



Instituti i Kosovës për Drejtësi  
Kosovo Law Institute  
Kosovski Institut Pravde

Anti-Corruption

**WEEK**

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## CONFLICT OF INTEREST IN THE KOSOVO PROSECUTORIAL COUNCIL



#bashkeendreqim #UnitedAgainstCorruption #KS

NGO Coalition "Anti Corruption Week 2017" is composed out of:  
KLI, GLPS, ÇOHU, GAP, INPO, KIPRED and COLUMBUS



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#### ABOUT 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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#### Content

I. Executive summary .....	<b>Error! Bookmark not defined.</b>
II. Case description.....	<b>Error! Bookmark not defined.</b>
III. Concrete findings.....	<b>Error! Bookmark not defined.</b>
IV. Public questions .....	9

## I. Executive summary

The Kosovo Prosecutorial Council (KPC) during 2015 was followed by many controversies and ambiguities regarding the extension of the legal mandate of some members of the KPC, respectively the mandate of Mrs. Sevdije Morina, a member of KPC from SPRK, and Mr. Jetish Maloku, a member of KPC from Basic Prosecution Offices.

Despite the fact that the law had defined that the mandate of KPC member is five years without possibility of extension, KPC in 2015 decided to continue the mandate of two KPC members, Morina and Mr. Maloku. Mrs. Morina had stayed as KPC member for approximately five years and nine months, and Mr. Maloku had stayed for approximately five years and five months.

As Mrs. Morina and Mr. Maloku, had participated in the discussion and had voted in favor of extending their mandate. Voting for the extension of the mandate to itself, which creates power in the decision-making process for prosecutorial system policies, including other benefits of being a KPC member represented a conflict of interest situation. At that time, international partners such as the US Embassy and the European Union project supporting the KPC gave written opinions that participation in the discussion and voting for themselves contradicts the law. EULEX had the opposite attitude.

The applicable legal framework in the Republic of Kosovo has clearly defined the state of conflict of interest in which official persons can be found.

Article 424 of the Criminal Code of Kosovo defines the criminal offense of Conflict of Interest when "an official person who personally takes part in any official matter in which he or any member of the family or any legal person concerned with it has a financial interest, is punishable by a fine or by imprisonment of up to three (3) years. "

According to the Code, the expression "participates" means the exercise of official authority through decision, approval, disapproval, recommendation, counseling, investigation or otherwise of exerting influence on an official matter. Whereas, the expression "official matter" means a court procedure or other official procedure; application, request for decision or other official designation; contract or claim; public auction or other procurement action; or any other matter affecting the financial or personal interests of the official or other person.

While Article 6 of the Law on the Prevention of Conflict of Interest in the exercise of public office has defined conflict of interest as a state of disagreement between the public duty and the private interests of the high official when it has direct or indirect private interests or property that may affect, may or may appear to affect its legality, transparency, objectivity and impartiality during the exercise of its public function.

The Code of Ethics and Professional Conduct for KPC Members in Article 3 also defines that: "A member of the Council shall be responsible for avoiding a conflict of interest on the basis of family or social relations in accordance with the legislation on the prevention of conflicts of interest. And in any case, if a member of the Council learns about any conflict of interest or any other circumstance that may raise doubts about his or her impartiality, he / she will terminate all activities on the case and immediately notify the Chairman of the Council in writing about that situation. "

The rise of these suspicions regarding the commission of a criminal offense of conflict of interest during the KPC public meeting, when these two members had discussed and voted for themselves, were never treated under the law by the Anti-Corruption Agency, Police or State Prosecutor.

Such action should be considered if the Code of Ethics and Professional Conduct of KPC members has been violated or if a criminal offense of conflict of interest has been consumed, which has never been addressed by the Anti-Corruption Agency and the prosecution bodies itself.

## **II. Case description**

In a democratic society where, minimum standards of good governance are applied, any decision-making must be based on basic principles such as independence, impartiality and integrity. In any case when these principles do not apply cumulatively in practice, the public questions the decisions adopted by public institutions.

