



Kosovo Law Institute

Accountability of the Justice System :

**A report on the regulation of accountability of
Judicial and prosecutorial system in Kosovo**

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About KLI

KLI, Kosovo Law Institute, is a non-governmental and not for profit public policy organization, a think tank specialized in justice sector.

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I. INTRODUCTION

The level of confidence of citizens on justice institutions is a very important element for the justice system.¹ In order to build confidence, these institutions should ensure transparency and accountability of justice system. In this manner, independence and impartiality of judges and prosecutors granted in the Constitution will be reflected also in their daily work by ensuring fundamental human rights and liberties. Such a standard is achieved only through professionalism and integrity of judges in issuing just decisions and prosecutors in conducting and prosecuting crimes.

The level of confidence of citizens in the judiciary is a valuable indicator to assess how functional is rule of law in a country.² The same applies for the prosecutorial system.

Article 10 of the Universal Declaration of Human Rights:

*“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.”*³

Whereas, the International Covenant on Civil and Political Rights of the UN General Assembly states:

*“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”*⁴

Basic Principles on the Independence of the Judiciary state clearly that the independence of judiciary should be granted by Constitution and laws of the countries, judiciary should be impartial in deciding on cases by avoiding inadequate influence, pressures and other interferences, that the judiciary should have jurisdiction on all cases which are of judicial nature and should have exclusive authority to decide if cases are within their competencies, and there should be no inadequate or unjustifiable interferences in judicial processes or to review judicial

¹ Opinion no. 3 of the Consultative Council of European Judges (CCEJ) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behavior and impartiality

² *Judicial ethic: Developments, challenges and solutions. The experience of Moldavia in strengthening Standards of Ethics for Judges* (Council of Europe: Lisbon Network).

³ *Universal Declaration on Human Rights, Article 10, UN General Assembly*, December 10, 1948.

⁴ *International Covenant on Civil and Political Rights, article 14, UN General Assembly*, adopted on December 16, 1955 and entered into force on March 23, 1976.

decisions judicial reviews or pardons/conditional release/amnesties which are conducted according to the law.⁵

Bangalore Principles of Judicial Conduct is another important document which guides judges on their conduct.⁶ It is very important to state that Bangalore Principles consist of six values: independence, impartiality, integrity, just, competence and dignity. Consequently, only an independent and impartial judiciary will be a pillar to build legitimacy on democracy of the country.⁷

All these values and principles apply also to prosecutors, who should be guided through professional work and integrity. In order to ensure such a justice system, it is very important to ensure independence of judicial and prosecutorial system and in meantime to install efficient accountability mechanisms, in order to judges and prosecutors to practice the highest principles on interpretation of the law.

a. Confidence level of citizens on justice system

Ethics and conduct of judges and prosecutors are very important in order to ensure confidence of citizens in the justice system. In Kosovo, the level of citizens' confidence on justice system in Kosovo is very low. This important indicator has not been considered a tool for accountability by the justice institutions. Based on different research activities conducted on this field, mainly conducted by international organizations, among other issues, here are the findings related to the justice system:

- *UNDP's Public Pulse* published on August 2013, shows that only 16.7%-17.7% of the respondents are satisfied with the work of courts and prosecution offices⁸
- *World Bank's "Doing Business 2014"* ranks Kosovo on 138th position with regard on enforcing contracts⁹
- According to *Transparency International*, public opinion poll has shown that shown that judiciary is considered to be quite affected by corruption, and it has a score of 4.1 (a score of 5 is considered to be the perception for extreme corruption)¹⁰

Low level of transparency and accountability in judiciary has resulted in low confidence of the parties on courts. The level of confidence on prosecutors is of the same level. This is a

⁵ *Basic principles on independence of judiciary, Judicial Independence Chapter, articles 1-4*, UN General Assembly, adopted on November 29, 1985 and December 13, 1985.

⁶ Bangalore Principles, 2006.

⁷ An opinion of CCJE states that Eastern European countries which have gone through transition from authoritarian regimes have witnessed that law and justice are key to produce legitimacy in building democracy. Ibid: 1.

⁸ *Public Pulse 6* (Prishtina: UNDP Kosovo, August 2013), p. 10.

⁹ *Doing Business, The World Bank*, see <http://www.doingbusiness.org/data/exploreconomies/kosovo/>.

¹⁰ *Transparency International*, see http://www.transparency.org/country#KOS_PublicOpinion.

consequence due to the response of prosecutors on certain cases, which indicates that no rules or laws apply in these cases, especially when they involve people who have high influence.

BIRN in its 2012 annual report on monitoring courts, among others states that there is lack of coordination in setting judicial sessions, inadequate representation of the state interest by prosecutors, procedural breaches during the judicial proceedings, lack of translation in judicial sessions, inaccurate transcripts, inadequate environment to hold judicial sessions, lack of respect of the judicial session schedule, lack of usage of electronic devices, and usage of mobile phones during judicial sessions, as well as lack of uniforms.¹¹ These deficiencies of judicial processes affect negatively perception of citizens, citizens' confidence, and lack of respect for justice institutions.

Judicial and prosecutorial system does not conduct research on public perception regarding the confidence level of citizens on justice institutions. On the other hand, justice institutions, same as the governmental institutions, continuously question the accuracy of research conducted by others. It is of great importance and it is an urgency to conduct professional and detailed public opinion on performance of justice system.

¹¹ This report has been based on 1,441 questionnaires which have been completed during 2012, where 1,040 court sessions have been monitored while 401 sessions have failed. Nimoni G., *Annual Court Monitoring Report 2012* (Prishtina: BIRN Kosova, January 2013).

