REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 25 January 2024
Ref. no.: AGJ 2319/24

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JUDGMENT

in

case no. KO55/23

Applicant

President of the Assembly of the Republic of Kosovo

Assessment of the proposed constitutional amendments, referred by the President of the Assembly of the Republic of Kosovo on 2 March 2023, by letter no. 08/3509/Do/1493/1

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge
Nexhmi Rexhepi, Judge, and
Enver Peci, Judge

Applicant

1. The President of the Assembly of the Republic of Kosovo (hereinafter: the Applicant) by letter [no. 08/3509/Do/1493/1], referred to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) the constitutional amendments proposed by forty (40) deputies of the Assembly of the Republic of Kosovo.

Subject matter

2. The subject matter of the Referral is the assessment of the draft amendments, whether the latter reduce/diminish any of the rights or freedoms guaranteed in Chapter II [Fundamental Rights and Freedoms] of the Constitution.

3. The content of the draft constitutional amendments is as follows:

"I

Amendment no. 27

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

4a. Serious failure to adhere the duties from paragraph 4 of this article includes cases where the judge has been continuously evaluated with insufficient performance or has been proven to have unjustifiable assets or to have vulnerable integrity or has committed serious disciplinary violations, as defined by the Law.

II
Amendment no. 28

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

6a. Serious failure to adhere the duties from paragraph 6 of this article includes cases where the prosecutor has been continuously evaluated with insufficient performance or has been proven to have unjustifiable assets or to have vulnerable integrity or has committed serious disciplinary violations, as defined by the Law.

III
Amendment no. 29

The following new paragraphs are added after Article 161:
Article 161A
Integrity control

1. Notwithstanding other provisions of this Constitution, the control of the integrity of the members of the Kosovo Judicial Council, the members of the Kosovo Prosecutorial Council, the presidents of all courts and all chief prosecutors, as well as the candidates for these positions, excluding the president of the Constitutional Court, is done by the Integrity Control Authority.
2. The term of office of the Integrity Control Authority is two (2) years from the election of all members of the Authority. The term of office of the Authority can be extended for a maximum of one (1) more year, if it is decided by a law adopted by 2/3 of the votes of all the MPs of the Assembly.
3. Integrity control for paragraph 1 of this article, shall be done only once for the subject of control, and shall include the assets control, as defined by this Law.
4. Complaint procedures against integrity control are not counted in the terms defined in paragraph 2 of this article.

Article 161B
Integrity Control Authority

1. The Integrity Control Authority shall be established for the purpose of the integrity control. Composition, selection, organization, functioning, powers and immunity of the Authority in question are defined by law and in accordance with this Constitution.
2. The Authority is composed of control panels and the Appeals College.
3. All members of the Authority shall exercise their responsibilities based on the principles of accountability, integrity and transparency.
4. The members of the control panels are eminent lawyers, with the highest integrity. The composition and other criteria shall be determined by law.
5. The Appeals College shall decide on appeals against the decision of the control panel and on other issues defined by law. The members of the Appeals College are distinguished jurists of the highest integrity. The composition and other criteria for members of the Panel are established by law.
6. The Authority is chaired by the chairperson, elected from among the members of the Appeals College. The method of selection, the mandate and powers of the chairperson shall be determined by law.

Article 161C
Election and dismissal of the members of the Integrity Control Authority

1. The President of the Republic of Kosovo shall organize an open and transparent process for the election of the members of the Authority from Article 161B.
2. The election process from paragraph 1 of this Article, which also includes the control of integrity and assets, as well as the possibilities for cooperation with other international institutions, organizations or bodies in this process, shall be determined by law.
3. The members of the Authority are voted in block and elected with the 2/3 of the votes of all MPs 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 2/3 of the votes of all MPs of the Assembly. The dismissal procedure shall be determined by law.
5. In case of termination of the term of office of the member of the Authority, the election process for the appointment of the new member shall be carried out according to the procedure defined by this Constitution and by law.

Article 161D
Powers of the Integrity Control Panel

1. Integrity control Panel shall perform checks the integrity of the control subjects from paragraph 1 of Article 161A, according to the manner and procedure defined by law.
2. For the exercise the powers from paragraph 1, the Integrity Control Panel is based on the data provided by the subject of control itself, data from public institutions and other subjects defined by law.
3. Depending on the result of the integrity control, the Integrity Control Panel shall confirm on the passing of the integrity control for the subject from paragraph 1 of Article 161A, or shall propose the dismissal as defined by law.
4. Notwithstanding Article 84 of this Constitution, in case of a proposal for dismissal by the Authority, the President of the Republic of Kosovo shall dismiss from the

position of the judge or of the prosecutor, the subject who does not pass the integrity control, according to the procedure established by this Constitution and by law.

Article 161E
Obligation of the subject of control for cooperation

1. The subject of control shall submit a formal statement, defined by law, to the Authority at the beginning of the integrity control, stating the data that enables the control of the integrity of the subject.
2. In case of refusal to submit the complete statement from paragraph 1, the Panel shall propose the dismissal of the subject of control.

Article 161F
Right to appeal to the Appeals College

1. The subject of control shall have the right to appeal against the decision or proposal of the Panel for dismissal, in the Appeals College, in the manner defined by law.
2. The decision of the Appeals College is final, enters into force immediately and cannot be appealed to the regular courts.
3. The right to appeal, according to paragraph 1 of this article, does not exclude the implementation of Article 113, paragraph 7 of this Constitution."

Legal basis

4. The Referral is based on paragraph 3 of article 113 [Jurisdiction and Authorized Parties] and paragraph 3 of article 144 [Amendments] of the Constitution, article 20 and article 54 of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law), and Rule 76 (Referral Pursuant to Paragraph 9 of Article 113 of the Constitution and article 54 of the Law) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

5. On 7 July 2023, the Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2023, were published in the Official Gazette of the Republic of Kosovo and entered into force fifteen (15) days after their publication. Consequently, during the examination of the Referral, the Constitutional Court refers to the provisions of the aforementioned Rules of Procedure. In this regard, in accordance with Rule 78 (Transitional Provisions) of the Rules of Procedure No. 01/2023, exceptionally, certain provisions of the Rules of Procedure No. 01/2018, will continue to be applied in cases registered in the Court before its abrogation, only if and to the extent that they are more favourable for the parties.

Proceedings before the Court

6. On 2 March 2023, the Applicant by letter [No. 08/3509/Do/1493/1], referred the proposed constitutional amendments no. 27, no. 28 and no. 29 to the Court for a prior assessment by the Court, if the latter reduce/diminish any of the rights or freedoms set forth in Chapter II of the Constitution.

7. On 3 March 2023, the President of the Court by Decisions [GJR. KO55/23] and [KSH. KO55/23] appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and Review

Panel, composed of Judges: Bajram Ljatifi (Presiding), Safet Hoxha and Remzije Istrefi-Peci.

8. On 7 March 2023, the Court notified the Applicant about the registration of the Referral. In addition, the Court requested the Applicant to provide a copy of this notification to each deputy of the Assembly of the Republic of Kosovo (hereinafter: the Assembly), in order to give them the opportunity to present their comments, if they have any, to the Court with respect to the Referral of the Applicant, by 22 March 2023.

9. On the same date, a copy of the Referral was sent to: (i) the President of the Republic of Kosovo; (ii) Prime Minister of the Republic of Kosovo; (iii) the Ombudsperson; (iv) the Minister of Justice of the Republic of Kosovo (hereinafter: the Minister of Justice); (v) the Chairperson of the Kosovo Judicial Council and (vi) the Chairperson of the Prosecutorial Council of the Republic of Kosovo, providing therein the opportunity to submit their comments to the Applicant's Referral, by 22 March 2023. The Court requested the Secretary General of the Assembly to submit by 22 March 2023, the relevant working documentsof the "*Assembly ad hoc Committee for Vetting in the Justice System*", which is related to the draft constitutional amendments, as well as all relevant documents and information related to the Referral.

10. On 17 March 2023, the Secretary General of the Assembly submitted to the Court the transcripts of the meetings of the Assembly *ad hoc* Committee on Vetting in the Justice System, which included the transcripts of the meetings of this committee, held on 20 December 2022, 27 December 2022, 21 February 2023 and 24 February 2023.

11. On 22 March 2023, the Ministry of Justice, the Judicial Council of the Republic of Kosovo (hereinafter: the KJC) as well as the Prosecutorial Council of the Republic of Kosovo (hereinafter: the KPC) submitted their comments to the Court regarding the Referral. On the same date, the deputy of the Assembly, Mr. Abelard Tahiri from the parliamentary group of the Democratic Party of Kosovo (hereinafter: Mr. Abelard Tahiri, deputy of the Assembly), submitted to the Court a request to extend the deadline for ten (10) additional days to present his comments regarding the Referral.

12. On 24 March 2023, the Court notified the deputy of the Assembly, Mr. Abelard Tahiri, that his request to extend the deadline for submission of comments has been approved, giving him the opportunity to submit his comments regarding the Referral to the Court until 3 April 2023.

13. On 3 April 2023, the deputy of the Assembly, Mr. Abelard Tahiri, submitted his comments to the Court.

14. On 5 April 2023, the Court notified the Applicant about the receipt of comments from (i) the Ministry of Justice; (ii) KPC; (iii) KJC; and (iv) the deputy of the Assembly Mr. Abelard Tahiri. The Court requested the Applicant to deliver a copy of these comments to each deputy of the Assembly, in order to give them the opportunity to submit their comments to the Court, if any, by 19 April 2023. On the same date, the Court notified: (i) the President of the Republic of Kosovo; (ii) the Prime Minister of the Republic of Kosovo; (iii) the Ombudsperson; (iv) the Minister of Justice; (v) the Chairperson of KPC; and (vi) the Chairperson of KJC, about the receipt of comments, giving them the opportunity to submit their comments to the comments of (i) the Ministry of Justice; (ii) KPC; (iii) KJC and (iv) the deputy of the Assembly, Mr. Abelard Tahiri, by 19 April 2023.

15. On 19 April 2023, the Office of the President of the Republic of Kosovo (hereinafter: the Office of the President) submitted to the Court a request to extend the deadline for seven (7) additional days, respectively until 26 April 2023, to submit her comments regarding the Referral.

16. On 20 April 2023, the Court notified the Office of the President that her request for extension of the deadline had been approved by the Court, and therefore, her comments on the Referral could be submitted to the Court until 26 April 2023.

17. On 19 April 2023, the Ministry of Justice submitted to the Court answers to the comments of (i) KPC; (ii) KJC and comments submitted by (iii) the deputy of the Assembly, Mr. Abelard Tahiri. On the same day, the KJC submitted to the Court a response to the comments of (i) the Ministry of Justice; (ii) KPC, as well as the comments of (iii) the deputy, Mr. Abelard Tahiri.

18. On 25 April 2023, the Office of the President submitted to the Court her comments regarding the case.

19. On 8 May 2023, the Court notified (i) the President of the Republic of Kosovo; (ii) the Prime Minister of the Republic of Kosovo; (iii) the Ombudsperson; (iv) the Minister of Justice; (v) the Chairperson of KPC; (vi) the Chairperson of KJC, about the receipt of the responses to the comments submitted by the Ministry of Justice and the KJC.

20. On the same date, the Court notified the Applicant about the receipt of the responses regarding the comments of the parties and asked him to distribute a copy of the responses to the comments to all the deputies of the Assembly. At the same time, the Court requested the Applicant "*to submit all the materials and documentation which the ad hoc Committee for Vetting in the Justice System made use of during the drafting of the proposed amendments*."

21. On 15 May 2023, the Secretariat of the Assembly submitted the following documents to the Court:

> (i) The letter of the Ministry of Justice addressed to the President of the Assembly for the submission of the Vetting file;
> (ii) The explanatory document of the Ministry of Justice regarding the Vetting process;
> (iii) Decisions of the Ministry of Justice on the establishment of working groups for the Vetting in the Justice System;
> (iv) Concept Paper on the Vetting, drafted by the Ministry of Justice;
> (v) Opinion no. CDL-AD(2022)011 related to the Concept-Paper on the Vetting of judges and prosecutors and the draft amendments, approved by the European Commission for Democracy through Law (hereinafter: the Venice Commission) at its 131st meeting plenary, 17-18 June 2022;
> (vi) Constitutional draft-amendments;
> (vii) Policy document from the Functional Review entitled "*Improving the integrity of judges and prosecutors*;
> (viii) The document entitled "*Modality and scenarios for issues of reform in the justice system"*.

22. On 28 September 2023, the Court reviewed the Applicant's Referral and unanimously decided that the Referral is admissible.

23. On 24 November 2023, the Court reviewed the report of the Judge Rapporteur and unanimously decided to postpone the review of the Referral for a next session after additional supplementations.

24. On 22 December 2023, the Court, unanimously, decided to declare the referral admissible, and found: (i) unanimously, that the proposed constitutional amendments no. 27 and no. 28, proposing the supplementation of the constitutional criterion for the dismissal of judges and prosecutors due to "*serious neglect of duties*", as stipulated by paragraph 4 of article 104 [Appointment and Removal of Judges] and paragraph 6 of article 109 [State Prosecutor] of the Constitution, with the wording "*has been continuously evaluated with insufficient performance*" or "*has committed serious disciplinary violations",* do not diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution; (ii) unanimously, that the proposed constitutional amendments no. 27 and no. 28, proposing the supplementation of the constitutional criterion for the dismissal of judges and prosecutors due to "*serious neglect of duties*", as stipulated by paragraph 4 of article 104 [Appointment and Removal of Judges] and paragraph 6 of article 109 [State Prosecutor] of the Constitution, with the wording "*has been proven to have unjustifiable assets*", established by a final court decision, do not diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution; (iii) unanimously, that the proposed constitutional amendments no. 27 and no. 28, proposing the supplementation of the constitutional criterion for the dismissal of judges and prosecutors due to "*serious neglect of duties*", as stipulated by paragraph 4 of article 104 [Appointment and Removal of Judges] and paragraph 6 of article 109 [State Prosecutor] of the Constitution, with the wording "*has vulnerable integrity*", diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution, whereas (iv) by six (6) votes for and two (2) votes against, that the proposed constitutional amendment no. 29, proposing the transitory/provisional control of the integrity of "*[…] the members of the Kosovo Judicial Council, the members of the Kosovo Prosecutorial Council, the presidents of all courts and all chief prosecutors, as well as the candidates for these positions […]",* by the Integrity Control Authority (Authority), does not diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution.

25. In accordance with rules 56 (Dissenting Opinions) and 57 (Concurring Opinions) of the Rules of Procedure of the Court, Judge Radomir Laban has prepared a dissenting opinion, while Judge Remzije Istrefi-Peci has prepared a concurring opinion, which will be published together with this judgment.

Summary of facts

26. On 11 August 2021, the Government of the Republic of Kosovo (hereinafter: the Government) by its Decision [Decision no. 04/24] approved the *"Rule of Law Strategy"* for 2021-2026. This Strategy defined four (4) objectives through which it was intended to strengthen: (i) the judicial and prosecutorial system of the Republic of Kosovo; (ii) criminal justice; (iii) access to justice and (iv) fighting corruption.

27. On 13 October 2021, the Government by Decision [no. 01/39] approved the "*Concept-paper on the development of the Vetting process in the justice system*" (hereinafter: Concept-paper on Vetting). By the same decision, the Government obliged the Ministry of Justice

and other competent institutions to implement this Decision, in accordance with the Government's Rule of Procedure and the conclusions presented in the Concept-paper on Vetting.

28. On 25 October 2021, the Minister of Justice addressed the Venice Commission with the request for the provision of an Opinion regarding the Concept paper on Vetting. The Venice Commission registered the request for the aforementioned opinion submitted by the Minister of Justice under number CDL-REF (2022) 005.

29. The Concept-Paper approved by the Government and submitted for opinion to the Venice Commission contained, among other: (i) a presentation of international standards; (ii) comparative analysis of international practice related to the vetting process; and (iii) the proposal for the five (5) options as follows:

> *"1. Option 1 – No changes, providing for the maintenance of the status quo;*
> *2. Option 2 – Improved implementation and enforcement of the existing legal framework, without legal changes;*
> *3. Option 3 – Vetting of all judges and prosecutors through specific legislative changes through the existing mechanisms in the Judges and Prosecutorial Councils;*
> *4. Option 4 Establishment of a special vetting body, i.e. by an external mechanism (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 3.5)."*

30. On 10 February 2022, the Ministry of Justice submitted to the Venice Commission the draft constitutional amendments regarding the vetting process of judges and prosecutors. The Venice Commission registered the request for the aforementioned opinion submitted by the Minister of Justice with number CDL-REF (2022) 006.

31. The draft constitutional amendments submitted by the Minister of Justice to the Venice Commission [published on the webpage of the Venice Commission] proposed the supplementation of paragraph 4 of article 104 [Appointment and Removal of Judges] and paragraph 6 of article 109 [State Prosecutor] of the Constitution. By these draft amendments it was determined or defined what constitutes serious neglect of duties, as criteria for the dismissal of judges and prosecutors (constitutional draft-amendments No. 27 and No. 28). Secondly, draft amendment no. 29 also proposed the establishment of the Transitional Evaluation Authority, competent for the transitional evaluation (for a period of five (5) years) of judges, prosecutors and positions in the justice system as defined by law, as well as of candidates for these positions. Also, by draft amendment no. 29, it was specified that the transitional evaluation period could be extended for two (2) additional years. Furthermore, the draft constitutional amendments related to the transitional evaluation of positions in the judicial system, among other things, specified (i) that the scope of the transitional evaluation (draft article 163) included evaluation of professional performance and integrity; (ii) the establishment of the integrity control authority, the composition, and the qualifying criteria for becoming members of the Authority, as well as the composition and decision-making in the evaluation panels; the appellate panel and its composition (draft article 164); (iii) the procedure for electing and dismissing the members of the Transitional Evaluation Authority (draft article 165); (iv) the competences of the panels for transitional evaluation (draft article 166); (v) the immunity of the members of the Transitional

Evaluation Authority (draft article 168); (vii) the rights of the subject under evaluation (draft article 169); (viii) access to data (draft article 170); (ix) the obligation of cooperation of the subject under evaluation, and of other public and private authorities during the transitional evaluation (draft article 171); (x) the right to appeal (draft article 174); (xi) transparency (draft article 175); and (xii) the termination of mandate of the Transitional Evaluation Authority (draft article 176).

32. From the content of the documentation published by the Venice Commission, it turns out that during the period 9-11 February 2023, the Rapporteurs of the Venice Commission for the drafting of the Opinion, and the representative of the Secretariat of the Commission held several virtual meetings with the representatives of the Office of the President, the Minister of Justice, the State Prosecutor's Office, the Chairpersons of KJC and KPK, with some of the political parties, representatives of the international community, and members of civil society.

33. On 18 February 2022, the Minister of Justice, the Chairperson of KJC, the Chairperson of KPC, the acting President of the Supreme Court and the acting Chief State Prosecutor signed a "*Joint Declaration of Commitment*". By this Joint Declaration, the signatory parties undertook as follows:

> *"[...]*
>
> *The Ministry of Justice, the Judicial Council of Kosovo, the Prosecutorial Council of Kosovo, the Supreme Court and the Chief State Prosecutor through this joint initiative pledge to continue the reform and work together in working groups for the evaluation, conceptualization and drafting of legal initiatives with the common aim to clarify, complete, amend and strengthen the legal framework in the areas mentioned below:*
> *- Evaluation of the Performance of Judges and Prosecutors;*
> *-The Process of Recruitment, Appointment and Reappointment of Judges and Prosecutors;*
> *-Discipline System of Judges and Prosecutors;*
> *-System of Verification of the Profile of Judges and Prosecutors (during performance evaluation) as well as of candidates for these positions (in the recruitment phase);*
> *-Professional Development of Judges and Prosecutors;*
> *-Strengthening Mechanisms for Asset Declaration for Judges and Prosecutors;*
> *-Status of Judges and Prosecutors;*
> *-Drafting of the Law on Civil Servants in the Administration of Courts and Prosecutors;*
> *-Implementation of recommendations from the TAIEX Mission to fight organized crime and corruption (2022), and*
> *-Other issues within the framework of the reform.*
>
> *The signatory institutions, through this signed statement, take this pledge to implement this legal reform package with the ultimate goal of strengthening the rule of law in Kosovo.*
> *[...]"*

34. On 13 March 2022, the Minister of Justice requested the Venice Commission to postpone the approval of the Opinion on the Concept-Paper on the Vetting until its next meeting under the reasoning that it be given more time for dialogue with all parties interested in the Republic of Kosovo.

35. On 18 May 2022, the Deputy Minister of Justice submitted to the Venice Commission the revised draft constitutional amendments, registered at the Venice Commission with no. CDL-REF (2022)023).

36. The revised constitutional draft-amendments [CDL-REF (2022)023], submitted to the Venice Commission, included the deletion of some articles or definitions that were proposed in the draft amendments submitted to the Venice Commission on 10 February 2022. According to the content of these revised draft constitutional amendments published by the Venice Commission, it is noted, among other things, that in contrast to the previous draft constitutional amendments, the provisions referring to: (i) the transitional evaluation of performance, which also included knowledge of the law and human rights, the capacity for legal reasoning and other defined competencies by law were removed; (ii) immunity; (iii) the rights of the subject under evaluation; (iv) access to data; (v) the obligation of cooperation of other public and private authorities during the transitional evaluation; (vi) transparency; and (vii) the termination of the mandate of the Transitional Evaluation Authority. Draft articles 163 to 168 set forth a (i) system of general vetting of all judges and prosecutors, entitled transitional evaluation; (ii) the transitional evaluation would last five (5) years, and could be extended for another two (2) years; (iii) the creation of the Transitional Evaluation Authority composed of evaluation panels, the Appeals College and the Secretariat, which would be elected by the Assembly with two-thirds (2/3) of the votes; (iv) the proposal that: "*upon the proposal of the Authority, the President of the Republic of Kosovo dismisses the judge or prosecutor who does not pass the transitional evaluation, according to the procedure provided by law.*"

37. On 19 and 20 May 2022, one of the rapporteurs of the Venice Commission and the representative of the Secretariat of the Venice Commission held meetings in the Republic of Kosovo, respectively with the (i) President; (ii) the President of the Assembly (iii) the First Deputy Prime Minister; (iv) the Minister of Justice; (v) the President of the Supreme Court; (vi) the Acting Chief State Prosecutor; (vii) the Chairpersons of KJC and KPC; (viii) political parties; (ix) the academia; (x) representatives of the international community and (xi) the civil society.

38. On 17-18 June 2022, the Venice Commission, at its 131st plenary session, adopted the Opinion [no. CDL-AD(2022)011] on the Concept-paper on the Vetting of judges and prosecutors and the draft constitutional amendments, which it published on 20 June 2022. The Court notes that the adopted Opinion of the Venice Commission refers to the Concept-Paper on Vetting [submitted by the Minister of Justice on 25 October 2021], the draft constitutional amendments [submitted by the Minister of Justice on 10 February 2022] and the draft constitutional amendments [submitted by the Deputy Minister of Justice on 18 May 2022].

39. In its opinion, the Venice Commission regarding the draft amendments submitted on 10 February 2022, among other things, emphasized the following:

> *"111. Due to the wide-ranging powers given to the vetting bodies, the original draft constitutional amendments, as they were presented, cannot be adopted as ordinary law because that law would obviously contradict Articles 85, 108 and 110 of the Constitution. If the draft constitutional amendments were adopted as ordinary law, they would have to be accompanied by a short constitutional amendment establishing*

the composition and powers of the vetting mechanism, the Transitional Evaluation Authority (TEA).

112.Concerning the composition of the TEA, according to draft Article 165 of the Constitution, the President organises the recruitment (Article 165 (1)) and Parliament elects TEA members by a simple majority (Article 165 (5)). However, the election of the TEA members by simple majority creates a danger of politicisation. In any case, the chicken and egg problem would remain. Who would vet the integrity of the members of the new TEA? A qualified majority for the election of the TEA Members, combined with input from civil society, could be part of a solution.

113. Under draft constitutional Article 166, the Transitional Evaluation Panel (TEV) would take decisions on demotion and mandatory training but would make only proposals for dismissal. Who would dismiss a judge/prosecutor upon such a proposal? Under Article 84 of the Constitution, it is the President who appoints judges and prosecutors upon proposals by the KJC and the KPC respectively. A clear procedural chain, from proposal to decision, should be established in the constitutional amendment. The draft amendments do not envisage changes to Article 84 of the Constitution.

114. In the same vein, the system of appeals remains unclear. Appeals to the Appellate Panel are directed against a "decision" of a Panel. Does this mean that there is no appeal against a "proposal" for dismissal and only against a final decision by the President?

115. The composition of the Appellate Panel remains unclear because the constitutional amendments refer to ordinary law for its composition. However, that composition is one of the provisions that should be regulated on the constitutional level.

116. Draft Article 175 also refers to the publication of "decisions". Does this mean that the "proposals" are not published? Is only the final decision (by the President of Kosovo) that is published (and appealable)?

117. Article 174.4 excludes appeals to the ordinary courts. Is there a possibility of appeal to the Constitutional Court possible under Article 113 (7) of the Constitution against a "violation by public authorities of their individual rights and freedoms guaranteed by the Constitution"? (e.g. right to political participation, fair trial, etc). That provision requires the prior exhaustion of all legal remedies. This would probably include an appeal to the Appellate Panel."

40. While in relation to the revised draft constitutional amendments, submitted to the Venice Commission on 18 May 2023, the latter, among other things, emphasized the following:

105. The revised constitutional amendments (CDL-REF(2022)023) are much shorter and focus on the main elements of the competences and composition of the vetting bodies, which is positive. The draft amendments to Articles 104 (4a) and 109 (6a) of the Constitution define the ground for dismissal "serious neglect of duties" as including cases when the judge or prosecutor "has been rated with insufficient performance, or has been found to have unjustifiable wealth, or vulnerable integrity, or has committed serious disciplinary offenses, as regulated by law."

106. These two constitutional amendments would also facilitate the dismissal of judges or prosecutors who provide irregular asset declarations. Their dismissal could be triggered by the Anti-Corruption Agency (and decided upon by the KJC and the KPC, possible after their integrity assessment). This would not depend on a vetting of all judges and prosecutors.

[…]

109. The Venice Commission welcomes that the revised draft amendments are more concise than the first set of draft amendments. The qualified majority for the election of the members fo the TEA is positive. The transitional evaluation would cover performance, wealth and integrity. However, in order to provide for a proportionate reform and to limit the disruption of the judicial system, the Venice Commission recommends limiting a transitional evaluation to the members of the KJC and KPC, court presidents and chief prosecutors. That evaluation should cover integrity (including inexplicable wealth) only but not cover performance, which is not a permissible ground for vetting. Furthermore, it is not a relevant issue for the members of the councils.

41. In a conclusion, the Venice Commission Opinion, stated that:

126. Option 5 raises its own difficulties, and the Venice Commission feels the draft constitutional amendments that have been prepared under Option 5, even in their revised shorter version, go too far by providing for a vetting for all judges and prosecutors, constitutional amendments, where necessary, should only provide for integrity checks of the members of the KJC and the KPC, court presidents and chief prosecutors.
127. Constitutional amendments should ideally establish only a state's commitment to a principle, or to the aspiration or ethos a country seeks to enshrine in its Laws. That would then facilitate measures concerning the composition and powers of the vetting bodies and its framework to be set out elsewhere in legislation and regulation. On the other hand, the Commission acknowledges, that in this instance, the same original draft constitutional amendments could not be entirely adopted in the form of simple law without constitutional underpinning. As a standalone law, these provisions would need to be accompanied by a (shorter) constitutional amendment, otherwise they would contradict Articles 85, 108 and 110 of the Constitution. The election of the TEA members by simple parliamentary majority would create a danger of politicisation. This has been taken into account in the revised constitutional amendments.
128. To sum up, the Venice Commission recommends introducing legislative changes that would improve the current system of judicial discipline, as a thorough extension of Option 2, this concerns notably a strengthening of the system of asset declarations and strengthening the vetting units within the KJC and the KPC. Constitutional changes should be considered only for underpinning integrity checks of the members of the KJC and the KPC, court presidents and chief prosecutors.
129. The Venice Commission is not in a position to assess how widespread the incidents in the judiciary of which its delegation was informed are and whether they concern individual judges and prosecutors or a large proportion of them. In any case, it is necessary to distinguish cases of professional incompetence, which can be addressed through training, from cases of deliberate malevolent acts, which can be addressed through integrity checks. 130. The Venice Commission considers that a reform of the judiciary in Kosovo is indeed necessary and that this may involve some form of effective integrity checks. It is however the Commission's opinion and that many elements of such a reform can be adopted on the level of ordinary law. Any vetting or integrity checks system introduced could be limited to KJC and KPC who exert disciplinary power over the other members of the judicial system. It would then be for the KJC and the KPC to deal with problems in the rest of the judicial system, both as concerns integrity and professionalism. The interference in constitutional rights should be strictly proportionate. Any constitutional amendments should aim at

minimal invasiveness in the competences of the KJC and the KPC while achieving the goal to reform the judiciary.
131. In the context of Kosovo effective "vetting" will of necessity mean a combination of various measures that will have a positive effect on the integrity and efficiency of the judiciary. Even if this type of vetting does not necessarily correspond to the formal definition given in section II.A above, all these measures taken together are part of a judicial reform that amounts to a "vetting" as legitimately aspired by the people and the authorities in Kosovo which is capable of delivering the required outcomes.
132. Experience shows that the introduction, sequencing and compatibility of vetting or integrity checking measures is operationally problematic and a precise model for each should therefore be designed with stakeholders on board. Failing which it may result in incomplete implementation. Then it crucially must be given sufficient operational roll - out time in order to evaluate its efficacy before other measures are introduced, otherwise this could obstruct everyone's best endeavours and compromise the desired outcomes.
133. The Venice Commission therefore recommends focusing on legislative changes, which are easier to implement, and limiting a system of integrity checks to the judicial and prosecutorial councils, court presidents and chief prosecutors. To make this reform viable, the final concept for the vetting and corresponding constitutional and legislative changes should be prepared on the basis of a sincere dialogue and in close cooperation with all stakeholders, the Ministry, KJC, KPC but also civil society and interested academics.

42. On 4 September 2022, the Government submitted the Vetting file to the Assembly, which included the following documentation:

(i) The explanatory document of the Ministry of Justice regarding the Vetting process:
(ii) Decisions of the Ministry of Justice on the establishment of working groups for Vetting in the Justice System;
(iii) Concept-paper on Vetting, drafted by the Ministry of Justice;
(iv) Opinion no. CDL-AD(2022)011 regarding the Concept-Paper on the Vetting of judges and prosecutors and the draft amendments, approved by the European Commission for Democracy through Law (hereinafter: the Venice Commission) at its 131st meeting plenary session, 17-18 June, 2022;
(v) Draft constitutional amendments;
(vi) Policy document from the Functional Review entitled "*Improving the integrity of judges and prosecutors*; and
(vii) The document entitled "*Modality and scenarios for issues of reform in the justice system*".

43. On 9 December 2022, the Assembly established the *ad hoc* Committee for the Development of the Transitional Evaluation Process. This committee consisted of the Chairman of the Committee, two vice-chairmen and eight (8) other members, all eleven (11) deputies of the Assembly of the Republic of Kosovo. This committee was constituted at its first meeting held on 20 December 2022. The Secretariat of the Assembly has submitted to the Court the minutes and transcripts of the meeting of this Committee of 20 December 2022, 27 December 2022, as well as 24 February 2023.

44. From the minutes submitted by the Secretariat of the Assembly, it turns out that the meetings of the *ad hoc* Committee were attended by Assembly officials, officials of the

Ministry of Justice, representatives of civil society, representatives of diplomatic and international missions and media representatives.

45. On 2 March 2023, the Applicant, in accordance with paragraph 9 of article 113 and paragraph 3 of article 144 of the Constitution, referred the draft amendments to the Constitution to the Court. In his Referral submitted to the Court, the Applicant asked the Court to make a preliminary assessment of whether the draft constitutional amendments reduce/diminish any of the rights or freedoms established in Chapter II of the Constitution.

Comments and responses to comments regarding the Referral

46. As specified in the part of the proceedings before the Court of this Judgment, comments on the Referral were submitted by: (i) the Office of the President; (ii) the Ministry of Justice; (iii) KJC; (iv) KPC, and (v) the deputy of the Assembly, Mr. Abelard Tahiri. The Ministry of Justice and KJC submitted responses to the comments of the aforementioned institutions. The comments and responses to the comments of the interested parties that refer to the proposed constitutional amendments, which are the subject of consideration by the Court, will be presented below.

(i) Comments of the Ministry of Justice, submitted on 22 March 2023

47. The Ministry of Justice, in addition to its comments to the Applicant's Referral, also submitted the Opinion of the Venice Commission on Kosovo, namely its Albanian and English versions.

48. The Court will further present the comments of the Ministry of Justice regarding the Referral, including those related to: (a) the need for the development of an integrity control; (b) proposed constitutional amendment no. 27; (c) proposed constitutional amendment no. 28 and (d) proposed constitutional amendment no. 29.

(a) regarding the need for the development of an integrity control

49. Regarding the need for the development of an integrity control, the Ministry of Justice in its comments emphasizes that:

> *[...]*
> *"8. The need for the development of the integrity control process in the justice system has been created as a result of many identified problems which have been reflected in many local and international analyzes and reports related to the judicial and prosecutorial system in Kosovo. Among the various problems that the system faces, integrity vulnerability is one of the key problems. The existing legal framework does not provide for an adequate mechanism of continuous control of the integrity of judges and prosecutors, as well as candidates for these positions.*
> *9. The big flaw lies in the fact that the control of the integrity of judges and prosecutors during their regular career is currently only a formality, without legal regulation of adequate procedures and data that are collected during this process, as a segment that is evaluated numerically, in which case it is calculated together with other relevant performance segments. The integrity control process is almost unregulated, leaving room for interpretation and arbitrariness."*

50. Further, the Ministry of Justice added that:

"10. *The report of the US Department of State has found that the judicial system has often failed to achieve a fair trial, being slow and not guaranteeing the accountability of officials. Even the EU Report on Kosovo has concluded that "the judiciary is still vulnerable to inappropriate political influence". In the same spirit, the reports prepared by various local civil society organizations have revealed a significant number of irregularities in the judicial and prosecutorial system. In addition, these findings have also been confirmed by the Venice Commission, which in its Opinion considers that a comprehensive and continuous reform of the justice system in Kosovo is really necessary as a response to the identified problems."*

51. Regarding the draft constitutional amendments submitted to the Court, the Ministry of Justice emphasizes that:

"11. *These findings, among others, have justified the removal of the competence of the judicial and prosecutorial councils for integrity control, and the transfer of this competence to an independent Authority, which is expected to be established based on the proposed amendment no. 29 and which will check the integrity of "high positions" in the justice system and candidates for these positions, and then the members of the judicial and prosecutorial councils, and the presidents of the courts and chief prosecutors with checked integrity, will continue to efficiently control the integrity of judges and other prosecutors and implement their other competencies.*

12. In this line, the need for the development of this process through constitutional amendments has been validated by the Venice Commission, where in the Opinion, in addition to legislative changes to improve the justice system by strengthening integrity control mechanisms, it recommends considering constitutional amendments (establishing of the Authority for Integrity Control) only for the control of the integrity of the members of the KJC and the KPC, the presidents of the courts (excluding the President of the Constitutional Court) and chief prosecutors, who will then strengthen the internal mechanisms and exercise their competencies efficiently [...]
13. Based on what was said above, the Ministry of Justice assesses that the constitutional amendments proposed by the Assembly of Kosovo are necessary and are based on the Opinion of the Venice Commission."

b) Regarding the proposed constitutional amendment no. 27

52. Regarding the proposed constitutional amendment no. 27, the Ministry of Justice emphasized the following:

14. *This amendment and the following amendment (no. 28) are about clarifying the grounds for dismissing a judge or prosecutor from his or her position. The current Article 104 (4) of the Constitution states that "Judges may be removed from office upon conviction of a serious criminal offense or for serious neglect of duties."*
15. The first basis for the dismissal of a judge is conviction for a serious criminal offense" is clear and easily interpretable based on the legal provisions in force. On the other hand, the second basis, "serious neglect of duties", is a concept not further defined and that creates room for interpretation, especially related to the integrity control process.
16. The law in force on Disciplinary Liability of Judges and Prosecutors lists the relevant violations of judges and prosecutors, on the basis of which a judge or

prosecutor can be dismissed, but nowhere does it define the constitutional basis for dismissal as "serious neglect of duties", thus leaving room for interpretation to the authorities that develop disciplinary procedures and integrity control. This Law, in Article 5, states that a Judge commits a disciplinary offense if he or she: "1.1 is convicted of a criminal offense; 1.2. violates the law, or 1.3. violates his/her official duties as a judge", while in paragraph 2 it lists specific violations, some of which are also related to the integrity of judges. The same regulation is for prosecutors in Article 6 of this Law. However, the listing of these violations does not clarify which of them is considered "serious neglect of duties" as required by the Constitution. Even if the above-mentioned Law is amended, the constitutional dilemma remains as to which elements can be included within the constitutional basis for dismissal "serious neglect of duties".

17. The opinion of the Venice Commission emphasizes the importance of integrity control, and unjustifiable wealth within the integrity control of judges and prosecutors. In paragraph 9 of the Opinion it is stated that "while integrity checks look at the risk or likelihood that improper conduct will happen in the future " (by the judge or prosecutor), while in paragraph 10 "the decision to negatively assess a current post holder should be linked to an indication of impropriety, for instance inexplicable wealth". For more in paragraph 14, the Venice Commission recognizes as one of the forms of integrity checks which are conducted on a more regular basis (for example the obligation to submit annually an asset declaration. Therefore, from the findings of the Venice Commission Opinion, it is clear that integrity, which includes the control of wealth if, among other things, it is unjustifiable, are the grounds on which a judge or prosecutor should be evaluated even when they are candidates for these positions, or even on a regular basis, during their mandate.

18. As a result, the vulnerable integrity that includes the unjustifiable wealth, are the basis of the assessment either by the Integrity Control Authority, the establishment of which will be based on amendment 29 of the draft constitutional amendments proposed and which will control the integrity of "high" positions in the justice system as mentioned above, or even the Judicial Council and the Prosecutorial Council, which should carry out integrity and wealth checks for all judges and prosecutors in the future, after the mandate of the Integrity Control Authority ends.

19. Therefore, in order to avoid any dilemma whether 'vulnerable integrity' and 'unjustifiable wealth' qualify as "serious neglect of duty" which is the current constitutional basis for dismissal under Article 104(4), the assessment and full support of the Ministry of Justice is that amendment 27 is necessary to clarify the basis for the dismissal of a judge. Serious neglect of the duties under this amendment will include "persistently insufficient performance evaluation, proof of the existence of unjustifiable wealth, vulnerability of integrity, or serious disciplinary violations". These grounds for dismissal will create the possibility to be further defined by the respective laws as defined by amendment no. 27 through the addition "as defined by law", which is an added value of this amendment and a possibility which can be argued that does not exist with the current Article 104(4) of the Constitution, because the aforementioned supplement is not defined in this provision.

20. It is also worth noting that this amendment and the following one (no. 28) were accepted by the Venice Commission in its Opinion and there were no recommendations for their change. Moreover, even in the Republic of Albania, in the process of "vetting" that has been going on for several years now, elements of the transitional reassessment of judges and prosecutors, in addition to professional skills, are also the control of wealth and image. The vetting process in Albania has

passed several tests of compatibility with international standards either by the Venice Commission or the European Court of Human Rights.
21. Finally, regarding this amendment, it is worth noting that the Ministry of Justice together with the heads of the justice system have recently signed a joint Declaration of commitment for justice reforms. In order to clarify the legal framework for integrity control, according to this document, the evaluation of the profile of judges and prosecutors and candidates for positions, will be one of the areas that will be evaluated and followed up with the necessary legal changes to build a stable system of integrity control by KJC and KPC in the future, after the end of the 2-year mandate of the Authority for Integrity Control. This is also a reason why "serious neglect of duties" should be clarified at the constitutional level and not create spaces for the interpretation of the compatibility of the laws that are changed with the current bases for the dismissal of the judge.
22. Therefore, taking into account all that was said above, the Ministry of Justice assesses that the draft amendment no. 27 clarifies the grounds for dismissal of a judge, the latter does not diminish any rights and freedoms defined by Chapter II of the Constitution of Kosovo, because all the elements included in this amendment are related to situations that make a subject unsuitable to exercise the duty of judge.

c) Regarding the proposed constitutional amendment no. 28

53. Regarding the draft amendment no. 28 of the Constitution, the Ministry of Justice added that:

"23. *The terminology of the grounds for dismissal of a prosecutor in Article 109(6) is the same as the terminology of the grounds for dismissal of a judge explained above in Article 104(4). Therefore, amendment no. 28 aims to clarify the ground for dismissal of a prosecutor from his or her position, namely the ground "serious neglect of duties" to include the same for judges "continuous insufficient performance evaluation, proof of the existence of unjustifiable assets, vulnerability of integrity, or serious disciplinary violations". Taking this into account, all the arguments mentioned above regarding amendment no. 27 are fully applicable to amendment no. 28, therefore the Ministry of Justice will not repeat them, but in this case it will only conclude that based on the assessment of the Ministry, neither the proposed amendment no. 28 reduces any rights and freedoms defined by Chapter II of the Constitution of Kosovo.*

d) Regarding the proposed constitutional amendment no. 29

54. As to the proposed constitutional amendment no. 29, the Ministry of Justice emphasized that:

"24. As far as the draft amendments no. 27 and 28 have a permanent character and will be implemented first by the Authority for Integrity Control and then continuously by the judicial and prosecutorial councils, amendment no. 29 has a temporary character.
25. This amendment, which has a total of 6 articles, defines the principles and basis for the establishment and operation of the Integrity Control Authority, as an extraordinary and independent Authority, which will control the integrity of the members of the KJC, the members of the KPC, presidents of all courts and all chief prosecutors, as well as candidates for these positions. The further functioning of the

Authority and the entire integrity control process will be further regulated by the Law on the Control of the Integrity of Certain Positions in the Justice System, which in the form of a Draft Law is currently being reviewed by the Ad-hoc Committee of the Assembly. Here, it is worth noting that the Venice Commission in its Opinion has suggested that the draft constitutional amendments be short, defining the main principles of the integrity control process, while the procedural details are set at the level of the Law.

26. The limitation of this Authority to check the integrity of only 'high positions' in the justice system is fully in line with the recommendations of the Opinion of the Venice Commission on Kosovo, as mentioned above. The objective of the establishment of this Authority is to ensure that judges, prosecutors and other council members with checked integrity serve in the "high positions" of the justice system. This would enable them to build a continuous integrity control system for all judges and prosecutors, as well as for candidates for judges and prosecutors, but also to perform adequate management of the judicial and prosecutorial system in general (recruitment, proposal, performance evaluation, promotion, transfer, discipline, etc.) and thus restore citizens' trust in the justice system.

27. In this regard, the Authority has a limited term of office (2 years, unless the term of office is extended for 1 additional year by a law approved by 2/3 of the votes of all deputies of the Assembly), during which term the control of integrity of all entities included in the proposed Article 161A is expected to be completed. As part of this Authority will be the control panels and the Appeals College, which will consist of eminent lawyers with the highest integrity who will be elected after the proposal of the President of the Republic of Kosovo, with the votes of 2/3 of to all members of the Assembly. The composition (number of members in the control panels and Appeals College) and other criteria for their members will be determined by Law, where, among other things, the representation of non-majority communities in this Authority and gender representation will be determined.