The integrity of a decision-making process means that the individual or collegial body does not make any compromise regarding certain interests in relation to his colleagues or other persons in his private life when making decisions. Integrity in itself implies that the individual is honest, works in good faith, is right in his work, when in his work is based on values that in public prove that the same is objective, treats citizens equally, applies in punctuate the law, manifest to the public confidence and certainty regarding the legality of the decision it takes. Integrity in a judicial process is not just a habit, it is a necessity.

When in practice these principles are not applied during the decision-making process in a democratic public society, this is considered a corrupt act.<sup>1</sup>

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<sup>1</sup> "Manual on Independence, impartiality and integrity of justice, thematic overview of best international policies, standards and best practices". Page 7. (Last viewed 20.11.2017 [http://ceeliinstitute.org/wp-content/uploads/2015/05/FULL\\_VERSION\\_FINAL1.pdf](http://ceeliinstitute.org/wp-content/uploads/2015/05/FULL_VERSION_FINAL1.pdf))

The integrity of the members of the Kosovo Prosecutorial Council was debated during the time of the competition for Chief State Prosecutor and in raising dilemmas for extending the mandate for the two members of the Council, Sevdije Morina and Mr. Jetish Maloku.

On 28 May 2015, the Assembly of Kosovo has adopted the package of judiciary laws, respectively amending the Law on the Kosovo Judicial Council (LKJC), the Law on Kosovo Prosecutorial Council (LKPC), the Law on Courts (LC) and the Law on State Prosecutor (LSP).

The amendment to the abovementioned laws envisages undertaking concrete actions by the two councils for the implementation of legal obligations regarding substantive changes regarding the process of recruitment of judges and prosecutors, the new composition of the KPC in accordance with the Constitution and the law, the passage of the Secretariat of the Office of the Chief State Prosecutor to the Kosovo Prosecutorial Council, the establishment of new permanent committees of the Prosecutorial Council, etc.

KPC during 2015 was followed by many controversies and uncertainties regarding the legal mandate of some members of the KPC, respectively the mandate of Mrs. Sevdije Morina, a member of KPC from SPRK, and Mr. Jetish Maloku, a member of KPC from Basic Prosecution Offices.

Whereas, on 8 March 2010, Mrs. Morina was appointed member of the KJC and at the same time a member of the Independent Judicial and Prosecutorial Commission (IJPC), during March 2011, Ms. Morina was transferred as a member to newly established KPC, pursuant to Article 43 of the CCK Law, which entered into force on 1 January 2011.

While, Mr. Maloku on July 15, 2010, was appointed a member at that time of the KJC and at the same time a member of the IJPC. Similarly, Mr. Maloku was transferred as a member of newly established KPC, according to Article 43 of the Law on the CCK, which entered into force on 1 January 2011.

The law on KPC has foreseen that the mandate of KPC members is five years without possibility of continuation.

Regarding the mandates of the aforementioned members of the KPC, the international representatives that supported the KPC gave an opinion, respectively the advisors from the US Embassy<sup>2</sup>, and advisors from the European Union Project for Support to the Judicial Council and

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<sup>2</sup> Note: The United States Department of Justice's analysis on mandates of prosecutorial members had advised the KPC that "the mandate of both Council members by the IJPC should expire in March 2015. This represents the natural expiration of the mandate of a member of the first appointed. Since both mandates start with the first nominee then they will end with the expiration of the mandate of the first nominee, and both mandates should end in March 2015. " (Law on Temporary Composition of the KJC, Article 7, paragraph 1).

Kosovo Prosecutorial Council, who had come to the conclusion that the mandate of prosecutorial members cannot exceed the five-year mandate defined by law.

While EULEX international advisors supporting the KPC have had a different attitude from other international advisers and have recommended the extension of the mandate for Mrs. Morina and Mr. Maloku until 2016.