II. INSTITUTIONAL ACCOUNTABILITY TOWARDS OTHER POWERS

The Constitution of the Republic of Kosovo has been a huge progress with regard to independence of judicial and prosecutorial system in Kosovo. The separation of powers principle and control and balance in the Republic of Kosovo is granted by the Constitution.¹² Along with independence, each power should be suited with accountability. Kosovo Judicial Council and Kosovo Prosecutorial Council enjoy great independence from other powers. Along with independence of these two Councils, policymakers and experts have shaped a system where accountability of the judicial and prosecutorial system to be ensured exclusively by internal mechanisms.

Accountability of the judicial and prosecutorial system towards other powers will be only symbolic and at minimal level. In this aspect, other powers hold judicial and prosecutorial system accountable through appointment process by the President of the Republic of Kosovo¹³ as well as annual report to the Assembly.¹⁴ Republic of Kosovo has a short history of building justice institutions through legal acts which aim to fulfill European Union criteria. While in Kosovo there is lack of accountability overall, it is a great need to set legal norms which ensure accountability, and through time to aim to build a culture of accountability.

a. President vs. Judiciary and Prosecution

Accountability of judicial and prosecutorial system through appointment and dismissal of judges and prosecutors by the President of the Republic of Kosovo is very limited, especially after the decision of Constitutional Court¹⁵ regarding the amendments suggested for the process of changing the Constitution.

The President of the Republic of Kosovo currently appoints and dismisses judges and prosecutors in accordance with the proposals of KJC and KPC. In case a President refuses to appoint or re-appoint any candidate for judge or prosecutor, the President should justify its action and present it to KJC and KPC within sixty days. Both Councils can propose the same candidate to the President or could propose another candidate.

President's decision not to appoint a judge or prosecutor should be backed up with very important justification, which shall be submitted to KJC and KPC, which in return based on that

¹² Article 4, Constitution of the Republic of Kosovo. June 15, 2008.

¹³ Article 84, Constitution of the Republic of Kosovo. June 15, 2008.

¹⁴ Article 108 Constitution of the Republic of Kosovo, June 15, 2008. Also see Article 4, Law on KPC. October 28, 2010.

¹⁵ Decision on cases K.O.29/12 dhe K.O.48/12. Proposed Constitutional Amendments delivered by Assembly Chairperson 137 Republic of Kosovo on March 23, 2012 and May 4, 2012. Nr. Ref. AGJ 284/12. Constitutional Court July 20, 2012.

would be able to judge their decision. In case a President does present sufficient evidence or reasonable justification regarding the refusal to appoint a proposed candidate, the Councils have the possibility to propose the same candidate again, who should be appointed immediately by the President without the possibility to refuse again. This situation has been clarified by the Constitutional Court, which has issued a decision on proposed amendments of the Constitution that are related to the mandate of the President.

Legal commentary¹⁶ of the Constitution of the Republic of Kosovo, in the section related to competences of the President, states that the concept of “appointment” and “dismissal” should not be interpreted as independent competencies of the President, but “logical commentary of these two constitutional concepts should be interpreted simply on ceremonial aspect. According to this commentary, it results that the President cannot control the merit of the propositions that come from Judicial Council and consequently cannot have substantial control over these propositions. Further, the commentary states that “the President is simply obliged to confirm such propositions”. The only possibility that the President can have a say in the appointment and dismissal process is related to the procedural aspect, but not in the substantial aspect.

In this report, we should also illustrate how were the appointments and dismissals handled in the past, which has shown political interference in the appointment process.¹⁷ During the most important process of the reform of justice system in Kosovo, more precisely the re-appointment and appointment process of judges and prosecutors, former Acting President, has taken off the list three candidates who were proposed to be judges and prosecutors. In one case, Acting President did not provide any explanation to KJC nor the public about his decision to refuse the appointment.¹⁸ Refusal to appoint and lack of any justification towards KJC was interpreted as pure political interference which was also stated in the European Commission Progress Report for Kosovo.

Current Legal Advisor to the President of the Republic of Kosovo states that regardless of the decision of the Constitutional Court, which has stated that the appointment competences of the President are limited, after the KJC and KPC propositions, the President has the final say on appointment or dismissal.¹⁹

Regardless of the interpretation made by independent experts, KLI supports the interpretation that Constitutional Court has provided in its decision which is also present in the legal commentary of the Constitution, which limits the President’s power in appointment and dismissal process, by stating that the President has powers only if procedural breaches are

¹⁶ Hasani E. and Çukalović I., *Legal Commentary: Constitution of the Republic of Kosovo* (Prishtina: GIZ, December 2013), p. 406.

¹⁷ EC Progress Report 2010 for Kosovo.

(see http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/ks_rapport_2010_en.pdf)

¹⁸ “Re-appointment and appointment process, independence and interference”. Musliu B. August 2011.