28. Two issues are of particular importance to be mentioned in this case related to Chapter II of the Constitution. First, the constitutional criteria for appointing the members of the Authority, which are further defined by the Law, are high, equivalent to the criteria that must be met by candidates to exercise the position of judge in the Republic of Kosovo. This is because this Authority will have judicial competences, because during its term it decides on the integrity of judges and prosecutors in "high positions" as well as candidates for these positions, and therefore, can make a proposal for the dismissal of the subject of control from the position of judge or prosecutor.

29. Secondly, the Authority, in addition to the implementation of the rights of the subject of control during the integrity control procedure, the rights which are further defined and materialized by the Law that will be derived from the constitutional amendments, also has two levels, where the control panel carries out control and decide on integrity, while the Appeals College hears appeals that can be made against the decision or proposal of the Panel (this includes the proposal for dismissal). The control panels and the Appeals College will not be Ad hoc bodies because they are not created only for a specific case, but will be permanent bodies that will remain until the completion of the integrity control process by the Authority for all subjects of control, which qualifies them as a "tribunal established by law".

55. Regarding the status as a "*tribunal*" of the Integrity Control Authority and the right to a legal remedy, the Ministry of Justice refers to the principles developed through the case law of the European Court of Human Rights (hereinafter: ECtHR), arguing that "*the*

permanent character, two levels, independence and impartiality of these bodies (taking into account the election procedure and criteria for appointing members), guarantee that the constitutional right to legal remedies is applied."

56. While in relation to the establishment of the Integrity Control Authority, the Ministry of Justice refers to the cases of the ECtHR, *Fruni v. Slovakia, Xhoxhaj v. Albania and Besnik Çani v. Albania.*

57. Based on the above, the Ministry of Justice, in terms of fulfilling the criteria and standards established through the case law of the ECtHR, specifies that: *(i) In this regard, the exclusion of appeals to regular courts is also explained, after the decision of the Appeals College, which is final, according to Article 161F(2); and (ii) "the right of the subject of control to refer to the Constitutional Court the violations of his or her individual rights and freedoms under Article 113 (7) of the Constitution is not limited and remains fully applicable under the proposed Article 161F(3)."*

58. The Ministry of Justice further specifies that the Law on integrity control will derive from the proposed constitutional amendment no. 29, it will further specify*: (i) the implementation of other relevant rights and constitutional freedoms for the subject of control, established in Chapter II of the Constitution; (ii) the Authority will be obliged, according to the Law, to apply the standards of fair and impartial judgment, to provide all the data collected on the integrity of the subject of the control, to make the review sessions for the integrity control public, reason the decisions and notify the party in time about them, as well as other ones guaranteed; and (iii) In this Law, the Law on General Administrative Procedure and the Law on Administrative Conflicts will be applied accordingly; and (iv) the Integrity Control Panel will have the task of implementing this control based on data provided by the subject of the control itself, data from public institutions and other entities defined by law".*

59. The Ministry of Justice returns again to the legitimate purpose of integrity control, arguing that: "*Integrity control follows a legitimate aim because this control is a social request, which is also confirmed by the Opinion of the Venice Commission, which assesses that 'within the Kosovar population, there seems to be a strong opinion that this (vetting) is necessary and that there is a will to make it happen. Also, as mentioned above, in this Opinion it is emphasized that "The Venice Commission considers that a reform of the judiciary in Kosovo is indeed necessary and that this may involve some form of effective integrity checks", and […] similar to the case of Kosovo, in the case of Xhoxhaj v. Albania, the ECtHR refers to the Venice Commission's assessment of vetting in Albania, where it was emphasized that the reassessment "was not only justified, but necessary to protect [the country] from the plague of corruption, which, if not dealt with, could completely destroy the judicial system." Also in this case, the ECtHR has determined that the general purpose pursued in the case of vetting in Albania was in the interest of national security, public safety and the protection of the rights and freedoms of others, as established in Article 8, paragraph 2.*

60. The Ministry of Justice in relation to the cooperation of the control subject specifies that: "*Article 161E of this proposed amendment defines the obligation for cooperation of the control subject by declaring the data that enable the Authority to control his or her integrity. Failure to submit such a statement with data results in a proposal for dismissal of the subject of control. The Ministry of Justice notes that the obligation of a public official, including judges and prosecutors, to submit data in order to verify his or her*

suitability to serve in the given position, is completely reasonable and does not limit any right or guaranteed freedom. The Ministry would like to remind the Court that this very issue was also raised in the Opinion on draft constitutional amendments for the judiciary in Albania and received a positive response, therefore such a statement has become mandatory in the process of "vetting" in Albania. Also, the ECtHR found in the case of Xhoxhaj v. Albania that such a statement serves as a basis for developing integrity control".

61. In summary of its arguments regarding the Referral, the Ministry of Justice concluded as it follows: *"[...] assesses that the proposed amendments to the Constitution are in full compliance with Chapter II of the Constitution. Also, according to the assessment of the Ministry, these proposed amendments are in harmony with the international conventions and standards applicable to the justice system and the case law of the ECtHR developed so far" and following this proposed the Court to "render a judgment which confirms that the proposed amendments to the Constitution no. 27, 28 and 29 do not reduce any rights and freedoms defined in Chapter II of the Constitution."*

(ii) KPC comments, submitted to the Court on 22 March 2023

62. The KPC initially notified the Court that the latter *"has continuously been an active participant in the vetting process where it has offered concrete comments regarding this issue which have not been taken into account by the current Government - the Ministry of Justice."*

63. Further, the KPC regarding the need for constitutional amendments, emphasized that: (i) *"The prosecutorial system has declared from the beginning that it does not support the constitutional amendments, for the reason that even if the constitutional changes were made, the judiciary must have independence and exercise its mandate without the interference of the executive and the legislative; (ii) we are not in a position to embark on deep reforms after a great deal of work to consolidate our independent judiciary. Any interference from outside by any mechanism would destabilize our work and pave the way for political influence from certain groups"; and (iii) that there is no need for constitutional changes, because the Constitution is the greatest guarantee for the assessment and removal of prosecutors who commit criminal offenses and serious violations of duty, therefore for each case where there is evidence that the prosecutor has committed criminal offenses based on the Constitution and laws in force, the prosecutor is dismissed, while in cases where the prosecutor commits a serious breach of duty, he may be dismissed from office."*

64. According to KPC: *"[...] if the purpose of vetting is to remove prosecutors who are involved in committing criminal offenses (not only corruption, but for all criminal offenses), this removal or dismissal from office is expressly allowed by the Constitution, while prosecutors who commit serious violations are dismissed based on the Constitution and the Law on Disciplinary Liability of Judges and Prosecutors."*

65. Finally, the KPC assessed that: *"the proposed changes violate the institutional independence and freedoms and rights guaranteed by the Constitution for the prosecutorial system."*

(iii) KJC comments, submitted to the Court on 22 March 2023

66. In addition to the comments on the Referral, which will be reflected in the following, the KJC submitted the following documents to the Court: (i) Decision [A. no. 2767] of the Basic Court in Prishtina, Department for Administrative Matters; (ii) the EULEX report for monitoring the recruitment process; (iii) the aforementioned Joint Declaration of Commitment; (iv) the letter of 30 November 2022 addressed to the Ombudsperson, for the initiation of the constitutional review of the Law on Salaries in the Public Sector; and (v) Finance Office document on the impacts of the new Law on Salaries on judges' compensation. Following this, the Court will refer to the comments of the KJC that relate only to Applicant's Referral.

67. Having said that, the Court will present KJC's comments regarding the Referral, including those related to: (i) The lack of *"an intended objectivethrough the constitutional amendments*"; (ii) proposed constitutional amendment no. 27 and (iii) proposed amendment no. 29.

a) Regarding the lack of "an intended objective" through the constitutional amendments

68. The KJC states, among other things, stresses: "*Next, we invite the Court to weigh the proposed amendments also in the light of some important developments in the system of justice and the rule of law in Kosovo, which have begun, or are expected to give such effects that in essence consume the object of the intended constitutional amendments*." In relation to this, the KJC informed the Court that in the last two years, two (2) large-scale recruitment processes of new judges have been conducted, monitored by international institutions and on 18 February, 2022, KJC, the Ministry of Justice, KPC, the Supreme Court and the Chief State Prosecutor, signed the Joint Declaration of Commitment for strengthening the rule of law.

b) Regarding the proposed constitutional amendment no. 27

69. The KJC specifies that: "[...] *the proposers of the amendments further and disproportionately expand the term "serious neglect of duties" from paragraph 4 of Article 104 of the Constitution. Thus, while concepts such as "serious disciplinary violation" or "insufficient performance" are to some extent related to the concept that this amendment intends to further detail (serious neglect of duties), in this amendment is added beyond and intended to introduce other grounds which can be used for interference in the justice system by the political branches of power (current or future). Thus, terms such as "vulnerable integrity" or "unjustifiable assets" are tools through which other branches of power can interfere in an exaggerated and disproportionate manner in the independence of the justice system, thereby infringing upon the right of citizens to due process guaranteed by the Constitution. When we are dealing with "unjustifiable assets", this concern becomes even more relevant now that Law no. 08/L-121, on the State Bureau for the verification and confiscation of unjustifiable assets, has been approved and is expected to enter into force, which does not require a criminal conviction to establish that an asset is unjustified. This fact, together with the existence, for decades, of an unregulated economy and with pronounced legal deficiencies that would oblige the citizens of Kosovo, and therefore also the judges, to keep and save the receipts and other relevant documents of every transaction made over the years, potentially makes each judge vulnerable to an administrative/civil process of "finding" that he/she has unjustifiable wealth.*
Another important aspect of the non-proportionality in the manner amendment no. 27 is phrased has to do with the fact that the proposers give the Legislative Branch, as the approver, and the Executive Branch, as the proposer, the opportunity to dictate by law the

detailed rules for all these aspects through which the term serious neglect of duties is further "defined". This way of regulation places the judge and the judiciary in a less predictable system than the one currently in force and makes it more possible that by the decisions passed by the political majority in the Assembly, through a law that could potentially be delayed by a simple majority, to establish rules that fundamentally interfere with a crucial aspect of the rule of law: that of appointing and holding judicial positions. The Judicial Council of Kosovo notes that a change similar to what was highlighted above is also proposed with the draft amendment no. 28 in terms of Article 109 of the Constitution. Since the relevant article regulates the aspects related to the State Prosecutor, and since the Prosecutorial Council of Kosovo is an institution with powers to protect and promote the independence of the prosecutorial system in accordance with the Constitution of the Republic of Kosovo, the KJC will not elaborate in detail on the draft amendment no. 28 at this stage. However, we emphasize that the importance of an independent prosecutorial system is equally relevant and crucial for the rule of law and its proper functioning in Kosovo. Consequently, some of the KJC comments below, in conjunction with Article 104 can be used for argumentative purposes and in relation to Article 109 of the Constitution."

70. Further, the KJC specifies that:

"The Council notes that this draft amendment has two main problems that affect directly, or due to their effect, the reduction of constitutionally guaranteed rights. First, this article expands the grounds for the judge's dismissal by actually creating new grounds for dismissal under the guise of "interpretation" of the term serious neglect of duties contained in the current paragraph 4 of Article 104 of the Constitution. Thus, as we pointed out earlier in this document, the Executive Branch and the Legislative Branch intend to add as a ground for the judge's dismissal the cases where it is "... proven that [the judge] has unjustifiable assets, or has vulnerable integrity, ... as provided by law." However, it should be noted that the issue of performance evaluation is already addressed by existing laws. Thus, according to Law No. 06/L-055 on Kosovo Judicial Council, in Article 27, it is determined that "The assessment of the commission for evaluating the judge's performance is the ground for [...] initiating the procedure for the judge's dismissal from office." Therefore, it is not clear why the amendment of the Constitution is required to define performance evaluation"" as a criterion for dismissal, when considering the fact that the Law on Kosovo Judicial Council has only specified this criterion that constitutes the ground for dismissal. Therefore, in this spirit, the motive for this proposal must be weighed in the light of the legal tradition and the common goals of the institutions to address this issue in a joint initiative, also reflected in the Letter of Commitment referenced in this letter.

The same legal dilemma also exists with regard to unjustifiable wealth, 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 wealth constitutes a criminal offense punishable according to the legislation in force and the Constitution only provided for the measure of dismissal for judges or prosecutors in case of committing a criminal offense proven by a final court decision.

The expansion of the grounds for dismissal of judges, together with the standard as defined by law by which this expansion is intended to be done, as we will elaborate below, is contrary to the Opinion of the Venice Commission, which should serve as a basis for limiting the political branches of power in making these proposals. Even more important than that, this practice is contrary to the practice of the Constitutional Court built over the years in this field of constitutional jurisprudence.
The problem related to the standard that has been set in the proposed amendment, which has to do with the fact that the grounds for dismissing a judge have been expanded and will be regulated further "as defined by law", raises another concern about the possibility of interfering with the system of justice.

[...]
There is no doubt, in the position of the KJC, that the provisions of the proposed amendment no. 27 represent a broad and fluid basis for interfering with extra-constitutional means in the individual and collective independence of judges. Consequently, this made the judicial system, factually but also legally, subordinate to the political branches of power. By placing the judiciary and individual judges in a vulnerable and completely unprotected position against the almost unlimited powers of the political branches (together) they made it unconceivable to guarantee a judicial system where citizens can seek and receive equal justice, impartiality and equal treatment before the law. Such a thing, in our opinion, is not and has never been the intention of the constitution makers.

c) Regarding the proposed constitutional amendments vis-à-vis the stances of the Venice Commission

71. The KJC underlines that: *"However, as we will see below, in addition to the stances highlighted by the Opinion of the Venice Commission, amendment no. 29 expands the list of entities allowed by this Opinion to have their integrity checked by adding the candidates for the abovementioned high positions. Moreover, in the proposed new article 161D, the Integrity Control Panel is left with blank competencies categorized only under the phrase "integrity control" which is claimed to be conducted "according to the manner and procedure defined by law". Even this aspect, the material jurisdiction of the assessment that this Panel will make, in KJC's viewpoint, goes beyond the limitation that the Opinion of the Venice Commission made to the assessed proposals. The article in question, 161D gives the Control Panel the competencies to propose the dismissal of the subject under control (in paragraph 3) and also puts the President in a position to approve this proposal in each case by determining that "...the President dismisses from the position of the judge...the subject who does not pass the integrity check". With this provision, the draft amendment creates, in a non-proportional and unjustifiable manner, two parallel and discriminatory systems for the dismissal of judges: one for subjects of control and one for judges in general. This goal does not seem natural for the article in question since it aims to establish a control of control subjects (managerial level of the justice system) and not for judges. Such an approach is contrary to the Venice Opinion on this initiative. Beyond the violation highlighted above, the proposed article 161D in paragraph 3 and 4 interferes arbitrarily with the powers of the president, giving the Integrity Control Panel effective competencies to dismiss judges, the competencies that naturally and traditionally have belonged and belong to the president.*

72. While in the section entitled "*Specific arguments in relation to Draft Amendments no. 27, 28 and 29*", the Judicial Council refers to the Judgment of the Court in cases KO29/12 and

KO48/12 and the Judgment of the Court in case KO 98/11, namely the stances of the latter related to the separation of powers and the independence of the judiciary.

c) Regarding the proposed constitutional amendment no. 29

73. In relation to the proposed constitutional amendment no. 29, the Court notes that the KJC raises the following issues: (i) the proposed constitutional amendment does not provide clarity on what the integrity control will include, and in this regard it refers to the principle of foreseeability; (ii) the control subjects have a temporary and non-permanent term of office; (iii) the proposed constitutional amendment no. 29 lacks detailed provisions for the Integrity Control Authority; and (iv) the proposed constitutional amendment no. 29 violates the rights guaranteed by articles 32 and 54 of the Constitution.

74. The KJC, regarding the clarity of what the integrity control will include according to this proposed constitutional amendment, specifies that: "*Legal foreseeability specifically requires that a provision is not applied retroactively, that the provision is consistent and that it is generally accessible to individuals to know the legal consequences of the norms. This is because in none of the articles proposed to be placed after Article 161, is it clarified what would be included in the integrity control. If this draft amendment is read in conjunction with amendment 27 as well as with the new proposed article 161B, paragraph 1, it is easy to conclude that this issue has also been attempted to be left to the discretion of the political branches to be regulated by law. However, such an important issue for a process that is meant to be serious should not leave the issue of integrity and the elements that will be evaluated to measure integrity to be regulated by law.*
The Council is concerned that if this way of constitutional changes is legitimized, in the future there is a risk that the main institutions for managing the justice system will face challenges in their daily work. This is because in an unforeseeable and flexible term of integrity "control" these institutions can easily be left without the appropriate quorum, thus jeopardizing the performance of their functions in the future processes of recruitment and management of the justice system. Beyond the normative/constitutional deficiencies related to legal foreseeability, the constitutional definition of integrity becomes even more important vis-à-vis article 161B, since it emphasizes and requires that the members of the panels be of high integrity. It is unjustifiable not to define, at the constitutional level, the elements of integrity in a process where the main part of the constitutional norms are proposed to address this issue. There can be no real expectation of an orderly integrity process, for example if the members of the panels within the Integrity Control Authority take on these roles without a predictable process regarding the qualities they must possess to perform this function.

75. Following this, the KJC refers to the Court's Judgment in cases KO29/12 and KO48/12 emphasizing that: "*As the Court has emphasized, in that case there is a risk of violating this article of the Constitution by not appointing judges in time. Both articles, 32 and 54, reiterate the principle of separation of powers to the extent that they reiterate that the exercise of judicial powers and access to legal remedies are cornerstones of one of those pillars, that is, of the judicial branch of the state.*"

76. Following this, the KJC regarding proposed constitutional amendment no. 29, the part related to the subjects subject to integrity control *"emphasizes that;* (i) *"subjects of control according to Article 161A, proposed through amendment no. 29 are: the Members of Kosovo Judicial Council, the Members of the Prosecutorial Council of Kosovo, the Presidents of all courts and all chief prosecutors, as well as the candidates for these*

positions, excluding the president of the Constitutional Court; (ii) The term of office of the Integrity Control Authority is two (2) years with the possibility of extension for one (1) additional year if 2/3 of all the deputies of the Assembly vote for this extension."

77. Regarding these two, the KJC specifies that: such a term of office is inadequate for the following reasons: (i) *the subjects of control that are intended to be the subject of the mandated process within the framework of amendment no. 29, are subjects with a limited term of office. For example, the term of office of the members of the Kosovo Judicial Council is five (5) years; the term of office of the members of the Prosecutorial Council is five (5) years; the term of office of the presidents of the courts is five (5) years without the right to re-election; (ii) in most of these positions the officials who currently hold them are in the middle or towards the end of their terms; and (iii) "Given that the term of office of the Authority for Integrity Control will be at most three (3) years, and in the most optimal case two (2) years, the effect of this "control" will be very minimal, given that such persons who are "checked" will leave these positions very soon after that check and other people will get the positions and for which officials, the Authority in question will not have temporal jurisdiction to check."*

78. The KJC in its comments reiterates that: "*The Council is of the position that the internal mechanisms of continuous integrity verification should be strengthened, which has motivated the Council's position to be part of the Joint Letter of Commitment which aims to target a significant number of issues through comprehensive legal reforms, including issues related to the figure of judges and candidates for judges. It is not clear whether in addition to the mandate of the leadership position, the judges can also lose their mandate as a judge since their mandate as a judge is linked to this mandate.*

79. Following this, the KJC specifies that the proposed constitutional amendment no. 29, lacks detailed provisions for the Integrity Control Authority. In this regard, the KJC adds the following: *"While the term of office of the original members of the Authority is three (3) years, on the other hand, the extension of the term for one (1) additional year will require 2/3 of the votes in the Assembly. This manner of regulation can make this Authority inefficient, given that in the institutional context of Kosovo, 2/3 of the votes of the Assembly are rarely reached. This may risk that a control process started or that remains in the appeal instance cannot be completed due to the lack of legitimacy of the Integrity Control Authority for the additional one (1) year mandate. This can block these institutions and consequently also cause negative consequences in the justice system and thus affect the reduction of human rights guaranteed in chapter 2 (such as: the right to legal remedies, the right to a fair trial and within reasonable time, etc.)."* Following this, the Judicial Council adds that the competences of the Integrity Control Panel are contrary to the provisions that guarantee the function and mandate of constitutional institutions.

80. Furthermore, the KJC emphasizes that draft article 161F in the draft constitutional amendment no. 29 "*completely eliminates the right to legal remedies"* and as such violates the rights guaranteed by articles 32 and 54 of the Constitution.

81. Finally, the KJC refers to international rights and standards regarding the independence of the judiciary, namely article 6 of the European Convention on Human Rights (hereinafter: the ECHR) and documents and instruments of the Council of Europe and the Venice Commission.

(iv) Comments submitted to the Court by Mr. Abelard Tahiri, deputy of the Parliamentary Group of the Democratic Party of Kosovo on 3 April 2023

82. On 3 April 2023, after the Court adopted the request of Mr. Abelard Tahiri to the Ombudsperson for an extension of the deadline for comments, the latter, on the same date, submitted to the Court his comments to the Applicant's Referral. His comments specifically refer to the proposed constitutional amendments no. 27 and 28, for which he specifies as follows:
[...]

> *"12. Article 104.4 of the Constitution explicitly establishes that "Judges may be removed from office upon conviction of a serious criminal offense or for serious neglect of duties." As such, this paragraph establishes a very strong guarantee on the mandate of judges, which also serves as a means of protection against politically motivated or influenced dismissals. Therefore, in the sense of this article, judges can only be dismissed on two grounds, that of conviction for a serious criminal offense, the determination of which is made by the Criminal Code of the Republic of Kosovo, and due to serious neglect of judicial duties.*
> *13. While draft amendment no. 27 proposes that a sub-paragraph be added to paragraph 4 of this article, expanding the list of grounds (cases) when a judge can be dismissed. [...]*
> *14. In this way, while draft amendment no. 29 is proposed as a transitional provision in article 161 A, 161 B, 161 C, 161 D, 161 E, 161 F, this is not the case with draft amendments no. 27 and 28. Therefore, only these last two are the subject of my comments and my request that they be examined by the Court and after the assessment be declared incompatible with the Constitution, because I consider that they diminish the rights and freedoms guaranteed by its Chapter II.*
> *15. Based on the fact that sub-paragraph 4a expands the grounds for dismissal of judges including, among others, the possibility that it has been proven that the same has unjustifiable wealth and/or has vulnerable integrity, we consider that these two proposed grounds conflict with chapter II of the Constitution, respectively articles 22, 36, 46 and 49."*

83. In relation to the above, deputy Abelard Tahiri specifies that such grounds as unjustifiable assets and vulnerable integrity "*are not applied according to international acts and instruments, as well as according to the most important documents of international institutions and bodies, which have unified the application of the principles of independent judiciary."* In this sense, he refers to the Bangalore Principles of Judicial Conduct; the Declaration of Principles of the Independence of the Judiciary by the Conference of Presidents of the High Courts of Central and Eastern Europe*;* Acts of the Consultative Council of European Judges (CCEJ).

84. Following from the above, the deputy, Abelard Tahiri, specifies that: "*to my opnion, the expansion of the ground for dismissal of judges remains controversial in: 1. The case when it is proved that they have unjustifiable assets and 2. The case when they have a vulnerable integrity. These two cases proposed in the challenged draft amendments to be implemented in the permanent plan, I consider to essentially violate the independence of the judicial system and the courts themselves as bearers of judicial power."* Regarding these two, the deputy, Abelard Tahiri, underlines that: "*are unprecedented and arbitrary grounds, which present a great opportunity for undermining the independence of the judiciary, setting standards for dismissal - different from international ones and*

promoting an abusive opportunity to undermine the independence of the judiciary guaranteed by the Constitution."

85. According to the deputy, Abelard Tahiri, *"these two grounds reduce the rights and freedoms from Chapter II of the Constitution, since I consider that they are in full contradiction with international acts applicable by most democratic countries and which aim to ensure the independence of courts and judges in their decisions."*

86. In the end, the deputy, Abelard Tahiri, proposes to the Court: "*to admit all the above comments given for the draft amendment no. 27 in their entirety also for the draft amendment no. 28, because the substance of these two amendments, challenged by me, is entirely the same."*

(v) Comments submitted by the Office of the President on 25 April 2023

87. In its comments submitted to the Court, the Office of the President of the Republic of Kosovo initially states that:

> *"[...] The Office of the President of the Republic of Kosovo has participated in the meetings related to the constitutional amendments for the vetting process, both during the work phase developed by the Ministry of Justice, and during the work with the ad-hoc Committee of the Assembly."*

88. In its comments, the Office of the President reiterates the need for the vetting process, as a result of*: "Stagnations and failures in the justice system in our country have been found continuously, both by reports of international organizations and mechanisms, as well as by independent local observers. This strongly proves that the existing mechanisms of the justice system have been shown to be inefficient, that is, insufficient to guarantee the necessary level of efficiency, professionalism and integrity of the judicial and prosecutorial system. The justice system continues to suffer from serious defects, starting from: the lack of efficient mechanisms to monitor and evaluate the integrity of judges and prosecutors; the lack of independence and efficiency of courts and prosecutors' offices, which results in the violation of citizens' rights; unsatisfactory professional level in decision-making, up to political influences, nepotism and corruption."*

89. Following this, the Office of the President, among other things, emphasizes that: *"Gender-based violence continues to remain among the most serious wounds of Kosovar society, and the repeated failures of the justice system to provide adequate protection for victims burdens the state of Kosovo with responsibility. This is just one of the segments where the justice system has consistently failed, and these failures have had fatal consequences for victims of gender-based violence, but have also provoked the expected reactions of public [opinion]."*

90. The Office of the President continues, by adding that: *"The legitimacy of the judicial power cannot be treated separately from the citizens' trust in the courts and the prosecution offices. Being the only one of the three branches of power that is not legitimized by citizen vote, the judicial power derives its legitimacy from the trust of citizens and justifies it through integrity, independence and professionalism."*

91. Finally, the Office of the President emphasizes that: **"***The joint institutional commitment to implement the vetting process through Constitutional amendments should be seen and*

evaluated as a reflection on the imperative need to build an effective and independent system. The fact that the ad-hoc Committee of the Assembly is composed of deputies from the government and the opposition, and has been approved unanimously, has given increased legitimacy to the work of this Committee. To have an effect beyond the superficial, as well as strong citizen legitimacy, a vetting process must be realized through the process of constitutional amendments approved by the Assembly of the Republic of Kosovo, as the most resourceful spokesperson for the voice of the citizens of the Republic of Kosovo. Any other approach would be more like an improvisation and would only be a camouflage of opposition to the vetting process. These approaches do not help the justice system itself and the just cause of protecting and strengthening its independence, integrity and professionalism.

> *[...]*
> *Therefore, considering the responsibility of amending the Constitution as an exclusive prerogative of the representatives of the people, this form of implementation of vetting exceeds the authorship of any power and institution, turning vetting into a necessary process of state and social interest.*
> *Likewise, the determination to implement the vetting process through the creation of constitutional mechanisms subjecting to the procedure of amending the Constitution, shows the reflection of the people's representatives to meet an important standard in the process of Kosovo's integration into the European Union. Kosovo has been constantly criticized by the supervisory mechanisms of the European Union, for a judicial system that is in the early stages of its development. Moreover, the capacity of the justice system to implement the acquis standards of the European Union continues to be viewed with skepticism even in the latest EU report on Kosovo for 2022.*
> *On the other hand, the construction of constitutional mechanisms that enable the realization of the vetting process, creates the highest standards of responsibility for the competent bodies to organize and manage the vetting process.*
> *The proposed constitutional amendments should also be seen in the service of supplementing the Constitution, due to the fact that these amendments increase the constitutional mechanisms to enable the most efficient implementation of Article 53 of the Constitution. Any amendment to the Constitution, which completes the Constitution in a certain segment, especially with mechanisms that it considers necessary to meet the objectives of the state of Kosovo in the process of integration into the European Union and that is assessed to be in accordance with the state and citizen interest, must have the support of the people's representatives.*

92. In light of the above, in its comments before the Court, the Office of the President concludes that: *"In this regard, the most serious reflection that Kosovo's institutions can undertake is to guarantee constitutional and legal mechanisms that would contribute to building capacities for an independent, professional and integrity justice system.*
Therefore, the President of the Republic of Kosovo assesses the vetting process as necessary and as a joint institutional responsibility in the interest of the state and the citizens of Kosovo. In light of the responsibilities to guarantee the constitutional functioning of the institutions, also related to the unifying role foreseen by the Constitution, the President will take the necessary responsibilities in relation to the vetting process in the justice system."

(vi) The responses of the Ministry of Justice to the comments of the KJC, KPC and the deputy Abelard Tahiri related to the referral, submitted on 19 April 2023

a) Responses of the Ministry of Justice to the KJC comments:

93. Regarding the KJC comments on the "*tendency of interference with the judicial system*", the Ministry of Justice states that: *"The problems and challenges of the justice system are evident in Kosovo, confirmed by credible local and international reports, as elaborated especially in paragraph 10 of the Ministry's comments sent to the Court earlier on this Referral (hereinafter: the first comments of the Ministry of Justice). Attached to these responses of the Ministry of Justice is a summary of local and international reports which have highlighted and identified numerous problems in the judicial and prosecutorial system. In order to reflect in an even more practical way one of the main problems of the justice system - nepotism, the Venice Commission has expressly mentioned in its Opinion, as follows: "Nepotism would be widespread in the Judiciary, where family members of judges and prosecutors at all levels were employed in judicial and prosecutorial positions. Within the Judiciary, interest groups would have formed that supported each other. Particular criticism was voiced of cases of non-prosecution, prosecution of incorrect crimes (e.g. light bodily harm, instead of attempted murder) or the preparation of indictments that were allegedly purposedly drafted in an incoherent manner, ensuring that they would fail in court."*

Based on the credibility of the opinions issued on the problems and challenges of the justice system, and in particular taking into account that the Ministry of Justice has sought opinions from the same sources in the most transparent way, the policies of the Ministry cannot in any way be evaluated as interference with the independence of the justice system as is usually done by the representatives of this system. The judicial system is an independent system in terms of its operation and internal policies. Applicable legislation or public policies affecting the judiciary are the competence of the Ministry of Justice, which clearly reflects the principle of checks and balances of powers. In this direction, and in the spirit of the constitutional and legal regulation, in every such initiative, the Ministry has invited for cooperation the representatives of the justice system, especially the KJC and the KPC, in order to draft policies and legislation that respond to the needs and challenges presented in the system. Such inter-institutional coordination is inevitable in order to produce adequate policies for the system. The subsequent coordination and addressing of the problems identified and supported by local and international organizations are the very opposite of the intervention claimed by the KJC and the KPC, these claims tend to exclude the role of the Government in the drafting of public policies of the judiciary, violating thus the constitutional principle of control and balance of powers, and with this also the insistence of maintaining the status quo."

94. Regarding the lack of an intended objective through the constitutional amendments, claimed by the KJC as a result of the finalized recruitment process and the signing of the Joint Declaration of Commitment, the Ministry of Justice emphasizes that:

> *"The Ministry of Justice assesses that with these two elements as mentioned by KJC, the intended objective of the constitutional amendments is not in any way consumed. Regarding the first element, as mentioned in paragraph 9 of the first comments sent by the Ministry of Justice, it should be reiterated that the process of recruiting new judges, not only during these last two years, but for a while now, has been developed without specific legal regulation of the procedure for checking the integrity of judges, thus raising questions about the efficiency of the recruitment process. For this we refer to the Regulation on the Recruitment of Judges, where in Article 23 only in a*

very general aspect is it determined that the Support Unit of the Recruitment Commission collects the necessary data for the verification of the personal and professional integrity of the candidate, respecting international standards and laws in force. It further stipulates that the candidate is informed about the data from this process before the oral interview and that these findings are evaluated in the result of the oral interview together with professional skills, knowledge of legislation and communication skills.

Therefore, the KJC Recruitment Regulation lacks the specification of the data collected during the integrity control, the rights and obligations of the candidate for judge during this process, the obligation of cooperation of other private institutions/persons, the validation of the data by the authority that collects them, and other issues that would ensure the efficiency of this process. The very big flaw is the fact that integrity is calculated with points in the recruitment process and not as a qualification that a person passes the integrity check or not. This creates situations where a candidate has been able to be evaluated with very high points in professional skills, knowledge of legislation and communication skills, while being rated lower in integrity, but despite this high rating in the first three (3) issues ranks him high and result in him being elected as a judge. It is worth noting that an almost identical situation also prevails during the recruitment of prosecutors. Then, the comments of the KJC only mention the integrity control during the recruitment of new judges, while the continuous integrity control of judges, in certain periods of time or during their transfer or promotion, is completely ignored. Despite the non-planning of the KJC for the recruitment of new judges, integrity control is a process that judges must undergo on an ongoing basis. Currently, the KJC includes the evaluation of integrity within the evaluation of judges' performance, evaluating integrity with points, which creates an inappropriate situation where a judge with excellent performance but no integrity continues to be part of the system. For the importance of continuous integrity control, we refer to paragraph 14 of the Opinion of the Venice Commission, where one of the forms of integrity control is the one that is done in more regular (continuous) forms, further elaborated in paragraph 17 of the first comments sent by the Ministry of Justice. Also, in paragraph 25 of this Opinion, the Venice Commission assesses that "The existing evaluation system of judges would not seem to be very effective".

95. The Ministry of Justice further adds that*: 'Otherwise, without the constitutional changes, the question arises as to which authority would be able to control the integrity of the members of the KJC and the KPC, or even other high positions such as court presidents and chief prosecutors. Integrity control by these positions for themselves is a very high standard for the context of Kosovo. Moreover, the dominant corporatism within the institutions of the justice system such as the KPC, as already validated by the opinions of the Venice Commission, does not contribute to the cause defended by the actors of the justice system. Moreover, if there was an interest in internal integrity control, during all these years, KJC and KPC would manage to create internal mechanisms and adequate integrity control procedures, and would not contribute to them for years, a problem which has now reached large proportions and which justifies the constitutional changes as recommended by the Venice Commission."*

96. Following this, the Ministry of Justice adds: *"As for the Declaration of Commitments, as explained in paragraph 21 of the first comments sent by the Ministry of Justice, the intended legal reforms are in full line with the intended constitutional amendments, because as explained, after "checking the integrity of high positions" in the justice system*

by the Integrity Control Authority, it will be necessary for the KJC and KPC with members with checked integrity, to create adequate internal mechanisms for further integrity control. Through these mechanisms, it is then possible to control the integrity of judges and prosecutors, as explained above. In addition, inter-institutional coordination serves the perfection of public policies and the control of powers and, as such, is done between institutions for state purposes where it does not highlight the individual who can lead a certain institution for a limited period of time. The Ministry of Justice aims at inter-institutional consultation, coordination and communication, not personal communication. The commitment to joint efforts towards the reform creates responsibility precisely for the justice system to contribute to its perfection, also through integrity control, therefore it creates responsibility and not escape from responsibility due to the committed cooperation."

97. Regarding the comments related to the proposed constitutional amendment no. 27, the Ministry of Justice emphasizes that*: "[…] the purpose of Amendment no. 27 is the complete opposite of what the KJC claims. As elaborated in the first comments sent by the Ministry of Justice, this amendment aims to clarify the constitutional basis for dismissing a judge for 'serious neglect of duty', including the elements of 'persistently insufficient performance evaluation', proof of the existence of unjustifiable wealth, vulnerability of integrity, or serious disciplinary violations. The clarification of this basis in the Constitution actually protects the independence of the justice system and increases the predictability of the elements that must be met for the dismissal of a judge. Vulnerable integrity, serious disciplinary violation, negative evaluation of performance or non-respect of duties, cannot but be a basis for dismissal because, on the contrary, it would harm the image of the judge or the prosecutor and would not contribute to the efficiency of the judiciary or in accountability, etc., the crucial aspects from the perspective of the citizen in particular. The laws that further regulate the procedures of integrity control, performance evaluation or discipline must therefore necessarily be in accordance with these elements defined in the constitutional amendment. These laws cannot define other additional bases or be subject to wider interpretations such as the current laws in relation to Article 104(4) for judges or Article 109(6) for prosecutors, of the Constitution."*

98. Following this, the Ministry of Justice refers to the Opinion of the Venice Commission on Kosovo, through which it is recommended that: "*However, to ensure a proportional reform and to limit disintegration of the judicial system, the Venice Commission recommends the limitation of a transitional assessment for members of the KJC and the KPC, presidents of courts and chief prosecutors. This assessment should only cover integrity (including unjustifiable wealth) but not performance, which is not a permissible basis for verification. Furthermore, this is a relevant issue for council members." In this regard, the Ministry of Justice reiterates that: "Based on this recommendation of the Venice Commission, the Ministry of Justice has revised the draft constitutional amendments, harmonizing them with all the recommendations of the Venice Commission."*

99. Finally, regarding the comments related to the proposed constitutional amendment no. 27, the Ministry of Justice emphasizes: "*Regarding the clarification of the constitutional basis for dismissal 'serious neglect of duties', the Ministry of Justice will not repeat its arguments presented above in paragraph 14 of these Responses, and in paragraphs 14 to 22 of the first comments sent by the Ministry of Justice, but at this point it clarifies for the Court that the claim of the KJC that unjustifiable wealth is regulated by the Criminal Code is completely untrue Criminal Code in article 430 'Failure to report or falsely reporting property, revenue/income, gifts, other material benefits or financial obligations' and the*

Law on Declaration of Assets only sanction issues of failure to report or false reporting of assets. So, the assessment of whether a public official (namely the judge or the prosecutor) declares the assets in time and whether his declaration is complete, in the sense of whether he made a false declaration or hid any assets that he owns or possesses. So these laws do not regulate in any way the source of wealth, whether the wealth declared by the public official is justifiable or not.

100. Following the comments of the KJC regarding the proposed constitutional amendment no. 29, the Ministry of Justice clarifies that: *"In point (3) regarding the discrimination claimed by the KJC related the legal remedies, but also the existence of legal remedies for the control subjects, the Ministry of Justice assesses that the right of judges to appeal against the decision on dismissal directly to the Supreme Court in accordance with Article 104(5) and the other exclusionary provision for the subject of control that such a complaint should be presented to the Appeals College within the Integrity Control Authority, is justified and is in accordance with the practice of the ECtHR. In point (3) regarding the discrimination claimed by the KJC as to the legal remedies, but also the existence of legal remedies for the control subjects, the Ministry of Justice assesses that the right of judges to appeal against the decision on dismissal directly to the Supreme Court according to Article 104(5) and the other exclusionary provision for the subject of control that such a complaint should be presented to the Appeals College within the Integrity Control Authority, is justified and is in accordance with the practice of the ECtHR.*

101. According to the Ministry of Justice: "*This difference in treatment meets the three criteria defined by the aforementioned practice (i) prescribed by law; (ii) legitimate purpose, and (iii) proportionality. Regarding the prescribed by law, the Constitution and the laws derived from the Constitution, and the draft amendment no. 29 and the law that will follow this amendment, will clearly define this difference. This distinction follows a legitimate aim, which is to check the integrity of 'high positions' in the justice system and the candidates for these positions, to enable the Judicial Council and the Prosecutorial Council to then build internal integrity control mechanisms for candidates for judges and prosecutors and continuous control of integrity, as recommended by the Opinion of the Venice Commission on Kosovo. Also, the criterion of proportionality is fulfilled, taking into account that the creation of a constitutional Authority outside the Judicial and Prosecutorial Council for integrity control and then potentially leaving the possibility of appeal to the Supreme Court (of judges do not have the integrity checked in this point) for dismissal of the judge, which this Authority can propose, would potentially compromise the entire process of integrity control by this Authority. For this reason, it is planned to create the Appeals College as part of the Integrity Control Authority, the nature of which qualifies it as a 'tribunal established by law'.*

102. Furthermore, regarding the comment of the KJC related to the lack of foreseeability of integrity control, the Ministry of Justice specifies that: ***"****Regarding the lack of clarity of what "integrity control" includes, the Ministry of Justice reminds the Court that the proposed constitutional amendments were recommended to be of a more general nature by the Venice Commission, which assessed that the original proposed amendments were "very detailed", thus stating 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". Therefore, the Ministry assesses that the detailed provisions regarding what it will include and how exactly the integrity control is defined, should be regulated at the level of ordinary law and not of the Constitution. Moreover, the existing spirit of the Constitution of the Republic of*

Kosovo does not follow a practice of giving definitions of similar terms. Here, the Ministry refers to the current basis for dismissal of judges, where "criminal offense" is not defined within the Constitution, but this is done by the Criminal Code of the Republic of Kosovo. Contrary to the definition of this basis by legal provisions, such a thing does not exist within the constitutional basis for dismissal "serious neglect of duties". Referring to the first comments sent by the Ministry of Justice and the explanations presented above, the Ministry will not reiterate the need for clarification of this constitutional basis for dismissal. However, the Ministry only reminds the Court once again that considering that 'vulnerable integrity' and 'unjustifiable assets' will qualify as "serious neglect of duties" within the framework of the proposed amendments, it constitutes sufficient clarification of this term , while their more specific elements should be regulated by provisions at the level of the law. Consequently, the Ministry assessed that providing a detailed definition of "integrity control" at the level of the Constitution would be contrary to its current spirit. Moreover, the ECtHR in case of Xhoxhaj v. Albania, found that a provision formulated in broad terms, as was the case with the term "violation of public trust", "is not unusual", and this referring to legal provisions which are considered more detailed and not constitutional ones which enjoy a more general approach.

103. Furthermore, to the KJC argument related to *"the risk of the lack of quorum in the Council for the continuation of the exercise of its functions in the future processes of recruitment and management of the justice system", the Ministry of Justice specifies that: "[...] that although the proposed constitutional amendments do not enter the details of the regulation of the work of the Authority, so as to avoid the paralysis of the Council, these aspects will be regulated at the level of the law to provide the necessary means to avoid the risk of the lack of a quorum in the Council. Amendment 161D, paragraph 1 states that the control of the integrity of the control subjects "is carried out according to the manner and procedure determined by law". This "manner and procedure" will be done in such a way that the subjects will be subject to control gradually, starting with the members of the councils themselves, but in parallel with the candidates for these positions. This will be done so that if any current members fail this integrity check, then the candidate for that position, who then undergoes the integrity check, will be able to take his place and avoid the risk of not having a decision-making quorum within the Council. In addition, the provisions within the current Draft Law that is being drafted by the Ad-Hoc Committee of the Assembly foresee another anti-deadlock mechanism, which ensures the tenure of the current members of the Council who do not pass the integrity check, until the election of new members.*

The Judicial Council currently has twelve (12) members. Of them, the earliest mandate is expected to end in January 2025, while the last one in January 2028. If it is calculated that the full term of office of the Authority, the mandate of three (3) current members, may end within the term of office of the Authority (if it is calculated that this Authority starts work in 2023". However, this can also be avoided, since these members can be the first to undergo the integrity control, and at the same time the integrity check for candidates for these positions will also be carried out as mentioned above. This will be done precisely to ensure that the Council will not be paralyzed and ensure its quorum of nine (9) members for decision making.

The Council, be it judicial or prosecutorial, after being subjected to this control, as mentioned above in these Responses, will continue this procedure through their internal mechanisms for the entire judicial, respectively prosecutorial system. So, the competencies of the Authority will pass to the councils themselves, a step which, in the spirit of the Opinion of the Venice Commission, ensures minimal interference in the competencies of the KJC and the KPC, but achieving the goal of reforming the justice system. The current

candidates who pass the integrity check, whose term was argued in the paragraph above, but also the new candidates with a five (5) year term will have enough of their terms to continue efficiently to undertake the integrity check of other judges and prosecutors."

