



Kosovo Law Institute

**Brief analysis
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ILLEGALITY OF JUDICIAL COUNCIL AND PROSECUTORIAL COUNCIL

Pristina, November 2016

Kosovo Law Institute (KLI)

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ABOUT KLI

KLI, Kosovo Law Institute (KLI), is non-governmental organization and non-profit of public policy, and specialized ideal in the justice sector.

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TABLE OF CONTENTS:

I. EXECUTIVE SUMMARY 4

II. ILLEGAL COMPOSITION OF KOSOVO PROSECUTORIAL COUNCIL..... 5

 a. RECOMMENDATIONS..... 6

III. ILLEGAL AMENDMENT OF THE CRITERIAS FOR JUDGES BY KJC..... 7

 a. Amendment of the regulation within the short period of time after the approval 7

 b. RECOMMENDATION 9

I. EXECUTIVE SUMMARY

Kosovo Law Institute (KLI) during the monitoring process has found that Kosovo Judicial Council (KJC) and Kosovo Prosecutorial Council (KPC), nearly six years after functioning as independent institutions with competence and responsibility to administer and manage the judicial and prosecutorial system cannot find the way to conduct the activity in accordance with the law, international standards and practices applicable in Kosovo.

Law on KPC stipulates that except for ex officio members, Council members are elected or appointed for a five (5) year term and that a member may be elected to one additional non-consecutive term of five (5) years. KLI findings show that within KPC there are privileged members, which continue their mandate illegally even after they have exercised the function over five years.

KPC member, Idain Smailji with the decision of KPC, A.no. 05/11, on February 15, 2011, was elected member of the KPC. With the transition to the new organizational structure of prosecution offices, according to the Law on State Prosecutor from January 1, 2013, the new composition of the KPC should have a member from the Appellate Prosecution Office. In this regard, according to the proposal of the Appellate Prosecution Office, KPC during December 2012, had decided for Idain Smailji to continue his mandate as member of the KPC, but now by representing the Appellate Prosecution Office.

Under the law on KPC, Smailji had a mandate until February 15, 2016. Despite this, the same one continues to serve in KPC as a member, Vice-President of KPC, Chairman of the Committee on the Performance Evaluation of Prosecutors and until recently has served also as Chairman of the Disciplinary Committee of the KPC.

The legitimacy and legality of the KPC, constitutes a basic standard for a fair, impartial, independent and professional functioning of the prosecutorial system. Both were violated by allowing members of this Council to exercise powers and responsibilities in contradiction with the law, damaging and threatening so the processes through which this system has passed since February 15, 2016.

KLI, recommends to KPC to urgently treat the mandate of the prosecutor Idain Smailji, as a member of the KPC, by returning the legality and legitimacy in KPC. Also, KPC is recommended to assess the legality of all decisions and policies adopted by KPC since February 15, 2016 in cooperation with international partners.

As well as, to urgently stop the installed culture of impunity of officials within prosecutorial system which for close interests damage in particular the image of the entire prosecutorial system in Kosovo, and also the rule of law in general.

KJC during 2016, has adopted, supplemented and amended four (4) times the **Regulation for Recruitment, Examination, Appointment and Re-appointment of Judges**. The same Council prior to the adoption of the Regulation had announced positions for judges in the Basic Courts in Kosovo. Moreover KJC has changed the criteria regarding the qualification test, reducing the passing criteria from 45 points to 40 points, after being published the results of the qualifying test.

This proves that the policy-making of the KJC is quite fragile and therefore it may cause confusion, by raising doubts about the impartiality and credibility of the whole process of recruitment and appointment of judges.

KLI recommends to KJC to re-evaluate the decision dated on October 22, 2016, in order to ensure and guarantee a transparent process, based on clear and objective criteria, to be

implemented the criterion of merit and legal certainty for all candidates in a same manner and equally.

II. ILLEGAL COMPOSITION OF KOSOVO PROSECUTORIAL COUNCIL

Law on Kosovo Prosecutorial Council (Law) defines that except for ex officio members, Council members are elected or appointed for a five (5) year term. A member may be elected to one additional non-consecutive term of five (5) years.