¹⁹ Interview with Mr. Selim Selimi, Advisor to the President Ms. Atifete Jahjaga.

present. KJC and KPC based on the Law on Kosovo Judicial Council and Law on Kosovo Prosecutorial Council, report to the President on the work of these Councils, Judiciary and Prosecutorial System overall, and this reporting mechanism does not relate to the accountability aspect, but has only informative character.²⁰

National Council against Corruption is another aspect related to the accountability of KJC and KPC in relation to the President. This Council is a mechanism which helps institutions to coordinate and cooperate in prosecuting corruption in Kosovo. The way the institutions report in this Council represents an accountability mechanism in the field of performance and progress in their fields. Through this way of reporting institutions identify the key knots of cooperation which are addressed through inputs made by institutions.²¹ EC Progress Report on Kosovo defines differently this mechanism by stating “The National Anti-Corruption Council was set up with the aim to ensure responsibility and accountability of involved institutions in the fight against corruption.”²² Regardless of the different interpretations on the mandate of this Council, this mechanism in practice is assessed as an awareness raising mechanism and has psychological effect on the heads of KJC and KPC, but in no way represents an accountability mechanism towards President and Council.²³

b. Assembly vs. Judiciary and Prosecution system

The Assembly of the Republic of Kosovo does not have mandate to hold accountable the judicial and prosecutorial system. The Assembly “monitors the work of Government and other public institutions, which based on Constitution and laws report to the Assembly”.²⁴ However, KJC and KPC report to the Assembly, but this reporting mechanism does not relate to a substantial aspect of accountability, but has only informative character.²⁵ Legal obligation has to do only with informing the Assembly, but in no way KJC²⁶ nor KPC are obliged to report or to be held accountable by the Assembly on the situation in judicial or prosecutorial system.

Some of the members of Parliamentary Committee on Legislation say that KJC’s and KPC’s reporting to the Assembly could have effects, but since the Assembly does not have power to ask for sanctions on performance of judges and prosecutors, either through a decision or resolution, but only through oral statements and this proves not to be helpful.²⁷ The Assembly has failed to

²⁰ Interview with Mr. Enver Peci, KJC Chairperson and Mr. Ismet Kabashi, Chief State Prosecutor and KPC Chairperson. November 2013.

²¹ Ibid 19.

²² EC Progress Report on Kosovo 2013, October 2013.

²³ Ibid 20.

²⁴ Article 65, Constitution of the Republic of Kosovo. June 15, 2008.

²⁵ Ibid 20.

²⁶ Ibid 16, p 518.

²⁷ Interview with Mr. Behar Selimi, Member of the Parliamentary Committee on Legislation.

establish mechanisms on strengthening the reporting mechanisms to the Assembly. For instance when the institutions report to the Assembly and if the MPs do not approve the report, there is no legal norm that specifies what follows up on such cases. Of course countries which have more experience on accountability mechanisms, the reporting to the Assembly would mean a great deal because it would raise concerns which would be addressed by adequate institutions, as it is the case with Kosovo, KJC and KPC.²⁸

The appointment of most of the KJC members by the Assembly²⁹ does not represent a form of holding accountable KJC by the Assembly, because these members are held accountable only by the Council and not the Assembly. Further, there is no regulation or procedural norm on appointment of KJC members by the Assembly. Lack of a regulation has resulted in problems during the appointment process because the selection is made without criteria and by letting the political parties and other actors to push for candidates that they are more related to.³⁰ Lack of a regulation also makes it more difficult to hold accountable the members that are appointed by the Assembly as the same will represent only those who secure votes for them and will not represent the interest of citizens.³¹ KJC members appointed by the Assembly could report to the Parliamentary Commission but in the end this would not be related to accountability.³² Hence, until the end of their mandate, no one can hold in any way accountable the KJC members appointed by the Assembly. No one abolishes the attempt to dismiss these members, but we have not witnessed such engagement in practice and it is not regulated through legal norms hence any tendency in this direction would be seen as political influence.³³

Chairman of the KJC during 2013 has reported to the Parliamentary Committee on Legislation, after this Committee sent an invitation.³⁴ There is no legal basis that would oblige Chairman of KJC to report to this Parliamentary Committee. None of the members of the Parliamentary Committee on Legislation, including the Chairperson, were able to explain if KJC should report only to the Assembly of Kosovo or reporting to the Parliamentary Committee is a constitutional right.³⁵

In certain cases, MPs have raised issues and sought to hold accountable the justice institutions. On November 2013, Parliamentary Committee on Foreign Affairs has raised the issue of lack of accountability by EULEX by suggesting that this mission has failed to ensure justice is delivered on time, taking into consideration that people have been held in custody for a long period of

²⁸ Ibid.

²⁹ Note: KJC consists of 13 members.

³⁰ Interview with Ms. Albulena Haxhiu, Member of the Parliamentary Committee on Legislation.

³¹ Ibid.

³² Ibid: 27.

³³ Ibid: 27.

³⁴ "Review of the 2012 KJC annual report". Transcript of a Prliamentary Committee on Legislation meeting. September 16, 2013.

³⁵ Ibid.

time.³⁶ In 2013, in the Assembly of Kosovo there was a debate on a judicial case for which case the courts have issued final decision. This has been a tendency of the Assembly to hold accountable the judiciary on decisions that it has issued and meantime to review these decisions. EC Progress Report on Kosovo has stated that “The decision of the Assembly to debate the so-called Kiqina case (in which former members of the Kosovo Liberation Army were found guilty of murder) and an attempt to adopt a decision interfering with the judicial process was a setback for Kosovo’s efforts to build strong and independent institutions of democratic governance. This is an issue of serious concern.”³⁷

Interferences on judicial system in name of the different levels have been noticed also in other cases, as the Progress Report states “As regards in dependence and impartiality, cases of political interference in the judiciary were reported. This includes points made by the government and the Assembly on rulings regarding war crimes (Kleçka and Drenica group). This was also noted by the Supreme and Constitutional Courts. There was also an attempt by the Assembly to investigate a case that had been through all the steps of the judicial procedure (Kiqina case). In reviewing a criminal case (involving a municipal president) in January, the Constitutional Court, by taking up the case and referring it back to the Supreme Court for review, wrongfully suggested that it could take upon itself to act as an (additional) court of last instance.”³⁸

With regard to KPC, the Constitution contains some conflicting norms that regulated the appointment of KPC members. On the section where the mandate of the Assembly is specified, the Constitution states that the Assembly “appoints members of the Kosovo Judicial Council and Kosovo Prosecutorial Council, in accordance with the Constitution”, whereas on another section it states that “the composition of Kosovo Prosecutorial Council, as well as the norms on appointment, dismissal, mandate, and organizational structure and rules and procedures, are regulated by law”.³⁹ Currently the Assembly does not appoint any KPC member. The Minister of Justice, ex-officio is a KPC member.

c. Judiciary vs. Government

Accountability of judicial and prosecutorial system towards the executive is more related to the budgetary aspect. KJC does not have any member from the government. Whereas, Minister of Justice is KPC member (ex-officio).