104. Following this, the Ministry of Justice adds that*: "Regarding the lack of a predictable selection process for the members of the Integrity Control Authority, regarding the qualities they must possess to perform this function, the Ministry reiterates its argument that the constitutional provisions should not contain detailed procedural provisions. However, the Ministry notes that the current amendments ensure a predictable process of selection of members of the Integrity Control Authority. Referring to Article 161B, in a general manner, the composition of the Authority, the general principles of the Authority's work, as well as the general criteria for exercising the function of a member of this Authority are presented. On the other hand, Article 161C is dedicated to the selection procedure itself, presenting the steps from the open selection process organized by the President to the dismissal procedure of these members, with the aim of this Authority being independent."*

105. As for the KJC comment that there is *"the risk of violating the Constitution by not appointing judges in time", the Ministry of Justice emphasizes that: "[...] it should be emphasized that other current competencies of the councils such as the appointment, dismissal, transfer, promotion of judges, respectively prosecutors, remains with the councils throughout the time that the Authority exercises its mandate for checking the integrity of 'high positions'. The Authority's mandate, therefore, according to Article 161B and 161D of the draft amendment no. 29 is limited to checking the integrity of 'high positions' and candidates for these positions, and eventually proposing their dismissal to the President. The competences for the appointment of judges will remain, as mentioned above, under the competence of the KJC, respectively the prosecutors under the competence of the KPC.*

106. Further and in relation to the comments of the KJC referred to the subjects of integrity control, the Ministry of Justice responds as follows:

> *"Regarding the argument that the two (2), eventually three (3) years term is inadequate due to the limited term of office of the control subjects, the Ministry of Justice, referring to its arguments in paragraphs 31 and 32, argues that this allegation does not represent an obstacle or reduction of the rights protected by Chapter II of the Constitution.*
>
> *Regarding the allegation of the lack of jurisdiction of the Integrity Control Authority to control the candidates for the vacant positions in the Council, the Ministry assesses that the fact that the candidates for the positions of the control subjects will be subjected to the integrity check in parallel, as well as by reiterating that the councils will be the first turn of this control, ensures that the Authority will have sufficient temporal jurisdiction to exercise this control. The goal is that with the end of the mandate of the Authority, Kosovo will have a KJC and KPC, whose members, including the presidents of the courts and the chief prosecutors, will be able to create internal integrity control mechanisms and implement appropriate constitutional and legal competencies.*
>
> *As for the allegation of not clarifying the possibility of losing the judge's mandate in case the dismissal of the control subject is proposed, the Ministry of Justice, referring*

to amendment 161D, paragraph 4, assesses that this consequence is very clear and leaves no room for a different interpretation, except that judges, respectively prosecutors, will be proposed for dismissal from their position in case they do not pass the integrity check.

107. In the following, the Ministry of Justice to the comments of the KJC regarding the lack of detailed provisions for the Integrity Control Authority, adds that: *"[...] the work of the Integrity Control Authority will not begin until the entry into force of the Law derived from the draft constitutional amendment no. 29, which will specify in detail all the provisions related to this Authority."* While in relation to the comment of the KJC that refers to *"the risk of not completing the control process or the appeal proceedings in case of not securing 2/3 of the votes in the Assembly for the extension of the mandate of the Integrity Control Authority",* the Ministry of Justice, clarifies that*: "as far as the appeal proceedings is concerned, it refers to Article 161A, paragraph 4, of the draft amendments, which avoids this risk, emphasizing that "The appeal proceedings against integrity control is not counted in the deadlines in paragraph 2 of this Article".*

108. Following the abovementioned response, the Ministry of Justice adds that*: "However, unlike the KJC, the Ministry of Justice, following the recommendation of the Venice Commission, assesses that the establishment of the standard of 2/3 of the votes for the establishment of the Authority and the extension of its mandate by the Assembly should remain as such to avoid the politicization, which could happen with a simple majority of votes in the Assembly of the Republic of Kosovo. Whereas, regarding the argument of the KJC about the possibility of reaching 2/3 of the votes, the Ministry returns the Court's attention to amendment 161C, based on which this Authority will undergo a strict selection process, which will be administered by an independent constitutional institution, with the help of an international mechanism, and will finally be voted by the Assembly. This process presented in this amendment removes the possibility that the extension of the term of office becomes possible by the selection institution itself. However, voting is a more political circumstance and of course this issue remains to be resolved by political means respecting the spirit of the Constitution of Kosovo."*

109. In its response to the KJC comment that *"The competences of the Integrity Control Panel are contrary to the provisions that guarantee the functioning and mandate of constitutional institutions"* the Ministry of Justice specifies that*: "[...] the competences of the Integrity Control Panel do not diminish the rights protected by Chapter II of the Constitution. The competence of the Panel to propose the dismissal of the subjects of control does not constitute a violation of the right to be elected, including the duration of the term, since the dismissal will not take place automatically with the entry into force of these amendments, but the decision on dismissal will follow a detailed review, which will be conducted by a completely independent institution chosen by the Assembly. The Ministry assesses as important the strengthening of an essential difference between the proposed amendments and the Judgment KO 29/12 and 48/12 referred to by the KJC. This is because, as argued in the above paragraph in the case of the proposed constitutional amendments, the Control Authority will not have the competence to prematurely terminate the mandate of the control subjects but will only make the proposal for dismissal to the respective authorities. This decision on the proposal will follow a decision made by the Authority, which fulfills the criteria of a 'tribunal established by law' and in this way takes on the attributes of judicial review."*

110. Further to the KJC comment that by the proposed article 161F the right to legal remedies is violated, the Ministry of Justice specifies that: "*The Ministry of Justice strongly opposes this point, going back to the first comments of the Ministry of Justice. So, the Ministry will not return to this argument, since it considers that the constitutional amendments, that is the right of appeal to the Appeals College, which constitutes a 'tribunal established by law' contains all the features of an effective legal remedy, therefore this amendment does not reduce the rights guaranteed in Chapter II of the Constitution of the Republic of Kosovo, in conjunction with Articles 6 and 13 of the ECHR.*"

111. Finally, regarding the international rights and standards related on the independence of the judiciary, the Ministry of Justice clarifies that: *"[...] all these international acts and even some additional ones have been the basis of the work in the concept document for the development of the vetting process in the justice system, where a special chapter is dedicated to these international standards together with the practices of other countries that have developed the vetting process. The compliance of the vetting process with international standards from the concept document up to the constitutional amendments that are with the Court is also evidenced by the reference of the concept document and draft constitutional amendments for consideration to the Venice Commission, by taking into account the role of this Commission as an advisory body of the Council of Europe for providing legal remedies on whether constitutional and legal proposals are in line with European standards and international experience in the fields of democracy, human rights and the rule of law."*

112. The Ministry of Justice further adds that: *"In terms of international standards, the KJC has also raised aspects of some rights derived from the ECHR which can be reduced by constitutional amendments, mentioned here Article 6, 10, 13 and 14. The arguments for Article 6 and 13 are presented above, however, as regards Article 10 of the Convention that guarantees freedom of expression, which the KJC claims to be reduced for judges for the free expression of their opinion, it is practically unclear which of the articles of the constitutional amendments can make this reduction because the Council did not refer to any relevant article. Secondly, freedom of expression in the context of this process is completely inviolable and undisputable, consequently not relevant because freedom of expression does not constitute an assessment criterion in the process, to reiterate that the basis of this control will be the integrity control that includes also the wealth control."*

113. In the end, in response to the comment of the KJC that the right is reduced through the draft constitutional amendments guaranteed by article 14 of the ECHR, the Ministry of Justice responds that*: "In relation to Article 14 of the ECHR, also alleged for reduction, but without specifying from which provision of the amendments, the KJC stated that judges should be appointed and promoted based on experience qualifications and not discriminatory factors. Such a statement is correct and acceptable, but in the present case it has not been in any way argued by the Council how the control subjects would be discriminated against, due to the fact that the control process is directly related to the management positions of the judicial and prosecutorial system, these positions are competent for ensuring the independence, non-discrimination, proportionality, professionalism and impartiality of the judicial, respectively prosecutorial system, and precisely these positions have also been recommended and confirmed by the Venice Commission for integrity control."*

b) Responses of the Ministry of Justice to the comments of the KPC

114. As to the comments of the KPC, the Ministry of Justice initially comments that: "*The Kosovo Prosecutorial Council in their comments have briefly opposed the constitutional amendments without arguing how they can reduce the rights provided in Chapter II of the Constitution. […] Therefore, as stated at the end of the letter, these comments were not prepared for the Constitutional Court, therefore, they do not correspond to the requests for reasoning and argumentation as to how these constitutional amendments can reduce any rights and freedoms according to Chapter II of the Constitution. The Ministry of Justice wishes to bring to the Court's attention that these comments of the KPC are outdated in the sense that many changes and developments have taken place since. While the comments retain the old positions which do not fully correspond to the current situation, in the real time of the consideration of the proposed amendments. However, some of the issues raised in those comments have already been elaborated in the first comments sent by the Ministry of Justice or even in these responses as above.*

c) Response of the Ministry of Justice to the comments of the deputy, Abelard Tahiri

115. Regarding the comments of the deputy of the Assembly, Mr. Abelard Tahiri, the Ministry of Justice responds as follows: "*First, regarding the allegations of deputy Mr. Tahiri in relation to the 'legitimization' of the Government's proposed amendments by the Assembly, the Ministry of Justice assesses that the process of drafting the amendments conducted by the Ad-Hoc Committee of the Assembly was a comprehensive process, with the participation of deputies from almost all parliamentary groups, including the Parliamentary Group of PDK, which is chaired by the deputy in question. During this process and discussions, the working group of the ad-hoc Committee has made significant changes in the draft amendments, even as a result of the proposals of the participating deputies from the opposition. In these working groups, representatives of KJC, KPC, the civil society organizations, and missions and international organizations, participated as well. As a result of this comprehensive process, as is now known, the ad-hoc Committee unanimously approved the proposals for constitutional amendments that are subject to review by the Constitutional Court.*

116. Following the specific comments of deputy Abelard Tahiri regarding the proposed constitutional amendments no. 27 and 28, the Ministry of Justice specifies that*: "[…] further clarification of the ground for dismissal of a judge or prosecutor 'serious neglect of duties' was accepted by the Venice Commission in its Opinion and there were no recommendations for change. In this context, the Opinion has also emphasized in a special way the importance of checking the integrity, and unjustifiable wealth in the context of checking the integrity of judges and prosecutors. The Ministry reminds the Court that the Venice Commission in this Opinion has assessed the compatibility of the proposed constitutional amendments with European standards and international experience in the fields of democracy, human rights and the rule of law.*

117. Finally, the Ministry of Justice adds that: *"[…] the constitutional amendment clarifies at the constitutional level what is included within the ground of 'serious neglect of duties', a ground already known for the dismissal of judges and prosecutors from the Constitution, but also from European and international standards. This ground is not arbitrary as alleged by the deputy in question, because the legal provisions in accordance with the Constitution and the proposed amendments will be applied for its assessment, either by the Integrity Control Authority as a temporary body or KJC and KPC as permanent bodies. In the Bangalore Principles referred to by the deputy, integrity is clearly defined as a value and fundamental principle of the judiciary and in the mentioned document of 2010*

'implementation measures', the ground proposed by amendments no. 27 and 28 is consistent with the finding in that document "….behavior that is clearly contrary to the independence, impartiality and integrity of the judiciary." Also, in the Basic Principles on the Independence of the Judiciary Declaration from the Conference of Presidents of the High Courts of Central and Eastern Europe referred by the deputy, it is mentioned "…the serious violation that makes the judge unsuitable to be as such…". Furthermore, in Opinion 3 of the CCJE, it is also emphasized that "judges should behave with integrity in office and in their private lives…". These principles developed by international bodies must be applied in accordance with the local context of the countries that take them into account. Corruption for a long time dominates as one of the biggest problems in the justice system, as evidenced by the local and international reports mentioned in these Responses, therefore a judge or prosecutor who has unjustifiable wealth cannot be considered to have integrity and be fit to serve in the justice system."

(vii) KJC responses to the comments of the KPC, the Ministry of Justice and deputy Abelard Tahiri from the PDK Parliamentary Group, submitted on 19 April 2023

118. In addition to its responses to the comments of the aforementioned institutions, the KJC also submitted the list of legal acts issued and adopted in 2022 and 2023 and its Annual Report.

(a) KJC responses to KPC comments

119. The KJC in its responses to the comments of the KPC stated that: "*As we pointed out in the first letter, of 22 March 2023, the Council believes that the Prosecutorial Council (KPC) is in a better position to defend and argue the independence of the prosecutorial system in Kosovo, and therefore the KJC supports the arguments of the KPC.*

(b) KJC responses to the comments of deputy of the Assembly, Mr. Abelard Tahiri

120. As to the comments of the deputy of the Assembly, Mr. Abelard Tahiri, the KJC adds that: *"The Judicial Council of Kosovo, assesses that even the comments of the deputy regarding the constitutional amendments should be treated and reviewed in the spirit of the interpretation that the Constitutional Court itself has on the issues related to the Constitution and the proposed amendments."*

(c) KJC responses to the comments of the Ministry of Justice

121. In the following, in response to the comments of the Ministry of Justice submitted on 22 March 2023, the KJC states that: *"[…] despite the allegation of the Ministry of Justice that the proposed "Vetting" has been validated by the Venice Commission, in some aspects the proposed constitutional amendments exceed what the Venice Commission has considered appropriate from the broader and more intrusive proposal that was initially presented to this institution. The concrete arguments on the way how this exceeding was carried out can be found in the preliminary letter of the Council provided to the Court on the same issue."*

122. Specifically, to the comments related to the proposed constitutional amendment no. 27, the KJC states that: *"[…] the proposed amendment 27 expands the grounds for the dismissal of judges in an intrusive and diminishing manner in relation to the rights guaranteed by*

Chapters 2 and 3 of the Constitution. In order not to repeat the detailed comments on this, they can be found in the preliminary letter forwarded by the Council to the Court. "While responding to the comment of the Ministry of Justice that the Law in force on the disciplinary liability of judges and prosecutors is unclear in relation to disciplinary liability, the grounds for it, and disciplinary violations, the KJC adds that: "The Council, as long as it is aware that the evaluation process of disciplinary liability in the past has been problematic, points out that recently there have been positive developments in this regard. This is also confirmed by the European Union Progress Report for Kosovo for 2022, in which it is emphasized that "The Kosovo Judicial Council has established an Advisory Committee on Judicial Ethics. Both Councils continue to conduct disciplinary procedures against judges and prosecutors. There is a slight shift towards imposing less lenient disciplinary sanctions, compared to previous years. "

123. As to the comments before the KJC itself related to the diminishing of human rights by the proposed constitutional amendments, the latter reiterates that by including but not being limited, are reduced: (i) the right to elect and be elected; (ii) the right to privacy; (iii) the right to fair and impartial trial; and (iv) the right to judicial protection of rights. According to the KJC: *"These rights are violated directly in relation to the parties that will be forced to submit to the processes caused by the proposed initiative, and/or indirectly, namely the rights of citizens that will be reduced or completely eliminated due to a justice system which tends to become dependent and interfered in political processes.*

124. Finally, the KJC asks the Court that*: "Beyond the competence, in the position of the Council, we consider that the Court has a constitutional and legal obligation to declare the proposed amendments in contradiction with the Constitution, namely to find that they diminish the constitutionally guaranteed rights."*

I. Relevant provisions of the Constitution of the Republic of Kosovo

Article 3
[Equality Before the Law]

1. The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.
2. The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members.

Article 4
[Form of Government and Separation of Power]

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.
2. The Assembly of the Republic of Kosovo exercises the legislative power.
3. The President of the Republic of Kosovo represents the unity of the people. The President of the Republic of Kosovo is the legitimate representative of the country, internally and externally, and is the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution.

4. The Government of the Republic of Kosovo is responsible for implementation of laws and state policies and is subject to parliamentarian control.
5. The judicial power is unique and independent and is exercised by courts.
6. The Constitutional Court is an independent organ in protecting the constitutionality and is the final interpreter of the Constitution.
7. The Republic of Kosovo has institutions for the protection of the constitutional order and territorial integrity, public order and safety, which operate under the constitutional authority of the democratic institutions of the Republic of Kosovo.

Article 7
[Values]

1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.
[…]"

Article 21
[General Principles]

"1. Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.
2. The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.
3. Everyone must respect the human rights and fundamental freedoms of others.
4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.

Article 22
[Direct applicability of International Agreements and Instruments]

"Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, 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:
(1) Universal Declaration of Human Rights;
(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
(3) International Covenant on Civil and Political Rights and its Protocols;
(4) Council of Europe Framework Convention for the Protection of National Minorities;
(5) Convention on the Elimination of All Forms of Racial Discrimination;
(6) Convention on the Elimination of All Forms of Discrimination Against Women;
(7) Convention on the Rights of the Child;
(8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment;

Article 24
[Equality Before the Law]

"1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.
2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.
3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.

Article 31
[Right to Fair and Impartial Trial]

"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
[...]
4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.
5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.
[...]"

Article 32
[Right to Legal Remedies]

"Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law."

Article 36
[Right to Privacy]

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.
2. Searches of any private dwelling or establishment that are deemed necessary for the investigation of a crime may be conducted only to the extent necessary and only after approval by a court after a showing of the reasons why such a search is necessary. Derogation from this rule is permitted if it is necessary for a lawful arrest, to collect evidence which might be in danger of loss or to avoid direct and serious risk to humans and property as defined by law. A court must retroactively approve such actions.
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 defense 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.

Article 55
[Limitations on Fundamental Rights and Freedoms]

1. Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.
2. Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment 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.
4. In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.
5. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.

Chapter IV
[Assembly of the Republic of Kosovo]

[…]

Article 65
[Competencies of the Assembly]

The Assembly of the Republic of Kosovo:
(1) adopts laws, resolutions and other general acts;
(2) decides to amend the Constitution by two thirds (2/3) of all its deputies including two thirds (2/3) of all deputies holding seats reserved and guaranteed for representatives of communities that are not in the majority in Kosovo;
[…]
(10) elects members of the Kosovo Judicial Council and the Kosovo Prosecutorial Council in accordance with this Constitution;
[…]

Chapter V
President of the Republic of Kosovo

[…]

Article 84
[Competencies of 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;
[…]"

Chapter VII
Justice System

Article 102
[General Principles of the Judicial System]

1. Judicial power in the Republic of Kosovo is exercised by the courts.
2. The judicial power is unique, independent, fair, apolitical and impartial and ensures equal access to the courts.
3. Courts shall adjudicate based on the Constitution and the law.
4. Judges shall be independent and impartial in exercising their functions.
5. The right to appeal a judicial decision is guaranteed unless otherwise provided by law. The right to extraordinary legal remedies is regulated by law. The law may allow the right to refer a case directly to the Supreme Court, in which case there would be no right of appeal.

Article 103
[Organization and Jurisdiction of Courts]

[…]

7. Specialized courts may be established by law when necessary, but no extraordinary court may ever be created.

Article 104
[Appointment and Removal of Judges]

1. The President of the Republic of Kosovo shall appoint, reappoint and dismiss judges upon the proposal of the Kosovo Judicial Council.
2. The composition of the judiciary shall reflect the ethnic diversity of Kosovo and internationally recognized principles of gender equality.
3. The composition of the courts shall reflect the ethnic composition of the territorial jurisdiction of the respective court. Before making a proposal for appointment or reappointment, the Kosovo Judicial Council consults with the respective court.
4. Judges may be removed from office upon conviction of a serious criminal offense or for serious neglect of duties.
5. A judge has the right to directly appeal a decision of dismissal to the Kosovo Supreme Court.
6. Judges may not be transferred against their will unless otherwise provided by law for the efficient operation of the judiciary or disciplinary measures.

Article 105
[Mandate and Reappointment]

1. The initial mandate for judges shall be three years. The reappointment mandate is permanent until the retirement age as determined by law or unless removed in accordance with law.

2. The criteria and procedures to reappoint a judge shall be determined by the Kosovo Judicial Council and they may be different in degree from the criteria used for the removal of judges.

Article 106
[Incompatibility]

1. A judge may not perform any function in any state institution outside of the judiciary, become involved in any political activity, or be involved in any other activity prohibited by law.
2. Judges are not permitted to assume any responsibilities or take on any functions that would in any way be inconsistent with the principles of independence and impartiality of the role of a judge.

Article 107
[Immunity]

1. Judges, including lay-judges, shall be immune from prosecution, civil lawsuit and dismissal for actions taken, decisions made or opinions expressed that are within the scope of their responsibilities as judges.
2. Judges, including lay-judges, shall not enjoy immunity and may be removed from office if they have committed an intentional violation of the law. 3. When a judge is indicted or arrested, notice must be given to the Kosovo Judicial Council without delay.

Article 108
[Kosovo Judicial Council]

1. The Kosovo Judicial Council shall ensure the independence and impartiality of the judicial system.
2. The Kosovo Judicial Council is a fully independent institution in the performance of its functions. The Kosovo Judicial Council shall ensure that the Kosovo courts are independent, professional and impartial and fully reflect the multi-ethnic nature of Kosovo and follow the principles of gender equality. The Kosovo Judicial Council shall give preference in the appointment of judges to members of Communities that are underrepresented in the judiciary as provided by law.
3. The Kosovo Judicial Council is responsible for recruiting and proposing candidates for appointment and reappointment to judicial office. The Kosovo Judicial Council is also responsible for transfer and disciplinary proceedings of judges.
4. 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.
5. The Kosovo Judicial Council is responsible for conducting judicial inspections, judicial administration, developing court rules in accordance with the law, hiring and supervising court administrators, developing and overseeing the budget of the judiciary, determining the number of judges in each jurisdiction and making recommendations for the establishment of new courts. New courts shall be established according to law.

6. The Kosovo Judicial Council shall be composed of thirteen (13) members, all of whom shall possess relevant professional qualifications and expertise. Members shall be elected for a term of five (5) years and shall be chosen in the following manner:
(1) five (5) members shall be judges elected by the members of the judiciary;
(2) four (4) members shall be elected by deputies of the Assembly holding seats attributed during the general distribution of seats; at least two (2) of the four (4) must be judges and one (1) must be a member of the Kosovo Chamber of Advocates;
(3) two (2) members shall be elected by the deputies of the Assembly holding reserved or guaranteed seats for the Kosovo Serb community and at least one of the two must be a judge;
(4) two (2) members shall be elected by the deputies of the Assembly holding reserved or guaranteed seats for other Communities and at least one of the two must be a judge.
(5) Incompatibilities with membership on the Kosovo Judicial Council shall be regulated by law.
7. The Kosovo Judicial Council elects from its members a Chair and Vice Chair each for a term of three (3) years. Election to these offices does not extend the mandate of the members of the Kosovo Judicial Council.
8. The Chair of the Kosovo Judicial Council addresses the Assembly of the Republic of Kosovo at least once a year regarding the Judicial System.
9. Candidates for judicial positions that are reserved for members of Communities that are not in the majority in Kosovo may only be recommended for appointment by the majority of members of the Council elected by Assembly deputies holding seats reserved or guaranteed for members of communities that are not in the majority in Kosovo. If this group of Council members fails to recommend a candidate for a judicial position in two consecutive sessions of the Council, any Council member may recommend a candidate for that position.
10. Candidates for judicial positions within basic courts, the jurisdiction of which exclusively includes the territory of one or more municipalities in which the majority of the population belongs to the Kosovo Serb community, may only be recommended for appointment by the two members of the Council elected by Assembly deputies holding seats reserved or guaranteed for the Serb Community in the Republic of Kosovo acting jointly and unanimously. If these two (2) members fail to recommend a judicial candidate for two consecutive sessions of the Kosovo Judicial Council, any Kosovo Judicial Council member may recommend a candidate for that position.

Article 109
[State Prosecutor]

1. The State Prosecutor is an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law.
2. The State Prosecutor is an impartial institution and acts in accordance with the Constitution and the law.
3. The organization, competencies and duties of the State Prosecutor shall be defined by law.
4. The State Prosecutor shall reflect the multiethnic composition of the Republic of Kosovo and shall respect the principles of gender equality.
5. The mandate for prosecutors shall be three years. The reappointment mandate is permanent until the retirement age as determined by law or unless removed in accordance with law.

6. Prosecutors may be removed from office upon conviction of a serious criminal offense or for serious neglect of duties.
7. The Chief State Prosecutor shall be appointed and dismissed by the President of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council. The mandate of the Chief State Prosecutor is seven (7) years, without the possibility of reappointment.

Article 110
[Kosovo Prosecutorial Council]

1. The Kosovo Prosecutorial Council is a fully independent institution in the performance of its functions in accordance with law. The Kosovo Prosecutorial Council shall ensure that all persons have equal access to justice. The Kosovo Prosecutorial Council shall ensure that the State Prosecutor is independent, professional and impartial and reflects the multiethnic nature of Kosovo and the principles of gender equality.
2. The Kosovo Prosecutorial Council shall recruit, propose, promote, transfer, reappoint and discipline prosecutors in a manner provided by law. The Council shall give preference for appointment as prosecutors to members of underrepresented Communities as provided by law. All candidates shall fulfill the selection criteria as provided by law.
3. 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. The composition of Kosovo Prosecutorial Council, as well as provisions regarding appointment, removal, term of office, organizational structure and rules of procedure, shall be determined by law.

II. Relevant international instruments

UNIVERSAL DECLARATTION OF HUMAN RIGHTS

Article 10

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 6
Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the

parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
[...]

Article 8
Right to respect for private and family life

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.

Article 13
Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

III. The relevant provisions of the legislation in force in the Republic of Kosovo related to: (i) the independence and impartiality of the judicial and prosecutorial system; and (ii) the evaluation procedure as well as the disciplinary procedure of judges and prosecutors

LAW No. 06/L-054 ON COURTS
[published in the Official Gazette on 18 December 2018]

CHAPTER II
BASIC PRINCIPLES OF JUDICIAL SYSTEM

Article 3
Exercise of Judicial Power

1. Judicial power in the Republic of Kosovo shall be exercised by the courts established by this Law.
2. Judicial power in the Republic of Kosovo shall be unique, independent, fair, apolitical, impartial, and shall provide equal access to the courts.

Article 4
Independence and Impartiality of the Courts

1. The Courts established by this Law shall adjudicate in accordance with the Constitution of the Republic of Kosovo and the applicable Laws in the Republic of Kosovo.
2. Judges while exercising their function and taking decisions shall be independent, impartial, uninfluenced in any way by any natural or legal person, including public bodies.

LAW No. 06/L-055 ON KOSOVO JUDICIAL COUNCIL
[published in the Official Gazette on 26 December 2018]

CHAPTER II
DUTIES, RESPONSIBILITIES AND COMPOSITION OF THE COUNCIL

Article 3
Basic principles of the activities of the Council

1. The Council:
1.1. is a fully independent institution in exercising its functions and enjoys organizational, administrative and financial independence for the fulfilment of the duties defined by the Constitution and by Law;
1.2. ensures the independence, non-discrimination, proportionality, professionalism and impartiality of the judicial system;
1.3. ensures that courts in Kosovo are fair, apolitical, accessible and professional;
1.4. ensures that courts respect the principles of non-discriminations, proportionality as well as human rights and gender equality guaranteed by the Constitution and international agreements and instruments applicable in the Republic of Kosovo;
1.5. ensures that the courts reflect the multiethnic nature of the Republic of Kosovo and takes the necessary measures to increase the number of judges from non-majority communities in Kosovo;

Article 7
Duties and responsibilities of the Council

1. The Council exercises the following duties and responsibilities:
1.1. decides on the organization, management, administration and oversight of the proper functioning of the courts according to the Law;
1.2. proposes to the President the appointment, reappointment and dismissal of judges, and ensures that all proposed candidates meet the criteria established by Law, according to the respective legal procedures;
1.3. proposes to the President the appointment and dismissal of the President of the Supreme Court of Kosovo, and ensures that the proposed candidate meets the criteria established by Law and that the respective legal procedures have been carried out;
1.4. decides on the selection, appointment and dismissal of the President of the Court of Appeals, of the Presidents of the Basic Courts and of the supervising judges;
1.5. ensures implementation and supervises the criteria for recruitment in the judiciary, which must be in accordance with the principles of merit, equal opportunities, gender equality, non-discrimination and equal representation, on the basis of public vacancy notice and after verifying the candidates' capacity to act;
1.6. decides to announce open vacancies for candidates for positions in the judiciary;
1.7. decides on the organization of the examination for candidates for judges according to the Regulation approved by the Council;
1.8. decides and supervises the implementation of criteria for the ethnic composition of the territorial jurisdiction of the respective court, and for the fulfilment of vacancies guaranteed for members of non-majority communities in Kosovo;
1.9. decides on the number of judges in each jurisdiction;

1.10. recommends the establishment of new courts and court branches, in accordance with the Law on Courts;
1.11. performs judicial inspection;
1.12. administers the judiciary;
1.13. drafts and oversees the budget for the judiciary;
1.14. decides on the promotion, transfer and discipline of judges;
1.15. sets the criteria for regular assessment of judges;
1.16. decides on the court workload;
1.17. ensures efficient functioning of the courts;
1.18. establishes and supervises the criteria for defining policies, standards and guidelines related to the training of judges, lay judges and other judicial staff, and oversees the implementation of professional training of judges and lay judges;
1.19. adopts the Code of Ethics for Professional Conduct for Council members, judges and lay judges, as well as the Code of Ethics for administrative judicial staff whose violation constitutes the basis for sanctions, including dismissal from office;
1.20. decides on the adoption of a unique court fee schedule applicable throughout the territory of the Republic of Kosovo;
1.21. ensures the management of the central criminal records system according to the Regulation approved by the Council;
1.22. approves annual reports on court activities and budget expenditures for the judiciary;
1.23. cooperates with the judicial councils of other states and relevant local and international organizations, provided that it does not affect the independence of its work;
1.24. adopts sub-legal acts in view of implementing its duties and responsibilities, in accordance with the legislation in force;
1.25. performs other duties as defined by Law.

LAW No. 06/L-056 ON KOSOVO PROSECUTORIAL COUNCIL
[published in the Official Gazette, on 03 April 2019]

CHAPTER II
DUTIES, RESPONSIBILITIES AND COMPOSITION OF THE COUNCIL

Article 3
Basic principles of the activities of the Council

1. The Council:

1.1. is a fully independent institution in the exercise of its functions in order to provide an independent, professional and impartial prosecutorial system as defined by the Constitution and by law;
1.2. ensures that the Prosecution Offices reflect the multi-ethnic nature of the Republic of Kosovo and takes the necessary measures in increasing the number of prosecutors from non-majority communities in Kosovo, in accordance with internationally accepted gender equality principles;
1.3. ensures that all the persons have equal access to justice;
1.4. ensures that the Prosecution Offices respect the principles of non-discrimination and proportionality, as well as human rights and gender equality, guaranteed by the

Constitution and international agreements and instruments applied in the Republic of Kosovo;
1.5. in exercising duties and competencies, the Council acts in a manner that respects and preserves the independence of prosecutors while they perform their prosecution functions. The Council shall not order or influence, attempt to influence or otherwise undertake any action or make any statement which could reasonably be considered as an interference or attempt to interfere with the independence of the prosecution function in relation to any person, investigation or subject.

Article 4
Independence and impartiality of Council members

The Chair, the Vice-Chair and the Council member exercise their duties independently, professionally and impartially.

Article 7
Duties and responsibilities of the Council

1. The Council exercises the following duties and responsibilities:
1.1. decides on the organization, management, administration and oversight of the functioning of the Prosecution Offices according to the Law;
1.2. proposes to the President the appointment, reappointment and dismissal of prosecutors, and ensures that all proposed candidates meet the requirements established by law, according to relevant legal procedures;
1.3. proposes to the President the appointment and dismissal of the Chief State Prosecutor, and ensures that the proposed candidate meets the requirements established by law and that the respective procedures have been carried out;
1.4. decides on the appointment of Chief Prosecutors of Basic Prosecution Offices, Special Prosecution Office and Appellate Prosecution Office, in accordance with the Law on State Prosecutor and Law on Special Prosecution Office of the Republic of Kosovo;
1.5. ensures the implementation and oversights the requirements for admission to the prosecution office, which should be made in accordance with the principles of merit, equal opportunities, gender equality, non-discrimination and equal representation, on the basis of public vacancy and after verifying candidates' capacity to act;
1.6. announces public vacancies for prosecutors;
1.7. decides on organizing the exam for candidates for prosecutors according to the regulation approved by the Council determines the number of prosecutors for each prosecution office;
1.8. establishes and oversees the implementation of the criteria for the ethnic composition of the territorial jurisdiction of the respective prosecution office and for the filling of vacancies guaranteed for members of non-majority communities in Kosovo;
1.9. decides on the number of prosecutors in each prosecution office;
1.10. prepares, submits and supervises the budget of the State Prosecutor and Prosecutorial Council;
1.11. decides on the promotion, transfer and discipline of prosecutors;
1.12. sets the criteria for the evaluation of prosecutors, for the prosecution offices workload and for efficient functioning of prosecution offices, as well as controls and guarantees the assessment process and reviews prosecutors' appeals regarding assessment;

1.13. sets and oversees the criteria for defining policies, standards and guidelines regarding the training of prosecutors and other staff and overseeing the implementation of training and professional development of prosecutors by the Academy or other associations or training organizations; 1.14. approves the Code of Professional Ethics for members of the Council, whose violation constitutes a basis for sanctions, including dismissal from the Council;
1.15. approves the Code of Professional Ethics for Prosecutors, the violation of which constitutes a basis for sanctions, including dismissal from office;
1.16. approves the Code of Professional Ethics for administrative staff, imposing of disciplinary measures determined by the respective Law on Civil Service of the Republic of Kosovo, the violation of which is the basis for sanctions;
1.17. ensures that prosecutors act independently, professionally and impartially during the performance of all prosecutorial functions;
1.18. cooperates with the Office of the Chief State Prosecutor in developing prosecutorial policies and strategies for the effective fight against criminality;
1.19. prepares annual reports on activities and expenditures of the State Prosecutor and Council;
1.20. oversees and administers prosecution offices and their staff;
1.21. supervises the secretariat, the Prosecution Performance Review Unit and issues rules and regulations in accordance with its competences;
1.22. determines procedures for hearings and the conduct of disciplinary hearings;
1.23. cooperates with the prosecutorial councils of other states and relevant local and international organizations, provided that it does not affect the independence of its work;
1.24. promulgates rules and regulations in accordance with the laws on public information regarding the management and disclosure of information available to the State Prosecutor;
1.25. establishes committees which the Council deems as necessary;
1.26. adopts work rules for the functioning of the Council and its committees and for the election of Council members elected by their colleagues, rules that are available to the public;
1.27. issues a regulation on the procedure for electing the Chief State Prosecutor and appointing Chief Prosecutors of Prosecution Offices;
1.28. issues a regulation on the internal organization of the State Prosecutor;
1.29. guarantees an open and responsible system of administering its decisions and the decisions of the State Prosecutor;
1.30. reports to the public on the implementation of its objectives set out specifically and based on measurable indicators;
1.31. adopts sub-legal acts in view of implementing its duties and responsibilities, in accordance with the legislation in force;
1.32. performs other duties as defined in the law.

LAW No. 06/L –057 ON DISCIPLINARY LIABILITY OF JUDGES AND PROSECUTORS [SUPPLEMENTED AND AMENDED BY LAW NO. 08/L - 003 ON AMENDING AND SUPPLEMENTING THE LAW No. 06/L-057 ON DISCIPLINARY LIABILITY OF JUDGES AND PROSECUTORS]
[published in the Official Gazette on 21 October 2021]

CHAPTER II
LIABILITY, OFFENSES AND DISCIPLINARY MEASURES AGAINST JUDGES AND PROSECUTORS

Article 4
Disciplinary Liability

Judges and prosecutors shall be subject to disciplinary liability for disciplinary offenses in accordance with procedures set forth in this Law.

Article 5
Disciplinary offenses for judges

1. A judge commits a disciplinary offense if he or she:
*1.1. is convicted **of a criminal offense**;*
*1.2. **violates the Law**; or*
*1.3. violates his/her official duties **as a judge**.*
2. A violation of duties of a judge, pursuant to this Law, shall include the following actions, if committed by a judge intentionally or with gross negligence:
2.1. performs official duties disrespecting the principle of judicial independence and impartiality by acting with prejudice or bias based on race, colour, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status of a party to the proceedings;
2.2. does not accord the treatment required by Law to the parties to the proceedings, their representatives, witnesses and other participants to the proceedings;
2.3. communicates to unauthorized persons non-public information obtained in the course of his or her official duty;
2.4. accepts any kind of gifts or remuneration which may lead to, or appear to lead to improper influence on official decisions and actions;
2.5. abuses the official position in any form to obtain illicit benefits for oneself or other persons or for any other purposes in contradiction with the Law;
2.6. does not report any case of potential disqualification from proceedings where required by Law;
2.7. in continuity fails to timely perform official duties required by Law;
2.8. engages in any ex-parte communication concerning the cases;
2.9. interferes with the actions of other judges and prosecutors with the intent to influence their activities and decisions in a manner prohibited by Law;
2.10. makes public statements during ongoing proceedings which may, or appear to adversely affect fair trial and equal treatment of the parties to the proceedings or which could harm the credibility and reputation of the court, or otherwise communicates to the public information on the composition of court panels, evidences and decisions related to any cases, unless the disclosure of such information is required by Law;
2.11. performs any function, duty or service, assumes any responsibility or engages in any activity, is a candidate for, or is elected to any function or duty which is incompatible with the duties of a judge under the Constitution, the Law on Courts, and the Code of Ethics and Professional Conduct of Judges;
2.12. in continuity fails to participate in disciplinary procedures and to respond to disciplinary investigations, unless permitted by Law;
2.13. provides false or misleading information in matters related to disciplinary proceedings and court related administrative procedures, including promotion and transfers;

2.14. in continuity fails to participate without reasonable justification in mandatory training programs prescribed by Law or Council regulations and policies;
2.15. engages in behaviour while on duty or in private which harms the reputation of the court or which may harm public confidence in the impartiality or credibility of the judiciary;
2.16. becomes a member of a political entity or any other political organization, seeks or holds any political office, is a candidate or is elected to any political post, or otherwise engages in any political activity.

Article 6
Disciplinary offenses for prosecutors

1. A prosecutor commits a disciplinary offense if he or she:
1.1. is convicted of a criminal offense;
1.2. violates the Law; or
1.3. violates his orher official duties as a prosecutor.
2. Violation of duties of a prosecutor, pursuant to this Law, shall include the following actions, if committed by a prosecutor intentionally or with gross negligence
2.1. continuously, fails to take any prosecutorial action required by the Law into force or fails to exercise prosecutorial within the deadlines foreseen by Law, except when the seriousness of failure to act or the level of the offense serves as a basis for initiation of the disciplinary procedures for a single violation;
2.2. fails to consider inculpatory as well as exculpatory evidence and facts during the investigation and does not make sure that the rights of the defendant are respected during the investigation;
2.3. communicates with the unauthorized persons the confidential information taken during the exercise of the official duty;
2.4. fails to ensure that evidence and facts during the investigation are collected in accordance with Law;
2.5. fails to take into consideration the rights of witnesses and injured parties, particularly to undertake measures in order to protect their life, security and privacy in compliance with the legislation into force;
2.6. fails to comply with the lawful decisions or instructions of the Chief Prosecutor;
2.7. fails to participate in disciplinary procedures and to respond to disciplinary investigations, unless permitted by Law;
2.8. provides false or misleading information in matters related to disciplinary proceedings and prosecution related administrative procedures, including promotion and transfers, except if otherwise provided by Law;
2.9. in continuity fails to participate without reasonable justification in mandatory training programs prescribed by Law or relevant regulations and policies;
2.10. engages in behaviour while on duty or in private which harms the honour and dignity of the State Prosecutor or which may harm public confidence in the impartiality or credibility of the State Prosecutor;
2.11. accepts any form of gifts or remuneration which may lead to, or appear to lead to improper influence on official decisions and actions;
2.12. abuses the official position in any form to obtain illicit benefits for oneself or other persons or for any other purposes in contradiction with the Law;
2.13. becomes a member of a political entity or any other political organization, seeks or holds any political office, is a candidate or is elected to any political post, or otherwise engages in any political activity.

Article 7
Disciplinary sanctions

1. One or more of the following disciplinary sanctions may be imposed by the Councils on judges and prosecutors for a disciplinary offense:
1.1. non-public written reprimand;
1.2. public written reprimand;
1.3. temporary wage reduction up to fifty percent (50%) for a period of up to one (1) year;
1.4. temporary or permanent transfer to a lower level court or prosecution office;
1.5. proposal for dismissal.
2. Disciplinary sanctions shall be imposed only in compliance with the principle of proportionality and taking into account:
2.1. the number and seriousness of the disciplinary offenses committed by a judge or prosecutor;
2.2. the consequences of a disciplinary offense;
2.3. the circumstances under which the disciplinary offense was committed;
2.4. the overall performance and behaviour of the judge or prosecutor;
2.5. the behaviour and level of cooperation of the judge or prosecutor during the disciplinary proceedings.
3. A decision on the disciplinary liability of a judge or prosecutor shall be issued also in cases when a judge or prosecutor has after the initiation of disciplinary procedures resigned from duty or whose function as a judge or prosecutor was terminated in any other manner.
4. With the exception of the non-public reprimand, all final decisions on disciplinary sanctions shall be published without delay, but not later than fifteen (15) days, by the respective Councils on their web-site.
5. The Council shall maintain a disciplinary evidence record which shall register all disciplinary investigations and sanctions against a judge or prosecutor. Records on a disciplinary investigation or sanction shall be deleted after a period of five (5) years with the exception of disciplinary sanctions imposed for an intentional violation of Law or for a disciplinary offense which has resulted in a conviction for a serious criminal offense.

Article 8
Dismissal of judges and prosecutors

1. The President of the Republic of Kosovo based on a proposal by the respective Council shall decide to dismiss a judge or a prosecutor. The respective Council shall propose to the President of the Republic of Kosovo the dismissal of a judge or a prosecutor only upon conviction of the judge or prosecutor of a serious criminal offense, an intentional violation of Law, or for serious neglect of duties.
2. Upon dismissal, all rights and privileges arising from the office of judge or prosecutor shall be terminated with the exception of any entitlements provided for by Law which are related to the office and which by Law are not affected by the dismissal.

Article 12
Investigation procedure

1. The Council shall initiate disciplinary procedures based on a request submitted pursuant to Article 9, paragraph 1 of this Law.