Despite the recommendations of international advisers from the US Embassy and the European Union<sup>3</sup>, which supported the KPC, the same Council had decided that non-prosecutorial members should continue their mandate Ms. Morina and Mr. Maloku by the end of 2015.

Respectively, Ms. Morina, had been a member for nearly five years and nine months, and Mr. Maloku had stayed as a member nearly five years and five months, while the Law on KPC foresaw that the mandate of KPC members is five years without possibility of continuation.

The EULEX Recommendation and the extension of the mandate of the two members of the KPC was also discussed in the fifth plenary meeting on the Stabilization and Association Agreement between Kosovo and the EU, held on 8 July 2015. At this meeting, Jean-Eric Paquet, Director of the Western Balkans of the European Commission, said on the implementation of the law package, emphasizing: *"We welcome the adoption of four laws that emerge from the Judicial Package. Adoption of legislation is only the first step of changing the system or structure. Kosovo now needs to focus on the rigorous and appropriate implementation of these laws."* Mr. Paquet has raised concerns regarding the legal basis of the mandates of some KPC members.

KPC when deciding to extend the mandate of the contested members also acted contrary to international practices and standards. During the extension of the mandate of these members, they participated in the discussion and voting process to continue their mandate. This action by the members of the KPC was in contradiction with the recommendation of international advisers who support the KPC.<sup>4</sup> KPC members whose extension of the mandate was discussed participated in the discussion and enabled the quorum for extending the mandate.

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<sup>3</sup> Note: The international project advisors of the European Union supporting the Kosovo Judicial and Prosecutorial Council in their opinion regarding the mandate of prosecutorial members in the KPC came to the conclusion that "after analyzing all relevant facts and the applicable legal framework, The Project Team does not find enough arguments to support the legality of allowing the additional one year mandate required for one of the current KPC members transferred from KJC / IJPC - Morina or Mr. Maloku".

<sup>4</sup> Finally, there are clear conflicts of interest that need to be addressed before the discussion and voting takes place. First, no KPC member whose mandate is in question should serve in a working group to prepare a legal analysis for submission to the Council. Second, no members whose mandate is in question should not be allowed to participate in any discussion and vote on their mandate. In order to maintain the quorum for the final review and voting, the two issues should be treated as separate. For the mandate of prosecutors, none of them should be allowed to participate in the discussion and vote. "US Justice Department Analysis.

KPC until the end of 2015, with contested content and with unlawful mandates of members of KPC, had adopted regulations, decisions and other documents that were challenged in the Progress Report of the European Commission for Kosovo since the same were opposed to the hierarchy of normative acts in Kosovo.<sup>5</sup>

For this situation of conflict of interest, at the time of the controversy of the KPC, had requested response from ACA, the former Chair of KPC, Syle Hoxha. In an AKM response, its officials emphasized the legal provisions on conflict of interest situations of KPC members.

“Responding to your email and your question related to: participation, discussion and voting of members of the Kosovo Prosecutorial Council when it relates to their personal mandate and whether it is a violation and is in compliance with the law on Preventing Conflict of Interest in Exercising Public Function.

- We inform you that based on Article 6 of Law 04 / L-051, the Conflict of Interest is the state of disagreement between the public duty and the private interests of the high official when he has direct or indirect private, personal or property interests which influence, may influence or appear to affect its legality, transparency, objectivity and impartiality during the exercise of its public function.
- Therefore, based on this notion and based on the Principles of Action and non-action of high Official foreseen under Article 7 and Point 7.8 of Law 04 / L-051, the High Official should not allow his private interests to conflict with his function. He should avoid conflicts of interest regardless of whether he is real or potential.
- At the same time article 13 point 1.2 of Law 04. /L-051: Every high official in the exercise of his public function, on the basis of his knowledge and in good faith, is obliged to make his own preliminary statement, case by case, of the existence of his private interest in decision-making in a particular case that may be the cause of the emergence of a conflict of interest. A case-by-case declaration of private interests is done by the high official each time this is required by the supervisor or by the supervisory institution. Declaration as a rule should be requested and made in advance. When this is not possible or when it has not occurred, the declaration should be requested to be made as soon as possible.
- It is also an obligation of KPC members to respect Article 3, point 4.5.6 of the Code of Ethics and Professional Conduct for KPC Members related to Responsibility to Avoid Conflict of Interest, adopted on 31 July 2012. "