Regardless of interpretations, should be seen as a tool to ensure greater independence for judiciary and prosecutorial system rather as an accountability tool. No one can pretend on logical

³⁶ “Lack of EULEX accountability results in bad image for Kosovo”, *Kosova Live 360*, see <http://www.kosovalive360.com/mungesa-e-llogaridhenies-se-eulex-it-krijon-imazh-te-keq-per-kosoven.html#sthash.9d6bjcAJ.rO1cgScV.dpbs>.

³⁷ *Ibid*: 22, f. 7.

³⁸ *Ibid*, f. 11.

³⁹ Article 110 Constitution of the Republic of Kosovo. June 15, 2008.

institutional interdependence basis, in case that the budget is categorized as a mechanism to condition the accountability, it is above all that the budgetary independence of judicial and prosecutorial system is seen as a mechanism to condition independence rather than ensure accountability towards other powers, and this is observed if we take into account the interrelation of the budget with the government as the holder of the executive power.⁴⁰ The budget could be a form of accountability, but it is not enough, as other powers cannot risk to have control only through budget, because by reducing the budget one increases the chances for corruption of other levels, beyond doubts, perceptions or what is discussed unofficially.⁴¹ Hence, budgetary limits would interfere with independence of judicial and prosecutorial system rather than contribute to the accountability aspect⁴² Further, in order not to have problems with the budget from one year to another, we have provided a security measure where the budget cannot be less than the previous year, and this is granted through Constitution.⁴³

⁴⁰ Interview with Mr. Florent Muqaj, Executive Director of the Institute for Constitutional and Parliamentary Studies.

⁴¹ Ibid: 27.

⁴² Interview with Mr. Ismet Kabashi, Chief State Prosecutor and KPC Chairperson.

⁴³ Interview with Mr. Hajredin Kuçi, Minister of Justice and KPC member.

III. ACCOUNTABILITY WITHIN JUDICIARY

The Constitution and the laws have aimed to make accountability of judicial and prosecutorial system an internal matter of the system. KJC and KPC have their own internal mechanisms through which they seek to ensure accountability of the system. Initially they seek to ensure this through performance assessment, through quantitative and qualitative assessments. And the other method is through disciplinary measures by investigating inappropriate behavior of judges and prosecutors, which is a mandate of the Office of the Disciplinary Counsel.

There is a thin line between accountability and interference in the work of judges and prosecutors. Taking into account independence of judges in decision making, accountability is a very sensitive aspect. In meantime, accountability reinforces independence and impartiality of judges and prosecutors. Hence, independence of judges and prosecutors should not be interpreted as an absolute right, but should go along with accountability. If the latter is missing, unlimited independence would equip people holding the position of judge with absolute power which in return would increase the probability for abuse of power.

There are two aspects of accountability, ethical aspect or disciplinary and the performance aspect. One is mainly an assessment about an act whereas the other has to do with evaluation based on the work of judges throughout a period of time.

a. Appeals in judiciary

Current initiatives for justice system reform have involved also the structural reform of the judiciary. Before the current system, the judiciary consisted of Municipal Courts, District Courts and Supreme Court, which had very complex competences. This structure was more related to the state system during the communism era, which did not allow for specialization of judges and would represent a problem due to very complex competences and mandate of each court.

Current justice system in Kosovo consists of three levels of regular courts including Basic Courts, Appeals Court and Supreme Court. As a result, parties have the chance to appeal decisions of lower instances to a higher instance. The appeals could be made regarding the decision or the procedure. In special cases, the parties could address their concerns also to Constitutional Court, which has a mandate on constitutional control.⁴⁴ Such multilevel system ensures greater legal security, functionality of justice, by making correction on the possible errors made by lower instances and to avoid making decisions in an arbitrary manner.

⁴⁴ Ibid: 16, f. 568.

b. Codes of Ethics and Behavior

There are a number of codes of ethics and behavior for members of these mechanisms which manage the judicial and prosecutorial system as well as judges and prosecutors, which involve:

- Code of Ethics and Professional Behavior for Judges (April 25, 2006, last amended on September 5, 2006)
- Code of Ethics and Professional Behavior on members of the Kosovo Judicial Council (October 8, 2012)
- Code of Ethics and Professional Behavior for lay-judges (April 25, 2006, last amended on September 5, 2006)
- Code of Conduct for the judicial administration
- Code of Ethics and Professional Behavior for Prosecutors (July 31, 2012)
- Code of Ethics and Professional Behavior for Members of the Kosovo Prosecutorial Council (July 31, 2012)
- Code of Professional Ethics for supporting staff (July 31, 2012)

The issue of disciplinary measure on judges has been regulated according to *Code of Ethics and Professional Behavior of judges*, which has been adopted on April 25, 2006. Kosovo Prosecutorial Council has issued a separate Code of Ethics and Professional Behavior for Prosecutors in 2012. EC Progress Report on Kosovo for 2013 states that both Councils need to regulate better the disciplinary regulations in order that “disciplinary procedures and policies on the fight against corruption in the judiciary lead to concrete results.”⁴⁵ Codes of Conduct do not specify all the actions in details, however, they provide a good basis to interpret what consists inadequate behavior or breach of code of conduct.