2. A Competent Authority shall request the Council to initiate disciplinary investigations based on a complaint submitted by a natural or legal persons which is not dismissed according to Article 9, paragraph 6 of this Law, or ex-officio when it has reasonable grounds to believe that a judge or a prosecutor has committed a disciplinary offence.
3. The Ombudsperson may request the Council to initiate disciplinary investigations against a Court President or the Chief Prosecutor if they have reasons to believe that they have committed a disciplinary offense pursuant to Article 9, paragraph 7 of this Law. The Ombudsperson may also request the Council to initiate disciplinary investigations against a judge or prosecutor if they consider that a Competent Authority has decided to dismiss a complaint against such judge or prosecutor in contradiction with Article 9, paragraph 5, in which case they shall provide a reasoning why the complaint should not have been dismissed.
4. The request to initiate disciplinary investigations shall be submitted in writing to the Council and to the judge or prosecutor who is the subject of investigation. The request shall state the identity of the judge or prosecutor who shall be investigated, a concise description of the factual and legal aspects which give rise to the allegation for a disciplinary offense and a proposal for a disciplinary sanction to be imposed by the Council. The Council shall establish and maintain an electronic database, which will register all complaints and requests for initiating disciplinary investigations and information submitted by competent authority. Each case will be registered within the same day that the complaint or request was received by the Council.
5. Within fifteen (15) working days from the receipt of the request to initiate disciplinary investigations, the Council shall establish an investigation panel to conduct the investigation. In cases foreseen in paragraph 3 of this Article, the Council may dismiss the request without forming the investigating panel, if it is considered with no value prima facie or not of a serious importance it is not substantial and it does not have any kind of relation with the disciplinary offence or falls under the status of limitations. The investigation panel concerning a judge, respectively president of the court, shall be composed of three (3) judges of a different court. The investigation panel concerning a prosecutor, respectively chief prosecutor for prosecutors, shall be composed of three (3) prosecutors of a different prosecutorial body. The Council shall determine the chairperson of the investigation panel from among the members of the investigation panel. The procedure for the selection and assignment of judges and prosecutors to serve on the investigation panel shall be determined by the Councils. The Council shall provide administrative and professional assistance to the investigation panel.
6. The investigation panel shall establish the facts and collect evidence related to the alleged disciplinary offense. The judge or prosecutor under investigation and the authority which has requested the initiation of investigation procedures may suggest witnesses, submit evidence, as well as request the submission of documents and the evidence held by other persons or institutions.
7. The investigation panel shall give the judge or prosecutor an effective opportunity to be heard in respect of the complaint and to be represented by defense counsel. The judge or prosecutor under investigation shall have access to all evidence collected by the investigation panel.
8. The investigation panel shall complete the investigation within three (3) months from the day it was established by the Council. In exceptional circumstances, the Council may extend the investigation for an additional period of up to two (2) months. Upon completion of the investigation, the investigation panel shall submit to the Council, the judge or prosecutor under investigation and the Competent Authority

which has requested the initiation of disciplinary investigations, a written report on all collected facts and evidence. Upon the submission of the report, the investigation panel shall cease its function at the moment when the case becomes final.
9. During the investigation procedure, the Council may ex officio or upon request of the Competent Authority, which has requested the initiation of investigations, suspend the judge or prosecutor who is under investigation if this is necessary considering the seriousness of the alleged disciplinary offences and to ensure the integrity and effectiveness of the investigation. [this paragraph was supplemented and amended by Article 2 of Law No. 06/L –057 on Disciplinary Liability of Judges and Prosecutors, published in the Official Gazette on 21 October 2021].
10. During the period of suspension of the judge/prosecutor from the previous paragraph, the same shall receive fifty percent (50%) of the monthly salary.
11. The provisions of the Criminal Procedure Code shall apply mutatis mutandis to collection of evidence and the rights of persons under investigation.

[…]

IV. The general principles and standards according to the documents of the United Nations, the European Union and the Council of Europe related to the independence and integrity of the judicial system and the procedure for dismissal of judges and prosecutors, as follows:

- *At the level of the United Nations*

(i) Basic Principles on the Independence of the Judiciary adopted by the General Assembly of the United Nations in 1985 [Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and adopted by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985;

(ii) The Bangalore Principles of Judicial Conduct, 2002;

(iii) United Nations Guidelines on the Role of Prosecutors, adopted on 27August 1990 at the 8th United Nations Congress on the Prevention of Crimes and the Treatment of Offenders;

(iv) Standards of professional responsibility and statement of the essential duties and rights of prosecutors, adopted by the International Association of Prosecutors, adopted on 23 April 1999.

- *At the level of the Council of Europe*

(v) The European Charter on the Statute for Judges, approved at the multilateral meeting organized by the Directorate of Legal Affairs of the Council of Europe in Strasbourg in July 1998 and its explanatory Memorandum;

(vi) Magna Carta of Judges (Basic Principles), Consultative Council of European Judges (CCEJ), 17 November 2010;

(vii) Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Deputies of Ministers) and Explanatory Memorandum.

(viii) Bordeaux Declaration, "*Judges and Prosecutors In a democratic society*" OPINION No.12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion no. 4 (2009) of the Consultative Council of European Prosecutors (CCPE) to the attention of the committee of ministers of the Council of Europe on the relations between judges and prosecutors in a democratic society, 8 December 2009 and its Explanatory Note.

(ix) Opinion no. 1 of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges.

(x) Report [CDL-AD(2010)004] of the Venice Commission on the Independence of the Judiciary, Part I, Independence of Judges (adopted at the 82nd plenary meeting, on 12-13 March 2010);

(xi) Report [CDL-AD(2007)028] of the Venice Commission on Judicial Appointments;

(xii) European Guidelines on the Ethics and Conduct of Public Prosecutors (Council of Europe, "Budapest Guidelines", 2005);

(xiii) Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System;

(xiv) Report [CDL-AD(2010)040] of the Venice Commission on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution service (adopted at the 85th plenary meeting, on 17-18 December 2010).

V. Opinions and *amicus curiae* briefs of the Venice Commission regarding the transitional assessment (vetting) of judges and prosecutors, respectively:

(i) Compilation of opinions and reports [CDL-PI(2022)051] of the Venice Commission regarding the vetting of judges and prosecutors (adopted on 19 December 2022);

- *Case of Albania*

(ii) Interim Opinion [CDL-AD(2015)045] on the Draft Constitutional Amendments on the Judiciary of Albania (adopted at the 105th plenary session, 18-19 December 2015);

(iii) Final Opinion [CDL-AD(2016)009] on the revised draft constitutional amendments on the judiciary (15 January 2016) of Albania; Adopted by the Venice Commission at its 106th plenary session (adopted on 11-12 March 2016);

(iv) Opinion on the extension of the term of office [CDL-AD(2021)053] of the transitional bodies in charge of the re-evaluation of judges and prosecutors; Adopted

by the Venice Commission at its 129th plenary session (adopted on 10-11 December 2021);

(v) *Amicus curiae brief* [CDL-AD(2016)036] for the Constitutional Court on the Law ob the Transitional Re-evaluation of Judges and Prosecutors (The Vetting Law), (adopted at the 109th plenary session, on 9-10 December 2016);

- *Case of Moldova*

(vi) Joint Follow-up Opinion [CDL-AD(2023)00] of the Venice Commission and the Directorate General of Human Rights and the Rule of Law of the Council of Europe on the Draft Law on the External Assessment of Judges and Prosecutors (adopted at the 134th plenary session, on 10-11 March 2023)

- *Case of Ukraine*

(vii) Urgent Joint Opinion [CDL-AD(2020)038] of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the Legislative Situation regarding anti-corruption mechanisms, following decision no. 13-R/2020 of the Constitutional Court of Ukraine.

VI. Relevant documents of the Government and the Opinion of the Venice Commission on Kosovo related to the integrity control process in the Republic of Kosovo

(i) Rule of Law Strategy 2021-2026;

(ii) Concept-Paper for the development of the vetting process in the Justice System, approved by the Government on 13 October 2021;

(iii) Relevant parts of Opinion no. 1064/2021 [CDL-AD(2022)011] of the Venice Commission on the Concept Paper on the Vetting of Judges and Prosecutors and the draft amendments to the Constitution (adopted at its 131-st Plenary Session, on 17-18 June 2022):

[...]

9. Vetting of judges and prosecutors as examined in earlier VC opinions is a process of examining current office holders. The concept of vetting involves the implementation of a process of accountability mechanisms to ensure the highest professional standards of conduct and integrity in public office. Vetting can run parallel with both Integrity checking and the investigation of criminal wrongdoing but they each serve different purposes and have different procedural and legal features. A criminal investigation is initiated to ascertain whether a criminal offence has been committed, while integrity checks look at the risk or likelihood that improper conduct will happen in the future. Critically, the burden of proof and the standard of proof will often be different. Criminal investigations seek to establish a fact beyond reasonable doubt, meaning that the burden of proof shall fall on the State. In other investigations like wider integrity checking the burden of proof will be discharged on the balance of probability.

10. In a system of prior integrity checks, the decision not to recruit a candidate can be justified in case of mere doubt, on the basis of a risk assessment. However, the decision to negatively assess a current post holder should be linked to an indication of impropriety, for instance inexplicable wealth, even if it cannot be proven beyond doubt that this wealth does come from illegal sources.
11. It is very important that integrity checking be clearly separated from the assessment of the professional capacities of a judge, even if both processes can intervene during recruitment or an evaluation. A lack of professional capacities can possibly be remedied through training but it is clearly a reason not to recruit a person.
12. The UN Secretary General stated that "[v]etting usually entails a formal process for the identification and removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary".
13. Integrity checking and vetting procedures are not explicitly regulated by international instruments. They have, however, been dealt with and commented upon, by soft law instruments and by case law.
14. The Venice Commission has dealt with three subcategories of national measures: (i) "pre-vetting" of candidates to a particular position; (ii) integrity checks which are conducted on a more regular basis (for example the obligation to submit annually an asset declaration);5 (iii) full-fledged vetting procedures.
15. While "pre-vetting" of candidates and integrity checks exercised through the evaluation of asset declarations are quite common and uncontroversial in principle, extraordinary vetting, as stressed by the Venice Commission, might only be justified in case of exceptional circumstances.7 In the case of Albania, the Commission based its recommendations on the assumption that the comprehensive vetting of the judiciary had wide political and public support within the country, that it was an extraordinary and a strictly temporary measure, and that this measure would not be advised to other countries where the problem of corruption within the judiciary did not reach that magnitude. Experience has shown that each case is different and needs to be assessed on its own merits.
16. Judicial independence is an integral part of the fundamental democratic principles of the separation of powers and the rule of law,8 and is guaranteed inter alia by Article 6 of the European Convention on Human Rights (ECHR) and also by Articles 4 and 31 and Chapter VII of the Constitution of Kosovo. According to international benchmarks, "independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. The vetting of judges, especially when carried out by an executive body, may constitute such an "external pressure".
17. At the same time, it must be stressed that the preservation of the necessary authority of the judiciary requires that
(a) the legal system puts in place adequate mechanisms to ensure that candidates are not appointed as a judge (or prosecutor) if they do not have the required competences, meet pre-determined eligibility criteria or do not meet the highest standards of integrity; and
(b) ordinary means of disciplinary and criminal proceedings result in dismissals of those who are found to be incompetent, corrupt or linked to organised crime. This is not only essential in view of the role a judiciary plays in a state governed by the rule of law, but also because a judge – once appointed for life – will in principle be irremovable except for limited grounds for dismissal.
18. Vetting often involves an interference with the right to private life which is protected inter alia by Article 8 of the ECHR. According to the case-law 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 ambit of Article 8 ECHR.12 The Court has made it clear13 that a person who is dismissed, transferred etc. from public employment, can complain about a violation of Article 8 ECHR14. Interference with the right to private life is only acceptable if it is covered by the limitations contained in Article 8 (2) ECHR15 and if it is proportionate to the aim pursued.

[…]

42. The Commission notes that there is some quite some ambiguity in Kosovo as concerns the terminology. In its section on the "Clarifications regarding the term 'vetting'", the Concept Paper refers to the ambiguity of the term, also explaining the difficulties in the Albanian language. The term "vetting" seems to be employed for diverse measures. For instance, the Concept Paper refers to "vetting and continuous vetting-inspired evaluation". Some proposals / options presented in the Concept Paper would have a much deeper impact than past or current mechanisms.

43. The current proposal for a reform is not a first attempt to improve the quality of the judiciary in Kosovo. In 2010-2011, the Independent Judicial and Prosecutorial Commission (IJPC), an independent body, part of the 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 focused on candidates for positions in the judiciary, starting with the Supreme Court down to municipal courts. Declarations made by the candidates were checked against information received from various sources. The current system of verification seems to be a remnant of that exercise. However, according to the Concept Paper KJC and the KPC, have internal administrative verification units, but it seems that they operate without a proper legal basis.25

44. As it is often the case in countries in transition, the renewal of the judges seems to be an answer to those problems. However, a more holistic and lengthy reform of the judicial sector may be necessary, and the vetting alone may not be capable of bringing fast and visible results. A classical vetting alone, as per international definitions, set out in section II.A above, would not be sufficient to improve the situation of the judiciary in Kosovo. A combination of various measures may be necessary to achieve that goal. The Kosovo authorities agree that vetting would be a complementary tool, which together with other reforms in the legal framework, in order to improve the situation in the justice system.

C. Constitutional framework

45. Article 108 of the Constitution is devoted to the Judicial Council, which shall inter alia ensure that "the Kosovo courts are independent, professional and impartial", and "is responsible for recruiting and proposing candidates for appointment and reappointment to judicial office". Proposals for appointments of judges, it is further added, "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 fulfil the selection criteria provided by law".

46. 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 for judges, "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".
47. 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 Counci;
(18) appoints and dismisses prosecutors of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council;"
48. It would seem that this presidential competence is a formal one, the decisions in substance being made in the KJC and KPC.
[…]

E. Option 5 - 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

97. Option 5 would be very similar to Option 4 but the vetting mechanism would be temporary only: "the establishment of a Vetting mechanism through constitutional changes with a temporary mandate to be ended once the first verification period ends. The verification process would be then transferred to the Kosovo Judicial Council (KJC) and the Kosovo Prosecutorial Council (KPC). Subject to the Vetting would be members of the KJC and KPC, the Chief State Prosecutor, all judges and prosecutors, court administrators, directors of the council's secretariat, director of the judicial inspection unit, as well as other officials engaged in courts and prosecution offices.
98. The mechanism (panels / appeals) would be similar to the one established under Option 4. Most of the arguments presented under Option 4 are therefore valid also for Option 5. The main difference is that the new mechanism would be dismantled after a first phase lasting five years and the disciplinary - and dismissal - powers would be handed back to the KJC and the KPC.
99. In its interim opinion on the draft Constitutional Amendments on the Judiciary of Albania, the Venice Commission discussed the question of the duration of the one-time vetting process. The Commission saw a "risk of transforming the vetting process into a de facto permanent arrangement, parallel to the ordinary accountability mechanisms. The Draft Amendments should make it clear that once a sitting judge passes through the vetting, his/her accountability would be further regulated by the ordinary rules contained in the Constitution and in the implementing legislation".30 The Venice Commission is of the opinion that an ad hoc vetting bodies should have a strictly limited task to perform a one-time vetting only. Once this is over, there is also a need to provide for a stable environment for judicial work.

[…]

1. Revised constitutional amendments

105. The revised constitutional amendments (CDL-REF(2022)023) are much shorter and focus on the main elements of the competences and composition of the vetting

bodies, which is positive. The draft amendments to Articles 104 (4a) and 109 (6a) of the Constitution define the ground for dismissal "serious neglect of duties" as including cases when the judge or prosecutor "has been rated with insufficient performance, or has been found to have unjustifiable wealth, or vulnerable integrity, or has committed serious disciplinary offenses, as regulated by law."

106. These two constitutional amendments would also facilitate the dismissal of judges or prosecutors who provide irregular asset declarations. Their dismissal could be triggered by the Anti-Corruption Agency (and decided upon by the KJC and the KPC, possible after their integrity assessment). This would not depend on a vetting of all judges and prosecutors.

107. Draft Articles 163 to 168 establish a system of general vetting of all judges and prosecutors called transitional evaluation. The transitional evaluation would last for five years but could be extended for another two years. A Transitional Evaluation Authority (TEA) would be established, composed of evaluation panels, an Appeals College and a Secretary. They all would be elected by the Assembly through a 2/3 majority.

108. The evaluation panels would be composed of two judges / prosecutors respectively and one lay member, composed ad hoc for each case. The Appeals College would be composed of five members. Cooperation with international institutions is a possibility. In Pristina, the Commission's delegation was informed that international participation in the selection of the members of the TEA is clearly the intention of the authorities.

109. The Venice Commission welcomes that the revised draft amendments are more concise than the first set of draft amendments. The qualified majority for the election of the members fo the TEA is positive. The transitional evaluation would cover performance, wealth and integrity. However, in order to provide for a proportionate reform and to limit the disruption of the judicial system, the Venice Commission recommends limiting a transitional evaluation to the members of the KJC and KPC, court presidents and chief prosecutors. That evaluation should cover integrity (including inexplicable wealth) only but not cover performance, which is not a permissible ground for vetting. Furthermore, it is not a relevant issue for the members of the councils.

[…]

IV. Conclusion:

118. The Minister of Justice of Kosovo requested an opinion on the very detailed Concept Paper for the vetting of judges and prosecutors (CDL-REF(2022)006). The Concept Paper sets out why it is necessary to reform the judicial system in Kosovo and proposes five options to go about the problems identified. The Venice Commission welcomes that the Concept Paper includes an important section on comparative experience on vetting. There is, however, an absence of clarity, concerning terminology, for example, the Concept Paper proposes the introduction of "vetting" as a one-off ad hoc process, but it also refers to existing recruitment and disciplinary mechanisms as "vetting".

119. The five options range from not taking any specific action, via reinforcing existing mechanisms, to legal amendments and finally constitutional amendments. Within the framework of the last option, the Minister of Justice also requested the Venice Commission to provide its opinion on draft constitutional amendments (CDL-REF(2022)006) and CDL-REF(2022)022).

120. In the light of the Concept Paper, other reports and the rapporteurs' meetings with stakeholders, the Commission agrees that Option 1 – not taking any measures - would not be sufficient to improve the current state of affairs. The Venice Commission

proposes distinguishing between individual cases of judicial misconduct and the wider problems related to the inefficiency of the judicial system, notably the excessive length of proceedings. The latter seem to require different measures as a remedy, notably also technical (IT)31 and a reform of court procedures.

121. The Concept Paper sets out convincingly that legal changes are warranted, and Option 2 refers to some of them. For instance, verification mechanisms should have a proper legal and regulatory basis. Legal changes should also enable the inclusion of judicial officials, including support staff, that are not covered by existing mechanisms. The Commission is of the opinion that further legal changes may be warranted, notably concerning the active use of asset declarations of judges and prosecutors (and also other State officials) for identifying possible cases of corruption and to take action in these cases. The Anti-Corruption Agency should be given sufficient resources for its work and it should be enabled – and obliged – to trigger disciplinary proceedings against the judges or prosecutors who provide irregular asset declarations.

122. The Commission also notes that a reform of the Kosovo Prosecutorial Council is being prepared and the Minister of Justice requested an opinion of the Venice Commission on this issue. The Minister of Justice has also requested an opinion of the Venice Commission on civil confiscation of illegally acquired assets which would make the asset declaration system more effective. The results of these reforms should be taken into account when considering constitutional amendments.

123. As concerns Option 3, special vetting bodies would be established but the existing Judicial and Prosecutorial Councils would retain the power to recommend the dismissal of judges and prosecutors to the President of Kosovo. From the Concept Paper it is not sufficiently clear why a general vetting of all judges and prosecutors establishing ad hoc vetting bodies is needed if an important part of the problem is related to inefficient application of and gaps in the legislation on existing bodies. The Venice Commission recommends entering into a thorough dialogue with Councils before adopting such changes. Without their active support, Option 3 is not likely to achieve the results hoped for.

124. Option 4 also envisages establishing special vetting bodies on a permanent basis but on the basis of constitutional amendments. The Commission recommends introducing any full-scale vetting of all judges and prosecutors, on a purely legislative level (option 3) or on the basis of constitutional changes, only after other avenues, legal and institutional reforms, possibly including integrity checks of the members of the KJC and KPC, have taken place and evaluated and were found to be unsuccessful.

125. Option 5 envisages establishing special vetting bodies on a temporary basis (for five years), also on the basis of constitutional amendments. After that period the power to recommend the dismissal of judges and prosecutors would be handed back to the KJC and the KPC.

126. Option 5 raises its own difficulties, and the Venice Commission feels the draft constitutional amendments that have been prepared under Option 5, even in their revised shorter version, go too far by providing for a vetting for all judges and prosecutors, constitutional amendments, where necessary, should only provide for integrity checks of the members of the KJC and the KPC, court presidents and chief prosecutors.

127. Constitutional amendments should ideally establish only a state's commitment to a principle, or to the aspiration or ethos a country seeks to enshrine in its Laws. That would then facilitate measures concerning the composition and powers of the vetting bodies and its framework to be set out elsewhere in legislation and regulation. On the other hand, the Commission acknowledges, that in this instance, the same original draft constitutional amendments could not be entirely adopted in the form of simple

law without constitutional underpinning. As a standalone law, these provisions would need to be accompanied by a (shorter) constitutional amendment, otherwise they would contradict Articles 85, 108 and 110 of the Constitution. The election of the TEA members by simple parliamentary majority would create a danger of politicisation. This has been taken into account in the revised constitutional amendments.

128. To sum up, the Venice Commission recommends introducing legislative changes that would improve the current system of judicial discipline, as a thorough extension of Option 2, this concerns notably a strengthening of the system of asset declarations and strengthening the vetting units within the KJC and the KPC. Constitutional changes should be considered only for underpinning integrity checks of the members of the KJC and the KPC, court presidents and chief prosecutors.

129. The Venice Commission is not in a position to assess how widespread the incidents in the judiciary of which its delegation was informed are and whether they concern individual judges and prosecutors or a large proportion of them. In any case, it is necessary to distinguish cases of professional incompetence, which can be addressed through training, from cases of deliberate malevolent acts, which can be addressed through integrity checks.

130. The Venice Commission considers that a reform of the judiciary in Kosovo is indeed necessary and that this may involve some form of effective integrity checks. It is however the Commission's opinion and that many elements of such a reform can be adopted on the level of ordinary law. Any vetting or integrity checks system introduced could be limited to KJC and KPC who exert disciplinary power over the other members of the judicial system. It would then be for the KJC and the KPC to deal with problems in the rest of the judicial system, both as concerns integrity and professionalism. The interference in constitutional rights should be strictly proportionate. Any constitutional amendments should aim at minimal invasiveness in the competences of the KJC and the KPC while achieving the goal to reform the judiciary.

131. In the context of Kosovo effective "vetting" will of necessity mean a combination of various measures that will have a positive effect on the integrity and efficiency of the judiciary. Even if this type of vetting does not necessarily correspond to the formal definition given in section II.A above, all these measures taken together are part of a judicial reform that amounts to a "vetting" as legitimately aspired by the people and the authorities in Kosovo which is capable of delivering the required outcomes.

132. Experience shows that the introduction, sequencing and compatibility of vetting or integrity checking measures is operationally problematic and a precise model for each should therefore be designed with stakeholders on board. Failing which it may result in incomplete implementation. Then it crucially must be given sufficient operational roll - out time in order to evaluate its efficacy before other measures are introduced, otherwise this could obstruct everyone's best endeavours and compromise the desired outcomes.

133. The Venice Commission therefore recommends focusing on legislative changes, which are easier to implement, and limiting a system of integrity checks to the judicial and prosecutorial councils, court presidents and chief prosecutors. To make this reform viable, the final concept for the vetting and corresponding constitutional and legislative changes should be prepared on the basis of a sincere dialogue and in close cooperation with all stakeholders, the Ministry, KJC, KPC but also civil society and interested academics.

134. The Venice Commission remains at the disposal of the Kosovo authorities for further assistance in this matter.

Admissibility of the Referral

125. In order to decide regarding the Applicants' Referral, the Court must first examine whether the admissibility criteria established in the Constitution and further specified in the Law and the Rules of Procedure have been met.

126. First, the Court must determine whether the Referral was filed by the authorized party, and second, it must determine whether it has jurisdiction to consider the proposed amendments.

127. The Court recalls that based on article 113.9 of the Constitution:

> *"The President of the Assembly of Kosovo refers proposed Constitutional amendments before approval by the Assembly […]".*

128. The Court notes that the President of the Assembly presented a proposal for constitutional amendments and that, consequently, the Referral was submitted by the authorized party based on article 113.9 of the Constitution.

129. The Court further recalls that based on the same article 113.9 of the Constitution, it must:

> *"[…] confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution".*

130. Therefore, the Court has jurisdiction to assess whether the proposed amendments diminish any of the rights and freedoms guaranteed in Chapter II of the Constitution.

131. Therefore, having been submitted by an authorized party and since the Court has jurisdiction to review the case, the Referral is admissible pursuant to article 113.9 of the Constitution.

I. Scope of the constitutional assessment

132. As stated in the section "*Proceedings before the Court*" above, the Applicant requested the assessment of the proposed constitutional amendments no. 27, no. 28 and no. 29, proposed by forty (40) deputies of the Assembly.

133. Based on the Referral submitted by the Applicant, the Court first clarifies that the proposed constitutional amendments referred to the Court by the President of the Assembly of the Republic of Kosovo and approved by the *ad hoc* Committee for Vetting in the justice system, established by the Assembly of the Republic of Kosovo, are related to: (i) the expansion/completion of the permanent constitutional grounds for the dismissal of judges and prosecutors in the Republic of Kosovo (proposed constitutional amendments no. 27 and no. 28); and (ii) the transitional/temporary integrity check process *"of the members of the Kosovo Judicial Council, the members of the Kosovo Prosecutorial Council, the presidents of all courts and all chief prosecutors, as well as the candidates for these positions",* namely the vetting process in the justice system (proposed constitutional amendment no. 29).

134. The Court highlights that the Constitution, as the highest legal act must be respected formally and solemnly when proposing amendments to it. The Court, mindful of the necessity for legal certainty in relation to this issue, emphasizes that, in accordance with

article 112 [General Principles] of Chapter VIII [Constitutional Court] of the Constitution: *"the Constitutional Court is the final authority for the interpretation of the Constitution and compliance of laws with the Constitution*" (see cases of the Court No. KO162/18, Applicant: *President of the Assembly of the Republic of Kosovo*, Judgment of 7 February 2019, paragraph 23; and KO207/22, Applicant: *President of the Assembly of the Republic of Kosovo*, Judgment of 4 July 2023, paragraph 30).

135. In addition, the Court, based on its case law, reiterates that in terms of assessing whether the proposed constitutional amendments submitted to the Court diminish fundamental rights and freedoms, it does not deal with the assessment of good public policies, proposed and approved by the Government and the Assembly. Having said that, also in the present case, the Court will not assess whether the proposed constitutional amendments are based on good public policies or even common and agreed solutions for the reform of the justice system, due to the fact that such an obligation based on the constitutional provisions belongs, among other things, to the Government and the Assembly themselves.

136. Therefore, the Court confirms that the constitutional review of the proposed amendments under paragraph 3 of article 144 [Amendments] of the Constitution, is limited to assessing whether the proposed constitutional amendment reduces any of the rights and freedoms defined in Chapter II, the very basis of which - by virtue of article 21 [General Principles] of Chapter II of the Constitution - consists of human rights and freedoms mentioned in that Chapter (see case, No. KO162/18, Applicant: *President of the Assembly of the Republic of Kosovo*, cited above, paragraph 24; and KO207/22, Applicant: *President of the Assembly of the Republic of Kosovo*, cited above, paragraph 31, see also cases No. K061/12, Applicant: *President of the Assembly of the Republic of Kosovo*, Judgment of 31 October 2012, par. 18, and no. KO44/14, Applicant: *President of the Assembly of the Republic of Kosovo*, Judgment of 31 March 2014).

137. The Court also considers that article 21 of the Constitution should be read in conjunction with article 7.1 of the Constitution that defines the values of the constitutional order of the Republic of Kosovo which is based "*on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of the law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers and a market economy"*. Such an approach originates from the case law of the European Court of Human Rights (hereinafter: the ECHR), according to which, the values of the Convention and which are reflected in its Preamble, including the principle of the rule of law, are an integral part of all articles of the ECHR and the latter must be interpreted in the light of these values (see, among others, the ECtHR case *Baka v. Hungary*, application no. 20261/12, Judgment of 23 June 2016, paragraph 117).

138. The Court notes that the review of the proposed amendment should be made also consistent with the obligations deriving from article 53 [Interpretation of Human Rights Provisions] of the Constitution, which requires that human rights be interpreted in accordance with the case law of the European Court on Human Rights (hereinafter: the ECtHR). In its case law, the Court, insofar as it is relevant and applicable, also takes into account and applies the case law of the Court of Justice of the European Union (hereinafter: CJEU).

139. In light of the above, the Court will proceed with the review of the proposed constitutional amendments.

II. Assessment of proposed constitutional amendments

Introduction

140. The Court first recalls that the object of the assessment of the Referral referred by the Applicant is whether the proposed constitutional amendments no. 27, no. 28 and no. 29 diminish human rights and freedoms established in Chapter II of the Constitution.

141. As it was also reflected in the part of the proceedings before the Court, the latter, after submitting the proposed constitutional amendments by the Applicant, sent them to: (i) the President; (ii) the deputies of the Assembly; (iii) the Government; (iv) the Ministry of Justice; (v) the Ombudsperson; (vi) KJC; and (vii) KPC. As a result, the Court has received comments regarding the proposed constitutional amendments from the Office of the President, the Ministry of Justice, deputy Abelard Tahiri, KJC, and KPC. Whereas the Ministry of Justice and KJC submitted the responses to the comments of the aforementioned institutions to the Court. The aforementioned comments and responses are reflected in this Judgment, to which the Court will also refer to during the review and assessment of the content of the proposed constitutional amendments.

142. In terms of the content of the proposed constitutional amendments, the Court recalls that the proposed constitutional amendments include two specific and separate categories that are related to the functioning of the justice system, namely:

> 1. Supplementing the grounds for dismissal of judges and prosecutors, in which case by the proposed constitutional amendments no. 27 and no. 28, it is determined that the criterion of "*serious neglect of duties*", which serves as a criterion for the dismissal of judges and prosecutors defined by paragraph 4 of article 104 of the Constitution and paragraph 6 of Article 109 of the Constitution, respectively, includes: (i) insufficient performance; (ii) unjustifiable assets; (iii) disciplinary violations and (iv) vulnerable integrity; and:
>
> 2. The establishment of a special authority, through the proposed constitutional amendment no. 29, namely the establishment of the Integrity Control Authority, which for a certain period of time has the competence to control the integrity of the members of the KJC and KPC, presidents of courts and chief prosecutors and candidates for these positions.

143. As reflected above, the proposed constitutional amendment no. 29 that refers to the control of integrity in the judicial and prosecutorial system originates from the initiative and policy documents of the Government of the Republic of Kosovo in the framework of the reform in justice and the preparatory work of the *ad hoc* Assembly Committee on Vetting in Justice.

144. Furthermore, based on the documentation submitted to the Court, the latter notes that the initiatives related to the reform in the justice system were specified through the approval of the for the Rule of Law Strategy, approved by the Government on 11 August 2021 and the Concept Document for the development of the vetting process in the justice system, approved by Decision [no. 01/39] of the Government of 13 October 2021. As a result of this, the Concept-document for the vetting of Judges and Prosecutors, at the request of the Ministry of Justice, was sent on 25 October 2021 for an opinion by the Venice Commission. To the aforementioned request for opinion, the Ministry of Justice also attached the draft

constitutional amendments, submitted to the Venice Commission on 10 February 2022, and the amended draft constitutional amendments, submitted on 18 May 2022. Following this request of the Ministry of Justice, the Court recalls that the Venice Commission, through Opinion no. CDL-AD(2022)011 adopted on 17-18 June 2022, *inter alia*, recommended: "*focusing on legislative changes, which are easier to implement, and limiting a system of integrity checks to the judicial and prosecutorial councils, court presidents and chief prosecutors. To make this reform viable, the final concept for the vetting and corresponding constitutional and legislative changes should be prepared on the basis of a sincere dialogue and in close cooperation with all stakeholders, the Ministry, KJC, KPC but also civil society and interested academics".*

145. In light of the assessment of the proposed constitutional amendments, the Court notes that:

(i) while the proposed constitutional amendments no. 27 and no. 28, respectively define/expand the grounds for dismissal due to *"serious neglect duties*", provided for by paragraph 4 of article 104 and paragraph 6 of article 109 of the Constitution, and which are of a permanent nature and which will be continuously implemented through mechanisms within the judicial and prosecutorial systems, respectively;

(ii) the proposed constitutional amendment no. 29, is of a temporary nature, which as a process is proposed to take place within a period of two (2) years, with the possibility of extension for one (1) year and which includes the integrity control of the members of the KJC and the KPC, the presidents of courts and chief prosecutors and candidates for these positions by a temporary body, established outside the judicial and prosecutorial system.

146. Having said that, the Court in assessing the proposed constitutional amendments and whether the latter diminish the fundamental rights and freedoms defined in Chapter II of the Constitution, will first summarize: (i) the basic constitutional principles regarding the separation of powers in the Republic of Kosovo; (ii) constitutional principles regarding the judicial and prosecutorial system in the legal order of the Republic of Kosovo, as specified by the Constitution and further clarified through its case law; (iii) the principles and standards regarding the independence of the judiciary and the prosecution stemming from the Constitution, international instruments and documents, including the instruments and documents of the United Nations, the European Union, and the Council of Europe, the Venice Commission, the case law of the ECtHR, the case law of the CJEU, as well as the comparative analysis of the Constitutions of the member states of the Council of Europe.

A. Basic constitutional and international principles

(i) Basic principles of the Constitution regarding the separation and balancing of powers

147. The Court first emphasizes that based on article 1 [Definition of State] of the Constitution, the Republic of Kosovo is "*an independent, sovereign, democratic, unique and indivisible state*". The "*democratic*" definition of the state of the Republic of Kosovo, among other things and as far as it is relevant to the circumstances of the present case, is complemented by four (4) essential constitutional provisions, namely article 3 [Equality Before the Law], article 4 [Form of Government and Separation of Power], article 7 [Values] and article 16 [Supremacy of the Constitution] of the Constitution of the Republic of Kosovo (see, cases no. KO100/22 and KO101/22, Applicant KO100/22, *Abelard Tahiri and 10 other deputies*

of the Assembly of the Republic of Kosovo; Applicant KO101/22, *Arben Gashi and 10 other deputies of the Assembly of the Republic of Kosovo*, Constitutional review of Law No. 08/L-136 on Amending and Supplementing Law no.06/L-056 on Kosovo Prosecutorial Council, Judgment, of 24 March 2023, paragraphs 154-155).

148. First, article 3 of the Constitution, among other things, specifies that (i) the Republic of Kosovo is governed democratically, with full respect for the rule of law, through its legislative, executive and judicial institutions; and (ii) the exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all communities and their members.

149. Second, article 4 of the Constitution determines the form of government and separation of power, and among others, specifies that 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, principles according to which, (i) the Assembly exercises legislative power; (ii) the President is the legitimate representative of the country internally and externally, and is the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution and representing the unity of the people according to the latter; (iii) The Government is responsible for the implementation of laws and state policies and is subject to parliamentarian control; (iv) the judicial power is unique, independent and is exercised by courts; and (v) the Constitutional Court is an independent organ for the protection of constitutionality and makes the final interpretation of the Constitution.

150. Third, article 7 of the Constitution, specifies that the constitutional order of the Republic of Kosovo, among other things and as far as it is relevant in the circumstances of the present case, is based on the principles of democracy, respect for human rights and freedoms, the rule of law, non-discrimination, pluralism and separation of state power and gender equality. This article is also supported through article 21 [General Principles] of the Constitution, based on which, among other things, basic human rights and freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.

151. Furthermore, the Court also notes that the principles of independence, separation and balancing of powers, the Constitution, have further been elaborated in separate chapters, namely in: (i) Chapter II, Fundamental Rights and Freedoms; (ii) Chapter III, Rights of Communities and their Members; (iii) Chapter IV, the Assembly of the Republic of Kosovo; (iv) Chapter V, President of the Republic of Kosovo; (v) Chapter VI, Government of the Republic of Kosovo; (vi) Chapter VII, the Justice System; (vii) Chapter VIII, the Constitutional Court of the Republic of Kosovo; and (viii) in Chapter XII, Independent Institutions.

(ii) Basic principles regarding the judicial and prosecutorial system in the legal order of the Republic of Kosovo

152. In light of the assessment of the proposed constitutional amendments and in the sense of the basic constitutional principles regarding the judicial and prosecutorial system in the legal order of the Republic of Kosovo, the Court emphasizes paragraph 5 of article 4 [Form

of Government and Separation of Power] of the Constitution, which stipulates that *"The judicial power is unique, independent and is exercised by courts".*

153. Beyond this basic principle defined by paragraph 5 of article 4 of the Constitution, the nature of the exercise of judicial power is further elaborated in Chapter VII [Justice System] of the Constitution, which establishes the structure of the justice system of the Republic of Kosovo.

154. Having said this, the Court reiterates that in terms of the independence of the justice system in particular and its interaction with other powers in the Republic of Kosovo, the justice system is specified through Chapter VII of the Constitution. The latter defines: (i) the general principles of the judicial system; (ii) organization and jurisdiction of the courts; (iii) appointment and dismissal of judges; (iv) their mandate and reappointment; (v) function incompatibility; (vi) immunity; (vii) KJC; (viii) State Prosecutor; (ix) KPC; and (x) the Advocacy.

155. Within Chapter VII, article 102 [General Principles of the Judicial System], of the Constitution specifies that:

> *"1. Judicial power in the Republic of Kosovo is exercised by the courts.*
> *2. The judicial power is unique, independent, fair, apolitical and impartial and ensures equal access to the courts.*
> *3. Courts shall adjudicate based on the Constitution and the law.*
> *4. Judges shall be independent and impartial in exercising their functions.*
> *5. The right to appeal a judicial decision is guaranteed unless otherwise provided by law. The right to extraordinary legal remedies is regulated by law. The law may allow the right to refer a case directly to the Supreme Court, in which case there would be no right of appeal.".*

156. Following this, paragraphs 1 and 2 of article 108 [Kosovo Judicial Council] of the Constitution, establish that:

> *"1. The Kosovo Judicial Council shall ensure the independence and impartiality of the judicial system.*
> *2. The Kosovo Judicial Council is a fully independent institution in the performance of its functions. The Kosovo Judicial Council shall ensure that the Kosovo courts are independent, professional and impartial and fully reflect the multi-ethnic nature of Kosovo and follow the principles of gender equality. The Kosovo Judicial Council shall give preference in the appointment of judges to members of Communities that are underrepresented in the judiciary as provided by law.*
> *[...]"*

157. Paragraph 1 of article 110 [Kosovo Prosecutorial Council] of the Constitution stipulates that: *"The Kosovo Prosecutorial Council is a fully independent institution in the performance of its functions in accordance with law. The Kosovo Prosecutorial Council shall ensure that all persons have equal access to justice. The Kosovo Prosecutorial Council shall ensure that the State Prosecutor is independent, professional and impartial and reflects the multiethnic nature of Kosovo and the principles of gender equality".*

158. Based on the above, the Court emphasizes that in terms of the principles of independence and impartiality of the judicial and prosecutorial system, based on the aforementioned provisions, the Constitution defines two (2) independent constitutional institutions, namely

the KJC and the KPC, which it mandates with the task of ensuring the independence and impartiality of the judicial and prosecutorial systems, respectively. More specifically, the KJC and KPC are "*fully independent*" constitutional institutions within the justice system, as regulated in a separate constitutional chapter, namely chapter VII, of the Constitution of the Republic of Kosovo.

159. The Court further emphasizes that Chapter VII of the Constitution determines that these two councils are the fundamental bearers of the independence of the justice system, the judicial and prosecutorial system, this independence embodied, among others, in articles 3, 4 and 7 of the Constitution. Based on the constitutional provisions of the two Councils, are defined as "*fully independent*" and in the exercise of this independence, among other things, they carry (i) the constitutional obligation to administer the justice system; (ii) of the proposal of the President of the Supreme Court and the Chief State Prosecutor; (iii) the proposal for the appointment of all judges and prosecutors; and (iv) determining these proposals, ensuring that the latter are based on the principles of merit, defined by the Constitution and relevant laws, always preserving the values of protecting fundamental rights and freedoms, gender equality and representation non-majority communities in the Republic of Kosovo.

160. Furthermore, the Court emphasizes that the Constitution in Chapter VII [Justice System] has regulated the functioning of the judicial and prosecutorial systems, including the KJC, the KPCK, the position of the President of the Supreme Court as well as the position of the Chief Prosecutor, in the same chapter. Based on this constitutional definition, the justice system is an integrated and completely independent system within the constitutional order of the Republic of Kosovo.

161. Based on the above, the Court emphasizes that the rule of law and the protection of human rights and freedoms are fundamental values of the constitutional order of the Republic of Kosovo, and in this sense, the rule of law and the protection of human rights are inviolable, and as such they include the impartiality of the judicial system as a democratic value and a prerequisite to guarantee the judicial protection of fundamental rights and freedoms.

162. In the following, the Court also points out that through its Judgment in cases KO29/12 and KO48/12, among others, in the assessment of the constitutionality of the amendments proposed in relation to articles 104 and 109 of the Constitution, regarding the appointment, the reappointment and dismissal of judges and the appointment and dismissal of the Chief Prosecutor following the proposal of the respective Councils, the Court also emphasized the full independence of the Councils in the exercise of their respective functions (see, among others, the Judgment of the Court in case KO29/12 and 48/12, Applicant, *the President of the Assembly of the Republic of Kosovo*, Assessment of the proposed constitutional amendments, submitted on 23 March 2012 and 4 May 2012, Judgment of 20 July 2012, paragraphs 205 to 212).

(iii) The principles derived from the documents and instruments of the United Nations, the European Union, the Council of Europe, and the Reports and Opinions of the Venice Commission regarding the independence of the judiciary and that of the prosecution

163. The Court will present below detached parts, relevant to the assessment of the proposed amendments to the Constitution, originating from the thematic documents and instruments of the United Nations, the EU and the Council of Europe, including the Reports and

Opinions of the Venice Commission, which deal specifically with issues related to the independence of the judiciary and the prosecutorial system, including the principles and standards that refer to the dismissal of judges and prosecutors as well as the assessment of integrity in the justice system, including also transitory assessment by external bodies, established outside the justice system.

164. The Court in relation to the judiciary shall submit the following documents: (i) the Basic Principles of Judicial Independence adopted by the United Nations General Assembly in 1985 and the *Bangalore Principles* of Judicial Conduct of 2002; (ii) The European Charter for the status of judges, approved at the multilateral meeting organized by the Directorate for Legal Affairs of the Council of Europe, in July 1998 and the Explanatory Memorandum of the European Charter for the Status of Judges; (iii) Recommendation CM/Rec (2010)12 of the Committee of Ministers of member states for judges: Independence, Efficiency and Responsibilities (approved on 17 November 2010) and its Explanatory Memorandum; (iv) "*Bordeaux Declaration*" Judges and Prosecutors in a democratic society, Opinion no. 12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion no. 4 (2009) of the Consultative Council of European Prosecutors (CCPE) for the attention of the Committee of Ministers of the Council of Europe and the relationship between Judges and Prosecutors in a democratic society and its explanatory document, of 8 December 2009; (v) *Magna Carta* of Judges (Basic Principles), of the Consultative Council of European Judges, of 17 November 2010; (vi) Opinion No. 1 of the Consultative Council of European Judges on the standards regarding the independence of the judiciary and the inviolability of judges; (vii) Report [CDL-AD(2010)004] of the Venice Commission on the independence of the judicial system, Part I; Independence of Judges, approved at the 82nd plenary meeting on March 12-13, 2010; and (viii) Opinions, Joint Opinions and *Amicus Curiae* responses regarding transitional assessment in the justice system, as well as the Rule of Law Framework (2019) of the European Parliament, the European Council and the European Commission, related to "*Further Strengthening the Rule of Law of Law within the European Union: current situation and possible next steps*", April 2019.