Council's member, Idain Smailji with the decision of KPC, A.no. 05/11, on February 15, 2011, was elected member of the Prosecutorial Council of the Republic of Kosovo, from prosecutors of Municipal Prosecution Offices. With the transition to the new organizational structure of prosecution offices, according to the Law on State Prosecutor from January 1, 2013, the new composition of the Council should have a member from the Appellate Prosecution Office. In this regard, according to the proposal of the Appellate Prosecution Office, KPC during December 2012, had decided for Idain Smailji to continue his mandate as member of the KPC, but now by representing the Appellate Prosecution Office. KLI considers that the decision to extend the mandate as member of the KPC, as a member of Council from KPC prosecutors, should not be interpreted as the beginning of a new mandate from January 1, 2013, but the extension of the mandate that had begun on February 15, 2011, as the law already defines.

KPC regarding the mandate of the Council members had discussed during two KPC meetings, in December 2012. International partners who have supported KPC at the time, as well as members of KPC, had concluded that the mandate of a KPC member expires naturally when it ends the five year mandate from the time he was elected, when the condition or status on which he was elected member of the Council changes.

According to the Law, the five (5) year mandate of Smailji as a member of the Council has ended on February 15, 2016. Despite this fact, the prosecutor of the Appellate Prosecution Office, Idain Smailji continues to exercise the mandate of a member of the Council illegally and in contradiction with the practices built by KPC in 2012.

Also, Article 6 of the Law on Amending and Supplementing the Law on KPC, among others has determined among other things that the functioning of KPC members as members ends with the expiration of the mandate, respectively in cases where a member of KPC fulfils the mandate of five (5) years as a member of KPC from the time he was elected to that position.

The illegal composition practice of KPC continues also during 2016, respectively from February 15, 2016, when the prosecutor of the Appellate Prosecution Office has fulfilled five (5) years as a member of the Council. Idain Smailji, from January 1, 2016 by a decision of the KPC was elected Vice-President of KPC. Moreover the same is also Chairman of the Committee on the Performance Evaluation of Prosecutors and until recently has served also with a decision from KPC as Chairman of the Disciplinary Committee of KPC.

The practice of adopting regulations and decisions by KPC in contradiction with the Law on KPC, is continuing also with the case of the prosecutor Smailji.

The Constitution and the Law on KPC have dominant power in relation to Decisions and Regulations adopted by KPC. The Council has no legal authority to extend the mandate of KPC members through regulations and decisions. The extension of the mandate of the KPC member, in contradiction with the law, constitutes serious violation of the law, and thus has risked the functionality, legitimacy and legality of KPC itself during the decision making, approval and implementation of policies process.

Furthermore, concerning is the fact that KPC is in the process of appointing new prosecutors in all Basic Prosecution Offices and has announced the competition for Chief Prosecutor of Basic Prosecution Offices. Concerning is also the fact that the same Council during the time when Smailji has exercised the function of KPC member, illegally has selected and appointed Chief Prosecutors in SPRK and the Appellate Prosecution Office.

Decisions adopted by KPC with illegal composition, may be subject of court proceedings, including the Administrative Court and the Constitutional Court in cases of violation of human rights and freedoms, as a result of decisions adopted in the Council, where Smailji has participated in the discussion or voting of decisions.

The legitimacy and legality of the KPC, constitutes a basic standard for a fair, impartial, independent and professional functioning of the prosecutorial system, including the administration and management of the State Prosecutor. KPC has legal and constitutional obligation to put forward the general interest before individual interests, in this case the interests of a KPC member. As, the installation of illegal practices by the institution itself, which is called to supervise and control the legitimacy and accountability of all prosecutorial system, is the most unfair message that is sent to all the staff in the prosecutorial system regarding the protection of values, ethics and image of the system itself.

a. RECOMMENDATIONS

KLI recommends to KPC to urgently treat the mandate of the prosecutor Idain Smailji, as a member of the KPC, by returning the legality and legitimacy in KPC.

KLI recommends to KPC to assess the legality of all decisions and policies adopted by KPC since February 15, 2016 in cooperation with international partners.

As well as, to urgently stop the installed culture of impunity of officials within prosecutorial system which for close interests damage in particular the image of the entire prosecutorial system in Kosovo, and also the rule of law in general.

III. ILLEGAL AMENDMENT OF THE CRITERIAS FOR JUDGES BY KJC

On July 15, 2015, entered into force the Law 05/L-033, on amendment and supplementing Law No. 03/L-223, on Kosovo Judicial Council (KJC). The amendment of the law on KJC provided new responsibilities for KJC with regard to the **regulation and organizing the exam for judges, including the evaluation of the performance during the initial mandate.**

As a result, on April 6, 2016, KJC approved **Regulation No. 05/2016 on recruitment, exam, appointment and re-appointment of judges**, through which are stipulated rules and criteria for the recruitment, appointment and re-appointment of judges. The approval of such Regulation was a legal obligation provided by the Article 17 of the Law on amendment and supplementing Law on KJC.

