the context of other countries which we will present below.

- One example explored the possibility where the members coming from the parliament must be elected by a qualified majority; In Kosovo's case, out of 7, 3 might come directly from the system, 4 might come from a qualified majority vote at the parliament, where one of them would be a prosecutor.
- Another possibility given is for some of the members coming from the parliament to be elected by the opposition parties. In Kosovo's case, out of 7, 3 to be selected by their peers, from the ruling party, and 2 from the opposition.
- The final example explored the possibility to reserve seats to representatives of external independent institutions such as Bar Association, the Ombudsperson, civil society, etc.

Yet, all these options have their flaws which for sure will become a problem in Kosovo's society. Nevertheless, as per the Venice Commission's Opinion, it's better to have a pluralistic flawed prosecutorial system which ensures the counterbalance of the members than a council

composed with members who are loyal to the ruling majority, or one dominated by prosecutors which risks corporatism.

In conclusion, downsizing the number of members is considered to be in accordance with the European standards considering that a balance among lay members and prosecutors is secured. Nevertheless, the Ministry of Justice must ensure that the KPC will not be subject to the undue political influence of the ruling majority. This can be avoided through a proportional election system which would ensure that KPC is sufficiently pluralistic, by providing the opposition with an increased role in the election process

As for the proposal to exclude the Chief State Prosecutor from the council, the Venice Commission proposes that he continues to serve in the council, but with much less competences, namely not having the right to cast a vote. Moreover, they advised that in order to balance the influence of the executive and the influence of the prosecutorial community within KPC, the Minister of Justice may also participate without the right to vote as well. To conclude on this point, the Commission found that the overlapping competences between the Chief State Prosecutor and the KPC should be clarified in order to avoid conflicts in the future.

With regards to dismissal procedures, the Venice Commission considers that the early dismissal of the current members cannot be based only on the disapproval of the parliamentary majority, and the security of tenure should be respected. The Commission refers to an opinion on Montenegro and explains that even if the prosecutorial council is reformed, it should not be allowed to completely renew its composition following each parliamentary elections, whenever the government changes. But, there are always exceptions. One might involve the introduction of new ineligibility criteria which would directly affect the ones which do not correspond to them. Second, if the method of appointing lay members changes from simple to qualified majority, the replacement would be acceptable, considering this would be a higher assurance of protecting the council from being politicized. Moreover, they recommended that 3 out of 10 current prosecutorial members might continue to serve their mandate just for the sake of respecting the issue of security of tenure and provide the possibility to the newly composed KPC to start functioning shortly. As a result, the Venice Commission felt that such a change would only be acceptable if it leads to a significant improvement of the overall system. According to them, the current composition should remain and the members should be allowed to serve their mandate. But if that is to change, the Ministry of Justice should demonstrate how *“their replacement serves a vital public interest and leads to the overall improvement in the system”* – in particular, its depoliticization.

In conclusion, it seems like the proposed amendments discussed above were not well justified. Although, one can easily find such conclusion confusing considering that [Kosovo is continuously evaluated to have an overall slow, inefficient judicial system, and vulnerable to undue political influence](#). Yet again, such proposed changes can only be pushed forward if they are to lead to a significant improvement of the overall system. And yes, although the Ministry's approach was unilateral, no one can argue against the tremendous need of changes at the KPC. Moreover, the changes must happen now and must be in line with the Venice Commission recommendations.

### **What now?**

First, the Ministry of Justice must focus on justifying the proposed changes regarding the dismissal of members, in order to pass the Venice Commission test composed of two elements: 1) does it serve a vital public interest and, 2) will it lead to the overall improvement of the system.

The main justification should involve all arguments reflecting the inefficiency of the current KPC members, such as: a) appraisal performance of prosecutors, and b) lack of disciplinary measures against prosecutors. Out of 13 current members, 10 of them are prosecutors who compose the disciplinary panels and the panels who measure the performance of each prosecutor in the country. Considering that [Kosovo's justice system is considered slow, inefficient and vulnerable to undue political influence](#) and, on the other hand, the number of dismissed prosecutors and those which have not passed the performance test is almost inexistent, provides sufficient evidence to support the argument that the KPC functions in the culture of corporatism and the current composition should change. Having an efficient and independent judicial system is a *vital public interest* which has for years been denied to Kosovo's people.

Second, the dismissal of the majority of the current members coming from the system is a reform which is urgently needed in order to *lead to the overall improvement in the system*. If the current composition is allowed to remain and serve their full mandate, KPC risks continuing to function on the basis of corporatism culture. Hence, the Ministry should introduce strong ineligibility criteria which would ensure the political neutrality of the system. And, as stated in the Venice Commission's opinion, at least 3 prosecutorial members must continue to serve their mandate as for the other 7 to be dismissed.

Third, in order to justify the new composition of the KPC, as per the Venice Commission's Opinion, the Ministry should ensure that the lay members represent a qualified majority and not the ruling majority. This test would be satisfied by creating a proportional system where opposition parties have a say on the election and appointment procedures of the lay members. Their involvement would ensure that the risk of politicisation would be avoided. This has been the main fear of the proposed amendments and as such it can be address to avoid any subordination of the KPC to the ruling majority.

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