165. Meanwhile, with regard to the prosecutorial system and issues related to its independence, it will refer to the following documents: (i) Standards of IAP (International Association of Judges) of 1999 on Professional Responsibility and the Declaration of Obligations and Essential Rights of Prosecutors; (ii) Recommendation Rec (2000) 19 of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System; (iii) European Guidelines on the Ethics and Conduct of Public Prosecutors, namely the Budapest Guidelines, Council of Europe, 2005; and (iv) Report CDL-AD(2010)040 on European Standards regarding the independence of the judicial system: Part II - Prosecution Service, adopted by the Venice Commission at its 85th plenary meeting on 17-18 December 2010.

a. Regarding the independence of the judicial system

- *At the level of the United Nations*

166. Article 10 of the Universal Declaration of Human Rights defines that: *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".*

167. The Preamble to the Fundamental Principles on the Independence of the Judiciary [adopted by the United Nations General Assembly in 1985], *inter alia*, states that: *"Independence is*

essential to both the rule of law and a fair trial as it bridges the gap between a number of human rights principles related to the judiciary and their implementation.".

168. The Bangalore Principles of Judicial Conduct of 2002 regarding the principle of independence have specified, *inter alia*, that: *"Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects."* Secondly, in the same principles it is determined that*: "Impartiality is essential to the proper discharge of the judicial office".*

- *At the EU level*

169. The Court also refers to article 47 (Right to an effective remedy and to a fair trial) of the Charter of Fundamental Rights of the European Union, which defines:

> *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
>
> *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.*
>
> *[...]."*

170. The CJEU through its case law, among other things, has emphasized that: *"In order to fulfill its role in a modern state and in an increasingly internally interconnected Europe, the judiciary must be organized in such a way as to ensure that judges are free to decide cases completely independently, abided by the law and only the law. Even the appearance of external influence and pressure should be avoided so that the public can believe that judicial decisions are made with this kind of independence. In a democratic state ruled by the rule of law, an independent judiciary is a must. In many EU member states, if not in all, the institution responsible for protecting the independence of the judiciary is the Judicial Council".* (case C-83/19, *Asociaţia 'Forum Judecătorilor din România'* (Forum of Judges of Romania), (CJEU), Judgment of 18 May 2021, paras 196- 197, 205, 207, 212, 231, 236).

- *At the level of the Council of Europe*

171. The right to an independent and impartial court is guaranteed first of all by article 6 of the ECHR, which establishes:

> *"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...].*
> *[...]"*

172. Recommendation (94) 12 on the Independence, Efficiency and Role of Judges, approved by the Committee of Ministers on 13 October 1994, also specifies that: *"The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal*

law". Whereas the Explanatory Memorandum of this Recommendation (94) 12 clarifies that: (i) *"the Council of Europe includes among its aims the institution and protection of a democratic and political system characterised by the rule of law and the establishment of a constitutionally governed state, as well as the promotion and protection of human rights and fundamental freedoms". (item 2) and (ii) "The recommendation on the independence, efficiency and role of judges recognises and emphasises the pre-eminent and significant role played by judges in the implementation of these aims. The independence of judges is one of the central pillars of the rule of law. The need to promote the independence of judges is not confined to individual judges only but may have consequences for the judicial system as a whole. States should therefore bear in mind that, although a specific measure does not concern any individual judge directly, it might have consequences for the independence of judges". (item 3).*

173. *"Magna Carta"* of judges, through which the basic principles are defined (Consultative Council of European Judges (CCJE), of 17 November 2010) in its part regarding the rule of law and the justice system determines that: "*The judiciary is one of the three powers of any democratic state. Its mission is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner".* As far as judicial independence is concerned, the *Magna Carta* specifies that: (i) *"Judicial independence and impartiality are essential prerequisites for the operation of justice;* (ii) *"Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.";* and (iii) *"Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary".*

174. Following this, regarding the establishment of a Body responsible for guaranteeing independence, *Magna Carta* establishes that: *"13. To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions [...]".*

b. Regarding the independence of the prosecutorial system

175. The Court will further present detached parts, relevant to the assessment of the proposed constitutional amendments, that refer to the principle of independence of the prosecutorial system, and that originate from the following documents: (i) United Nations Guidelines on the Role of Prosecutors, of 1990; (ii) Professional Standards of IAP (International Association of Prosecutors), of 1999 (iii) Report on European Standards regarding the Independence of the Judicial System: Part II – "*Prosecution Service*", approved by the Venice Commission in its the 85th plenary session on 17-18 December 2010; (iv) "*The Role of Public Prosecution in the Criminal Justice System*", Recommendation Rec (2000) 19, approved by the Committee of Ministers of the Council of Europe on 6 October 2000 and Explanatory Memorandum; (v) Opinions no. 9 (2014) and no. 13 (2018) of the Consultative

Council of European Prosecutors; and (vi) Summary of Opinions and Reports of the Venice Commission on Prosecutors CDL-PI(2022)23, published on 26 April 2022.

176. First, at the level of the United Nations, the Court refers to the Guidelines on the Role of Prosecutors in their preamble, through which the role of the prosecution in ensuring *"equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal,*

> *[...]*
> *Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime,*
> *Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions".*

177. Second, the 1999 Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors, specify that: *"The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference".*

178. Third, at the level of the Council of Europe, the Report on European Standards as regards the Independence of the Judicial System: Part II – "The Prosecution Service", approved by the Venice Commission at its 85th plenary session on 17- 18 December 2010 (hereinafter: Report on the Prosecution Service) states that: (i) A prosecutor, like a judge, may not act in a matter where he or she has a personal interest, and may be subject to certain restrictions aiming to safeguard his or her impartiality and integrity; (ii) The qualities required of a prosecutor are similar to those of a judge, and require that suitable procedures for appointment and promotion are in place; (iii) where a prosecutor falls short of the required standard, the impartial judge may be able to correct the wrong that is done. However, there is no guarantee of such correction and in any event great damage can be caused. It is evident that a system where both the prosecutor and the judge act to the highest standards of integrity and impartiality presents a greater protection for human rights than a system which relies on the judge alone (paragraphs 17, 18 and 19).

179. While according to the Venice Commission: *"Even in systems where the prosecutor is not part of the judiciary, the prosecutor is expected to act in a judicial manner. While the Constitution should confer independence on the system as well as on the general prosecutor care will have to be taken to maintain a balance between, on the one hand, the protection of subordinate prosecutors from interference by the Government, Parliament, the police or the public and, on the other hand the authority and responsibility of the general prosecutor for ensuring that they carry out their functions properly"*(see Compilation of Venice Commission Opinions and Reports concerning Prosecutors, CDL-PI(2018)001, published on 11 November 2017, p.28).

180. Recommendation Rec (2000) 19, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and the Explanatory Memorandum on "*The Role of Public Prosecution in the Criminal Justice System*" addresses: (i) the functions of the public

prosecutor; (ii) the safeguards provided to public prosecutors for carrying out their functions; (iii) the relationship between public prosecutors and the executive and legislative powers; (iv) the relationship between public prosecutors and court judges; (v) the relationship between public prosecutors and the police; (vi) the duties of the public prosecutor towards individuals; and (vii) international co-operation.

181. Opinion no. 9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors (Rome Charter), among other things, assessed that: (i) "*The independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary. Therefore, the general tendency to enhance the independence and effective autonomy of the prosecution services should be encouraged"* (point IV); (ii) *The European Court of Human Rights (hereafter "the Court") considered it necessary to emphasise that "in a democratic society both the courts and the investigation authorities must remain free from political pressure". It follows that prosecutors should be autonomous in their decision making and, while cooperating with other institutions, should perform their respective duties free from external pressures or interferences from the executive power or the parliament, having regard to the principles of separation of powers and accountability. ECtHR also referred to the issue of independence of prosecutors in the context of "general safeguards such as guarantees ensuring functional independence of prosecutors from their hierarchy and judicial control of the acts of the prosecution service"* (paragraph 34); and (iii) *"The manner in which the Prosecutor General is appointed and dismissed plays a significant role in the system guaranteeing the correct functioning of the prosecutor's office*" (paragraph 55).

182. Opinion no. 4 (2009) entitled "*Judges and prosecutors in a democratic society*" (Bordeaux Declaration), adopted together with the Consultative Council of European Judges (CCJE) reiterates that*: (i) " the independence of the public prosecution is a necessary corollary to the independence of the judiciary. CCPE also refers to its Opinion No. 9 (2014) entitled "European norms and principles regarding prosecutors" Charter of Rome), where it is stated that the general tendency to increase the independence and effective autonomy of prosecution services should be encouraged, prosecutors should be autonomous in their decision-making and perform their duties without external pressure or interference*" (paragraph 3); (ii) "*in recent years, the ECtHR has developed important judicial practice in support of the independence of prosecutors, regardless of whether they are considered judicial authorities or not. The prosecutor who directs and controls the first stage of the criminal procedure should be considered an "advanced defender of human rights" and this essential role should be played throughout the process*" (paragraph 7); (iii) "*taking into account the closeness and complementary nature of the missions of judges and prosecutors, as well as the requirements regarding their status and conditions of service, prosecutors should have guarantees similar to those for judges*" (paragraph 14); (iv) "*prosecutors must be independent in their status and behaviour, they must enjoy external independence, namely in the face of unfair or illegal interference by other public or non-public authorities, e.g. political parties and they must enjoy internal independence and must be able to freely perform their functions and decide, even if the modalities of action differ from one legal system to another, according to relations with the hierarchy*" (paragraph 31); and (v) "*relevant provisions should be adopted in the member states, in parallel with the independence of judges, to strengthen the independence, accountability and ethics of prosecutors, either in the field of criminal law or in relation to other areas of their competence. Political influence should not be acceptable*" (recommendations, point i).

183. In this regard, the Court also refers to the case law of the CJEU, according to which, among other things *"an authority, such as a public prosecutor's office, which is competent, in criminal proceedings, to prosecute a person suspected of having committed a criminal offence so that that person may be brought before a court, must be regarded as participating in the administration of justice of the relevant Member State"* (see CJEU case C-508/18 and C-82/19, application from the Supreme Court of Ireland, Judgment of 27 May 2019, paragraph 60).

184. In light of the above, the Court will apply the principles elaborated above during the assessment of the proposed constitutional amendments no. 27 and no. 28, to continue the examination and assessment of the proposed constitutional amendment no. 29.

B. Assessment of the proposed constitutional amendments no. 27 and no. 28

Introduction

185. The Court first recalls that the proposed constitutional amendments no. 27 and no. 28 of the Constitution will be assessed in accordance with the scope of assessment defined as above.

186. Moreover, the Court recalls that the proposed constitutional amendments no. 27 and no. 28, are aimed at supplementing paragraph 4 of article 104 and paragraph 6 of article 109 of the Constitution, and in terms of defining or expanding the criteria for the dismissal of judges/prosecutors are intended to be approved as permanent constitutional amendments.

187. The Court will assess the content of these proposed constitutional amendments in the light of the content of paragraph 4 of article 104 and paragraph 6 of Article 109 of the Constitution, through which the proposer of the constitutional amendments intends to define the criterion of "*serious neglect of duties*", as criteria for the dismissal of judges and prosecutors.

188. The Court first refers to paragraph 4 of article 104 [Appointment and Dismissal of Judges] of the Constitution, which stipulates that:

> *"4. Judges may be removed from office upon conviction of a serious criminal offense or for serious neglect of duties".*

189. Further, paragraph 6 of article 109 [State Prosecutor] of the Constitution, which stipulates that: *"Prosecutors may be removed from office upon conviction of a serious criminal offense or for serious neglect of duties".*

190. The Court also recalls that the content of the two proposed constitutional amendments no. 27 and no. 28 is the same. Having said that, the proposed constitutional amendments include the following:

> 1. The proposed constitutional amendment no. 27 proposes that a new paragraph be added after paragraph 4 of article 104 of the Constitution, which stipulates that:
>
> "*4a. Serious failure to adhere the duties from paragraph 4 of this article includes cases where the judge has been continuously evaluated with insufficient performance or has been proven to have unjustifiable assets or to have vulnerable integrity or has committed serious disciplinary violations, as defined by the Law".*

2. The proposed constitutional amendment no. 28 proposes that a new paragraph be added after paragraph 6 of article 109 of the Constitution, as follows:

"6a. Serious failure to adhere the duties from paragraph 6 of this article includes cases where the prosecutor has been continuously evaluated with insufficient performance or has been proven to have unjustifiable assets or to have vulnerable integrity or has committed serious disciplinary violations, as defined by the Law".

191. The Court recalls that the proposed constitutional amendments no. 27 and no. 28 stem from the initiative of the Ministry of Justice, which on its request to the Venice Commission for opinion on the Concept-paper, of 13 March 2023 and 18 May 2023, respectively, had also sent draft the constitutional amendments no. 27 and no. 28. Having said that, the Court notes that the content and essence of the proposed constitutional amendments no. 27 and no. 28, proposed by the *ad hoc* Committee of the Assembly and referred to the Court by the President of the Assembly, apart from some wording and language clarifications, do not differ in their content from the two (2) aforementioned constitutional amendment proposals sent to the Venice Commission for opinion.

192. Finally, the Court points out that the proposed constitutional amendments no. 27 and no. 28, respectively, do not refer to the creation of the transitional integrity control process, as proposed by the proposed amendment no. 29. Therefore, the Court will examine the proposed constitutional amendments no. 27 and no. 28 in the sense of, a) constitutional and international principles and standards that aim to preserve the integrity and independence of the judicial and prosecutorial system, including that of the judges and prosecutors themselves; b) comparative analysis of the Constitutions of the member countries of the Council of Europe; c) legislation in force in the Republic of Kosovo regarding responsibilities and disciplinary and ethical violations of judges and prosecutors; d) the Opinion of the Venice Commission on Kosovo regarding the proposed constitutional amendments no. 27 and no. 28; and e) comments and responses of the Ministry of Justice, KJC and KPC.

a. General international principles and standards concerning the criteria for the dismissal of judges and prosecutors

(i) General international principles and standards concerning the criteria for the dismissal of judges

193. In the context of the assessment of the proposed constitutional amendment no. 27, which is related to the dismissal of judges, the Court will refer to the principles and standards, defined by international documents and instruments as follows.

194. At the level of the United Nations, according to the Basic Principles on the Independence of the Judiciary in relation to "*Discipline, suspension and removal*", among others, it is noted that: (i) Judges should be subject to suspension or removal only for reasons of incapacity or conduct that renders them unable to perform their duties; (ii) all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct; (iii) "*Decisions in disciplinary, suspension or removal proceedings must be subject to an independent review. This principle cannot be applied to decisions of the highest court and those of the legislature in the impeachment or similar proceedings*" (paragraphs 18, 19 and20).

195. At the level of the Council of Europe, Recommendation CM/Rec (2010)12 of the Committee of Ministers for Member States on Judges: Independence, Efficiency and Responsibilities [adopted by the Committee of Ministers of the Council of Europe in chapter VIII [Ethics of judges], has determined that: *"judges should be guided in their activities by ethical principles of professional conduct. These principles not only include duties that may be sanctioned by disciplinary measures but offer guidance to judges on how to conduct themselves"* (point 72). While the Explanatory Memorandum of this Recommendation regarding the codes of ethics clarifies that: *"Since Recommendation no. R (94) 12, codes of judicial ethics have been adopted in several member states. [...] These texts highlight independence and impartiality as standards of judicial ethics, but also refer to the clear reasoning of the judgments, institutional responsibility, diligence, active listening, integrity, courtesy to the parties and transparency, all of which are closely related to the principles that have informed this new recommendation and "Public confidence in the administration of justice is one of the essential components of a democracy. This involves not only respect for independence, impartiality, efficiency and quality, but also relies on the quality of the individual behavior of judges. Respect by judges of ethical requirements is a duty which comes with their powers."* (points 68 and 69).

196. In particular, the aforementioned Explanatory Memorandum referring to Recommendation no. R (94) 12, emphasizes that *"ethics standards should not be confounded with a disciplinary regime."* (point 70 of the Explanatory Memorandum). In the following, the latter specifies that: *"Ethics standards aim at achieving in an optimal manner, the best professional practices, while disciplinary regimes are essentially meant to sanction failures in the accomplishment of duties* (*Recommendation, paragraph 73*)*." and "Judges seeking advice on ethics should be able to consult bodies established for such purposes. Such special bodies should be distinct and well differentiated from organs enforcing disciplinary sanctions (Recommendation, paragraph 74)".*

197. Following this, the European Charter for the Status of Judges has specified that a judge ceases to exercise his office permanently through resignation, medical certification of physical unfitness, reaching the age limit, expiry of a fixed legal term, or dismissal within a procedure as envisaged in paragraph 5.1 of the Charter (point 7.1.). While point 7.1. establishes that: *"The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.".*

198. The explanatory memorandum regarding the disciplinary responsibility of the judge also specifies that: *"The Charter deals here with the judge's disciplinary liability. It begins with a reference to the principle of the legality of disciplinary sanctions, stipulating that the only valid reason for imposing sanctions is the failure to perform one of the duties explicitly defined in the Judges' Statute and that the scale of applicable sanctions must be set out in the judges' statute".* Moreover, the Charter lays down guarantees on disciplinary hearings, namely that*:* (i) disciplinary sanctions can only be imposed on the basis of a decision taken following a proposal or recommendation or with the agreement of a tribunal or authority, at least one half of whose members must be elected judges; (ii) the judge must be given a full hearing and

be entitled to representation; (iii) if the sanction is actually imposed, it must be chosen from the scale of sanctions, having due regard to the principle of proportionality; and (iv) provides for a right of appeal to a higher judicial authority against any decision to impose a sanction taken by an executive authority, tribunal or body, at least half of whose membership are elected judges.

199. In the following, the Report on the Independence of the Judiciary Part I: Independence of the Judicial System, adopted by the Venice Commission [CDL-AD(2010)004], specifies that: *"The Venice Commission has consistently supported the principle of irremovability in constitutions. Transfers against the will of the judge may be permissible only in exceptional cases. As regards disciplinary proceedings, the Commission's Report on Judicial Appointments favours the power of judicial councils or disciplinary courts to carry out disciplinary proceedings. In addition, the Commission has consistently argued that there should be the possibility of an appeal to a court against decisions of disciplinary bodies."* (point 43).

(ii) General international principles and standards concerning the criteria for the dismissal of prosecutors

200. International principles and standards related to the criteria for the dismissal of prosecutors, among others, are defined in: (i) the United Nations Guidelines on the Role of Prosecutors, approved on August 27, 1990 at the 8th Congress of the United Nations for the prevention of crimes and the treatment of offenders; (ii) European Guidelines on Ethics and Conduct for Public Prosecutors (Council of Europe, "Budapest Guidelines", 2005); (iii) Recommendation Rec (2000)19 of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System; and (iv) Report on European Standards on the Independence of the Judicial System: Part II – Prosecution Service.

201. The Venice Commission in its Report on "European Standards as regards the Independence of the Judiciary: Part II - Prosecution Service" specifies, among other things, that: (i) there is a fundamental difference in how the concept of independence or autonomy is perceived when applied to judges compared to the prosecution. In this respect, the Commission specified that even when though it is part of the judicial system, the prosecution is not a court. The independence of the judiciary and its separation from executive authority is a cornerstone of the rule of law, from which there can be no exceptions. Judicial independence has two aspects, the institutional one, where the judiciary as a whole is independent, as well as the independence of individual judges in decision-making (including their independence from the influence of other judges), however, the independence or autonomy of the prosecution is not of a strict nature such as that of the courts; and (ii) even when the prosecution as an institution is independent, there may be a hierarchical control of the decisions and activities of prosecutors other than the general prosecutor. Regarding the Draft Law of Ukraine on the amendment of the Constitutional Provisions on the Prosecutor's Office, the Venice Commission, among other things, found that: The Law on the Prosecutor's Office should clearly define the conditions for the early dismissal of the Prosecutor. In its Opinion on the Draft Law of Ukraine on Amending the Constitutional Provisions on the Prosecution, the Commission also found that: *"The grounds for such dismissal would have to be prescribed by law. [...] The Venice Commission would prefer to go even further by providing the grounds for a possible dismissal in the Constitution itself. Moreover, there should be a mandatory requirement that before any decision is taken, an expert body has to give an opinion whether there are sufficient grounds for dismissal"*. (point 39 of the aforementioned Report).

b. Comparative analysis of the Constitutions of the member states of the Council of Europe

202. In the following, the Court will refer to the constitutional provisions of the Constitutions of the member states of the Council of Europe that relate to the criteria for the dismissal of judges and prosecutors, where they are applicable.

203. As a result of this comparative analysis, it follows that (i) some of the Constitutions of these member states do not refer at all to the issue of dismissal of judges (see, among others, the Constitutions of Bosnia and Herzegovina, France and Switzerland); (ii) a category of the constitutions of these member states of the Council of Europe stipulate that the criteria for dismissal of judges shall be prescribed by law (see, Constitutions of Armenia; Belarus; Czech Republic; Georgia; Hungary; Italy; Luxembourg; Moldova; Netherlands; Norway; Romania); (iii) while another category of Constitutions stipulate that the issue of dismissal of judges shall be determined by law and is the subject to a judicial decision (see, Constitutions of Andorra; Austria; Azerbaijan; Belgium; Denmark; Estonia; Finland; Germany; Greece ; Iceland; Latvia; Poland; Spain and Serbia).

204. The Court will further present the criteria for dismissal of judges/prosecutors according to the constitutional provisions of another category of Constitutions, through which the dismissal criteria for judges/prosecutors are defined therein, including the Constitution of Bulgaria; Croatia; Cyprus; Ireland; Lithuania; Montenegro, North Macedonia; United Kingdom; Albania, Slovakia; Slovenia; Sweden; Turkey as well as Ukraine. Following this, the Court will refer to the Constitutions of the member states of the Council of Europe as follows:

(i) The Constitution of Bulgaria stipulates that: *"They, including the persons referred to in para. 2 shall be released from office only upon: completion of 65 years of age; resignation; judgment which has the force of res judicata for a penalty of deprivation of liberty for an intentionally committed criminal offence; permanent de facto inability to perform their duties for more than a year; serious infringement or systematic neglect of their official duties, as well as actions damaging the prestige of the judiciary"*. [paragraph 3 of article 129 of the 1991 Constitution [amended in 2015]];
(ii) The Constitution of Croatia specifies that*: "A judge shall be relieved of office: at his/her own request; -if permanently incapacitated from performing his/her duties; if sentenced for a criminal offence making him/her unworthy of holding judicial office; if, in accordance with law, the State Judicial Council so decides due to the perpetration of a grave infringement of discipline; and when reaching seventy years of age."* [article 120 of the Constitution];
(iii) The Constitution of Montenegro in its article 121 establish that*: "The duty of a judge shall cease at his/her own request, when he/she fulfills the requirements for age pension and if the judge has been sentenced to an unconditional imprisonment sentence. The judge shall be released from duty if he/she has been convicted for an act that makes him unworthy for the position of a judge; performs the judicial duty in an unprofessional or negligent manner or loses permanently the ability to perform the judicial duty.";*
(iv) The Constitution of North Macedonia in article 99 stipulates that: *"A judge is discharged from duty: if he/she so requests; if he/she permanently loses the capability of carrying out a judges office, which is determined by the Republican Judicial Council; if he/she fulfills the conditions for retirement; if he/she is sentenced for a*

criminal offence to a prison term of a minimum of six months; owing to a serious disciplinary offence defined in law, making him/her unsuitable to perform a judges office as decided by the Republican Judicial Council; and owing to unprofessional and unethical performance of a judges office, as decided by the Republican Judicial Council in a procedure regulated by law"; and

(v) The Constitution of Albania in article 140 establishes that: "*A judge of the High Court may be removed by the Assembly by two-thirds of all its members for violation of the Constitution, commission of a crime, mental or physical incapacity, or acts and behavior that seriously discredit judicial integrity and reputation. The decision of the Assembly is reviewed by the Constitutional Court, which, when it determines the existence of one of these grounds, declares his removal from office.*" Whereas, paragraph 6 of article 147 of the Constitution of the Republic of Albania specifies that: "*A judge may be removed by the High Council of Justice for commission of a crime, mental or physical incapacity, acts and behavior that seriously discredit judicial integrity and reputation, or professional insufficiency. The judge has the right to appeal this decision to the High Court, which decides in the joint colleges*". In the following, article 149 of the Constitution of Albania determines that also: *"The General Prosecutor may be discharged by the President of the Republic on the proposal of the Assembly for violations of the Constitution or serious violations of the law during the exercise of his duties, for mental or physical incapacity, and for acts and behavior that seriously discredit prosecutorial integrity and reputation".*

c. Legislation in force of the Republic of Kosovo regarding responsibilities and disciplinary and ethical violations of judges and prosecutors

205. In addition to the constitutional criteria, disciplinary responsibilities and their violation by judges and prosecutors and the types of disciplinary measures are also determined by the legislation in force of the Republic of Kosovo, namely by Law no. 06/L - 057 on Disciplinary Liability of Judges and Prosecutors [supplemented and amended by Law no. 08/L - 003 on amending and supplementing Law no. 06/L-057 on Disciplinary Liability of Judges and Prosecutors, published in the Official Gazette on 21 October 2021] (hereinafter: Law on Disciplinary Liability of Judges and Prosecutors).

206. In the following, and in relation to the professional and ethical responsibilities of judges, secondary legislation was also approved by the KJC, which, among others, includes: (i) Code of Ethics and Professional Conduct for Judges; (ii) Regulation (02/2020) on the internal organization of Courts; (iii) Regulation (03/2020) on the organization and activity of the Kosovo Judicial Council; (iv) Regulation (09/2016) on the Appointment, Dismissal and performance evaluation of court presidents; (v) Regulation (11/2016) for evaluating the performance of judges; Regulation (05/2019) on the Disciplinary Procedure of Judges; and (vi) Regulation (04/2020) on the authority, organization, and operation of the judicial inspection unit.

207. Whereas, regarding the professional and ethical responsibilities of prosecutors, secondary legislation has also been approved by the KPC, which includes, among others: (i) the Code of Ethics and Professional Conduct for Prosecutors; (ii) Regulation (No. 1006/2023) for the Advisory Commission on the Ethics of Prosecutors; (iii) Regulation (No. 02/2022) on the Recruitment, Examination, Appointment and Re-appointment of State Prosecutors; and (iv) Administrative Instruction No. 01/2023 for the Drafting of Normative Acts of the KPC.

208. The Court also recalls that article 5 (Disciplinary offenses for judges) of the Law on Disciplinary Liability of Judges and Prosecutors stipulates that: *"1. A judge commits a disciplinary offense if he or she: 1.1. is convicted of a criminal offense; 1.2. violates the Law; or 1.3. violates his/her official duties as a judge. [...]".* Following this, the types or circumstances of violation of duties as a judge are listed in paragraph 2 of this article, respectively in subparagraphs 2.1 to 2.16.

209. Article 6 (Disciplinary offenses for prosecutors) of the Law on Disciplinary Liability of Judges and Prosecutors establishes that: *"1.* A prosecutor commits a disciplinary offense if he or she: *1.1. is convicted of a criminal offense; 1.2. violates the Law, or 1.3. violates his or her official duties as a prosecutor. [...]".* Following this, the types or circumstances of violation of duties as a prosecutor are listed in paragraph 2 of this article, respectively in subparagraphs 2.1 to 2.13.

210. The Court also recalls that based on article 7 (Disciplinary Sanctions) of the Law on Disciplinary Liability of Judges and Prosecutors, the proposal for dismissal of a judge or prosecutor is one of the disciplinary measures, while, based on article 8 (Dismissal of judges and prosecutors) of the aforementioned Law, decisions related to the dismissal of judges or prosecutors are taken by the President of the Republic of Kosovo, based on the proposal of the relevant Council, which proposes to the President of the Republic of Kosovo the dismissal of judges or prosecutors only after (i) conviction of the judge or prosecutor for a serious criminal offense; (ii) intentional violation of the law; or (iii) serious neglect of duty.

d. The Opinion of the Venice Commission on Kosovo regarding the proposed constitutional amendments no. 27 and no. 28

211. In its Opinion, namely in the part of its conclusion, the Venice Commission basically emphasized that:

> *"128. [...] recommends introducing legislative changes that would improve the current system of judicial discipline, as a thorough extension of Option 2, this concerns notably a strengthening of the system of asset declarations and strengthening the vetting units within the KJC and the KPC. Constitutional changes should be considered only for underpinning integrity checks of the members of the KJC and the KPC, court presidents and chief prosecutors.*
> *129. The Venice Commission is not in a position to assess how widespread the incidents in the judiciary of which its delegation was informed are and whether they concern individual judges and prosecutors or a large proportion of them. In any case, it is necessary to distinguish cases of professional incompetence, which can be addressed through training, from cases of deliberate malevolent acts, which can be addressed through integrity checks.*
> *130. The Venice Commission considers that a reform of the judiciary in Kosovo is indeed necessary and that this may involve some form of effective integrity checks. It is however the Commission's opinion and that many elements of such a reform can be adopted on the level of ordinary law. Any vetting or integrity checks system introduced could be limited to KJC and KPC who exert disciplinary power over the other members of the judicial system. It would then be for the KJC and the KPC to deal with problems in the rest of the judicial system, both as concerns integrity and professionalism. The interference in constitutional rights should be strictly proportionate. Any constitutional amendments should aim at minimal invasiveness*

in the competences of the KJC and the KPC while achieving the goal to reform the judiciary".

212. Regarding the proposed constitutional amendments no. 27 and no. 28, and related to the definition of what circumstances may constitute "*serious neglect of duty*" in the case of judges and prosecutors, the Court refers to the extracted parts of the Venice Commission Opinion that specifically relate only to these proposed constitutional amendments.

213. In the part of the Opinion of the Venice Commission that refers to the content of the proposed constitutional amendments amended and submitted for opinion by the Deputy Minister of Justice, on 18 May 2022, it is noted that:

> "*105. […] The draft amendments to Articles 104 (4a) and 109 (6a) of the Constitution define the ground for dismissal "serious neglect of duties" as including cases when the judge or prosecutor "has been rated with insufficient performance, or has been found to have unjustifiable wealth, or vulnerable integrity, or has committed serious disciplinary offenses, as regulated by law."*
> *106. These two constitutional amendments would also facilitate the dismissal of judges or prosecutors who provide irregular asset declarations. Their dismissal could be triggered by the Anti-Corruption Agency (and decided upon by the KJC and the KPC, possible after their integrity assessment). This would not depend on a vetting of all judges and prosecutors.*
> *[…]*

e. Comments and responses of interested parties regarding the proposed constitutional amendments no. 27 and no. 28

214. In the following, the Court will briefly refer to: (i) the Explanatory Document of the Ministry of Justice regarding the Vetting process; and (ii) the comments of the parties, which are specifically related to the proposed constitutional amendments no. 27 and no. 28.

215. In the Explanatory Document regarding the vetting process, submitted by the Ministry of Justice on 4 September 2022 to the Assembly, the latter in relation to the proposed constitutional amendments no. 27 and no. 28 respectively, specified that:

> "*Amendments no. 27 and 28 are related to the clarification of the basis for dismissal of a judge or prosecutor from the position. In articles 104 and 109 of the Constitution, it is currently provided that they can be dismissed only in case of conviction for a serious criminal offense or due to serious neglect of duties. Since, the first ground, the punishment for a serious criminal offense is clearer, the Constitution has not defined the term "serious neglect of duties" and therefore there is room for interpretation and how this term can include for example. Continuous poor evaluations, disciplinary violations defined by the Law on Disciplinary Liability or others. However, in order to have a justice system with integrity, of course unjustified wealth or vulnerable integrity (for example, the possibility of influencing a judge or prosecutor due to family or other ties, or personal habits) must be grounds for dismissal.*
> *In this regard, with amendments no. 27 and 28, the term "serious neglect of duties" is clarified to include four grounds: (1) insufficient performance; (2) unjustifiable assets: (3) vulnerable integrity and (4) serious disciplinary violations. Other details of the four "grounds" are regulated by separate laws. These amendments are foreseen as "permanent amendments" in the sense that they will continue to be applied even*

after the transition period, where the evaluation of judges and prosecutors in management positions is done by an external mechanism, but even then when such an assessment is made by the judicial and prosecutorial councils. So it is not time bound".

216. Whereas, the Ministry of Justice, through its comments submitted to the Court on 22 March 2023 regarding these two proposed constitutional amendments, also clarified that:

> *"14. This amendment and the following amendment (no. 28) are about clarifying the grounds for dismissing a judge or prosecutor from his or her position.*
> *[...]*
> *15. The first basis for the dismissal of a judge, "conviction for a serious criminal offense", is clear and easily interpretable based on the legal provisions in force. On the other hand, the second basis, "serious neglect of duties", is a further undefined concept that creates room for interpretation, especially related to the integrity control process.*
> *16. The law in force on Disciplinary Liability of Judges and Prosecutors lists the relevant violations of judges and prosecutors, on the basis of which a judge or prosecutor can be dismissed, but nowhere does it define the constitutional basis for dismissal as "serious neglect of duties", thus leaving room for interpretation to the authorities that develop disciplinary procedures and integrity control".*

217. The KJC in relation to these two proposed constitutional amendments, among other things, has specified that: "[...] *the proposers of the amendments further and disproportionately expand the term "serious neglect of duties" from paragraph 4 of Article 104 of the Constitution. Thus, while concepts such as "serious disciplinary violation" or "insufficient performance" are to some extent related to the concept that this amendment intends to further detail (serious neglect of duties), in this amendment is added beyond and intended to introduce other grounds which can be used for interference with justice system by the political branches of power (current or future). Thus, terms such as "vulnerable integrity" or "unjustifiable assets" are tools through which other branches of power can interfere in an exaggerated and disproportionate manner in the independence of the justice system, thereby infringing upon the right of citizens to due process guaranteed by the Constitution. [...] This fact, together with the existence, for decades, of an unregulated economy and with pronounced legal deficiencies that would oblige the citizens of Kosovo, and therefore also the judges, to keep and save the receipts and other relevant documents of every transaction made over the years, potentially made each judge vulnerable to an administrative/civil process of "finding" that he/she has unjustifiable assets".*

218. Following the aforementioned comments, namely in light of the comments submitted by the Ministry of Justice, it results that the proposed constitutional amendments no. 27 and no. 28 refer to the performance evaluation process and disciplinary issues, and the process of checking the integrity of judges and prosecutors, as a permanent processes in the justice system. Having said that, from the clarifications and comments submitted by the Ministry of Justice, it results that the proposed constitutional amendments no. 27 and no. 28, respectively, aim at expanding the criterion of serious neglect of duties in two categories, those of professional/disciplinary issues and those related to integrity control, which includes unjustifiable assets and vulnerable integrity. However, based on the aforementioned comments of the Ministry of Justice, and the preparatory work documents of the *ad hoc* Assembly Committee, it is not clarified whether an integrity check of judges/prosecutors is intended to be a one-time or regular process. The Court has reiterated

above that the proposed constitutional amendment no. 29, which is based on the recommendation given through the Opinion of the Venice Commission, aims at controlling the integrity of high and management positions in the justice system and candidates for these positions for a transitional period and by an external body, established outside the KJC and KPC.

If the proposed amendments no. 27 and no. 28 diminish human rights and freedoms defined by Chapter II of the Constitution

219. The Court will continue with the examination and review of the proposed constitutional amendments no. 27 and no. 28, which are identical in content and refer to the permanent dismissal criteria for judges and prosecutors. The Court, during its examination and in the assessment of whether the proposed constitutional amendments no. 27 and no. 28 diminish the rights and freedoms guaranteed by Chapter II of the Constitution, will apply the aforementioned constitutional principles; international principles and standards related to dismissal criteria; as well as the aforementioned comparative analysis of the Constitutions of the member states of the Council of Europe.

220. Regarding the proposed constitutional amendments no. 27 and no. 28 through which it is established what circumstances constitute "*serious neglect of duty*", as a criterion for the dismissal of judges and prosecutors, respectively, the Court will assess whether these proposed amendments diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution and the values of the Republic of Kosovo specified by article 7 of the Constitution.

221. As specified above, the Court reiterates that the KJC and the KPC within the framework of Chapter VII as independent constitutional institutions, which the Constitution clearly mandates with the task of ensuring the independence and impartiality of the judicial and prosecutorial system, are the only competent and responsible bodies for the development of procedures related to the dismissal of judges and prosecutors. In addition, against the decision to dismiss judges based on paragraph 5 of article 104 of the Constitution, a direct appeal can be submitted to the Supreme Court.

222. The Court also points out that the principles and standards related to the dismissal of judges and prosecutors, respectively, and related to the exercise of their profession, directly affect the values of integrity, independence and impartiality of the judiciary and the principle of professionalism in addition to the criteria defined for dismissal in articles 104 and 109 of the Constitution, they are also embodied as principles and as guarantees in articles 4 and 7 of the Constitution, but also the provisions of Chapter II of the Constitution, including but not limited to articles 24, 29, 31 and 54, as well as article 102 of the Constitution and relevant legislation in force. Therefore, the Court considers that the issues or violations that affect the integrity of judges and prosecutors are not limited to the provisions of paragraph 4 of article 104 and paragraph 6 of article 109 of the Constitution, through which the criteria for dismissal of judges and prosecutors are determined.

223. The Court, based on the clarifications given above, will assess whether the proposed constitutional amendments no. 27 and no. 28 diminish/reduce the fundamental rights and freedoms guaranteed by Chapter II of the Constitution, in accordance with the principle of legal certainty, which principle is also embodied in the constitutional provisions of Chapter II of the Constitution and those of the ECHR.

224. The Court, in the aforementioned context, recalls that through its case law it has continuously emphasized that the principle of legal certainty, which is embodied in the concept of the rule of law, guaranteed by articles 3 and 7 of the Constitution, and in all articles of the ECHR, among other things, stipulate that legal norms must be clear and as such must ensure that legal situations and relationships remain predictable (see, similarly, the Court's Judgment in case KO216/22 and KO220/22, para. 237).

225. The Court assesses that even in terms of constitutional changes, the proposed constitutional amendment must respect the principle of legal certainty, in terms of the requirement for "*foreseeability*" and "*clarity*" of the norm. The latter is also related to the obligation of the proposer and the drafter of the constitutional amendments, that during the drafting of the proposed constitutional amendments, take into account the relevant aspects of the principle of legal certainty, including the "*foreseeability*" of the constitutional norm, in order that the latter do not result in the reduction of the rights and freedoms guaranteed by Chapter II of the Constitution. In this sense, the Court evaluates that any supplementation or the amendment of the constitutional norm, which, moreover, when affecting fundamental rights and freedoms, must be characterized with clarity and precision, have a relevant justification, be proportional and, as such, guarantee the necessary level of "*foreseeability*" for all individuals who may be affected by the change of a constitutional norm and its implementation in the future.

226. The Court further emphasizes that "*foreseeability*" first of all requires that each norm be phrased with sufficient precision and clarity, so as to enable individuals and legal entities to regulate their behavior in accordance with it. Individuals and other legal entities must know exactly how and to what extent they are affected by a certain constitutional and legal norm and how a new norm changes their previous status or condition foreseen by another norm (see, among others, the Rule of Law Checklist of the Venice Commission [CDL-Ad (2016)007, adopted on 18 March 2016, paragraphs 58 and 59). In this sense, the Court assesses that the principle of legal certainty necessarily requires a clear and predictable phrasing of the norm, which in its application does not allow the implementer/public authority and/or the legislator to give it different meanings and with the consequence of not being in accordance with the purpose that norm aims at. In this regard, the Court refers to the case law of the ECtHR, through which it has been emphasized that rule of law, as one of the fundamental principles of a democratic society, is inherent in all the articles of the Convention (see, among others, the case of the ECtHR, *Broniowski v. Poland*, application no. 31443/96, Judgment of 22 June 2004, para. 147).

227. The Court also recalls the standard established by the Venice Commission, through the Report [no. 469/2008] on constitutional amendments (adopted at its 81st plenary meeting on 11-12 December 2009, [CDL-AD(2010)001) where, among other things, it is emphasized that:

> *"5. The question of constitutional amendment lies at the heart of constitutional theory and practice. Constitutionalism implies that the fundamental rules for the effective exercise of state power and the protection of individual human rights should be stable and predictable, and not subject to easy change. This is crucial to the legitimacy of the constitutional system. At the same time, even quite fundamental constitutional change is sometimes necessary in order to improve democratic governance or adjust to political, economical and social transformations. To the extent that a society is formed by its written constitution, the procedure for changing this document becomes in itself an issue of great importance. The amending power is not a legal technicality but a*

norm-set the details of which may heavily influence or determine fundamental political processes. […]"

228. In the same Report of the Venice Commission in the section on transparency and democratic legitimacy of the constitutional amendment process, it is determined that: (i) "*The constitutional amendment procedures should be drafted in a clear and simple manner, and applied in an open, transparent and democratic way. This is perhaps just as important as the finer details and requirements of the rules themselves"* (point 202); (ii) *"In such situations it is particularly important to have structured and balanced procedures, involving all the political actors as well as civil society, as the Venice Commission has observed on several occasions"* (point 203); (iii) *"In this sense, properly conducted amendment procedures, allowing time for public and institutional debate, may contribute significantly to the legitimacy and sense of ownership of the constitution and to the development and consolidation of democratic constitutional traditions over time. In contrast, if the rules and procedures on constitutional change are open to interpretation and controversy, or if they are applied too hastily or without democratic discourse, then this may undermine political stability and, ultimately, the legitimacy of the constitution itself".* (point 204); and (iv) *"a duly, open, informed and timely involvement of all political forces and civil society in the process of reform can strongly contribute to achieving consensus and securing the success of the constitutional revision even if this inevitably takes time and effort."* (point 205).

229. Following this, the Court also refers to the Rule of Law Checklist [CDL-AD(2016)007, approved by the Venice Commission on 11-12 March 2016] (hereinafter: the Checklist) through which the various aspects of the Rule of Law were developed and established, among others: (a) legality; (b) legal certainty; (c) prevention of abuse of power; (d) equality before the law and non-discrimination, (e) access to justice; (f) prohibition of arbitrariness; and (g) protection of human rights (see paragraph 18 of the Checklist). Furthermore, this document also defines the elements of each of the aforementioned categories, where the principle of legal certainty, among other things, defines that the latter also includes the aspect of foreseeability. While the principle that refers to access to justice, among other things, also includes the aspect of independence and impartiality of the judiciary and the prosecution.

230. Concerning the independence of the judiciary, as a component of access to justice, the Checklist determines that it must be assessed whether there are sufficient constitutional and legal rules that guarantee the independence of the judiciary. In this sense, one of the controlling criteria is the question of whether: the basic principles for judicial independence, including the criteria for judicial appointments, disciplinary and dismissal issues, are stipulated by the Constitution or relevant legislation. In terms of this question, the Rule of Law Checklist inquires whether the criteria or circumstances of dismissal are limited to disciplinary or criminal offenses defined by law and following that if this procedure is clearly prescribed by law. In the following, the same list develops/establishes the requirements as follows:

"ii. Are there legal remedies for the individual judge against a dismissal decision?
iii. Are the grounds for disciplinary measures clearly defined and are sanctions limited to intentional offences and gross negligence?
iv. Is an independent body in charge of such procedures?
v. Is this body not only comprised of judges?

vi. Are the appointment and promotion of judges based on relevant factors, such as ability, integrity and experience? Are these criteria laid down in law?
[…]
viii. Is there an independent judicial council? Is it grounded in the Constitution or a law on the judiciary? […]
ix. May judges appeal to the judicial council for violation of their independence?"
[…] (see Rule of Law Checklist, cited above, p. 20.)

231. In terms of these criteria related to the independence of the judiciary, the Rule of Law Checklist also states that: *"The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation."* (point 74 of the Checklist).