Judicial and Prosecutorial Councils lack a mechanism which would issue opinions or would interpret different issues of the Code. In absence of such mechanisms, the importance of the Codes has not been raised to the appropriate level. Further, judges and prosecutors have interpreted in different ways different issues. Judges and Prosecutors do not have the opportunity to address to an independent advisory mechanism separate from the Disciplinary Committee in order to learn if certain out of court activities result in breaching code of conduct.

c. Extrajudicial activities of judges and prosecutors

Judges and prosecutors’ primary job and focus is their working position in judicial and prosecutorial system. All extrajudicial activities of judges and prosecutors represent a way for them to keep in touch with society and reality by not becoming isolated.⁴⁶ Any extrajudicial activity of judges and prosecutors should be scrutinized and make an assessment how such

⁴⁵ *Ibid.*: 22, f. 11.

⁴⁶ *Ibid.*: 1.

activity is perceived by the public, with focus on those people who are more informed about the system.⁴⁷

In Kosovo, governmental and other state institution officials, mainly because they hold public positions which have huge influence on society, have used the prestige of their offices to advance their private interests. Judges and prosecutors have also used the prestige of their offices for such advancements. Judges and prosecutors are among the few of the most privileged civil servants of public institutions, taking into account the independence that they are granted, their security of tenure, and their salary which is sufficient to live with dignity. However, they seem not to be satisfied with such a status and have shown to be greedy and engage in extrajudicial activities which take up considerable time and attention, for which they receive financial benefits. All these activities are within legal norms but there is also space to interpret these as breach of Code of Ethics or Conduct. Among these prosecutors and judges, one can find people who engage on up to nine different activities, where besides their work as judge they engage also on analytical work, lecturing, as well as other engagements, where all of these activities are paid.

Based on different commentaries of Code of Ethics for Judges, judges should not give the impression that they are using their office to advance their personal interest. “Judges also should not spend considerable time away from his/her duties as a judge in order to lecture or engage on other paid activities. Further, the source of the income should not be one that raises questions on inadequate interference or relates to the ability of judge to make impartial decision on a future case that could be in the court.”⁴⁸ This happens all the time in Kosovo, especially when we have in mind cases such as the one mentioned above, where judges engage on activities which require a lot of attention as the one who engages on up to nine activities.

Law on Courts has already set clear norms, where each judge should be careful in engaging in any activity, which would be perceived as interference in their independence and impartiality. Norm on judges’ conduct states that “Judges shall not perform any duty or service that may or may be perceived to interfere with their independence and impartiality or may otherwise be incompatible with the performance of the duties of a judge or the provisions of the Code of Conduct for Judges.”⁴⁹ In Kosovo’s context, the first part of this article provides a basis to say that judges have risked their independence and impartiality due to advancement of their personal interest to gain financial benefits.⁵⁰

According to commentaries of Codes of Ethics for Judges, there is a need for judges to restrain themselves from engaging on diverse extrajudicial activities. Due to the high importance of their position, judges should feel comfortable with such limits as their activities are under continuous public scrutiny and subject to public discussions. Further, “even if the conduct of judges is in

⁴⁷ Ibid: 1.

⁴⁸ Comment 4.2.54. Acceptance of reasonable income for extrajudicial activities.

⁴⁹ Article 35, Law on Courts.

⁵⁰ “Half of prosecutors and judges have two jobs”. Express. December 4, 2013. (<http://www.gazetaexpress.com/?cid=1,15,128183>)

accordance with the laws, which is also relevant, is not the only factor to decide about their regularity”.⁵¹ During the previous years in Kosovo a large number of private higher institutions have been established, where a number of judges and prosecutors have been engaged as lecturers in Law Faculties. Their engagement in these scientific activities and lecturing is not prohibited by law. However, this kind of engagement is perceived by public as a personal financial benefit and advancement because of their office rather than their expertise. Further, this is perceived as buying the silence of prosecutors and judges not to prosecute certain people in case of breaching the laws.⁵² Judges can be engaged on extrajudicial activities, including lecturing, “however, there should be a good equilibrium between the need to engage on extrajudicial activities and the need not to give the impression that these activities could influence their independence and impartiality. It is very important to question if in certain social context and in the eyes of a reasonable observer, judge is engaged on activities which could compromise independence and impartiality or would give out such impression.”⁵³ Such a perception has already been established in Kosovo and there is a public debate over this matter.

Private higher education institutions have hired judges and prosecutors as lecturers of law. These education institutions are registered as businesses with aim to generate profits. KJC, KPC, judges and prosecutors consider these activities as something within legal boundaries while the agency that has the mandate to prevent conflict of interest views this as something that will damage the efficiency of the judicial branch.⁵⁴ Extrajudicial activities such as lecturing are very challenging job and require great deal of attention. Higher risk is when judges and prosecutors engage on activities in which in return they receive financial benefits and greater attention is required.⁵⁵

On the other hand, the Director of the Office for Disciplinary Counsel, which investigates inadequate conduct of judges and prosecutors on possible breach of Code of Ethics, is refrained from accepting any additional compensation besides the reasonable and required expenditures.⁵⁶ This is one of the ways to prevent possible conflict of interest.