KLI during the monitoring process of the KJC, found that it took KJC nine (9) months to approve such regulation, while based in the law KJC was obliged to approve it within six (6) months.

As such, based on the Law No. 05/L-033 on amendment and supplementing Law No. 03/L-223, on (KJC), Council was obliged that within six (6) months of the entry into force of the law, to approve all regulations provided in the law. Such obligation derives from the Article 17 of the above law, which provides as below:

“Provided regulations in this law, will be promulgated within six (6) months, after the entry into force of this law.”

In this regard, KLI found that there were delays in approval of the secondary legislation in general, and the above regulation specifically. According to the legal deadline, this Regulation should be adopted by the KJC until **December 15, 2015**, while it was adopted on April 6, 2016, which results nine (9) months from the entry into force of the law and four (4) months after the deadline foreseen in Article 17, as quoted above.

a. Amendment of the regulation within the short period of time after the approval

KLI from the monitoring process provides that the ability of the KJC to draft and approve clear and transparent policies, through the secondary legislation is not consolidated yet. Due to the mere fact that KJC the above regulation approved amended and supplemented several times within a very short period of time.

On May 11 and August 16, 2016, were approved Regulations, which amended and supplemented the Regulation 05/2016 on the process of recruitment, exam, appointment and re-appointment of judges.

Moreover, the amendments of the regulations were done while the advertisement of the positions for judges was still open. Such approach shows that the policy making process within KJC is fragile, which makes confusion and establishing doubts on the re-ability of the recruitment and appointment process of judges.

KJC on March 22, 2016, announced advertisement for 14 positions for judges, out of which 12 positions for judges in Basic Courts. While the recruitment committee on October 15, 2016, organized the qualification exam for candidates for judges.

KLI during the monitoring process of KJC noted that the approval and amendment of the regulations were done before and during the time when the advertisement for judges was still open, including the change of the rules and criteria's after the qualification exam for judges was organized by KJC.

Finally, KJC through a decision dated on October 28, 2016, again changed the rules provided in the basic regulation, by reducing the passing points for the candidates to 40 points out of 45 points foreseen in the regulation, regarding the qualification exam.

Amendment and supplementing the regulations regarding the process of recruitment, exam, appointment and re-appointment of judges, changing the rules and criteria's during the ongoing process of recruitment, and especially on the way while the qualification exam was organized, affects to the public trust and candidates who applied for the position of judge.

Amending of the rules and reduce of criteria during the process puts in an unequal position all candidates who have passed the threshold before amending the criteria. Moreover, the reduction of criteria puts in danger the entire appointment process of judges, since in case if KJC during the completion of the appointment process of judges will propose for nomination a candidate for judges from those who have not passed the qualification test held on October 15, 2016, respectively, have had less than 40 points, will discriminate and restrict the rights of candidates which were more successful and who have passed the threshold of 45 points.

Decision dated on October 28, 2016, is also in contradiction to its purpose and the scope for which the regulation was adopted. Decision dated on October 28, 2016, is also in contradiction to its purpose and the scope for which the regulation was adopted. According to this regulation, its provisions are adhered by all the candidates for judges during the recruitment process, KJC, members of the Committee established by this Regulation, as well as the staff of the KJC who are involved in implementation of the regulation.

International practices and standards that define minimum criteria of the process of appointment of judges, determine the "all decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit criteria, taking into account the definition of qualifications, integrity, opportunities and efficiency.

Moreover Opinion no. 1 of the Consultative Council of European Judges recommends that the responsible authorities of the member States competent to decide and advise on the appointment and promotion of judges should introduce, publish and give effect to objective criteria, in order

to ensure that the selection and career of judges to be based on merit, taking into account the definition of qualifications, integrity, opportunities and efficiency. Moreover it is essential that judges have a sense of justice and a sense of impartiality. However, in practice, it is difficult to assess this criterion, therefore transparent procedures and coherent practices should be required during their implementation.

In this regard, KLI assesses that such practices built by KJC regarding amending of rules, criteria and procedures during the process of appointment of judges are in contradiction with the applicable law in Kosovo, as well as with international standards and practices.

b. RECOMMENDATION

KLI recommends to KJC to re-evaluate the decision dated on October 22, 2016, in order to ensure and guarantee a transparent process, based on clear and objective criteria, to be implemented the criterion of merit and legal certainty for all candidates in a same manner and equally.