232. In the following, this Checklist specifies that: (i) The ECtHR highlights four elements of judicial independence: the manner of appointment, the term of office, the existence of guarantees against external pressure - including in budgetary matters - and whether the judiciary appears as independent and impartial; (ii) limited or renewable terms of office may make judges dependent on the authority which appointed them or has the power to re-appoint them; (iii) legislation on dismissal may encourage disguised sanctions; and (iv) offences leading to disciplinary sanctions and their legal consequences should be set out clearly in law. The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s) (see points 75 -78 of the Checklist).

233. In this context, and in relation to the criteria or circumstances that constitute *"serious neglect of duties"* and as such may result in the dismissal of judges/prosecutors, proposed by the proposed constitutional amendments no. 27 and no. 28, the Court also refers to Opinion no. 355/2005 of the Venice Commission on draft constitutional amendments regarding the reform of the judicial system in the "*the former Yugoslav Republic of Macedonia*" [adopted at its 64th plenary meeting on 21-22 October 2005 [CDL-AD (2005)038], through which it was emphasized that:

"31. So far as concerns the removal of judges, a judge can at present be removed from office if convicted of a crime and sentenced to a prison term of at least six months. This provision will remain. A judge can also be removed for a "serious disciplinary offence" defined in law, making him or her unsuitable to hold office as decided by the State Judicial Council, or for unprofessional and unethical conduct, as decided by the Judicial Council. The new text will refer only to serious violation of the Constitution, and a finding to this effect will require a two-thirds decision of the total membership of the Judicial Council.
32. This latter provision appears to give a greater protection for the independence of judges, though it may be desirable to confer on the Judicial Council some sanction to deal with unprofessional behaviour by judges falling short of the standard of serious violation of the Constitution, for example by admonishing a judge in private. […]"

234. Following the above-mentioned elaboration, the Court will assess whether the proposed constitutional amendments no. 27 and 28 are in compliance with the principle of legal certainty and as such meet the criterion of "*foreseeability*" and the precision of the constitutional norm.

235. The Court reiterates that the proposed constitutional amendments no. 27 and 28, in fact, propose the expansion of the criterion of *"serious neglect of duties"* as a constitutional criterion for the dismissal of judges/prosecutors, which according to the proposal includes the circumstances: (i) when the judge has been continuously evaluated with "*insufficient performance; (ii) has been found to have "unjustifiable assets, or vulnerable integrity"; (iii) has been found to have "vulnerable integrity", as prescribed by law; and (iv) has committed serious disciplinary offenses, as regulated by law"*.

236. Following this, the Court will assess these four criteria separately, which according to the proposed constitutional amendments no. 27 and no. 28, respectively, will form the basis for dismissal of judges/prosecutors. In this sense, the Court will begin by examining the criteria related to (i) *"continuously evaluated with insufficient performance";* and (ii) *"serious disciplinary violations",* to proceed with examining the circumstances of (iii) *"unjustifiable assets";* and (iv) *"vulnerable integrity"*.

1. Regarding "*continuously evaluated with insufficient performance"*

237. In terms of the criterion of "*serious neglect of duties*", which currently constitutes a constitutional basis for the dismissal of a judge/prosecutor, the proposed amendments no. 27 and no. 28 propose to supplement this criterion with "*continuously evaluated with insufficient performance*" of the judge/prosecutor. The Court notes that such a concept is related to his/her professional aspect. In the context of the aforementioned proposal, the Court will next refer to (i) the United Nations Basic Principles on the Independence of the Judiciary ; (ii) the United Nations Guidelines on the Role of Prosecutors; (ii) Opinion of the Venice Commission; (iii) constitutional and legal basis in the Republic of Kosovo; and (iv) the comparative analysis of the Constitutions of the member states of the Council of Europe, in order to continue with its assessment and determination on whether this criterion is compatible with the requirement of "*foreseeability*" in the sense of the principle of legal certainty and, therefore, in accordance with the fundamental rights and freedoms guaranteed through Chapter II of the Constitution.

238. The Court first recalls that the United Nations Basic Principles on the Independence of the Judiciary also refer to the principle of "*professionalism*", as one of the essential values of the judicial system. Therefore, such a circumstance, in the sense of the principle of "*professionalism*" of the judge/prosecutor, as foreseen by the aforementioned international standards, may constitute a basis for "*serious neglect of duties"*.

239. Following this, and in terms of maintaining independence and impartiality in the justice system, which is also related to the principle of "*irremovability*" of the judge/prosecutor, such a procedure must guarantee a clear, predictable and measurable legal framework, which does not allow wide discretion to the assessing authority. The Court also supports this in the sense of (a) the United Nations Basic Principles on Independence of the Judiciary, through which in relation to "*Discipline, suspension and removal*" it has been assessed that: (i) judges should be subject to suspension or dismissal only for reasons of incapacity or behaviour that renders them unable to discharge their duties; (ii) all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct; (iii) *"Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings"* (paragraphs 18, 19 and 20); and (b) the United Nations Guidelines on the Role of Prosecutors, through which in terms of the disciplinary procedure they recommend that:

"Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review; and *Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines"* (points 21 and 22 of the Guidelines).

240. Also, in relation to the evaluation of the performance of the judge/prosecutor, the Court also refers to the Opinion of the Venice Commission on Ukraine on Amendments to the Legal Framework governing the Supreme Court and Judicial Governance Bodies [CDL-AD(2019)027], through to which it emphasized that: "*The evaluation of judges is normally intended as a means to improve the judge's work and as a means to decide on the promotion of judges. In the case of a promotion, a negative outcome of the evaluation means that the status quo applies. In this case, the evaluation is meant to decide between the status quo and what is effectively a demotion of the judge to a lower court and which may entail a transfer to a different part of the country or even dismissal. While not formally a disciplinary measure, a negative result of the evaluation procedure entails negative consequences for the judges' irremovability and security of tenure, which is an effect that resembles the effect of disciplinary sanctions. Moreover, unlike disciplinary measures which are based on specific violations, the evaluation criteria are general and leave a wide margin of discretion to the evaluating body. The process, as set out in Law No. 193-IX, instead amounts to a vetting of the judges of the Supreme Court."* (paragraph 60 of the Opinion).

241. In light of the above, the Court, firstly, notes that performance evaluation as a procedure, although not necessarily of a disciplinary nature, in cases of poor performance evaluation, may result in a proposal for dismissal, and that its effect is a disciplinary sanction. As long as in terms of guaranteeing the rights of litigants/individuals under investigation, respectively, such a criterion ensures the guarantee of their rights to liberty and security, the right to a fair and impartial trial and the protection of judicial rights, defined by articles 31, 32 and 54 of the Constitution.

242. Secondly, returning to the constitutional and legal basis in the Republic of Kosovo, the Court reiterates that the legislator finds the basis for the issue of "*insufficient and continuous performance*" of the judge/prosecutor, except that in paragraph 4 of article 104 of the Constitution, also in the guarantees, which originate from articles 21, 29, 31, 32 and 54 of Chapter II of the Constitution, and which are related to the rights of the parties to the judicial/investigation procedure, respectively. This is due to the fact that the issue of the performance of the judge/prosecutor may affect the reduction of the rights and freedoms guaranteed by Chapter II of the litigants/and individuals under the investigation procedure, and as a result undermine the proper administration of justice, as one of the main pillars of the rule of law in a democratic society. The Court also highlights that the criteria and procedures related to the criterion of professional performance are established in the relevant legal regulation. In this regard, the Court, concerning the evaluation of the performance of judges, refers to the Regulation (11/2016) on the evaluation of the performance of judges, approved by the KJC.

243. However, the Court considers that if the proposer of the constitutional amendments assesses that such a criterion that is related to the professional performance of the judge/prosecutor as a legal concept should be specified even further at the level of the constitutional norm by being further specified by law, such a determination is possible, provided that the legislation which will further specify the procedures related to this criterion, must ensure that the KJC and the KPC, which initiate and lead such a procedure, respect the principles and international standards elaborated above, which, among other things, include that (i) the decision based on insufficient and continuous performance to be the subject of a procedure that respects the integrity of the judge/prosecutor: (ii) the judge/prosecutor must be provided a full hearing and have the right to representation; (iii) respecting the principle of proportionality; and (iv) guaranteeing the right to appeal as defined by articles 32 and 54 of the Constitution. In relation to the latter, the Court recalls that in the case of judges, access to the court is guaranteed by paragraph 5 of article 104 of the Constitution, through which it is specified that against dismissal decisions, the latter may submit an appeal to the Supreme Court. Having said that, based on the comparative analysis of the Constitutions of the member states of the Council of Europe, the Court notes that a similar criterion related to the insufficient performance or unprofessional performance of the judge is also defined in the respective Constitutions of Bulgaria, Montenegro and North Macedonia.

244. Thirdly, in terms of the "*foreseeability"* of the constitutional norm, the Court assesses that the criterion of *"insufficient and continuous performance*", which results in "*serious neglect of duties*" is sufficiently clear and "*predictable*", and as such, the implementation and application of such a criterion in the procedure conducted in accordance with the constitutional guarantees also serves the advancement of the rights of the parties to the procedure and the proper administration of the justice system itself.

245. Finally, in light of the elaboration as above, the Court finds that the result of the performance of the judge/prosecutor, which originates from the principle of "*professionalism*", may result in disciplinary sanction, and as such falls within the definition of "*serious neglect duties*", as a constitutional basis for the dismissal of the judge/prosecutor according to the provisions of paragraph 4 of article 104 and paragraph 6 of article 109 of the Constitution.

246. Based on the above-mentioned clarifications, the Court finds that the proposed constitutional amendments no. 27 and no. 28 by which it is proposed that "*serious neglect of duties*" also constitutes "*continuous insufficient performance*", and therefore, constitutes a basis for dismissal of the judge/prosecutor, always in compliance with legal guarantees, does not result in the reduction of fundamental rights and freedoms, guaranteed in Chapter II of the Constitution.

2) As regards the "*serious disciplinary violations*"

247. In terms of the criterion of "*serious neglect of duties*", which currently constitutes the constitutional basis for the dismissal of the judge/prosecutor, the proposed constitutional amendments no. 27 and no. 28, respectively, propose the inclusion of the wording related to the "*serious disciplinary violations*" of the judge/prosecutor. In relation to this proposal, the Court will refer to: (i) the European Charter on the Statute for Judges of the Council of Europe and its Explanatory Memorandum; (ii) Magna Carta of Judges and the Consultative Council of Judges (CCEJ); (iv) the Report on Appointments in Justice approved by the Venice Commission; (v) United Nations Guidelines on the Role of Prosecutors; and (iv) the comparative analysis of the Constitutions of the member states of the Council of Europe, in

order to continue with its assessment and determination on whether this criterion is in compliance with the requirement of "*foreseeability*" in the sense of the principle of legal certainty and therefore also in accordance with the values of the constitutional order of the Republic of Kosovo according to the provisions of article 7 of the Constitution and the fundamental rights and freedoms guaranteed in Chapter II of the Constitution.

248. In the aforementioned context, the Court first notes that European Charter on the Statute for Judges [of the Council of Europe] in paragraph 1 of article 5 [Liability] stipulates that: *"The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties[….]"*. While its Explanatory Memorandum specifies that the Charter on the Statute for Judges refers to the principle of legality of disciplinary sanctions, determining that *"the only valid reason for imposing sanctions is the failure to perform one of the duties explicitly defined in the Judges' Statute and that the scale of applicable sanctions must be set out in the judges' statute"*. (point 5.1 of the Explanatory Memorandum). Following this, the European Charter, in its article 5, defines that: (i) disciplinary sanctions can only be imposed on the basis of a decision taken after a proposal or recommendation or with the consent of a court or authority, where at least half of its members must be elected judges; (ii) The judge must be provided a full hearing and be entitled to representation; (iii) If the sanction is actually imposed, it should be chosen from the scale of sanctions, having due regard to the principle of proportionality; and (iv) provides for the right of appeal to a higher judicial authority.

249. In the following, the Magna Carta (Magna Carta) of the Consultative Council of Judges (CCEJ) in its point 6 defines that *"Decisions on selection, nomination and career shall be based on objective criteria and taken by the body in charge of guaranteeing independence"*, and in point 19 specifies that: *"In each State, the statute or the fundamental charter applicable to judges shall define the misconduct which may lead to disciplinary sanctions as well as the disciplinary procedure"*.

250. On the other hand, the Report on Judicial Appointments of the Venice Commission (adopted by the Venice Commission at its 70th plenary meeting, on 16/17 March 2007, [CDL-AD(2007)028], has specified that it favors the powers of judicial councils for conducting disciplinary procedures. In the following, in this same report, it was emphasized that: *"The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them"*. (point 23 of the Report).

251. Following this, the United Nations Guidelines on the Role of Prosecutors (adopted on 27 August 1990 at the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders" have specified that (i) "*Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review*". (point 21) and (ii) *"Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines"*. (point 22).

252. The Court, referring to the aforementioned principles and standards, notes that a disciplinary violation by a judge/prosecutor can be considered a violation related to the rules of ethics and conduct of a judge.

253. Secondly, returning to the constitutional and legal basis in the Republic of Kosovo, the Court reiterates that the lawmaker, finds the basis for the issue of "*disciplinary violation*" of the judge/prosecutor, except that in paragraph 4 of article 104 and paragraph 6 of article 106 of Constitution, also in the guarantees, which originate from articles 21, 29, 31, 32 and 54 of Chapter II of the Constitution, and which are related to the rights of the parties in court/investigation proceedings, respectively. This is due to the fact that the issue of conduct and violations of the rules of ethics of the judge/prosecutor can affect the reduction of the rights and freedoms guaranteed by Chapter II of litigants/and individuals under investigation procedure, and as a result undermine the administration of justice, as one of the main pillars of the rule of law in a democratic society.

254. Likewise, the Court highlights that the criteria and procedures related to the disciplinary violation of judges and prosecutors, respectively, are established in the legislation in force of the Republic of Kosovo. In this regard, the Court again refers to the Law on Disciplinary Liability of Judges and Prosecutors, which through its respective articles 5 (Disciplinary offenses for judges) and 6 (Disciplinary offenses for prosecutors) defines the types of disciplinary offenses. Moreover, within the framework of the KJC, the Code of Ethics and Professional Conduct for Judges and the Regulation (05/2019) on the Disciplinary Procedure of Judges have been approved and are in force. Whereas the Code of Ethics and Professional Conduct for Prosecutors and the Regulation for the Advisory Committee on Prosecutors' Ethics are approved and in force within the KPC.

255. However, the Court considers that if the proposer of the constitutional amendments assesses that such a criterion related to "*serious disciplinary violations*" by the judge/prosecutor as a legal concept should also be defined at the level of the constitutional norm, while being further specified by law, such a determination is possible, provided that the legislation which will further specify the procedures related to this criterion ensures that the KJC and the KPC, which initiate and lead such a procedure, must respect the principles and international standards elaborated as above, which, among other things, include that: (i) the decision based on *"serious disciplinary violation"* be the subject of a procedure that respects the integrity of the judge/prosecutor; (ii) the judge/prosecutor must be provided a full hearing and have the right to representation; (iii) respecting the principle of proportionality; and (iv) guaranteeing the right to appeal as defined by articles 32 and 54 of the Constitution. In relation to the latter, the Court recalls that in the case of judges, access to the court is guaranteed by paragraph 5 of article 104 of the Constitution, through which it is specified that against dismissal decisions, the latter may submit an appeal to the Supreme Court. Having said that, based on the comparative analysis of the Constitutions of the member states of the Council of Europe, the Court notes that a similar criterion related to the "*serious disciplinary violations*" of the judge is also defined in the respective Constitutions of (i) Bulgaria (see article 129); (ii) Croatia (see article 120); and (iii) North Macedonia (see article 99).

256. Thirdly, in terms of the "*foreseeability"* of the constitutional norm, the Court assesses that the criterion of "*serious disciplinary violations"* by the judge/prosecutor, which results in "*serious neglect of duties*" is sufficiently clear and "*foreseeable*", and as such the implementation and application of such a criterion in the procedure conducted in

accordance with the constitutional guarantees also serves the advancement of the rights of the parties in the procedure and the proper administration of the justice system itself. This is due to the fact that, as specified above, such a dismissal criterion, which can constitute a basis for dismissal, is included at the level of the constitutional norm and in some of the Constitutions of the member states of the Council of Europe.

257. Finally, in light of the elaboration as above, the Court finds that the "*serious disciplinary violations*" of the judge/prosecutor that result in disciplinary sanction, fall within the definition of "*serious neglect duties*", as a constitutional basis for the dismissal of the judge/prosecutor according to the provisions of paragraph 4 of article 104 and paragraph 6 of article 109 of the Constitution.

258. In addition, in light of the assessment and finding as above and related to the "*continuous insufficient performance"* of the judge/prosecutor, the Court also in relation to the *"serious disciplinary violation*", reiterates that the legislator finds the basis for this criterion, as in the case of the judge/prosecutor, except that in paragraph 4 of article 104 and paragraph 6 of article 109 of the Constitution, also in the guarantees, which originate from articles 21, 24, 29, 31, 32 and 54 of Chapter II of the Constitution, which are related to the rights of the parties in judicial and/or investigation proceedings. This is due to the fact that the commitment of a serious disciplinary violation by the judge/prosecutor may result in the reduction of the rights and freedoms guaranteed by Chapter II of the litigants/and individuals under the investigation procedure, and as a result undermine the proper administration of justice, as one of the main pillars of the rule of law in a democratic society.

259. Based on the aforementioned clarifications, the Court finds that the proposed constitutional amendments no. 27 and no. 28 by which it is proposed that "*serious neglect of duties*" also constitutes "*serious disciplinary violations"*, and therefore, constitutes a basis for the dismissal of the judge/prosecutor, always in accordance with the necessary legal guarantees, does not result in the reduction of rights and fundamental freedoms guaranteed in Chapter II of the Constitution.

260. Finally, the Court finds that the proposed constitutional amendments no. 27 and 28, by which it is proposed that "*serious neglect of duties*" also constitutes "*serious disciplinary violations, as defined by law*", does not reduce the fundamental rights and freedoms guaranteed in Chapter II of the Constitution.

3) Regarding "*unjustifiable assets*"

261. The Court first recalls that the proposed constitutional amendments no. 27 and no. 28 are permanent amendments and as such refer to a process of developing procedures within the KJC and the KPC. In this sense, the definition or proposal for amending/supplementing the constitutional criteria for dismissal, within the framework of the permanent constitutional norm, must be in accordance with the values of the rule of law, including the principle of legal certainty, and therefore, also be "*clear and foreseeable*". Therefore, in the following the Court will develop the examination and assessment of the criteria related to "*unjustifiable assets*" and "*vulnerable integrity*", which according to the Applicant are proposed to enter the scope of "*serious neglect of duties*", in the sense of the principle of legal certainty, which is related to the "*clarity*", "*precision*" and "*foreseeability*" of the norm, which it aims to achieve during its implementation as a permanent constitutional norm.

262. In the aforementioned context, the Court recalls that the Ministry of Justice in relation to *"unjustifiable assets"* and *"vulnerable integrity",* through its documentation submitted to the Assembly, clarified that: "*[…] in order to have a justice system with integrity, of course unjustified assets or vulnerable integrity (for example, the possibility of influencing a judge or prosecutor due to family or other ties, or personal habits) must be grounds for dismissal. […] These amendments are foreseen as "permanent amendments" in the sense that they will continue to be applied even after the transition period, where the evaluation of judges and prosecutors in management positions is undertaken by an external mechanism, but even then when such an assessment is made by the judicial and prosecutorial councils. So it is not time bound".*

263. The Ministry of Justice, also in its comments submitted to the Court and in its responses to the comments of the KJC, reiterated that the proposed constitutional amendments no. 27 and no. 28, respectively, aim at expanding the criterion of *"serious neglect of duties"* into two categories, those of (i) professional/disciplinary issues and those related to (ii) integrity control, which include *"unjustifiable assets"* and "*vulnerable integrity*". Regarding the latter, the Ministry of Justice has specified that: "*As a result, the vulnerable integrity that includes the unjustifiable assets, are the bases of the assessment either by the Integrity Control Authority, the establishment of which will be based on amendment 29 of the draft constitutional amendments proposed and which will control the integrity of "high" positions in the justice system as mentioned above, or even the Judicial Council and the Prosecutorial Council, which should carry out integrity and assets checks for all judges and prosecutors in the future, after the mandate of the Integrity Control Authority ends".*

264. The Court, in the following, and in light of the comments and responses to the comments submitted to the Court, including the principles elaborated in this Judgment, will assess whether the proposed constitutional amendments no. 27 and no. 28, through which it is the expanding of the grounds for dismissal "*serious neglect of duties*" is proposed, even in circumstances where it is "*proven that there are unjustifiable assets*" of the judge/prosecutor, diminish the fundamental rights and freedoms established in Chapter II of the Constitution, and the values determined by article 7 thereof.

265. In the assessment of this proposal, the Court will take as a basis: (i) the Rule of Law Checklist; (ii) the case law of the ECHR; (iii) applicable legislation in the Republic of Kosovo; (iii) opinions of the Venice Commission; and (iv) the comparative analysis of the Constitutions of the member states of the Council of Europe.

266. In the above-mentioned context, the Court first notes that the Rule of Law Checklist, in terms of the principle of access to justice, in point c) [Impartiality of judges] paragraphs 89-90 of it requires to assess whether:

> *"Are there specific constitutional and legal rules providing for the impartiality of the judiciary?*
> *i. What is the public's perception of the impartiality of the judiciary and of individual judges??*
> *ii. Is there corruption in the judiciary? Are specific measures in place against corruption in the judiciary (e.g. a declaration of assets)? What is the public's perception on this issue?*

267. Furthermore, according to the Rule of Law Checklist:

"90. Impartiality of the judiciary must be ensured in practice as well as in the law. The classical formula, as expressed for example by the case-law of the European Court of Human Rights, is that "justice must not only be done, it must also be seen to be done". This implies objective as well as subjective impartiality. The public's perception can assist in assessing whether the judiciary is impartial in practice. Declaration of assets is a means of fighting corruption because it can highlight any conflict of interest and possibly lead to scrutiny of any unusual income".

268. Based on the above, the Rule of Law Checklist in terms of fighting and preventing corruption, as a prerequisite for guaranteeing the impartiality of the judiciary and the individual judge himself, recognizes the necessity of taking specific legal measures related to the declaration of assets. The Venice Commission supports this view in the principles established through the case law of the ECtHR, which refer to the impartiality of the judiciary, both in the objective and the subjective aspects. Moreover, the Court, among others, refers to the ECtHR case *Micallef v. Malta*, through which it had emphasized that: (i) appearances can have a certain significance or, in other words, *"justice must not only be done, it must be seen to be done"*; (ii) what is in question is the trust that the courts in a democratic society convey to the public; and (iii) any judge for whom there is a legitimate reason to fear of a lack of impartiality must recuse himself; (iv) the existence of local procedures for ensuring impartiality, namely the rules governing the removal of judges, is a relevant factor; and (v) the court will take these rules into account when making its assessment of whether a court was impartial and, in particular, whether the appellant's fear can be regarded as objectively justified (see, ECtHR case *Micallef v. Malta*, application no. 17056/06, Judgment of 15 October 2009, paragraphs 98 and 99).

269. Following this, and in the context of the specific rules related to the disciplinary and dismissal proceedings of judges, the Rule of Law Checklist, in the context of the principle of access to justice, in title 1 (Independence and impartiality), point a) (Impartiality) of the judiciary], also seeks to assess whether:

i. Are there sufficient constitutional and legal guarantees of judicial independence?
ii. Are the basic principles of judicial independence, including objective procedures and criteria for judicial appointments, tenure and discipline and removals, enshrined in the Constitution or ordinary legislation?
iii. Are judges appointed for life time or until retirement age? Are grounds for removal limited to serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions? Is the applicable procedure clearly prescribed in law? Are there legal remedies for the individual judge against a dismissal decision?
iv. Are the grounds for disciplinary measures clearly defined and are sanctions limited to intentional offences and gross negligence?
v. Is an independent body in charge of such procedure?
vi. Is this body not only comprised of judges?

270. The Court, in addition to the principles of the Rule of Law Checklist, which in terms of fighting and preventing corruption, as a prerequisite for guaranteeing the impartiality of the judiciary and the individual judge himself, recognizes the necessity of taking specific legal measures, including the declaration of assets, which may result in the dismissal of the judge/prosecutor, also refers to the Venice Commission in its Opinion on the introduction of the procedure of renewal of security vetting through amendments to the law of Croatian courts [CDL- AD(2022)005], where, *inter alia*, it emphasized that the authority of a

judiciary can only be maintained if (a) the legal system puts in place adequate mechanisms to ensure that candidates are not appointed as judges if they do not have the required competences or do not meet the highest standards of integrity; and (b) the judiciary is cleansed of those who are found to be incompetent, corrupt or linked to organized crime. According to the Venice Commission: *"this is not only essential in view of the role a judiciary plays in a state governed by the rule of law, but also because a judge – once appointed for life – will in principle be irremovable except for limited grounds for dismissal."* (paragraph 14).

271. In the following, the Venice Commission in the Opinion on the introduction of changes in the constitutional law *"status of judges"* of Kyrgyzstan [CDL-AD(2011)017], in the section entitled *D. Requirements towards a judge in accordance with his or her status"* in paragraph 15 emphasized that: *"Judges are required to strictly comply with the Constitution and laws and to observe their oath of office. They are to observe the requirements of the Code of Honour of judges. […] An important provision requires them to declare assets and incomes in accordance with the legislation of the State. This could be an important safeguard, given that there is a history of judicial corruption in Kyrgyzstan".*

272. The Court also refers to the ECtHR case of *Xhoxhaj v. Albania*, the circumstances of which case were related to the process of checking the integrity or transitional vetting of all judges and prosecutors in the Republic of Albania. In terms of the claims related to her dismissal, as a result of the non-declaration of an immovable property, the ECtHR examined them in the sense of article 6 of the ECHR, on the basis of the principle of legal certainty, and article 8 of the ECHR, in understanding her professional integrity and reputation. In relation to the former, namely in terms of the principle of legal certainty, the ECtHR emphasized, among other things, that "*The adverse findings against her were based both on the disclosure made in her vetting declaration of assets and prior asset declarations filed by her and her partner. It is understandable that the applicant was placed in a somewhat difficult position to justify the lawful nature of the financial sources owing to the passage of time and the potential absence of supporting documents. However, this situation was partly due to the applicant's own failure to disclose the relevant asset at the time of its acquisition*." The ECtHR also emphasized that the Law on Vetting in the Republic of Albania provided mitigating circumstances if the person subject to vetting faced an objective inability to present supporting documents. However, the ECtHR noted that the Applicant had not provided any supporting documents justifying the existence of an objective inability to demonstrate the legal nature of her partner's income from 1992 to 2000 (see paragraphs 343-353 of the Judgment). As a result of this assessment, the ECtHR further concluded that there has been no violation of article 6 of the ECHR. While, in the sense of article 8 of the ECHR, which is related to the dismissal of the subject of control, again within the vetting process, and in relation to the declaration of the Applicant's assets, the ECtHR justified the permanent ban on the exercise of profession on the basis of declaration of assets. The ECtHR, among other things, assessed that the lifelong ban on the exercise of the judicial function imposed on the applicant and other individuals removed from office due to serious ethical violations was not contrary to or disproportionate to the integrity of the judicial function and the trust of the public in the justice system. As a result of this assessment, the ECtHR concluded that there has been no violation of article 8 of the ECHR (see paragraphs 402-414 of the Judgment).

273. In light of the above, the Court notes that the Venice Commission and the ECtHR consider the declaration of assets as a prerequisite for guaranteeing the impartiality of the judiciary and the judge/prosecutor himself. The Court also notes that according to the Venice

Commission, the guarantee of impartiality in the justice system is a prerequisite for the protection of the right of individuals to access justice, while the ECtHR considers the sanction of dismissal of a judge as a result of failure to declare assets, in principle, as a proportional measure in relation to the integrity of the judicial function and public trust in the justice system.

274. On the other hand, referring to the comparative analysis of the Constitutions of the member states of the Council of Europe, it results that none of the constitutional provisions of these Constitutions have specified "*unjustifiable assets*" at the level of the constitutional norm, as a basis for the dismissal of judges and/or prosecutors. Based on the elaboration of these Constitutions, which expressly at the level of the constitutional norm determine the criteria for dismissal of judges/prosecutors, it is observed that the nature of the criteria for dismissal is related to the aspect of professional performance, violation of duties and disciplinary violations, and violations related to integrity of the function of the judge/prosecutor. This includes the Constitution of the Republic of Albania, which was amended precisely for the purposes of the justice reform, including the transitional assessment process, namely vetting for all positions in the justice system. As it was highlighted above, the Court recalls that the Constitution of Albania in (i) article 140 stipulates that "*A judge of the High Court may be removed by the Assembly by two-thirds of all its members for violation of the Constitution, commission of a crime, mental or physical incapacity, or acts and behavior that seriously discredit judicial integrity and reputation […].*" paragraph 6 of article 147 specifies that: "*A judge may be removed by the High Council of Justice for commission of a crime, mental or physical incapacity, acts and behavior that seriously discredit judicial integrity and reputation, or professional insufficiency […];* whereas (iii) article 149 determines that: *"The General Prosecutor may be discharged by the President of the Republic on the proposal of the Assembly for violations of the Constitution or serious violations of the law during the exercise of his duties, for mental or physical incapacity, and for acts and behavior that seriously discredit prosecutorial integrity and reputation".*

275. The Court also returns to the Opinion of the Venice Commission on Kosovo, through which in relation to the proposed constitutional amendments no. 27 and no. 28, emphasized as follows: *"To sum up, the Venice Commission recommends introducing legislative changes that would improve the current system of judicial discipline, as a thorough extension of Option 2, this concerns notably a strengthening of the system of asset declarations and strengthening the vetting units within the KJC and the KPC. Constitutional changes should be considered only for underpinning integrity checks of the members of the KJC and the KPC, court presidents and chief prosecutors"* (paragraph 128 of the Opinion) and *"[…] a reform of the judiciary in Kosovo is indeed necessary and that this may involve some form of effective integrity checks. It is however the Commission's opinion and that many elements of such a reform can be adopted on the level of ordinary law. Any vetting or integrity checks system introduced could be limited to KJC and KPC who exert disciplinary power over the other members of the judicial system. It would then be for the KJC and the KPC to deal with problems in the rest of the judicial system, both as concerns integrity and professionalism. The interference in constitutional rights should be strictly proportionate. Any constitutional amendments should aim at minimal invasiveness in the competences of the KJC and the KPC while achieving the goal to reform the judiciary"* (paragraph 130 of the abovementioned Opinion).

276. Subsequently, the Venice Commission, in its Opinion on Kosovo, also emphasized that: *"These two constitutional amendments would also facilitate the dismissal of judges or prosecutors who provide irregular asset declarations. Their dismissal could be triggered*

by the Anti-Corruption Agency (and decided upon by the KJC and the KPC, possible after their integrity assessment). This would not depend on a vetting of all judges and prosecutors." (see paragraph 106 of the Venice Commission Opinion).

277. Moreover, the Court also refers to the Report of the Rule of Law of the European Union for 2022, from which it follows that in most member states, there is special legislation regarding the conflict of interest and the declaration of assets for public officials, including judges and prosecutors.

278. In light of the aforementioned principles and in the assessment of the proposed constitutional amendments no. 27 and no. 28, in the context of completing the constitutional basis for dismissal of the judge/prosecutor as a result of *"proving the unjustifiable assets",* the Court reiterates that the constitutional provisions in force, such as those of Chapter I, Chapter II and Chapter VII of the Constitution and which are related to the integrity and independence of the justice system, provide sufficient basis for the proposal of dismissal as a result of violations committed by judges and prosecutors, including violations that infringe upon the integrity of the function of the judge/prosecutor.

279. More specifically, the Court once again recalls that based on paragraph 4 of article 104 [Appointment and Removal of Judges] and paragraph 6 of article 109 [State Prosecutor] of the Constitution, judges and prosecutors may be dismissed from office upon (i) "*conviction of a serious criminal offense*" or (ii) "*for serious neglect of duties*". Whereas, paragraph 2 of article 107 [Immunity] of the Constitution stipulates that: *"Judges, including lay-judges, shall not enjoy immunity and may be removed from office if they have committed an intentional violation of the law."* Following this, the Law on Disciplinary Liability of Judges and Prosecutors, in its articles 5 (Disciplinary offenses for judges) and 6 (Disciplinary offenses for prosecutors), defines the list of disciplinary violations, which include the circumstances in which the judge and/or the prosecutor, (i) is convicted of a criminal offense; (ii) violates the law; or (iii) violates his/her official duties. On the other hand, article 7 (Disciplinary sanctions), defines the list of disciplinary violations, including the possibility of the proposal for dismissal of the judge and/or prosecutor by the KJC and/or KPC, respectively.

280. Furthermore, the Criminal Code no. 06/L-074 of the Republic of Kosovo, defines the criminal offense of not reporting or false reporting of wealth, income, gifts, other material benefit or financial obligations. In article 430, the aforementioned Code defines that (i) any person, obligated by law to file a declaration of property, income, gifts, other material benefits or financial obligations, who fails to do so, shall be punished by a fine or by imprisonment of up to three (3) years; (ii) the criminal offense is considered to have been committed when the statement is not submitted within the deadline for submission of the statement; (iii) any person, who according to the law is obliged to make a declaration of wealth, income, gifts, other property benefits or financial obligations, who makes a false declaration or does not present the data required in the declaration , shall be punished with a fine and imprisonment of six (6) months to five (5) years; and (iv) the undeclared or falsely declared value of property, income, gifts or other pecuniary benefit, is confiscated. The Court also points out that the mechanism of asset declaration is regulated by the legislation in force of the Republic of Kosovo, namely Law no. 08/L-108 on Declaration, Origin and Control of Assets and Gifts.

281. According to the above explanations, it is not disputed that based on paragraphs 4 of article 104 and paragraph 6 of article 109 of the Constitution, judges and prosecutors who have

committed the criminal offense defined by article 430 of the Criminal Code, meet the constitutional and legal criteria to be proposed for their dismissal by the respective Councils. Such a position has also been emphasized by the Venice Commission through its Opinion on Kosovo on the assessment of the proposed constitutional amendments no. 27 and no. 28, emphasizing, among other things, that the dismissal of judges and prosecutors, related to "*irregular asset declarations*", could also be initiated by the Anti-Corruption Agency, with the final decision-making within the relevant Councils (see, paragraph 106 of the Opinion of the Venice Commission). According to the above clarifications, the Rule of Law Checklist of the Venice Commission refers to the declaration of assets, as "*a means of fighting corruption because it can highlight any conflict of interest and possibly lead to scrutiny of any unusual income.*"

282. Having said this and as long as it is not disputed that the punishment for the criminal offense of not reporting or false reporting of wealth, income, gifts, other material benefits or financial obligations, constitutes a basis for the dismissal of the judge and/or prosecutor, within the criterion of "*conviction for a serious criminal offense*" specified through articles 104 and 109 of the Constitution, respectively, the Criminal Code of the Republic of Kosovo, does not specify/define the concept of "*unjustifiable assets*" as a separate criminal offense.

283. Moreover, taking into account that there already is a constitutional basis for the dismissal of judges and prosecutors, both in the context of a serious criminal offense and in the context of serious neglect of duties, but taking into account that the concept of unjustified assets is not specified in the applicable criminal or civil legislation, the assessment procedure related to the "*unjustifiable assets*" of the judge/prosecutor should be defined and further specified through the applicable law and which incorporates the applicable international standards and those that originate from the Constitution of the Republic of Kosovo, in the context of the independence of the judicial power and prosecutorial system, including in the context of the individual independence of judges and prosecutors. Moreover, such a procedure must be in compliance with the requirements of a fair and impartial trial, in the sense of article 31 of the Constitution, in conjunction with article 6 of the ECHR and those of access to justice, in the sense of articles 32 and 54 of the Constitution.

284. The Court emphasizes that the principle of "*clarity*" and "*predictability*" of the norm, beyond the principle of legal certainty, is of special importance in the context of maintaining the independence of the judicial system, as an essential value of the rule of law in any democratic order. The concept of independence of judges and prosecutors is inseparable from that of the independence of the judicial power and/or prosecutorial system. The concept of an "*independent and impartial court established by law*", a guarantee that originates from article 31 of the Constitution and article 6 of the ECHR, is directly related to the guarantees for the individual independence of judges.

285. One of the guarantees of this independence is the principle of security of tenure and irremovability. Any rule that is an exception to this principle must be completely "*clear and predictable*" also in terms of the basis and the procedure followed, because otherwise, one of the basic principles of the independence of judges and prosecutors would be violated.

286. Such a position is emphasized by the Opinions of the Consultative Council of European Judges of the Council of Europe. More precisely, (i) Opinion no. 1 (2001), regarding the Independence of the Judiciary and the Irremovability of Judges, among other things, specifies that exceptions to the principle of security of tenure and irremovability, with an emphasis on disciplinary measures, must be immediately subject to evaluation and the basis

and method through which judges can be disciplined and that there should be precise and clear definitions regarding the grounds on which judges can be removed, including through disciplinary procedures that meet the criteria of a regular standard under the European Convention on Human Rights (see, Opinion no. 1, paragraph 59); and (ii) Recommendation CM/Rec(2010)12, according to which, among other things, the security of tenure and the principle of irremovability are the essential elements of the independence of judges and that the termination of the mandate should be limited only to cases of serious disciplinary violations or criminal offenses specified by law (see Recommendation CM/Rec(2010)12, paragraphs 49 and 50). Furthermore, the Rule of Law Checklist of the Venice Commission, in the context of elaborating the principles related to the independence of the judicial system, in the context of the grounds for the dismissal of judges, expressly requires the clarity of the basis and the procedure according to which the judge may be dismissed (see Checklist, p. 33).

287. Supplementing the current constitutional basis for dismissal of judges and prosecutors, namely paragraph 4 of article 104 and paragraph 6 of article 109 of the Constitution, according to proposed amendments no. 27 and no. 28, with the criterion of "*unjustifiable assets*" within the framework of "*serious neglect of duties*", and which according to the above clarifications, at the level of the constitutional norm is not applicable on its own, as such in the context of the further specification with the relevant laws also, must meet the criterion of "*clarity*" and "*predictability*" of the norm. This is of exceptional importance, in the context of completing the grounds for the dismissal of judges and prosecutors in relation to the essential principle of their independence and impartiality, namely the principle of security of tenure and the principle of irremovability, with the exception of punishment for criminal offences and sanctions for serious disciplinary violations, the basis and procedures regarding which must be precisely defined by law.

288. Therefore, in light of the above-mentioned clarifications, the Court considers that if the proposer of the constitutional amendments considers that such a criterion related to the "*unjustifiable assets*" of the judge/prosecutor should also be defined at the level of the constitutional norm, such a definition is possible, provided that the legislation which will further specify the procedures related to this criterion must ensure that the procedure followed is based on a final judicial decision, and which procedure must respect the principles and international standards elaborated as above, which, among other things, include that: (i) during the procedure followed, the integrity of the judge/prosecutor is respected; (ii) the judge/prosecutor must be given a full hearing and have the right to representation; (iii) to respect the principle of proportionality; and (iv) to guarantee the right to appeal as defined by articles 32 and 54 of the Constitution.

289. Therefore, while it is not disputed that non-reporting and/or false reporting of wealth currently constitutes a basis for the dismissal of a judge and/or prosecutor, and that the concept of "*unjustifiable assets*" differs from the aforementioned criminal offense, "*unjustifiable assets*" which is confirmed by a final court decision, may constitute a basis for the dismissal of the judge and/or prosecutor, provided that it is further specified by law and is subject to constitutional guarantees related to (i) the right to a fair and impartial trial, in the sense of article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with article 6 (Right to a fair trial) of the ECHR and (ii) access to justice and effective legal remedy, in terms of articles 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution.

290. In light of the elaboration as above, the Court finds that the proposed constitutional amendments no. 27 and no. 28 by which it is proposed to expand the basis for dismissal "*serious neglect of duties*" even in circumstances where it is "*proven that there are unjustifiable assets*" of the judge/prosecutor by a final court decision, do not result in the reduction of fundamental rights and freedoms established in Chapter II of the Constitution, and the values defined by article 7 thereof.

4) Regarding "*vulnerable integrity*"

291. The Court, in the following, will assess whether the proposed constitutional amendments no. 27 and no. 28, which are related to the criterion of "*vulnerable integrity*" as a basis for dismissal of a judge/prosecutor due to "*serious neglect of duties*", diminish the rights and freedoms established in Chapter II of the Constitution, and the values defined through its article 7.

292. Regarding "*vulnerable integrity*", the Court once again recalls that the drafter and proposer of constitutional amendments in the sense of the principle of legal certainty and which is related to the requirements for "*clarity and precision*" and "*foreseeability*" of the constitutional norm, through its preparatory documentation, submitted to the Court, did not clarify and define what is meant by the wording "*vulnerable integrity*" of the judge/prosecutor.

293. Moreover, it also remains unclear whether the procedure for the assessment related to the "*vulnerable integrity*" of the judge/prosecutor is (i) the subject to a transitory assessment conducted by KJC and KPC; (ii) is subject to the initiation of a procedure within the KJC and the KPC that is initiated as the case may be, based on the suspicion that may arise as to whether the judge/prosecutor has "*vulnerable integrity*"; or (iii) subject to an ongoing integrity control procedure by the KJC and the KPC. The Court recalls that the Venice Commission, through its Opinion, recommended a vetting process, which only included checking the integrity of the members of the KJC, those of the KPC, presidents of courts and chief prosecutors.

294. Based on the aforementioned principles regarding the principle of legal certainty and the importance that constitutional amendments must be "*clear, accessible and predictable*", according to the principles summarized by the relevant reports of the Venice Commission, the Court assesses that the criterion of "*vulnerable integrity*" defined through the proposed constitutional amendments no. 27 and no. 28, does not meet the criterion of "*clarity*" and "*predictability*" of the constitutional norm. This is due to the fact that the drafter/proposer of this proposed constitutional amendment has not clarified what circumstances constitute "*vulnerable integrity*", in order to establish that such a circumstance constitutes "*serious neglect of duties*" of the judge/prosecutor.

295. Furthermore, the Court emphasizes that an ambiguous and unpredictable constitutional norm may allow the legislator room to give such a norm definitions that are not compatible with the goal that that norm aims for. Having said this, the Court reiterates that it is of fundamental importance that the subject or individual, to whom the constitutional norm is addressed, is not faced with legal uncertainty. The Court also recalls the clarifications given in the context of the assessment of the concept of "*unjustifiable assets*" and the fact that, taking into account the importance of the principle of independence of the judicial power, including the individual independence of judges and prosecutors, the principle of security of tenure and irremovability, is one of the basic principles stemming from the relevant

international instruments, and consequently, any exception to this rule must be clearly established/defined in the applicable laws, both in terms of the basis and in terms of the procedure to be followed.