Judges and prosecutors besides their duties to investigate, prosecute and judge different cases, they have also a duty to participate in different committees and other functions besides their primary activities. For instance, based on the law, judges and prosecutors are required to participate as members of the Conditional Release Panel,⁵⁷ in certain Committees for Performance Assessment and other committees, in the Elections Complaints and Appeals Panel,⁵⁸ in the Central Election Commission,⁵⁹ and other bodies. In all these engagements,

⁵¹ Comment: 4.2.2. Judges should accept limits on their activities

⁵² Interview with Mr. Hasan Preteni. Anti Corruption Agency Director.

⁵³ Comment: 4.2.41. Active extrajudicial activities.

⁵⁴ *Konushevcic A., “Judges’ and Prosecutors’ engagement in their work”, December 4, 2013, Radio Free Europe, see <http://www.evropaelire.org/content/article/25189866.html>.*

⁵⁵ *Ibid*: 1.

⁵⁶ Article 46, Law on KJC.

⁵⁷ Article 122, Ligji number 04/L-149 August 28, 2013.

⁵⁸ Article 115, Law no. 03/L-073.

judges and prosecutors accept additional tasks and income which require their attention which is reflected on their performance of judicial and prosecutorial functions. For some of these engagements, judges are compensated with more than 25% of their base salary as judge.⁶⁰ These positions are set in law, however, financial compensation is not in line with the Code of Ethics and Professional Conduct for Judges.

Some judges generate huge financial income by engaging on extrajudicial activities, which almost equal their base salary that they receive for their judge position. This represents a breach of Code of Ethics and Professional Conduct of Judges, as this Code does not allow for financial compensation that is more than 25% of the base salary of the judge.⁶¹ Businesses which engage judges and prosecutors as lecturers have already started to be parties in courts, and their cases are now in judicial processes.⁶² These cases will be challenging for justice system, taking into account the narrow interests of some prosecutors and judges related to these parties.

d. Declaration of wealth and income

Judges and prosecutors are obliged to declare their wealth and these forms are published also in the official website of the Anti-Corruption Agency.⁶³ Information on wealth and income are updated every year and are available for the general public at any moment. Such an opportunity contributes towards greater transparency of the system and the public easily could assess if a judge or prosecutor has certain interests or if they have made false declaration to the state institutions regarding their wealth and interests. A great part of data presented by judges and prosecutors cannot be easily compared and are not complete.⁶⁴ As the new Criminal Code has entered into force on January 1, 2013, failure to declare or false declaration of wealth, income, presents, or any other material benefit or financial obligations is a criminal activity, which before this date was considered as a misdemeanor.⁶⁵ The sentences for such criminal activities are quite serious, including the cumulative sentence with a fine combined with imprisonment, as well as confiscation of the undeclared wealth.

After the 2012 declaration of wealth, Anti-Corruption Agency has conducted a complete check of the forms of 59 officials out of 270 judicial officials who have submitted their declarations.⁶⁶

⁵⁹Article 139, Constitution of the Republic of Kosovo.

⁶⁰ For instance, judges who engage on ECAP receive 4,000-5,000 Euros annually, which is above 25% of their base salary.

⁶¹ Chapter B, Extrajudicial activities, *Code of Ethics and Professional Conduct for Judges*.

⁶² One of the private university owners is already accused for unlawful benefits. In this Private University there are judges and prosecutors who lecture on different classes. *Bajrami S.*, "Accusation against a college owner", Zeri.info, January 21, 2014, see <http://www.zeri.info/artikulli/25223/aktakuze-per-pronar-in-e-kolegjit-fama>.

⁶³ Law no. 04/L-050.

⁶⁴ Note: In some cases, judges and prosecutors have not declared their income and positions they hold from which they benefit certain income, as it is participation in different committees.

⁶⁵Article 437, Criminal Code, entered into force on January 1, 2013.

⁶⁶ Note: With regard to prosecutors it is more difficult to obtain information which of them have been controlled by the Anti Corruption Agency. *Annual Report 2012* (Prishtina: Anti-Corruption Agency, March 2013), p. 22.

13 of these officials have revised their declarations. Even after this control, declaration of wealth and income made by judges lack complete information, which have been also reflected on 2013 declarations.

e. Office of the Disciplinary Counsel

Office of the Disciplinary Counsel (ODC)⁶⁷ is an independent institution that investigates possible breaches of conduct of judges and prosecutors. ODC after collecting materials and evidence decides if a case should be presented to the KJC's or KPC's Disciplinary Committee, or it dismisses the case.

Box 1:

Disciplinary breaches which are subject to ODC investigation include:⁶⁸

- a) Committing a criminal activity or misdemeanor which is not in line with the obligations of the judge to uphold highest standards of moral and ethical integrity,
- b) Neglect judicial functions,
- c) Conduct which is not in line with the obligations of judges to be independent and impartial,
- d) Any relevant breach of the Code of Ethics and Conduct,
- e) Failing to act in line with decisions and orders issued by the Kosovo Judicial Council,
- f) Providing false, fraudulent or not complete information on any issue that is under the mandate of Kosovo Judicial Council including also information provided upon the candidacy for appointment as judge or lay judge during the period of advancement in position or in a context of disciplinary issues.