Additionally, these provisions cited by the ACA about the Code of Ethics and Professional Conduct of the KPC, which are obliged to respect, stipulate that:

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<sup>5</sup> European Commission Progress Report for Kosovo for 2015. Page 13 (See link <https://mapl.rksgov.net/getattachment/4eb17bf0-695f-4a4b-bce6-101e66ba55c9/Raporti-per-Kosoven-2015.aspx>)

- A member of the Council is responsible for avoiding a conflict of interest on the basis of family or social relations in accordance with the legislation on the prevention of conflicts of interest.
- In any case, if a member of the Council learns about any conflict of interest or any other circumstance that may raise doubts about his or her impartiality, he / she will terminate all activities on the case and immediately notify the Chairman of the Council in writing about that situation.
- In any case, if a Council member conceals or denies any circumstance of conflict of interest or any other circumstance that may raise doubts about his or her impartiality, any member of the Council has knowledge of this circumstance, it would be mandatory for this member to report this circumstance to the Chairman of the Council.

However, the ACA in response to KLI, has returned the response sent to KPC Chairman, Mr. Sylë Hoxha, but did not answer why he did not handle the case.<sup>6</sup>

KLI for all these raised issues asked for a response from Ms. Sevdije Morina and Mr. Jetish Maloku, but they have responded.<sup>7</sup>

### **III. Specific findings**

- KPC has violated Article 5 of the Law on Kosovo Prosecutorial Council, regarding the extension of mandate of members Ms. Sevdije Morina and Mr. Jetish Maloku;
- Ms. Sevdije Morina and Mr. Jetish Maloku have acted in violation of the conflict of interest provisions set forth in the Criminal Code of Kosovo and the Law on Prevention of Conflict of Interest in the exercise of public function;
- Mrs. Sevdije Morina and Mr. Jetish Maloku have acted in violation of conflict of interest provisions set out in the Code of Ethics and Professional Conduct for KPC Members.
- During 2015, when KPC members Ms. Sevdije Morina and Mr. Jetish Maloku have stayed with contested mandate in the KPC, the Council has adopted very important decisions for the prosecutorial system of Kosovo, including the appointment of the Chief State Prosecutor, appointment of new KPC members, unlawful termination of the member of the KPC civil society, appointment of prosecutors to the Office of the Chief State Prosecutor, adoption of a number of regulations and policies from the KPC, etc.

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<sup>6</sup> The KLI has requested official response from the Director of the Anti-Corruption Agency, Shaip Havolli, who responded by email. November 2017.

<sup>7</sup> KLI about this topic has requested official response via email and phone from Ms. Sevdije Morina, Deputy Chief State Prosecutor and Mr. Jetish Maloku, Chief Prosecutor of the Basic Prosecution of Gjilan. November 2017.

- KLI publicly reported on these violations in the KPC.
- KPC, State Prosecutor, Kosovo Police and the Anti-Corruption Agency have never informed the public if any action is taken on this issue.

#### **IV. Public questions**

- *Why KPC allowed members Ms. Sevdije Morina and Mr. Jetish Maloku continue to stay as members of the Council even after the expiration of a lawful mandate?*
- *Why did the Anti-Corruption Agency not take any action to investigate suspicions of committing a criminal offense of conflict of interest by KPC members who have discussed and voted for themselves, consequently for their own benefits?*
- *Why did Kosovo Police not take any action to investigate suspicions of committing a criminal offense of conflict of interest by KPC members who have discussed and voted for themselves, consequently for their own benefits?*
- *Why did the State Prosecutor not take any action to investigate suspicions of committing a criminal offense of conflict of interest by KPC members who have discussed and voted for themselves, consequently for their own benefits?*