296. Furthermore, the Court refers to the analysis of those Constitutions, which expressly, at the level of the constitutional norm, establish the criteria for dismissal of judges/prosecutors, and recalls that the nature of the criteria for dismissal is related to the aspect of professional performance, violation of duties and disciplinary violations, and violations related to the integrity of the function of the judge/prosecutor. The Court refers to the Constitution of Albania, which by article 140 stipulates that: "*A judge of the High Court may be removed by the Assembly by two-thirds of all its members for violation of the Constitution, commission of a crime, mental or physical incapacity, or acts and behavior that seriously discredit judicial integrity and reputation. [...]".* The same criteria for dismissal defined at the level of the constitutional norm according to paragraph 6 of article 147 and article 149 of the Constitution of Albania apply to judges and the General Prosecutor. In the following, the Constitution of Bulgaria, in paragraph 3 of its article 129, establishes that: *"They, including the persons referred to in para 2 shall be released from office only upon: completion of 65 years of age; resignation; judgment which has the force of res judicata for a penalty of deprivation of liberty for an intentionally committed criminal offence; permanent de facto inability to perform their duties for more than a year; serious infringement or systematic neglect of their official duties, as well as actions damaging the prestige of the judiciary".* In light of the elaboration of the Constitutions of the member states of the Council of Europe, the Court notes that they do not define the wording "*vulnerable integrity*" as a basis or criterion for the dismissal of judges/prosecutors. But the latter, relate the criteria for the dismissal of judges/prosecutors to the commission of a criminal offense, disciplinary violation, or insufficient professional performance or those ethical violations that discredit the figure of the judge/prosecutor or damage the reputation of the judiciary.

297. In light of the elaboration as above which includes: (i) the principles and requirements arising from the Rule of Law Checklist; (ii) lack of clarification or definition of the wording of "*vulnerable integrity*" by the drafter or proposer of the constitutional amendments; and (iii) the comparative analysis of the Constitutions of the member states of the Council of Europe, the Court considers that the wording proposed by the drafter of this proposed constitutional amendment, in terms of the principle of legal certainty, does not meet the requirements of "*clarity*" and "*foreseeability*" of the constitutional norm.

298. Therefore, the Court returning to what the proposed constitutional amendments no. 27 and no. 28 aim to define and expand the grounds of dismissal at the level of the constitutional norm and as such to be permanent, in the sense of the "*precision and clarity*" of the constitutional norm and the implementation of the goal that they aim to achieve in strengthening the rule of the law and strengthening the integrity of the justice system, considers that this proposal may result in the reduction of fundamental rights and freedoms guaranteed by Chapter II, in terms of the principle of legal certainty in a democratic society, namely the reduction of rights of judges and prosecutors, but also of individuals and legal entities, as parties to the proceedings, in terms of their access to justice, namely in an independent and impartial court established by law according to the guarantees of article 31 of the Constitution in conjunction with article 6 of the ECHR.

299. The Court emphasizes that the definition or procedure proposed according to the proposed constitutional amendment no. 29, which is related to the integrity control of "*leading*

positions in the justice system", which procedure may result in a proposal for dismissal, cannot be related to the permanent criteria for dismissal of judges and prosecutors established in paragraph 4 of article 104 as well as paragraph 6 of article 109 of the Constitution, since the constitutional amendment proposal no. 29 and which, unlike the proposed amendments no. 27 and no. 28, is of a temporary nature, as will be assessed separately in this Judgment, defines specific criteria based on which the control of "*leading positions in the justice system will be carried out".*

300. Accordingly, as explained above, the Court's conclusion regarding the proposed constitutional amendments no. 27 and no. 28, does not affect the constitutional amendment proposal no. 29.

Conclusion regarding the proposed constitutional amendments no. 27 and no. 28

301. In light of the aforementioned elaboration, the Court applying the constitutional principles, those of international instruments that are directly applicable in the legal order of the Republic of Kosovo, and international standards that are related to the principles of the independence of the justice system, the principle of independence and impartiality of the judge/prosecutor himself, the principle of professionalism, integrity and his/her conduct, emphasizes that:

a) it is not disputed that the independence of the judicial power and the prosecutorial system are essential principles of the constitutional order of the Republic of Kosovo, which is based on the values of the rule of law and democracy. The Constitution of the Republic of Kosovo defines KJC and KPC as two independent constitutional institutions, granting them the competence to administer the judicial and prosecutorial system, respectively, including issues related to disciplinary procedures for judges and prosecutors, and the competence for the proposal of their dismissal. These competencies of the Councils include also the obligation to act with due efficiency in the implementation of the applicable laws, including the Law on Disciplinary Liability of Judges and Prosecutors, and to take the necessary measures against any judge and prosecutor who may violate the integrity of the judicial and prosecutorial system in the Republic of Kosovo. Therefore, the Court emphasizes that the proper functioning and administration of justice, including public trust in this system, reflects one of the most essential principles of a democratic society based on the rule of law, the principle which is a fundamental value of the constitutional order of Republic of Kosovo; and

b) in the assessment of that, if the proposed constitutional amendments no. 27 and no. 28, diminish the rights guaranteed in Chapter II of the Constitution, and the values established in its article 7, the Court in the sense of the principle of legal certainty, which is related to the "*clarity*", "*precision*" and "*foreseeability*" of a constitutional norm, concludes that:

1. Proposed constitutional amendments proposing the supplementation of the constitutional criterion for the dismissal of judges and prosecutors due to "*serious neglect of duties*", as stipulated by paragraph 4 of article 104 [Appointment and Removal of Judges] and paragraph 6 of article 109 [State Prosecutor] of the Constitution, with the wording "*has been continuously evaluated with insufficient performance"* of the judge/prosecutor, do not diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution;

2. Proposed constitutional amendments proposing the supplementation of the constitutional criterion for the dismissal of judges and prosecutors due to "*serious neglect of duties*", as stipulated by paragraph 4 of article 104 [Appointment and Removal of Judges] and paragraph 6 of article 109 [State Prosecutor] of the Constitution, with the wording *"serious disciplinary violation",* do not diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution;

3. Proposed constitutional amendments no. 27 and no. 28, proposing the supplementation of the constitutional criterion for the dismissal of judges and prosecutors due to "*serious neglect of duties*", as stipulated by paragraph 4 of article 104 [Appointment and Removal of Judges] and paragraph 6 of article 109 [State Prosecutor] of the Constitution, with the wording "*has been proven to have unjustifiable assets*", established by a final judicial decision, do not diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution. The Court assessed that: (i) as long as it is not disputed that non-reporting and/or false reporting of assets currently constitutes a basis for the dismissal of the judge and/or prosecutor; and (ii) that even the concept of "*unjustifiable assets*" differs from the above-mentioned criminal offense, "*unjustifiable assets*" which is established by a final court decision, may constitute a basis for the dismissal of the judge and/or prosecutor, being subject to the obligation to further specify this concept through the applicable laws in accordance with the constitutional guarantees that are related but not limited to (i) access to justice, in the sense of articles 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution; as well as (ii) the right to fair and impartial trial, in the sense of article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with article 6 (Right to a fair trial) of the ECHR; and

4. Proposed constitutional amendments no. 27 and no. 28, proposing the supplementation of the constitutional criterion for the dismissal of judges and prosecutors due to "*serious neglect of duties*", as stipulated by paragraph 4 of article 104 [Appointment and Removal of Judges] and paragraph 6 of article 109 [State Prosecutor] of the Constitution, with the wording "*has vulnerable integrity*", diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution. The Court assessed that: (i) the wording "*has vulnerable integrity*", as a permanent basis for the dismissal of a judge and/or prosecutor, is characterized by a lack of a "*clear*" and "*foreseeable*" definition. Therefore, in sense of (i) balancing the principle of security of tenure of the judge and/or prosecutor and the importance of this principle for the independence of the judicial and prosecutorial systems, including the independent court established by law as required by article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with article 6 (Right to a fair trial) of the ECHR; and (ii) "*lack of clarity*" and "*unforeseeability*" of the proposed wording, including in the context of the lack of necessary procedural guarantees pertaining to the assessment of "*vulnerable integrity*" as a permanent basis for the dismissal of judges and prosecutors, proposed at the level of the constitutional norm, the Court found that such a proposal, results in diminishing the fundamental rights and freedoms guaranteed by Chapter II of the Constitution.

C. Assessment of the proposed constitutional amendment no. 29

Introduction

302. The Court recalls that the proposed constitutional amendment no. 29, proposes to add 6 (six) additional articles to the Constitution after article 161 of the Constitution (articles 161A; 161B; 161C; 161D; 161E; and 161F). The Court, more specifically, recalls that this proposed constitutional amendment proposes: (i) the creation of a mechanism to control the integrity of leading positions in the justice system; (ii) its temporary mandate and the determination that the integrity check is done only once for the subject of the integrity control (article 161A); (iii) the establishment of the Integrity Control Authority (article 161B); (iv) the election and dismissal of the members of the Integrity Control Authority (article 161C); (v) Competencies of the Integrity Control Panel (article 161D); (vi) the obligation for cooperation by the control subject (article 161E); and (vii) the right of appeal to the Appeals College [of the Integrity Control Authority] (article 161F).

303. In assessing whether the proposed constitutional amendment no. 29, diminishes the fundamental rights and freedoms guaranteed by Chapter II of the Constitution, the Court in this Judgment, will further elaborate and examine each of the proposed articles within this proposed constitutional amendment, referring to general international principles and standards that are related to the control of integrity (vetting) in the justice system, which originate from (i) the findings of the ECtHR and CJEU through the relevant case law; and (ii) the opinions and reports of the Venice Commission related to the integrity control process.

General international principles and standards related to integrity control (vetting) in the justice system

304. The Court initially highlights that the procedures related to the vetting process are not governed by international instruments, but the latter have been elaborated and reviewed by opinions and recommendations (instruments of soft law) and case law, namely that of the ECtHR and the CJEU (see, *inter alia*, the Joint Opinion of the Venice Commission and the Directorate General for Human Rights and the Rule of Law of the Council of Europe regarding some measures related to the selection of candidates for administrative positions in self-administration bodies of judges and prosecutors and the amendment of some normative acts, paragraph 14).

305. According to the Venice Commission: *"The concept of vetting involves the implementation of a process of accountability mechanisms to ensure the highest professional standards of conduct and integrity in public office."* (see, paragraph 10 of the Opinion of the Venice Commission on Kosovo).

306. In this sense, the Venice Commission specified that pre-vetting and integrity checks through asset declarations are quite common and, in principle, non-controversial. However, extraordinary vetting, as the Venice Commission has stressed, might only be justified in case of exceptional circumstances (see the above-mentioned compilation of the Venice Commission Reports on Vetting of Judges and Prosecutors). That said, in the case of Albania, the Venice Commission based its recommendations on the assumption that comprehensive vetting of the judiciary had broad political and public support at the country level and was considered to be an exceptional and transitory measure (see, the Provisional Opinion of the Venice Commission for Albania on the draft constitutional amendments on the Judiciary[CDL-AD(2015)045]).

307. Following this, the Court also refers to the initiative of the process of an external assessment of judges and prosecutors in Moldova. Based on the Opinion of the Venice Commission on

Moldova, it follows that such an initiative was undertaken through the draft law and that such proposal included an extraordinary evaluation of some judges and prosecutors (see, Joint Opinion of the Venice Commission and the General Directorate of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on the external assessment of Judges and Prosecutors, adopted by the Venice Commission at its 134th plenary meeting, on 10-11 March 2023 CDL-AD (2023)005. Subsequently, the draft law drafted by the Ministry of Justice in Moldova stipulated that a category of judges and prosecutors be subject to a full re-evaluation by two evaluation commissions, bodies established outside the justice system (one for judges and one for prosecutors), especially created for this purpose, and which were given investigative competencies. The investigation carried out by the aforementioned commissions results in a report which is submitted respectively to the Superior Council of Magistracy (SCM) and the Superior Council of Prosecutors (SCP), that takes the final decision regarding the judge/prosecutor in question and may dismiss them. According to this draft law, the decisions of SCM and SCP are appealable to the Supreme Court, which can uphold the decision or remand the case for a new examination to the two commissions of inquiry or SCM and SCP, respectively (see paragraph 6 of Opinion).

308. Further, relying on the case law of the ECtHR in the case *Xhoxhaj v. Albania*, the ECtHR stated that *"[...] the Vetting Act was enacted further to the Assessment Report and the Reform Strategy, as well as substantial constitutional amendments. It responded to alarming levels of corruption in the judiciary, as assessed by the national legislature and other independent observers, and to the urgent need to combat corruption, which had also been highlighted in the Constitutional Court's decision. Therefore, [ECtHR] considers that, in such circumstances, a reform of the justice system entailing the extraordinary vetting of all serving judges and prosecutors responded to a "pressing social need"*. (see case *Xhoxhaj v. Albania*, application no.15227/19, Judgment of 9 February 2021, paragraph 404).

309. Based on the opinions and reports of the Venice Commission and the case law of the ECtHR, procedures related to vetting in justice may affect a number of rights guaranteed by the ECHR (see, ECtHR cases *Besnik Çani v. Albania*, application no. 37474/20, Judgment of 4 October 2022 (violation of article 6 of the ECHR, as a result of the violation of the right to a court established by law); *Sevdari v. Albania*, application no. 40662/19, Judgment of 13 December 2022 (violation of article 8 of the ECHR) *Thanza v. Albania*, application no. 41047/19, Judgment of 4 July 2023 (violation of article 6 of the ECHR).

310. In the case of *Thanza v. Albania*, the ECtHR for the first time found a violation of article 6 of the ECHR based on the procedures conducted to check the integrity of the applicant as a judge of the Supreme Court, as a result of the vetting of the judicial system in Albania. The Court further notes that the ECtHR, within the framework of the cases related to the transitional assessment process in the Republic of Albania, also decided in the cases (i) *Nikëhasani v. Albania* (application no. 58997/18, Judgment of 13 December 2022), which found that the dismissal of the applicant as a prosecutor due to serious doubts regarding her financial assets as a result of the vetting process was justified and that the permanent ban on exercising functions in the system of justice did not constitute a violation of article 8 of the ECHR, and (ii) *Gashi and Gina v. Albania* (application no. 29943/18, Judgment of 4 April 2023) through which the ECtHR in relation to the first applicant, who was dismissed as a prosecutor as a result of the vetting process, found that her claims for violation of article 6 and article 8 were manifestly ill-founded, while in relation to the second applicant found that his suspension as a prosecutor pending criminal proceedings even after the end of the criminal procedure without a legal basis, constituted a violation of article 8 of the ECHR.

311. The Court will proceed with the assessment of the proposed constitutional amendment no. 29, proposing to add 6 (six) additional articles to the Constitution after article 161 of the Constitution, namely articles 161A; 161B; 161C; 161D; 161E; and 161F.

1. Article 161A [Integrity Control]

312. Following the examination and assessment of the proposed constitutional amendment no. 29, the Court refers to article 161A [Integrity Control] of this proposed amendment, which defines:

> *1. Notwithstanding other provisions of this Constitution, the control of the integrity of the members of the Kosovo Judicial Council, the members of the Kosovo Prosecutorial Council, the presidents of all courts and all chief prosecutors, as well as the candidates for these positions, excluding the president of the Constitutional Court, is done by the Integrity Control Authority.*
> *2. The term of office of the Integrity Control Authority is two (2) years from the election of all members of the Authority. The term of office of the Authority can be extended for a maximum of one (1) more year, if it is decided by a law adopted by 2/3 of the votes of all the MPs of the Assembly.*
> *3. Integrity control from paragraph 1 of this article, shall be done only once for the subject of the control, and shall include the asset control, as defined by this Law.*
> *4. Complaint procedures against integrity control are not counted in the terms defined in paragraph 2 of this article*".

313. The Court notes that, article 161A [Integrity control] of the proposed constitutional amendment no. 29, establishes (i) the positions of the judicial and prosecutorial system which are subject to integrity control as well as the mandate of the Integrity Control Authority, specifying that (ii) the members of the Kosovo Judicial Council, the members of the Prosecution Council of Kosovo, presidents of all courts and all chief prosecutors, as well as candidates for these positions are subject to the Integrity Control Authority, (iii) the mandate of the Control Authority is two (2) years from the election of all members of the Authority and which may to be extended for a maximum of one (1) more year, if it is decided by a law approved by 2/3 of the votes of all the deputies of the Assembly; and (iv) the integrity control for the above-mentioned positions in the justice system is carried out only once for the subject of the control and includes the property check, as defined by law, as long as the appeal procedures against the integrity check are not counted in the above-mentioned deadlines.

314. Initially, and in terms of the wording in paragraph 1 of article 161A of the proposed constitutional amendment no. 29, namely the wording "*Notwithstanding other provisions of this Constitution […]",* The Court notes that such wording refers to the temporary transfer of a constitutional competence for the purposes of the establishment and operation of the Authority established outside the justice system for the purposes of implementing the aforementioned amendment. Following this, article 161A of the proposed constitutional amendment no. 29 specifies that*: "[…] the integrity control of the members of the Kosovo Judicial Council, the members of the Kosovo Prosecutorial Council, the presidents of all courts and all chief prosecutors, as well as the candidates for these positions, excluding the president of the Constitutional Court, is carried out by the Integrity Control Authority."*

315. More precisely, the content of the proposed amendment no. 29 has the result of temporarily affecting (i) the constitutional competencies of the Kosovo Judicial Council and the Kosovo Prosecutorial Council to appoint and dismiss members of the KJC, KPC, the presidents of the Courts, chief prosecutors and candidates for these positions, according to the respective powers specified in articles 108 [Kosovo Judicial Council] and 110 [Kosovo Prosecutorial Council] of the Constitution; and therefore temporarily, also (ii) the constitutional competencies of the President of the Republic provided by paragraphs 15, 16, 17 and 18 of article 84 [Competencies of the President] of the Constitution; and (iii) the constitutional competence of the Assembly established in paragraph 10 of article 65 [Competencies of the Assembly] of the Constitution.

316. The wording "*notwithstanding other provisions of this Constitution [...]",* cannot imply in any way the restriction or diminishing of the fundamental rights and freedoms established in Chapter II of the Constitution or even the content of other constitutional provisions and which do not directly serve the limited and temporary purpose of the proposed amendment no. 29. Any position to the contrary would constitute an extremely formalistic and isolated interpretation of the wording of the norm.

317. Such a position also clearly stems from the already consolidated case law of the Court, based on which, the Constitution of the Republic of Kosovo consists of a unique entirety of constitutional principles and values on the basis of which the state of the Republic of Kosovo has been built and must function. These principles and values embody and reflect the spirit of the Constitution, which is transposed in each of its norms. As such, the Constitution and each of its norms must be interpreted interdependently with each other and not in isolation of one another, and always taking into account its principles and values. No norm of the Constitution can be interpreted separately and in isolation of the principles and values proclaimed in the Constitution, including its Preamble. No constitutional norm can be taken out of context and interpreted mechanically and independently of the rest of the Constitution. This is due to the fact that the Constitution has an internal cohesion, according to which each part is connected to the other (see, among others, KO100/22 and KO101/22, Applicant KO100/22, *Abelard Tahiri and 10 other deputies of the Assembly of the Republic of Kosovo*; Applicant KO101/22, *Arben Gashi and 10 other deputies of the Assembly of the Republic of Kosovo*, cited above, paragraph 153).

318. Moreover, such wording is also used in the constitutional amendment no. XXIV as well as in the final [Chapter XIII] and transitional [Chapter IV] provisions included in the Constitution entered into force on 15 June 2008, among others in articles 143, 146, 147, 148, 149, 150, 153, already repealed through constitutional amendments no. I-XII.

319. With the clarifications given above, according to the provisions of the proposed constitutional amendment no. 29, the Court will refer to the purpose of the integrity control process by the Integrity Control Authority [based on article 161A] as a separate process, which is proposed to be conducted outside the provisions of Chapter VII of the Constitution, namely without the involvement of KJC and KPC.

320. Having said this, the Court will firstly and as follows (i) summarize the comments of the interested parties related to article 161A and the purpose and proposers of the proposed amendments for the integrity control of the above-mentioned positions by an external body, followed by (ii) the assessment of whether the latter diminishes fundamental rights and freedoms, guaranteed by Chapter II of the Constitution.

a. Comments of the parties

321. Regarding the comments of the interested parties, the Court will refer to the comments submitted by (i) the Office of the President; (ii) the Ministry of Justice; (iii) KPC; (iv) KJC; and (v) the response of the Ministry of Justice to the comments of the KJC.

322. The Office of the President in its comments, emphasizes the need for the integrity control process by an external body, among others, as a result of *: "stagnations and failures in the justice system in our country have been found continuously, both by reports of international organizations and mechanisms, as well as by independent local observers. This strongly proves that the existing mechanisms of the justice system have been shown to be inefficient, that is, insufficient to guarantee the necessary level of efficiency, professionalism and integrity of the judicial and prosecutorial system. The justice system continues to suffer from serious defects, starting from: the lack of efficient mechanisms to monitor and evaluate the integrity of judges and prosecutors; the lack of independence and efficiency of courts and prosecutors' offices, which results in the violation of citizens' rights; unsatisfactory professional level in decision-making, up to political influences, nepotism and corruption".*

323. The Ministry of Justice, in terms of the proposed constitutional amendments for assessment before the Court, refers to the Report of the US Department of State, which has concluded that the judicial system has often not achieved a fair trial, being slow and not guaranteeing the accountability of officials and the European Union Report on Kosovo, through which it was emphasized that "*the judiciary is still vulnerable to undue political influence*". According to the Ministry of Justice, the aforementioned findings, among other things, justify the removal of the competence of the KJC and the KPC for integrity control, and the transfer of this competence to an external and independent authority, which will carry out the integrity control of "high positions" in the justice system and candidates for these positions, of members of the KJC and KPC, respectively, of presidents of courts and chief prosecutors, who after undergoing and passing the integrity check, will continue efficiently with the integrity control of judges and prosecutors. The Ministry of Justice emphasizes that the selection of these positions, as subjects of integrity control by the Control Authority, is based on the recommendations given by the Venice Commission, through its Opinion on Kosovo in relation to the Concept document for Vetting of judges and prosecutors and the draft constitutional amendments.

324. The KPC, among other things, maintains that: "*it does not support the constitutional amendments, for the reason that even if the constitutional changes were made, the judiciary must have independence and exercise its mandate without the interference of the executive and the legislative"*. The KPC, in summary, states that: (i) there is no need for constitutional amendments, because *"the Constitution is the greatest guarantee for the assessment and removal of prosecutors who commit criminal offenses and serious violations of duty"* and (ii) in case it has been proven that the prosecutor has committed a criminal offense or has committed a serious violation of his duties, the latter based on the constitutional provisions and legislation in force can be dismissed from his position.

325. The KJC, on the other hand, emphasizes that the developments within this council consume the need for constitutional amendments, reasoning that: (i) in recent years, two (2) large-scale recruitment processes of new judges have been carried out, these processes were monitored by international institutions; and (ii) on 18 February 2022, a Joint Declaration of Commitment was signed between the KJC, the Ministry of Justice, the KPC, the Supreme

Court and the Chief State Prosecutor for strengthening the rule of law that contribute to this process. As for the subjects of control determined by article 161A, the KJC emphasizes that: "*equivalent to the criteria are subjects with a limited term of office, and a part of them are already towards the end of their terms; as a result the effect will be minimal considering the time limit, some of them will complete their terms, while for others there will not be enough time to check them. Moreover, they emphasize that a number of them are chosen by the Assembly itself and the same will be able to ensure that those who are elected are with integrity.*"

326. The Ministry of Justice, in response to the comments of the KJC, reiterated the reasonableness of the integrity control of *'high positions'* in the justice system by the Integrity Control Authority , emphasizing that it will be necessary for the KJC and KPC with members with controlled integrity, to create adequate internal mechanisms for further control of the integrity of judges and prosecutors.

b. The Court's assessment

327. Based on the above, the Court recalls that according to paragraphs 1 and 2 of article 108 [Kosovo Judicial Council] of the Constitution, the KJC ensures the independence and impartiality of the judicial system, and as such is a completely independent institution in exercising its functions. Likewise, according to paragraph 3 of article 108, the KJC is also responsible for the transfer and for the disciplinary proceedings against judges. In the following, based on paragraph 1 of article 110 [Kosovo Prosecutorial Council] of the Constitution, the KPC is a fully independent institution in the performance of its functions, in accordance with law, while paragraph 2 of this article, among other things, establishes that the KPC will recruit, propose, promote, transfer, discipline prosecutors in the manner regulated by law.

328. Whereas paragraphs 15, 16, 17, and 18 of article 84 [Competencies of the President] of the Constitution, stipulate that the President of the Republic appoints and dismisses the President of the Supreme Court and the judges of the Republic of Kosovo upon the proposal of the KJC, respectively the Chief State Prosecutor and the prosecutors of the Republic of Kosovo, with the proposal of the KPC. Furthermore, based on paragraph 10 of article 65 [Competencies of the Assembly], the Assembly *"elects members of the Kosovo Judicial Council and the Kosovo Prosecutorial Council"* in accordance with the Constitution.

329. In this regard, the Court notes that by the proposed article 161A, within the transitional period, it is proposed that the Integrity Control Authority conduct integrity control for high positions in the judicial and prosecutorial systems, which differs from the procedures defined by the constitutional and legal provisions in force, because: (i) an integrity control system is created; (ii) integrity control consists of a body outside the judicial and prosecutorial system; (iii) the integrity control through constitutional amendments is once for the control subjects and the term of office of the Integrity Control Authority is two (2) years with the possibility of extension for one (1) year, by the law voted by two thirds (2/3) of all deputies of the Assembly; and (iv) in case of failing to pass the integrity control, the subject of the control is proposed for dismissal by the Integrity Control Authority itself.

330. Based on the above, the Court reiterates that the proposed amendment establishes the Integrity Control Authority, to which it grants constitutional competencies, similar to those of (i) paragraph 10 of article 65 [Assembly]; (ii) paragraphs 15, 16, 17 and 18 of article 84 [Competencies of the President]; and (iii) the provisions related to the appointment and

dismissal of the members of the KJC, the KPC, the Presidents of the courts and the chief prosecutors according to the provisions of articles 108 and 110 of the Constitution.

331. However, the referral before the Court has as its object of review the proposed constitutional amendments, submitted by the applicant, and the jurisdiction of the Court provided by paragraph 3 of article 144 [Amendments] of the Constitution, includes the assessment of whether the proposed constitutional amendments diminish the individual rights and freedoms established in Chapter II of the Constitution.

332. The Court reiterates that it is within the competence of the Assembly to establish and develop such a process through constitutional amendments, but always ensuring that the constitutional amendments do not diminish the fundamental rights and freedoms guaranteed in Chapter II of the Constitution, and article 7 of the Constitution, which in the circumstances of the present case are related to the rights of (i) integrity control subjects; as well as (ii) the rights of all citizens of the Republic of Kosovo. This is due to the fact that the process of the integrity control of the leading positions of the justice system for a transitional period may affect the individual rights and freedoms of litigants in judicial proceedings and of individuals/legal entities in investigative proceedings.

333. In this context, the Court reiterates that vetting in the justice system as an extraordinary measure results in determinations that affect the constitutional competencies of the respective institutions, including the transfer of constitutional competencies from one institution to other institutions or bodies, as it turns out be the Integrity Control Authority.

334. In this regard, based on the preparatory documents submitted to the Venice Commission for its opinion, it follows that the initial proposals included various options, including the integrity control process by an external body for all judges and prosecutors. As a result of the recommendations given by the Venice Commission, through its opinion, the proposer of the constitutional amendments has been determined for the process of integrity control in terms of assets and past assessment for the aforementioned leadership positions in the justice system. This definition, according to the drafter of the proposed constitutional amendments, aims to transfer the competence of integrity control to an external body and for a transitional period of the aforementioned positions in the justice system, and as a result of the successful passing of this control, these positions with checked integrity will continue with the integrity control of judges and prosecutors.

335. Therefore, taking as a basis the constitutional provisions in force that define the competencies of the KJC and the KPC, stipulated in certain provisions of articles 108 and 110 of the Constitution, respectively, and the competencies of the President provided for by paragraphs 15, 16, 17 and 18 of article 84 of the Constitution and the competence of the Assembly, foreseen by paragraph 10 of article 65 of the Constitution, the Court finds that the integrity control for a transitional period and of the aforementioned positions and candidates for these positions in the justice system through an external authority, that of the Integrity Control Authority can only be done through constitutional amendments.

336. This aforementioned conclusion of the Court is also highlighted in the Opinion of the Venice Commission on Kosovo, where in its paragraph 111 it is specified that: "*Due to the wide-ranging powers given to the vetting bodies, the original draft constitutional amendments, as they were presented, cannot be adopted as ordinary law because that law would obviously contradict Articles 85, 108 and 110 of the Constitution. If the draft constitutional amendments were adopted as ordinary law, they would have to be accompanied by a short*

constitutional amendment establishing the composition and powers of the vetting mechanism, the Transitional Evaluation Authority (TEA)".

337. In this context, the Court being aware of the effect that the vetting process can have on the justice system, and the goal that is intended to be achieved through this process, emphasizes that the proposed constitutional amendment no. 29, affects individual rights and freedoms on two levels, namely:

> (i) the rights of integrity control subjects, namely members of the KJC and the KPC; presidents of all courts and all chief prosecutors; as well as candidates for these positions; and
>
> (ii) the fundamental rights and freedoms of all citizens, taking into account that such a process includes the control of the integrity of the highest and leading positions in the justice system, and these authorities are responsible for the overall operation and administration of justice system, and as such can affect the administration of individuals' cases before courts and prosecutors.

338. Furthermore, the Court reiterates that in the circumstances of the present case, the fundamental rights and freedoms guaranteed by Chapter II of the Constitution are read in conjunction with paragraph 1 of article 7 [Values] of the Constitution, which stipulates that *"the constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy".*

339. Likewise, the Court also refers to paragraph 1 of article 56 [Fundamental Rights and Freedoms during the State of Emergency] that "*derogation of the fundamental rights and freedoms protected by this Constitution may only occur following the declaration of a State of Emergency as provided by this Constitution and only to the extent necessary under the relevant circumstances".* According to article 56 of the Constitution, the derogation of the fundamental rights and freedoms guaranteed by articles 23 [Human Dignity], 24 [Equality Before the Law], 25 [Right to Life], 27 [Prohibition of Torture, Cruel, Inhuman or Degrading Treatment], 28 [Prohibition of Slavery and Forced Labour], 29 [Right to Liberty and Security], 31 [Right to Fair and Impartial Trial], 33 [The Principle of Legality and Proportionality in Criminal Cases], 34 [Right not to be Tried Twice for the Same Criminal act], 37 [Right to Marriage and Family] and 38 [Freedom of Belief, Conscience and Religion] of the Constitution, is not allowed under any circumstances, thus, including the state of emergency.

340. However, taking into account the competences and responsibility of the Assembly in terms of constitutional amendments, as well as the KJC and the KPC in the administration of the judicial and prosecutorial system respectively, the transfer of the responsibilities provided by the Constitution to another authority for a transitional period, must serve a legitimate aim and not go beyond what is necessary to achieve that purpose.

341. In this context, also through the Rule of Law Strategy, which resulted in the approval of the Concept-document for Vetting and the request for Opinion submitted to the Venice Commission and finally in drafting the proposed constitutional amendments, presented before the Court, it is noted that: *"Before elaborating all these objectives, it is worth emphasizing that during the Functional Review Process, a certain part of*

recommendations that derived from policy documents mentioned in Chapter 2, be it for drafting certain laws, secondary legislation or implementation measures have already started to be implemented by the Government of Kosovo, KJC, KPC but also other institutions foreseen for implementation thereof. The measures selected within the objective of strengthening the judicial and prosecutorial system aim to target building citizens' trust in justice by intervening in addressing four main elements in this regard: increasing the accountability of judges and prosecutors (5.1.1), increasing the efficiency of the judicial and prosecutorial system (5.1.2), increasing professionalism (5.1.3) and integrity of judges and prosecutors (5.1.4). The interventions envisaged under the specific objective of increasing accountability aim to achieve and increase the level of responsibility that judges, prosecutors and support staff give to the citizens they serve, oversight institutions and the general public. The specific objective for increasing the efficiency of the judicial and prosecutorial system aims to increase, through the proposed measures, the speed and effectiveness of judicial processes and procedures led by prosecutors, so that justice is served more quickly and fairly".

342. In this regard, the Court recalls the relevant parts of the Opinion of the Venice Commission on Kosovo, through which it is emphasized that: (i) *"The Venice Commission considers that a reform of the judiciary in Kosovo is indeed necessary and that this may involve some form of effective integrity checks. [...] The interference in constitutional rights should be strictly proportionate. Any constitutional amendments should aim at minimal invasiveness in the competences of the KJC and the KPC while achieving the goal to reform the judiciary". (*paragraph 130*); (ii) "In the context of Kosovo effective "vetting" will of necessity mean a combination of various measures that will have a positive effect on the integrity and efficiency of the judiciary. Even if this type of vetting does not necessarily correspond to the formal definition given in section II.A above, all these measures taken together are part of a judicial reform that amounts to a "vetting" as legitimately aspired by the people and the authorities in Kosovo which is capable of delivering the required outcomes."* (paragraph 131*); and (iii) "experience shows that the introduction, sequencing and compatibility of vetting or integrity checking measures is operationally problematic and a precise model for each should therefore be designed with stakeholders on board. Failing which it may result in incomplete implementation. Then it crucially must be given sufficient operational roll - out time in order to evaluate its efficacy before other measures are introduced, otherwise this could obstruct everyone's best endeavours and compromise the desired outcomes."* (paragraph 132).

343. Finally, the Venice Commission concludes its opinion with the following recommendation*: "recommends focusing on legislative changes, which are easier to implement, and limiting a system of integrity checks to the judicial and prosecutorial councils, court presidents and chief prosecutors. To make this reform viable, the final concept for the vetting and corresponding constitutional and legislative changes should be prepared on the basis of a sincere dialogue and in close cooperation with all stakeholders, the Ministry, KJC, KPC but also civil society and interested academics".*

344. The Court considers that such a process pursues a legitimate aim, aiming at the proper functioning and administration of justice, as one of the main pillars of the rule of law in a democratic society, which process, after the completion of the control of the integrity of these high positions by the Integrity Control Authority, is administered through the Judicial Council, namely the Prosecutorial Council.

345. In light of the above, in the present case the transfer of the competence of integrity control to another independent authority that does not include the KJC and the KPC: (i) can only be implemented through constitutional amendments; (ii) only leading positions in the justice system, and candidates for these positions, are subject to this transitional integrity control process, during a transitional period.

346. The Court, in the following, refers to the second paragraph of article 161A of the proposed constitutional amendment no. 29, which stipulates that: "*2. The term of office of the Integrity Control Authority is two (2) years from the election of all members of the Authority. The term of office of the Authority can be extended for a maximum of one (1) more year, if it is decided by a law adopted by 2/3 of the votes of all the MPs of the Assembly".*

347. As the Court has emphasized above, such a process of transferring constitutional competencies through constitutional amendments follows a legitimate aim and aims at the proper functioning and administration of justice within the period foreseen by the proposed constitutional amendments.

348. The Court emphasizes that the extension of the term of office of the Integrity Control Authority after the end of the two (2) year period can be done by the law "*approved by 2/3 of the votes of all the deputies of the Assembly*". This is due to the fact that through the proposed constitutional amendment in paragraph 2 of article 161A, which in case of its adoption by the Assembly, the latter delegates the competence to two-thirds (2/3) of the deputies to vote on the extension of the mandate of the Integrity Control Authority, only for one (1) year.

349. However, the Court, in terms of the rights of the subjects of control and litigants and individuals in the investigative procedure, guaranteed by articles 29, 30, 31, 32 and 54 of the Constitution, emphasizes that in case of a failure to extend the mandate of the Integrity Control Authority for one (1) year, through the law voted by two-thirds (2/3) of all deputies of the Assembly, the mandate of the Authority ends immediately. Likewise, in case of extension of the mandate for one (1) year, but in case of not completing the integrity control process within the aforementioned period, the Authority's mandate ends with immediate effect.

350. Following this finding, the Court emphasizes that the integrity control process can only be established through constitutional amendments, and that such a process serves the legitimate aim, emphasized and justified by the proposer and drafter of the proposed constitutional amendment no. 29.

351. In light of the aforementioned elaboration and assessment, the Court finds that article 161A of the proposed temporary constitutional amendment no. 29, does not diminish the fundamental rights and freedoms, established in Chapter II of the Constitution, and the values specified by article 7 of the Constitution.

2. In relation to article 161B [Integrity Control Authority], article 161C [Election and dismissal of the members of the Integrity Control Authority], article 161D [Powers of the Integrity Control Panel], and article 161F [Right to appeal to the Appeals College]

352. The Court notes that articles 161B, 161C, 161D and 161F of the proposed constitutional amendment no. 29 of the Constitution, determine: (i) the establishment of the Integrity Control Authority [article 161B]; (ii) election and dismissal of members of the Integrity Control Authority [article 161C]; (iii) the competencies of the Integrity Control Authority [article 161D]; and (iv) the right to appeal against the decisions of the Appeals College of the [Integrity Control Authority] [article 161D]. More specifically:

- Article 161B [Integrity Control Authority] of the proposed constitutional amendment no. 29, stipulates that: (i) The Integrity Control Authority consists of (a) control panels; and (b) the Appeals College, in which case the latter decides on appeals against the decision of the control panels; (ii) members of these bodies *"eminent judges, with the highest integrity"*; (iii) The Authority is chaired by the President, who is elected from among the members of the Appeals College; whereas (iv) the composition, selection, organization, functioning, competencies and immunity of the Authority are determined by law.

- Article 161C [Election and dismissal of the members of the Integrity Control Authority] of the proposed constitutional amendment no. 29, regulates the issue of appointing the members of the Integrity Control Authority and determines that (i) the President of the Republic of Kosovo organizes an open and transparent process of electing the members of the Authority; (ii) the latter are voted in bloc and are elected with the votes of 2/3 of all the deputies of the Assembly of the Republic of Kosovo; (iii) the members of the Authority are dismissed after the proposal of the Appeals College with the votes of 2/3 of all the deputies of the Assembly in accordance with the procedure stipulated by law; whereas (iv) in case of termination of the mandate of the member of the Authority, the election process for the appointment of the new member is conducted according to the procedure established in this Constitution and by law.

- Article 161D [Powers of the Integrity Control Panel] of the proposed constitutional amendment no. 29 determines that: (i) the integrity control is based on the data provided by the subject of the control itself, the data from public institutions and other subjects and confirms the passing of the integrity control for the subject or proposes dismissal as defined by law; and (ii) notwithstanding article 84 of the Constitution, in case of a proposal for dismissal by the Authority, the President of the Republic of Kosovo dismisses from the position of judge or prosecutor the subject who does not pass the integrity check.

- Article 161F [Right to appeal to the Appeals College] of the proposed constitutional amendment no. 29 establishes that (i) the control subject has the right to appeal against the proposal of the Panel for dismissal, in the Appeals College; (ii) that the decision of the Appeals College is final and cannot be appealed to the regular courts; and (iii) the right of the control subject to file a constitutional complaint based on paragraph 7 of article 113 of the Constitution.

353. Based on the content of articles 161B, 161C, 161D (paragraphs 1, 3 and 4) and 161F of the proposed constitutional amendment no. 29, the Court notes that these are related to each other because they stipulate: (i) the establishment and functioning of the Integrity Control Authority through the Control Panels and the Appeals College, (ii) the method of selection of its members, (iii) the effects of their decision-making, including the two instances of decision-making within the Integrity Control Authority, as well as (iv) the right to a

constitutional appeal of the control subject against the decisions of the Appeals College of the Integrity Control Authority.

354. As a result of this, the Court will examine and assess the latter in a joint reading, except for paragraph 2 of article 161D which specifies that: "*For the exercise of the powers from paragraph 1, the Integrity Control Panel is based on the data provided by the subject of the control itself, data from public institutions and other subjects defined by law".* This is because this definition is related to article 161E, which provides for the obligation for cooperation by the integrity control subject. Consequently, the Court further in this Judgment will treat together paragraph 2 of article 161D and article 161E of the proposed constitutional amendment no. 29, in the sense of the right to private life guaranteed by article 36 of the Constitution in conjunction with article 8 of the ECHR.

355. Based on the above, taking into account the competence of the Integrity Control Authority and of its members, the criteria for their selection, the right of the control subjects to a legal remedy, proposed by the proposed constitutional amendment no. 29, the Court emphasizes that the latter are subject to the rights, principles and criteria established in articles 31, 32 and 54 of the Constitution, in conjunction with articles 6 and 13 of the ECHR.

356. However, the Court recalls that paragraph 1 of article 161B determines the establishment of the Integrity Control Authority, which is vested with the power to perform integrity control of the positions specified in paragraph 1 of article 161A, whereas the composition, selection, organization, functioning, competencies and immunity of the members of the Integrity Control Authority are stipulated by law and in accordance with the Constitution. In terms of the composition of the Integrity Control Authority, which will be determined by law, the Court notes that in order for the amendment to be implemented through the law, the latter in terms of the composition of the Integrity Control Authority must guarantee (i) gender equality (paragraph 2 of Article 7 and article 24 of the Constitution) and (ii) representation of members of the non-majority community according to the provisions of Chapters III and VII of the Constitution.

357. In assessing this proposed constitutional amendment, the Court notes that article 161B and article 161F establish that: (i) the members of the Integrity Control Authority are eminent judges with the highest integrity; and (ii) the latter will consist of control panels that evaluate control subjects and the Appeals College that decides on appeals against the control panel. While the decision of the Appeals College (iii) is final and cannot be contested before the regular courts. Also, the proposal-amendment does not exclude (iv) the individual referral to the Constitutional Court according to the jurisdiction defined in paragraph 7 of article 113 of the Constitution.

358. Regarding the above, the Court first notes that article 161F defines the two-instance decision-making regarding integrity control based on the proposed constitutional amendment no. 29, within the Integrity Control Authority, but excludes the right to legal remedies before regular courts against decisions of the Integrity Control Authority, except for the right to submit a referral to the Constitutional Court based on paragraph 7 of article 113 of the Constitution.

359. In this respect, the Court reiterates that the issue of the status of the Integrity Control Panels and the Appeals College within the Control Authority raises questions of the right to a fair trial guaranteed by article 31 of the Constitution and Article 6 of the ECHR. In this sense, the status of these two bodies within the Integrity Control Authority raises the question of

whether the Integrity Control Panel and the Appeals College fulfill the criterion of an independent and impartial "*court/tribunal*", as stipulated by Article 31 of Constitution, in conjunction with article 6 of the ECHR.

360. Therefore, in terms of the assessment of articles 161B, 161C and 161D (paragraphs 1, 3 and 4) of the proposed constitutional amendment no. 29, in the following Court will examine whether (i) the Integrity Control Panel and the Appeals College have the status of "*court/tribunal*", within the meaning of article 31 of the Constitution, in conjunction with article 6 of the ECHR; to continue with (ii) the assessment of whether or not the rights of the control subjects to legal remedies against the decisions of the Control Panel and the Appeals College have been diminished. During its review, the Court will refer to (a) the comments of the parties; (b) the rights defined by the Constitution and ECHR; (c) the relevant case law of the ECtHR; and (d) opinions of the Venice Commission.

(i) If the Integrity Control Panel and the Appeals College meet the criteria to be considered a "*court/tribunal*" in the sense of Article 31 of the Constitution

b. Comments of the parties

361. Regarding the comments of the interested parties, the Court will refer to the comments submitted by (i) the Ministry of Justice; (ii) KJC; and (iii) the response of the Ministry of Justice to the comments of the KJC that specifically relate to articles 161B, 161C, and 161D (paragraphs 1, 3 and 4) of the proposed constitutional amendment no. 29.