ODC lacks human and financial capacities. Chairperson of KJC declares that “I am not satisfied with the composition of this office as they lack adequate and professional capacities but also logistical capacities in order to investigate appropriately a case of breach of conduct by judges.”⁶⁹ ODC has raised this concern also because the Kosovo Judicial Institute has not invited ODC personnel in its trainings.⁷⁰ During this period, ODC consists of five investigators who cover 350 judges and 125 prosecutors. This is a small number of investigators to cover such a huge number of judges and prosecutors taking into account the delays of justice institutions to solve cases. Institutional independence of ODC is at stake. Lack of independence is reflected in three aspects: appointment of the director, management and budgeting.⁷¹ This kind of limitation of independence of ODC will certainly have consequences on the efficiency and quality of the work of this mechanism.

⁶⁷ ODC, on June 14, 2008, Judicial Inspection Unit has been transformed to ODC.

⁶⁸ Article 5.3, AI no. 2006/8 sets the disciplinary measures.

⁶⁹ KLI interview with Mr. Enver Peci, KJC Chairperson.

⁷⁰ From September 18, 2008 until June 18, 2010, ODC did not receive any invitation from KJI. ODC Report 2010 (Prishtina: ODC, February 2011), p. 47.

⁷¹ ODC Director confirms that there is a conflict between Law on KJC and Law on KPC regarding the budget. Interview with Mr. Zef Prendrecaj, ODC Director.

Decisions issued	2011	2012	2013
<i>Reports issued from ODC</i>	62	12	19
<i>Sessions held by Disciplinary Committee</i>	12	?	11
Dismiss the procedures as the person is no longer a judge	17	0	0
Dismiss the procedure due to the death of judge	2	0	0
Reprimand	17	5	7
Salary reduction 50 % for two months	1	2	2
Salary reduction 50 % for four months	0	1	0
Reprimand and Remark	1	0	0
Dismiss disciplinary charges	14	7	11
Refusal of ODC request for suspension	1	0	0
Dismiss disciplinary charges as the person is no longer part of the judiciary even though the Disciplinary Committee has made a decision that these actions are inadequate conduct of judges	4	0	0
Reprimand with instructions to undertake corrective actions	0	7	1
Temporary suspension from the position of judge	0	3	2
Disciplinary Committee recommends KJC to propose to the President to dismiss a judge from his/her position	0	2	23
Total number of issued disciplinary measures	57	27	23
<i>Appeals against the decisions of Disciplinary Committee</i>	11	8	14
<i>Approving the appeals and returning the cases to the Disciplinary Committee</i>	1	0	0

Table 1 – Disciplinary decisions of KJC

Decisions issued	2011	2012	2013
<i>Reports issued from ODC</i>	16	15	4
<i>Sessions held by Disciplinary Committee</i>	?	?	?
Dismiss	6	3	0
Reprimand	1	2	1
Salary reduction 50 % for three months	0	1	1
Salary reduction 50 % for six months	1	1	0
Correctional reprimand	0	1	0
Not sanctioned	0	0	1
Dismiss disciplinary charges as the person is no longer part of the prosecutorial system even though the Disciplinary Committee has made a decision that these actions are inadequate conduct of prosecutors	0	0	0
Dismiss the report	1	1	0
Reprimand with instructions to undertake corrective actions	0	0	1
Temporary suspension from the position of prosecutor	0	0	0

Suspension without pay	1	2	0
Disciplinary Committee recommends KPC to propose to the President to dismiss a prosecutor from his/her position	0	0	0
Total number of issued disciplinary measures	10	11	4
<i>Appeals against the decisions of Disciplinary Committee</i>	1	8	0
<i>Approving the appeals and returning the cases to the Disciplinary Committee</i>	0	2	0

Table 2 – Disciplinary decisions of KPC

i. Appointment of Director

ODC Director is appointed by 2/3 of the KJC and KPC members.⁷² This way the appointment of the Director as well as the great responsibilities of KJC and KPC to manage the PDC, create an environment for interference of the independence of judiciary. According to the Minister of Justice, there are two possibilities for establishing control and balance of the justice system, either in the appointment process or the disciplinary process of the judges and prosecutors. As any interference in the appointment process is considered serious interference in the independence of judicial and prosecutorial system, it remains that this issue to be best handled by regulating the disciplinary process.⁷³ Current appointment process of the Director does not ensure the institutional independence of ODC.

In order to ensure greater independence of this mechanism, there should be greater independence from KJC and KPC. One of the most viable options to establish the agency as an independent mechanism, is to have ceremonial responsibilities towards the Assembly of Kosovo, besides the case of appointment of ODC Director.

ii. Budgeting

One of the most profound problems of the justice institutions and those that relate to this sector is lack of financial independence. ODC lacks such independence, and this is mainly due to the conflicting norms in the Law on KJC and Law on KPC. In the Law on KJC, financial independence is secured on a high level where ODC is asked to deliver its budget proposal directly to the Assembly.⁷⁴ Whereas, on the Law on KPC, this independence has been limited where ODC is asked to deliver the budget to the Ministry of Finance.⁷⁵ Both of these laws have been approved on the same day and currently they implement Law on KPC. The ODC Director

⁷² Article 46, Law on KJC.

⁷³ Ibid: 43.

⁷⁴ Article 49, Law on KJC.