362. The Ministry of Justice, regarding the criteria that the members of the Integrity Control Authority must meet, emphasized that "*the constitutional criteria for appointing the members of the Authority, which are further defined by the Law, are high, equivalent to the criteria that must be met by candidates to exercise the position of judge in the Republic of Kosovo. This is because this Authority will have judicial competences, because during its mandate it decides on the integrity of judges and prosecutors in "high positions" as well as candidates for these positions, and therefore, can make a proposal for the dismissal of the subject of control from the position of judge or prosecutor".* In the following, in terms of the two-level decision-making, the Ministry of Justice emphasizes that*"[...] the control panel carries out control and decide on integrity, while the Appeals College hears appeals that can be made against the decision or proposal of the Panel (this includes the proposal for dismissal). The control panels and the Appeals College will not be Ad hoc bodies because they are not created only for a specific case, but will be permanent bodies that will remain until the completion of the integrity control process by the Authority for all subjects of control, which qualifies them as a "tribunal established by law*". In this context, the Ministry of Justice clarified that: "*the permanent nature, two-level, independence and impartiality of these bodies (taking into account the election procedure and the criteria for appointing members), guarantee that the constitutional right to legal remedies is applied".*

363. The above-mentioned clarifications and elaboration are supported by the Ministry of Justice by referring to the ECtHR cases *Fruni v. Slovakia* [application no. 8014/07, Judgment of 21 September 2011], *Xhoxhaj v. Albania* [cited above], and *Besnik Çani v. Albania* [cited above], and adds that constitutional amendment proposal no. 29 respects the principles and standards established through the case law of the ECtHR.

364. The KJC on the other hand, regarding article 161B, states that many issues related to the Integrity Control Authority have been left *"to the discretion of the political branches to be*

regulated by law. However, such an important issue for a process that is meant to be serious should not leave the issue of integrity and the elements that will be evaluated to measure integrity to be regulated by law". The KJC also raises the issue of the definition of the term "*integrity"* both in relation to the assessment that will be made by the Integrity Control Authority and also in terms of the fulfillment of this criterion by the members of the Integrity Control Authority, emphasizing that *"It is unjustifiable not to define, at the constitutional level, the elements of integrity in a process that the main part of the constitutional norms are proposed to address this issue. There can be no realistic expectation of an orderly integrity process for example if members of panels within the Integrity Control Authority take on these roles without a predictable process as to the qualities they must possess to perform this function"*. The KJC supports this position by referring to articles 32 and 54 of the Constitution, and further emphasizes that the separation of powers and the right to legal remedies are the cornerstone of the judicial branch. In the end, the KJC emphasizes that article 161F of the proposed constitutional amendment no. 29 "*fully eliminates the right to legal remedies*" and as such violates the right to legal remedies, guaranteed by articles 32 and 54 of the Constitution.

365. While in response to the comments of the KJC, the Ministry of Justice emphasizes that: "*Regarding the lack of a predictable selection process for the members of the Integrity Control Authority, regarding the qualities they must possess to perform this function, the Ministry returns to its argument that the constitutional provisions should not contain detailed procedural provisions. However, the Ministry notes that the current amendments ensure a predictable process of selection of members of the Integrity Control Authority. Referring to article 161B, in a general way, the composition of the Authority, the general principles of the Authority's work, as well as the general criteria for exercising the function of a member of this Authority are presented. On the other hand, article 161C is dedicated to the selection procedure itself, presenting the steps from the open selection process organized by the President up to the dismissal procedure of these members, with the aim of this Authority being independent." Moreover, the Ministry of Justice emphasizes that the Authority's mandate is only related to the positions included in amendment no. 29, while the competence for the election of judges and prosecutors remains with the respective Councils"*.

b. Relevant rights stipulated by the Constitution and international instruments

366. In assessing whether the Integrity Control Panel and the Appeals College meet the criteria to be considered a "*court/tribunal*" within the meaning of article 31 of the Constitution, the Court first refers to paragraphs 1 and 2 of article 31 [Right to Fair and Impartial Trial] of the Constitution, which determine:

> *"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*
>
> *2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law. […]"*

367. The Court further recalls that article 6 (Right to a fair trial) of the ECHR in its paragraph 1 stipulates that: "1. *In the determination of his civil rights and obligations or of any criminal*

charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. […]"

368. The Court also refers to article 10 of the Universal Declaration of Human Rights which foresees: *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".*

369. Following this, article 47 (The right to an effective remedy and to a fair trial) of the Charter of Fundamental Rights of the European Union stipulates that:

> *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
>
> *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*
>
> *[…]".*

370. Following this, the Court notes that article 31 of the Constitution, article 10 of the Universal Declaration of Human Rights, article 6 of the ECHR as well as article 47 of the European Charter of Fundamental Rights, determine that everyone has the right that his/her case be heard (i) by a court/tribunal; (ii) independent and impartial, and (iii) established by law.

371. Therefore, since based on the constitutional amendment proposal no. 29, the jurisdiction of regular courts is excluded, the Court must assess whether the Control Panel and the Appeals College, in the sense of the provisions of article 31 of the Constitution and article 6 of the ECHR, meet the criteria to be considered as a *"court/tribunal"*.

c. The case law of the ECtHR regarding the qualification as a court/tribunal

372. In this regard, the Court reiterates that based on its obligation defined by article 53 [Interpretation of Human Rights Provisions] of the Constitution: *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

373. Following this, and in the context of the notion "*court/tribunal",* the Court notes that the ECtHR in its consolidated case law has specified that: *"an authority which is not classified as one of the courts of the State may, for the purposes of Article 6 § 1, fall within the concept of a "tribunal" in the substantive sense of this expression. According to the Court's settled case-law [ECtHR], a "tribunal" is characterized in that substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of legal rules and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements, "such as independence, in particular of the executive, impartiality, duration of its members' terms of office".* (see, among others, ECtHR cases, *Guðmundur Andri Ástráðsson v. Iceland* [GC], application no. 26374/18, Judgment of 1 December 2020, paragraph 219; and *Xhoxhaj v. Albania*, cited above, paragraph 282).

374. In light of the above, the ECtHR has specified that examples of bodies, which are recognized with the status of a *"court/tribunal"* in the sense of paragraph 1 of article 6 of the ECHR also include bodies established outside the judicial system for the evaluation of judges and prosecutors to exercise their functions (see ECtHR case*, Xhoxhaj v. Albania*, cited above, paragraph 283).

375. Further, the ECtHR relates qualification an authority as *"court/tribunal"* to *"independence"* of a *"court/tribunal",* and in this regard, among other things, emphasized that: "*In order to establish whether a tribunal can be considered to be "independent" within the meaning of Article 6 § 1, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and the question whether the body presents an appearance of independence"* (see*, inter alia*, ECtHR cases *Kleyn and Others v. the Netherlands,* no. 39343/98, Judgment of 6 May 2003, paragraph 190; and *Xhoxhaj v. Albania*, cited above, paragraph 289). Specifically, the ECtHR specified that: *"Independence" refers, in this connection, to the necessary personal and institutional independence that is required for impartial decision making, and it is thus a prerequisite for impartiality."* (see*, inter alia*, ECtHR cases *Guðmundur Andri Ástráðsson v. Iceland*, cited above, paragraph 234; and *Xhoxhaj v. Albania*, cited above, paragraph 291).

376. The Court, in the circumstances of the proposed constitutional amendment no. 29 and which is related to the voting in bloc of the members of the Integrity Control Authority by the Assembly, highlights that the ECtHR in the case of *Xhoxhaj v. Albania*, did not provide a finding regarding whether the voting in bloc of the members of the Independent Qualification Commission was in/compliance with the notion of a "*court/tribunal*" in the sense of paragraph 1 of article 6 of the ECHR. The ECtHR dealt with the Applicant's claims in terms of whether the Independent Qualification Commission as a vetting body was a "*court established by law*". In determining this criterion, the ECtHR examined whether the two vetting bodies met the criteria of an "*independent and impartial court*".

377. As far as the criterion of the duration of the mandate of the members in the sense of an "*impartial and independent court/tribunal*", the ECtHR specified that:

> *"297. Turning to the term of office of the members, the Court notes that, pursuant to domestic law, members of the IQC have a non-renewable five-year term of office. The Court finds no issue with the fixed duration of the term of office of members of the vetting bodies. Assuming that the fixed period of time was relatively short, this is understandable given the extraordinary nature of the vetting process, as further highlighted by decision no. 2/2017 of the Constitutional Court (see paragraph 164 above).*
> *298. The Court further points out that what matters is the irremovability of the members during their term of office, which is considered to be a corollary of their independence (see Campbell and Fell v. the United Kingdom, 28 June 1984, § 80, Series A no. 80, and Maktouf and Damjanović v. Bosnia and Herzegovina [GC], nos. 2312/08 and 34179/08, § 49, ECHR 2013 (extracts), albeit in the context of a criminal case; see also the general principles emanating from the CJEU's judgments in paragraph 224 above). The absence of any formal recognition of the irremovability of judges in the Vetting Act does not in itself imply a lack of independence, provided that it is recognised in fact and that the other necessary guarantees are present (see Sacilor-Lormines, cited above, § 67). It can be seen from the provisions of the Vetting Act that this is indeed the case. Neither the legislature nor the executive can*

require the resignation or removal from office of the members of the vetting bodies. Section 17 of the Vetting Act specifies the limited cases where they may be removed from office (see paragraph 127 above). The fact that they can only be removed in the event of the commission of a disciplinary breach, in accordance with the procedure prescribed by law, does not call into question the necessary guarantees for their irremovability, which are present in this case".

378. In light of the above-mentioned elaboration of the case law of the ECtHR, the Court notes that a "*court/tribunal*" in the substantive sense is characterized by (i) an established judicial function, namely, if the latter decides cases based on competencies defined by law; (ii) be independent and impartial; (iii) the method of selection of its members; and (iv) the term of office of its members.

d. Opinions of the Venice Commission

379. Based on the reports and opinions of the Venice Commission and related to the criteria that must be met to assess whether the authorities for integrity control (vetting) can be considered as a "*court/tribunal*", in the sense of article 31 of the Constitution, in conjunction with article 6 of the ECHR, the Court refers to (i) the *Amicus Curiae* Brief of the Venice Commission to the Constitutional Court of Albania regarding the Law on the Transitional Re-evaluation of Judges and Prosecutors (the Vetting Law), approved at its 109 meeting - plenary sessions, on 9-10 December 2016, [CDL-AD(2016)036] and (ii) the Final Opinion of the Venice Commission on the revised draft constitutional amendments on the Judiciary (of 15 January 2016), approved at the meeting of its 106th plenary session, on 11-12 March 2016). In relation to these two documents, the Court, while applying the principles and criteria established through the case law, in the case of the Control Panel and the Appeals College and assessing whether these last two can be considered as "*court/tribunal*" will refer to the specific positions and findings of the Venice Commission, provided by the two aforementioned opinions.

e. Application of the aforementioned principles in the case of the Control Panel and the Appeals College

380. In this regard, the Court notes that in the present case, through constitutional amendment proposal no. 29, the jurisdiction of the KJC and the KPC has been temporarily excluded in relation to the control of the integrity of the subject defined by article 161A, while the jurisdiction of the appeal against the decisions of the Control Panels has been assigned to the Appeals College within the Integrity Control Authority.

381. First, in terms of **the established judicial function**, in the present case, based on articles 161B, 161C, 161D and 161F of the proposed constitutional amendment no. 29, it results that (i) the integrity control panels within the Integrity Control Authority, have jurisdiction to check the integrity of the control subjects, while the Appeals College to review the appeals related to the decisions of the control panels, therefore, the right to appeal is guaranteed; while (ii) the latter decide based on constitutional norms and the procedure defined by law.

382. Secondly, **in terms of the choice of members**, the Court notes that the members of the Integrity Control Authority (i) are appointed by the Assembly of Kosovo with the votes of two thirds (2/3) of all deputies; and (ii) dismissed with the votes of two-thirds (2/3) of all deputies of the Assembly, but only after the proposal of the Appeals College.

383. As for the method of electing the members of the Integrity Control Authority, the Court notes that paragraph 3 of article 161C of the proposed constitutional amendment no. 29, determines that the latter are voted in "*block*", and *"are elected with the votes of 2/3 of all the MPs",* whereas according to paragraph 5 of the same article: "*In case of termination of the term of office of the member of the Authority, the election process for the appointment of the new member shall be carried out according to the procedure defined by this Constitution and by law".*

384. However, the Court emphasizes that the issue of "*block*" voting is closely related to the principle of the right to a fair trial guaranteed by article 6 of the ECHR and article 31 of the Constitution in the sense of the right to an impartial tribunal.

385. Based on the documentation submitted to the Court, it follows that the practical reason of the proposer of the constitutional amendments to determine the method of voting in "*block*" of the members of the Integrity Control Authority, is related to the necessary consensus in the Assembly regarding the selection and voting of members of the Integrity Control Authority at both instances of decision-making.

386. However, the process of integrity control for a transitional period, as stated above, is an extraordinary measure, which is imposed only when it is considered that other measures cannot guarantee the proper functioning of the justice system. As a result, a broad consensus within the Assembly for the development of such a process is essential and necessary.

387. The Court further recalls the case law of the ECtHR, which includes the aforementioned cases *Guðmundur Andri Ástraðsson v. Iceland*, *Xhoxhaj v. Albania* and *Besnik Çani v. Albania*, and notes that in these cases, among others, the claims of the applicants were also assessed in the sense of the principle of the court established by law, as an integral part of article 6 of the ECHR. The Court recalls that the ECtHR in the case of *Xhoxhaj v. Albania* assessed whether the two bodies of transitional control of positions in the judiciary could be considered as a court established by law, within the meaning of article 6 of the ECHR. However, based on the finding given, by its Judgment in this case, the latter, despite the specific claims, had not found whether *en bloc* voting of members of the IQC (vetting authority) in Albania was incompatible with the principle of "*the court established by law*", in the sense of article 6 of the ECHR. ECtHR, by its Judgment in the case *Xhoxhaj v. Albania*, among other things, specified that:

> *295. To start with the IQC's independence, the applicant took issue with the manner of appointment of the members of the IQC, namely their election en bloc by Parliament. The Court considers that there are a variety of different systems in Europe for the selection and appointment of judges, rather than a single model that would apply to all countries. It reiterates in this connection that although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in its case-law, election or appointment of judges by the executive or the legislature is permissible under the Convention, provided that, once elected or appointed, they are free from influence or pressure and exercise their judicial activity with complete independence (see Sacilor-Lormines v. France, no. 65411/01, § 67, ECHR 2006-XIII; Flux v. Moldova (no. 2), no. 31001/03, § 27, 3 July 2007; Thiam v. France, no. 80018/12, § 80, 18 October 2018; and Guðmundur Andri Ástráðsson, cited above, § 207).*

296. While the Court has no reason, in general, to call into question the manner in which the members of the IQC were appointed, it nevertheless remains for it to assess whether, in the present case, the IQC possessed the "appearance of independence" required by the Court's case-law in terms of safeguards against extraneous pressure. The applicant failed to demonstrate that the members of the IQC which dealt with her case had received any instructions or had been subject to any pressure from the executive. The material in the case file does not disclose any evidence of such instruction or pressure being exerted on the panel by the executive. That on the eve of the IQC's announcement of the operative provisions in her case the Prime Minister made a general statement about the progress of the vetting process in general, without any specific link to or mention of her case, could not be taken as an instruction or pressure exerted by the executive on the vetting bodies (see paragraphs 22 and 264 above). The Prime Minister's statement contained general remarks about the ongoing developments of the vetting process and was not directed against a particular case or individual."

388. On the other hand, the Venice Commission, by its final Opinion on the revised draft constitutional amendments on the judiciary (of 15 January 2016) of Albania regarding the method of electing the members of the two authorities, competent for the transitional assessment, had emphasized : "*That being said, the Venice Commission reiterates that it ultimately belongs to the Albanian legislator to choose an appropriate system for electing members of the IQC and judges of the SQC*" (paragraph 61 of the Opinion).

389. Based on the above, the Court applying the above-mentioned principles established through the case law of the ECtHR (see the cases *Xhoxhaj v. Albania* and *Guðmundur Andri Ástraðsson v. Iceland*) and the conclusions of the Venice Commission regarding *en bloc* voting, as determining criterion to ascertain whether the Integrity Control Authority, and whether the election of the members of the relevant authorities, can be considered a "*court/tribunal*" in the sense of article 31 of the Constitution, notes that the ECtHR has not ascertained whether *en bloc* voting of bodies or competent authorities for integrity control constitutes a violation of the principle of the court established by law, while the Venice Commission attributes such competence to the local legislator.

390. In this sense, the Court considers that the voting of the members of the Integrity Control Authority in block and their election with two-thirds (2/3) of the votes of all deputies is not incompatible with the principles and criteria related to the manner of elections of the members of the Integrity Control Authority in the sense of the concept of "*court/tribunal*" in the context of article 31 of the Constitution, in conjunction with article 6 of the ECHR. However, the legislator during the implementation of the constitutional amendment through the law must ensure that: (i) through the definition of the criteria for the appointment of its members, specified further by law, guarantee the professional aspect and integrity of the members of the Integrity Control Authority; and (ii) the Assembly in the voting procedure must be provided access to the documentation that contains specific information regarding the fulfillment of the criteria for the election of members, and the selection procedure organized by the President, which reinforces the obligation of the Assembly that during the voting of the members of the Authority in bloc with two-thirds (2/3) of the votes of all deputies to assess and ensure that each candidate for member of the Authority, on an individual basis, fulfills the highest professional and integrity criteria; and (iii) the composition of the Authority and new appointments to positions subject to integrity checks must be consistent with constitutional obligations for gender equality and representation of non-majority community members.

391. In addition, and in relation to the criteria for appointment as well as dismissal, the Court, based on the relevant international documents and practices elaborated in this Judgment, considers that it is necessary that their further specification through the law should be equivalent to those for appointments to the judiciary and the prosecutor's office and at least meet the conditions for appointments to permanent positions in the justice system.

392. In this respect, the Court refers to "*Amicus Curiae Brief for the Constitutional Court of the Republic of Albania on the Law on the Transitional Re-evaluation of Judges and Prosecutors (The Vetting Law)*" which establishes that*"[…] The conditions for appointment to the Independent Commission and the Appeal Chamber seem to be equivalent to those for judicial appointments and appear to be at least as rigorous as those in place for appointments to permanent judicial office. The arrangements for making the appointments appear to be designed to ensure so far as practicable the appointment of suitably qualified candidates who meet the criteria"* (paragraph 32).

393. While, in relation to the guarantees that refer to the integrity of candidates for members of the Integrity Control Authority, the Court refers again to the *Amicus Curiae* Brief for the Constitutional Court of Albania by which it emphasized:

> *"31. The Independent Commission is divided into panels which are described in Article C as permanent. Both it and the Appeal Chamber are "to operate with accountability, integrity and transparency and with the objective of promoting an independent and competent system of justice free from corruption." Article 4 of the Vetting Law provides further that both institutions "shall exercise their duties as independent and impartial institutions based on the principles of equality before the law, constitutionality and lawfulness, proportionality and other principles which guarantee the rights of assesses for a due legal process." In addition, certain procedures established in administrative law and practice are to apply to their activities. 22 Article 27 of the Vetting Law ("Guarantees of Impartiality") deals with conflicts of interest by members of the re-evaluation institutions and decisions taken by members of the institutions who have a conflict of interest amount to serious disciplinary misconduct (para. 1)".*

394. Thirdly, in terms of **the criterion of independence and impartiality** of the Integrity Control Panels and the Appeals College, based on the proposed constitutional amendments, their members (i) are not accountable for their actions to the institution that proposed or selected them and (ii) their decisions are final and cannot be appealed before the regular courts.

395. Fourthly, regarding the **duration of the term of office** of the members of the Integrity Control Authority, the Court, based on article 161A of the proposed constitutional amendment, recalls that the mandate of this Authority is two (2) years, with the possibility of extension for (1) year, according to the clarifications given in this Judgment.

396. Fifth, in relation to the right of control subjects **to access the court**, and as will be dealt with in more detail below, the Court recalls that based on paragraph 1 of article 161F, the latter, against the decisions of the Integrity Control Panel, can exercise the remedy of appeal to the relevant Appeals College, moreover, the possibility of a request for constitutional review of the contested act in the Constitutional Court is also defined according to the provisions of paragraph 7 of article 113 of the Constitution.

Conclusion

397. Based on the aforementioned findings, the Court based on (i) the competence of the Integrity Control Panel and that of the Appeals College to control the integrity of the leading positions of the justice system and the candidates for these positions; (ii) the method of election of its members by two-thirds (2/3) of the votes of all deputies and the qualification criteria to be elected members of these two bodies of the Integrity Control Authority ; (iii) the duration of the term of office of this Authority for a limited period of two (2) years with the possibility of extension for another (1) year; (iv) the access of control subjects to justice or the right to legal remedies to submit an appeal to the Appeals College against the proposal for dismissal by the Integrity Control Panel, as well as then to the Constitutional Court, assesses that both the Control Panel, as well as the Appeals College, in principle, meet the criteria b in paragraph 1 of article 31 of the Constitution and paragraph 1 of article 6 of the ECHR to be considered as a "*court/tribunal*".

398. In conclusion, the Court notes that the latter meet the defined criteria of an "*independent and impartial court/tribunal*" as essential elements to guarantee regular and fair process. Therefore, the Court finds that the Control Authority, including its status, structure, competencies, as defined by articles 161B, 161C, 161D and 161F of amendment no. 29 of the Constitution, do not diminish the fundamental rights and freedoms established by Chapter II of the Constitution.

399. Having said this, the Court emphasizes that the proposed amendments only create the general structure, status and functioning of the Integrity Control Authority , while further procedures and the organization are determined to be regulated at the level of law, which must respect the principles and constitutional guarantees. The aforementioned conclusion does not prejudge the legal provisions that will specify the operational issues and procedures before the Integrity Control Authority, which can be contested before the Court by parties authorized under article 113 of the Constitution.

400. In conclusion, the Court considers that the Integrity Control Panel and the Appeals College are "*courts/tribunals*" within the meaning of article 31 of the Constitution, in conjunction with article 6 of the ECHR, and therefore, it finds that articles 161B, 161C, and 161D of the proposed constitutional amendment no. 29, do not diminish the fundamental rights and freedoms defined by Chapter II of the Constitution, respectively they do not diminish the rights guaranteed by article 31 of the Constitution, in conjunction with article 6 of the Central.

(ii) Regarding the right to a legal remedy against the decisions of the Appeals College of the Integrity Control Authority

c. Comments of the parties

401. The Ministry of Justice in its comments emphasizes that the right of the control subject to submit a constitutional complaint based on paragraph 7 of article 113 of the Constitution to the Constitutional Court, whereby it enables the latter to contest the constitutionality of the decision of the Appeals College due to violations of his/her individual rights and freedoms is not limited and remains fully applicable under the proposed article 161F(3).

402. On the other hand, the KJC emphasizes that draft article 161F in proposal-amendment no. 29 "*completely eliminates the right to legal remedies"* and as such violates the right to legal remedies, guaranteed by articles 32 and 54 of the Constitution.

b. Basic principles regarding the right to a legal remedy

403. Regarding the right to a legal remedy, the Court recalls its consolidated case law in this context and emphasizes that this right is closely related to the right to a fair and impartial trial by a "*court/tribunal*" in the sense of article 31 of the Constitution and article 6 of the ECHR. The Court recalls article 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution. The former establishes that *"every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law"*.; while the second, that *"Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated"*. As defined in the case law of the Court and which is based on the case law of the ECtHR, in principle and in their entirety, article 54 of the Constitution on the judicial protection of rights, article 32 of the Constitution on the right to a legal remedy and Article 13 of the ECHR on the right to an effective remedy, guarantee: (i) the right to judicial protection in case of violation or denial of any right guaranteed by the Constitution or by law; (ii) the right to use a legal remedy against judicial and administrative decisions which violate the guaranteed rights in the manner defined by law; (iii) the right to effective legal remedies if it is established that a right has been violated; and (iv) the right to an effective remedy if a right guaranteed by the Constitution and ECHR has been violated, which the Court will examine in the context of the request for constitutional changes.

c. The Court's assessment

404. Regarding the right to a legal remedy, the Court notes that paragraph 1 of article 161F of the proposed constitutional amendment no. 29, determines that the subject of control has the right to appeal against the decision or proposal for dismissal by the Integrity Control Panel, to the Appeals College. As for the right to submit a referral to the Constitutional Court according to paragraph 7 of article 113 of the Constitution, the Court notes that paragraph 3 of article 161F stipulates that "*The right of the control subject to file constitutional appeal based on paragraph 7 of Article 113 of the Constitution"*.

405. The Court notes that paragraph 3 of article 161F should also be read in harmony with paragraph 7 of article 113 of the Constitution, according to which, *"Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law"*. In this context, even the right to submit a constitutional complaint by the subjects of control to the Constitutional Court can be done after the exhaustion of legal remedies, respectively after the issuance of the decision of the Appeals College.

406. Therefore, as it was emphasized above, the Court recalls that through the aforementioned proposal-amendments, the jurisdiction of the regular courts regarding the decisions of the integrity control panels is excluded. However, the guarantees of the right to a fair trial which are related to the right to an independent and impartial court and which must be guaranteed through the exercise of the competencies of the Integrity Control Authority at two instances of decision-making, as well as the determination of control subjects are also guaranteed the

right to submit a constitutional complaint against the Decision of the Appeals College in accordance with article 113, paragraph 7 of the Constitution, it turns out to be guaranteed.

407. In conclusion, the Court considers that the right to legal remedies against the decisions of the Integrity Control Panels is guaranteed, and therefore finds that articles 161B, 161C, 161D and 161F of the proposed constitutional amendment no. 29, do not diminish the fundamental rights and freedoms defined by Chapter II of the Constitution, namely the right to legal remedies, guaranteed by articles 32 and 54 of the Constitution, in conjunction with article 13 of the ECHR.

3. Regarding article 161E [Obligation of the subject of control for cooperation]

408. The Court notes that article 161E [Obligation of the subject of control for cooperation] of the proposed constitutional amendment no. 29, establishes that: (i) the control subject submits a formal declaration at the beginning of the integrity control to the Integrity Control Authority, stating the data that enable the control of the subject's integrity; while (ii) the refusal to submit the aforementioned declaration results in the dismissal of the control subject.

409. The Court also notes that the issue of data is also regulated by paragraph 2 of article 161D of the proposed constitutional amendment no. 29, which determines that the Integrity Control Panel is based on the data provided by the control subject itself, data from public institutions and other entities defined by law.

410. In the assessment of article 161E and paragraph 2 of article 161D of the constitutional amendment proposal no. 29, the Court will briefly refer to: (i) the comments of the interested parties; (ii) proceeding with the elaboration of the principles established through the case law of the ECtHR, the standards, and the opinions of the Venice Commission; to conclude with (iii) its assessment and finding, if the aforementioned articles diminish the fundamental rights and freedoms defined in Chapter II of the Constitution.

a. Comments of the parties

411. The Court recalls that the Ministry of Justice in its comments submitted to the Court emphasized that "*Article 161E of this proposed amendment defines the obligation for cooperation of the control subject by declaring the data that enable the Authority to control his or her integrity. Failure to submit such a statement with data results in a proposal for dismissal of the subject of control. The Ministry of Justice notes that the obligation for a public official, including judges and prosecutors, to submit data in order to verify his or her suitability to serve in the given position, is completely reasonable and does not limit any right or guaranteed freedom. The Ministry would like to remind the Court that this very issue was also raised in the Opinion on draft constitutional amendments on the judiciary in Albania and received a positive response, therefore such a statement has become mandatory in the process of "vetting" in Albania*".

412. The Court notes that article 161E and paragraph 2 of article 161D of the proposed constitutional amendment no. 29, establish (i) the obligation to submit a formal statement regarding the data that enables the control of the subject's integrity; and that (ii) failure to submit this statement results in the dismissal of the control subject.

413. Therefore, all other issues related to the content of the declaration, including the data that are mandatory to be submitted, have not been determined by constitutional amendments and will therefore be determined by law.

414. Notwithstanding the above, the fact that the necessary data for integrity control assessment have not been determined by proposed amendments remain to be determined at the law level. The Court notes that the issue of data, but also the possible dismissal of the control subjects, involve the issue of the right to private life and protection of personal data stablished in article 36 [Right to Privacy] of the Constitution and article 8 (Right to respect for private and family life) of the ECHR. Taking this into account, the Court will further present the basic principles related to the aforementioned articles of the Constitution and the ECHR.

b. Applicable constitutional and ECHR provisions

415. The Court emphasizes that it is at the will of the verification subjects whether they undergo the integrity control process or not, however, the lack of willingness to be part of the process, means relinquishing from their positions within the justice system. Having said this, the Court points out that such an issue is not defined by the proposed constitutional amendments and therefore is not before it as an issue.

416. In terms of assessing this constitutional amendment proposal, the Court first recalls article 36 [Right to Privacy] of the Constitution, which defines:

> *"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 defense 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".*

417. The Court also recalls article 8 of the ECHR (The right to respect for private and family life), which stipulates that:

> *"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".*

c. Case law of the Court and of the ECtHR regarding the applicability of article 36 of the Constitution, in conjunction with article 8 of the ECHR

418. As regards the right to privacy, the Court notes that the primary purpose of article 8 of the ECHR, according to the case law of the ECtHR, is to protect individuals from arbitrary "*interference*" with their: (i) private ; (ii) family life; (iii) home; or (iv) correspondence (see

the case of Court KI56/18, Applicant: *Ahmet Frangu*, Judgment of 22 July 2020, paragraph 83; and KI113/21, Applicant *Bukurije Xhonbalaj*, Judgment of 20 December 2021, paragraph 71; see, in this context, *inter alia*, also the ECtHR cases *P. and S. v. Poland*, Judgment of 30 October 2012, paragraph 94; and *Nunez v. Norway*, application no. 55597/09, Judgment of 28 June 2011, paragraph 68). These rights, based on the ECHR system and the relevant case law of the ECtHR, are secured through: (i) negative obligations, namely the obligation of the state not to "*interfere*" with private and family life; and (ii) positive obligations, namely the obligation of the state to ensure that these rights are effectively enjoyed (see the case of Court KI56/18, Applicant: *Ahmet Frangu*, Judgment of 22 July 2020, paragraph 83).

419. In this respect, the ECtHR emphasized that the concept of "*the right to privacy"* is broad and is not subject to any exhaustive definition. The protection of personal data is of particular importance in terms of the enjoyment of the right to private and family life as guaranteed by article 8 and the fact that the information is in the public domain does not necessarily exclude the protection from article 8 (see the ECtHR case *Satakunnan Markkinapörssi Oy* and *Satamedia Oy v. Finland*, application no.931/13, Judgment of 27 June 2017, paras. 129-134).

420. More specifically, as regards employment or dismissal disputes, the ECtHR established that "*disputes were not per se excluded from the scope of "private life" within the meaning of Article 8 of the Convention. There are some typical aspects of private life which may be affected in such disputes by dismissal, demotion, non-admission to a profession or other similarly unfavourable measures. These aspects include (i) the applicant's "inner circle", (ii) the applicant's opportunity to establish and develop relationships with others, and (iii) the applicant's social and professional reputation. There are two ways in which a private-life issue would usually arise in such a dispute: either because of the underlying reasons for the impugned measures (in that event the Court employs the reason-based approach) or – in certain cases – because of the consequences for private life (*see ECtHR cases, *Xhoxhaj v. Albania*, cited above, paragraph 359 and *Denisov v. Ukraine*, no. 76639/11, Judgment of 25 September 2018, paragraph 115).

421. The Court reiterates that, in addition to the constitutional guarantees, applicable laws in terms of the protection of personal data and private life, in implementation of this proposed constitutional amendment, a special law will be issued by the Assembly, which must meet the constitutional and the ECHR criteria.

422. Furthermore, the Court emphasizes that the expression, "*prescribed by law*" according to paragraph 2 of article 8 of the ECHR generally requires that, first, the measure taken must be based on domestic law; and it also refers to the quality of the law in question that it must be consistent with the rule of law and accessible to the person to whom it applies, who must, moreover, be able to foresee the consequences for him, in accordance with the rule of law (see ECtHR case *Kruslin v. France*, application no. 11801/85, Judgment of 24 April 1990, para. 27, and *Dragojević v. Croatia*, cited above, para. 81).

423. On the basis of the general principles elaborated above, the Court will further assess: (i) whether the data determined by article 161E of the constitutional amendment proposal no. 29 constitute "*interference*" with the right to private life guaranteed by article 36 of the Constitution and article 8 of the ECHR. If the answer to this question is positive, the Court, based on the case law of the ECtHR, will assess: (ii) whether such an interference is

"*prescribed by law*"; (iii) if the interference has a "*legitimate aim*" and is (iv) "*necessary in a democratic society".*

(i) if the data and the consequences of not submitting the declaration defined by article 161E of amendment no. 29 of the Constitution constitutes interference with the right to private life guaranteed by article 36 of the Constitution, and article 8 of the ECHR

424. In this respect, the Court emphasizes that article 161E provides for the declaration of data that enables the integrity control of the control subject. The control of the property and the past turns out to be two aspects in which the control subjects are obliged to cooperate.

425. In this regard, the Court emphasizes that data related to the person's wealth as well as data of the past constitute personal data for the purpose of the right to private life, established in article 36 of the Constitution and article 8 of the ECHR. Having said this, the Court notes that the determination to submit the formal declaration for the data that enables the control of the integrity of the subject, constitutes "*interference*" with the private right of the control subject. In addition, the ECtHR has already found that article 8 of the ECHR is applicable in cases of termination of employment, which include some aspects of private life and, among other things, the issues of the internal family circle, the possibility of the Applicant to create and develop relationships with others, the social and professional reputation of individuals.

426. Therefore, since the issue of data but also the issue of the dismissal of the control subjects fall in the sphere of the right to private and family life, the Court will further deal with the issue of whether the limitation of the private right (i) is defined by law; (ii) pursues the legitimate aim; and (iii) the issue of proportionality or the necessity of such interference in a democratic society.

(ii) if "*interference*" is "*prescribed by law*"

427. The Court reiterates that article 161E foresees that the control subject submits a formal declaration defined by law, at the beginning of the integrity control to the Authority, stating the data that enables the control of the subject's integrity. Consequently, if the latter refuses to do so, the Panel proposes his or her dismissal.

428. In this regard, the Court once again refers to its case law and that of the ECtHR, according to which the term "*law*" implies that the limitation must be based on domestic law. In this respect, in the present case, the limitation is defined by a constitutional amendment proposal and it is foreseen that it will be further defined by law.

429. In this respect, the Court will assess the decision to submit the formal declaration regarding the data enabling the integrity control, but the latter cannot assess (i) the determination by law of the specific data, nor their legitimate purpose since the latter must be defined by a law approved in the Assembly, and which without prejudice, may be subject to the review of the assessment of its constitutionality, by the authorized parties established in article 113 of the Constitution. Similarly, also in relation to the possible consequences of the possible dismissal of the control subject.

430. Having said this, the Court assesses that the obligation to present a formal declaration regarding the data that enables the control of the subject's integrity is "*prescribed by law*", namely by article 161E of the proposed amendment no. 29.

(iii) if the interference/restriction in right to privacy has followed a "*legitimate aim*"

431. In this regard, the list of purposes for which "*interference/restriction*" with individual rights would fall within the scope of the concept of public interest, according to the case law of the ECtHR, is broad and may include various purposes that are subject to public policy considerations in different factual contexts. The Court notes that paragraph 2 of article 8 of the ECHR stipulates that restrictions may be made for the purpose of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

432. In this respect, the Court has already emphasized that the purpose of the assessment is to ensure that the entire target group which has been assessed as having to be subject to Vetting must submit the data in the fields that are required. It is the Authority's responsibility to verify these data and at the same time to act in accordance with the right to private and family life and the protection of personal data. The formal statement to declare the data that enables the control of the integrity of the subject, serves this control.

433. Therefore, the Court will below assess whether this proposal is "*necessary in a democratic society*", in the sense of article 36 of the Constitution, in conjunction with article 8 of the ECHR.

(iv) if the measure is "*necessary in a democratic society*"

434. In this regard, the ECtHR emphasized that if a measure is "*necessary in a democratic society*", the term "*necessary*" in this context does not have the flexible meaning of "*usable*", "*reasonable*", "*desirable*", but implies the existence of a "*pressing social need*" in relation to the interference with fundamental rights and freedoms. In this regard, the ECtHR emphasized that: (i) in principle, it is up to the local authorities to make the initial assessment regarding the "*pressing social need*" in each case; (ii) the margin of appreciation is left to the local authorities; and (iii) however, their decision is subject to assessment by the ECtHR. In this respect, the limitation of the rights established in the ECHR cannot be considered as "*necessary in a democratic society*" - two distinctive signs of which are tolerance and broad-mindedness - as long as, among other things, it is proportional to achieve the aim sought to be achieved (see ECtHR case, *Dudgeon v. United Kingdom*, no. 7525/76, Judgment of 22 October 1981, paras. 51-53).

435. The Venice Commission in its *Amicus* brief to the question of the Constitutional Court of Albania on the Law on the transitional re-evaluation of judges and prosecutors whether the background check constituted interference with the rights guaranteed by article 8 of the ECHR of the Constitutional Court of Albania emphasized that:

> "*57. Moreover, Article 14 of the Vetting Law specifies that the rapporteur in each case is to undertake all procedures for ensuring the evidence which is deemed necessary for the decision-making process of the panel. In addition, Article 23 seems to envisage that the legal advisers may be assigned a role in the activity of the working group through delegation. It is essential that the rapporteur should have access to all the*

documents and material in the possession or control of the working group and that s/he or his/her representative should be able to observe meetings of the group. It may be that the use of these provisions could secure effective control over the activities of the working group by the Independent Commission.
58. In conclusion, whether or not the re-evaluation institutions have the power to maintain full control over the background assessments and to obtain access to all relevant material is an important element to be taken into account by the Constitutional Court in its examination of the Vetting Law. If the Court considers that the re-evaluation bodies have the power to maintain full control over the background assessment process, then the legal provisions concerning the background assessment of the persons subject to the re-evaluation process, while they are undoubtedly obtrusive, could be considered as not representing an unjustifiable interference with the private or family life of judges and prosecutors contrary to Article 8 ECHR."

436. In this regard, the Court assessed above that only leading positions in the justice system and candidates for those positions are subject to the integrity control process, namely those positions that will be filled within a certain time limit of two (2) years after the entry into force of the constitutional amendments, with the possibility of extension for one (1) additional year with the voting of two-thirds (2/3) of the votes of all deputies, which includes only positions that have a role in controlling judges and prosecutors according to the regular control system (appeal procedures against the integrity control are not counted in the above-mentioned deadlines); (ii) the latter is done first for the control subject.

437. In this respect, the Court also notes that the formal declaration is not mandatory but is made only in case the control subject wants to become subject of the integrity control. In this respect, although in case of refusal to submit the statement, the panel proposes the dismissal of the control subject, the latter enjoys the right to decide whether he wants to sign such a statement or not. Following this determination, the Court notes that the proposed constitutional amendments are silent regarding the subjects of integrity control, namely the members of the KJC and the KPC who are not judges or prosecutors.

438. In this sense, the Court assesses that these provisions, as far as they determine the obligation to submit a formal declaration with the data that enable the control of the subject's integrity, are proportional and as such also necessary in a democratic society.

439. Therefore, based on the above, the Court assesses that article 161E and paragraph 2 of article 161D of the proposed constitutional amendment no. 29, do not diminish the fundamental rights and freedoms, defined in Chapter II of the Constitution, namely do not diminish the right guaranteed by article 36 [Right to Privacy] of the Constitution and article 8 (Right to respect for private and family life) of the ECHR.

440. However, the Court assessed only the proposed constitutional amendments related to the declaration on the data of the control subject, without prejudice as to how the manner of declaration and the relevant procedure will be further specified by law. Having said that, a further determination or specification by the legislator may be subject to constitutional review with the referral by the authorized parties, as established in article 113 of the Constitution.

Conclusion regarding the proposed constitutional amendment no. 29

441. In light of the above-mentioned elaboration, the Court applying the constitutional principles, those of the international instruments - directly applicable in the legal order of the Republic of Kosovo, the case law of the Court and the ECtHR concludes that the establishment of the Integrity Control Authority, which is vested with the power of integrity control "*of the members of the KJC, the members of the KPC, the presidents of all courts and all chief prosecutors, as well as the candidates for these positions, excluding the President of the Constitutional Court*", can only be determined through constitutional amendments. Moreover, and following the assessment of the proposed constitutional amendment, namely if it diminishes the fundamental rights and freedoms guaranteed in Chapter II, the Court concludes that:

1) article 161A of the proposed constitutional amendment no. 29, does not diminish the fundamental rights and freedoms, guaranteed in Chapter II of the Constitution, and the values defined by its article 7;
2) articles 161B; 161C; 161D (paragraphs 1, 3 and 4) and article 161F of the proposed constitutional amendment no. 29, do not diminish the fundamental rights and freedoms guaranteed in Chapter II of the Constitution, respectively they do not diminish the rights guaranteed by article 31 of the Constitution, in conjunction with article 6 of the ECHR, and articles 32 and 54 of the Constitution, in conjunction with article 13 of the ECHR; and
3) article 161E and paragraph 2 of article 161D of the proposed constitutional amendment no. 29, do not diminish the rights guaranteed in Chapter II of the Constitution, respectively do not diminish the rights guaranteed by article 36 of the Constitution, in conjunction with article 8 of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with article 113.9 and article 144.3 of the Constitution, pursuant to article 20 of the Law and based on Rule 48 (1) (a) of the Rules of Procedure, in the session held on 22 December 2023,

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, by six (6) votes for and two (2) votes against, that the proposed constitutional amendment no.29, proposing the transitory control of the integrity of *"[...] the members of the Kosovo Judicial Council, the members of the Kosovo Prosecutorial Council, the presidents of all courts and all chief prosecutors, as well as the candidates for these positions [...]*", by the Integrity Control Authority, does not diminish the fundamental rights and freedoms guaranteed by Chapter II [Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo;

III. TO HOLD, unanimously, that the proposed constitutional amendments no.27 and no.28, proposing the supplementation of the constitutional criterion for the dismissal of judges and prosecutors due to "*serious neglect of duties*", as stipulated by paragraph 4 of article 104 [Appointment and Removal of Judges] and paragraph 6 of article 109 [State Prosecutor] of the Constitution, with the wording "*has been continuously evaluated with insufficient performance*" or "*has committed serious disciplinary violations*", as permanent grounds for the dismissal of judges and prosecutors, do not diminish the fundamental rights and freedoms guaranteed by Chapter II [Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo;

IV. TO HOLD, unanimously, that the proposed constitutional amendments no.27 and no.28, proposing the supplementation of the constitutional criterion for the dismissal of judges and prosecutors due to "*serious neglect of duties"*, as stipulated by paragraph 4 of article 104 [Appointment and Removal of Judges] and paragraph 6 of article 109 [State Prosecutor] of the Constitution, with the wording *"has been proven to have unjustifiable assets*", by a final judicial decision, do not diminish the fundamental rights and freedoms guaranteed by Chapter II [Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo;

V. TO HOLD, unanimously, that the proposed constitutional amendments no.27 and no.28, proposing the supplementation of the constitutional criterion for the dismissal of judges and prosecutors due to "*serious neglect of duties"*, as stipulated by paragraph 4 of article 104 [Appointment and Removal of Judges] and paragraph 6 of article 109 [State Prosecutor] of the Constitution, with the wording "*has vulnerable integrity*", diminish the fundamental rights and freedoms guaranteed by Chapter II [Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo;

VI. TO NOTIFY, this Judgment to the Parties and in accordance with paragraph 4 of article 20 (Decisions) of the Law, to publish it in the Official Gazette of the Republic of Kosovo; and

VII. TO HOLD that this Judgment enters into force on the day of its publication in the Official Gazette of the Republic of Kosovo, in accordance with paragraph 5 of article 20 (Decision) of the Law.

Judge Rapporteur **President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.