⁷⁵ Article 39, Law on KPC.

assess that such budgeting procedure interferes in the independence of institution.⁷⁶ Such independence certainly is reflected also in lack of adequate human and logistical resources to fulfill the mission of this office.

f. Disciplinary Committees

Disciplinary Committee consists of three KJC members, two of whom should be judges.⁷⁷ According to KJC report 2013, KJC Disciplinary Committee has reviewed 34 reports, by holding 13 disciplinary sessions, and issuing 27 decisions.⁷⁸ Undertaken measures are reprimand (5), reprimand with instructions to undertake correctional actions (7), salary reduction by 50% (3), dismiss charges (7), temporary suspension until completion of the disciplinary investigation (1), suspension until a decision is issued by court (2), and proposition to dismiss from the office (2).⁷⁹

The issue of discipline is regulated by the Code of Ethics and Professional Conduct of Judges, which has been adopted on April 25, 2006. EC Progress Report on Kosovo 2013, states that the Code of Ethics and Professional Conduct needs to be revised in order “disciplinary procedures and policies on the fight against corruption in the judiciary lead to concrete results.”⁸⁰

There have been numerous critiques addressed to the Disciplinary Committee and KJC regarding the decisions on disciplinary measures. 2010 ODC report has raised concerns on the decisions of both these mechanisms.⁸¹ Among main concerns for ODC it has been the conclusion issued by KJC for some cases for which it stated that have reached the period of time that cannot be investigated further.⁸² Consequently, the concerns were also related to the decisions of the Disciplinary Committee and KJC based on this conclusion.⁸³ Such a conclusion had no legal basis and has created a space for decision making that is not based on objective criteria and is an arbitrary decision. Such a conclusion and decisions undertaken as part of this conclusions have raised concerns over the legal insecurity. The same situation is also with the disciplinary activities against prosecutors, where the legal basis is similar to that of judges, where the breaches of conduct are sanctioned according to a Code of Ethics and Professional Conduct for Prosecutors. Judicial and prosecutorial system in Kosovo lack a mechanism, which would interpret if certain activities are breach of Code of Ethics and Conduct. Such interpretations would prevent possible breaches and would serve to ensure that judges and prosecutors have no

⁷⁶ Ibid: 71.

⁷⁷ Article 33, Law on KJC.

⁷⁸ Annual Report 2012 (Prishtina: KJC, August 2013), p. 13.

⁷⁹ *Ibid*, f. 13.

⁸⁰ *Ibid*: 23, f. 11.

⁸¹ *Ibid*: 70.

⁸² Conclusion issued on February 11, 2010, when KJC was composed of Lirije Osmani, Zhivojin Jokanivic, Bilgaip Maznika, Gabriella Vaqlentich and Hari Katara.

⁸³ Such decisions have been KDGJ 2010/09, KDGJ 2010/10, KGJK nr 14//2010, dhe KDGJ 2010/18.

doubts in their engagement. These interpretations would represent a precedent for the future and would aim to improve the accountability within the system. Establishment of such a mechanism is encouraged also by the international professional associations, including the Consultative Council for European Judges.

“Disciplinary sanctions were imposed in 14 cases by the Judicial Council (in 2013) and in 11 cases by the Prosecutorial Council (2012 and 2013). None of them resulted in dismissal. The code of conduct for judges needs to be strengthened. The disciplinary regulations in both Councils need to be adjusted to ensure that the disciplinary procedures and policies on the fight against corruption in the judiciary lead to concrete results.”⁸⁴

g. KJC and KPC Composition

Appointment of KJC members represents a serious problem with regard to possible interference of the legislative branch on judiciary. This is due to the fact that majority of the KJC members are appointed by the Assembly of Kosovo. EC Progress Report on Kosovo has stated that this is a problem with independence of judiciary.

KJC and KPC composition has also other deficiencies which do not ensure accountability of the system. This is mostly related to Chief Prosecutors and Presidents of Courts who are members of these Councils. As a result the Chief Prosecutors and Presidents of Courts hold themselves accountable for managing prosecution offices and courts. In order to ensure accountability, this composition should be reviewed and analyze if a different composition would allow for better accountability system to be in place.

“As regards accountability, the Judicial Council adopted implementing legislation on the organization and activities of the Council, and on the appointment and evaluation of judges. A panel for the evaluation of the performance of judges has conducted the first evaluations in view of the confirmation of judges’ initial mandates.”⁸⁵

⁸⁴ *Ibid*: 23, p. 11.

⁸⁵ *Ibid*: 23, p. 11.

IV. RECOMMENDATIONS

1. **KJC** should draft a new Code of Ethics and Professional Conduct. This Code should take into account the international standards and documents which aim to contribute towards the respect of human freedoms and rights. Also, the Code should take into account the Bangalore Principles.
2. **KPC** should amend Code of Ethics and Professional Conduct in order to avoid current deficiencies.
3. **KJC** should establish a Committee for Ethics. Among other things this committee would issue opinions regarding different issues which would prevent breach of code by judges. Also, these opinions would ensure that we have the interpretation on different issues related to the Code based on the context. The Committee would issue opinions based on requests or ex-officio.
4. **KPC** should establish a Committee for Ethics. Among other things this committee would issue opinions regarding different issues which would prevent breach of code by prosecutors. Also, these opinions would ensure that we have the interpretation on different issues related to the Code based on the context. The Committee would issue opinions based on requests or ex-officio.
5. **ODC** should be granted greater independence from KJC and KPC, by establishing an independent institution. Only in such a way there would be ensured independence and strengthen the capacities of this office which should ensure that liberties and rights of parties are respected and judges and prosecutors conduct is to the most professional level. In this spirit, greater financial independence should be granted to ODC in order not to be subject to limitations which would affect the efficiency and professionalism of this office.
6. **Performance evaluation** of judges and prosecutors should be linked to disciplinary measures. Evaluation criteria for performance should be objective and should be interpreted to judges and prosecutors in advance, in order to make for them more easier to evaluate themselves their performance.
7. **Composition of KJC and KPC** should change in order to ensure greater independence of judicial branch. KJC and KPC should not be composed of Presidents of Courts and Chief Prosecutors, in order to ensure that accountability system is improved.