



Instituti i Kosovës për Drejtësi
Kosovo Law Institute
Kosovski Institut Pravde

Short analysis:
No. 01/2018 - KLI

Ministry of Justice game with the Law on State Prosecutor

**(Short legal analysis of the proposals given by the Ministry of Justice on
Amendments to the Law on State Prosecutor)**

Pristina, March 2018

Kosovo Law Institute (KLI)

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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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March 2018

Pristina, Republic of Kosovo

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I. Executive summary

The Kosovo Law Institute (KLI) has analysed the initiative of the Ministry of Justice (MoJ) for the amendment of the Law on State Prosecutor, which is in contradiction with the Constitution of the Republic of Kosovo, principles and obligations that the Republic of Kosovo has taken in relation to the European Union regarding the implementation of the priorities arising from the European Reform Agenda (ERA).

MoJ deviated from the specific request of ERA, which was approved by the Kosovo Assembly in February 2017, which required the strengthening of the fight against corruption and organized crime through the strengthening of the capacities of the Special Prosecution Office of the Republic of Kosovo (SPRK). Within the ERA framework, the amendment of the Law on State Prosecutor was requested in order to increase the number of prosecutors in SPRK by lowering the legal criteria for the admission of prosecutors to this prosecution office.

Despite the specific request within ERA, the MOJ during the amendment to the Law on State Prosecutor encompassed amendments that contradict with the Constitution of the Republic of Kosovo and the standard of good governance in the prosecutorial system, attempting to strengthen the institution of the Chief State Prosecutor with the constitutional competencies that belong to the Kosovo Prosecutorial Council (KPC).

In this regard, through the first MoJ proposal in the draft law, it is attempted that the Office of the Chief State Prosecutor - as a third instance - to take competencies in the investigation and prosecution of perpetrators of criminal offenses in Kosovo, the competencies that are exercised in Kosovo by Basic Prosecution Offices and SPRK - as a first instance. The applicable law in Kosovo sets that state prosecutors in Basic Prosecution Offices have substantive and territorial competence to file indictments or conduct criminal investigations at the Basic Courts, to which they have been established. The applicable law in Kosovo does not foresee that State Prosecutors in the Office of the Chief State Prosecutor - as a third instance - conduct investigations and raise indictments against perpetrators of criminal offenses. The competencies of the Chief State Prosecutor, State Prosecutors in the Office of the Chief State Prosecutor - as a third instance - are limited only to the exclusive competence of a third instance case before the Supreme Court and on all cases involving extraordinary legal remedies, which fits the culture and legal practice in Kosovo since the beginning.

The proposal regarding the granting of additional powers to the Office of the Chief State Prosecutor to investigate and prosecute perpetrators of criminal offences, builds standards and practices that seriously damage the hierarchy of the prosecutorial system in Kosovo, as in the case of raising indictments by the Office of the Chief State Prosecutor, the same office should file a complaint through a lower instance prosecution, in this case through the Appellate Prosecution. The proposal seriously violates the public confidence in the independence and

impartiality of the Office of the Chief State Prosecutor in the cases of filing requests for protection of legality.

The third proposal given by the MOJ attempts to remove the limitations for prosecutors who receive reward for professional activities in the amount of over twenty-five per cent (25%) of the basic salary and the obligation to notify the KPC of this award. This proposal contradicts the draft Law sent to the Assembly of Kosovo on the prevention of conflict of interest, which is also a requirement within ERA. The purpose of the draft law was that while exercising public functions to address the limitation on high state officials, who hold several positions at the same time. So, if the 25% limit of the Law on State Prosecutor is repealed, there will be no legal control over KPC prosecutors and they can easily receive additional income from private or public institutions more than the basic salary.

The second proposal given by the MoJ attributes direct power to the Chief State Prosecutor, that are competencies of the KPC. According to this proposal, the Chief Prosecutor assigns prosecutors to the Special Prosecution Office, according to urgent needs and caseloads in this prosecution for the period of one year, with the possibility of an extension for another year. This proposal is directly contradictory to Article 110 of the Constitution, which stipulates that the KPC will recruit, promote, transfer, discipline prosecutors in the manner regulated by law. The Constitution does not recognize the term "assignment", but only promotion and transfer. Installing a new institute regarding the assignment of prosecutors by the Chief State Prosecutor seriously damages the career institute in the prosecutorial system, competition and equal treatment of prosecutors.

KLI recommends to the Kosovo Assembly members that during the debate and voting for this draft law to take into consideration the Constitution of the Republic of Kosovo, the obligations arising from ERA, findings, assessments and recommendations of the KLI in this paper as well as comments and recommendations sent by the international factor that support the justice institutions in Kosovo.

II. Ministry of Justice game with the Law on State Prosecutor

KLI has analysed the MOJ's initiative for amendments to the Law on State Prosecutor, which contradicts the Constitution of the Republic of Kosovo, principles and obligations that the Republic of Kosovo has taken in relation to the European Union regarding the implementation of priorities that derive from ERA.

The purpose of ERA is to serve as a guide to the development of a political dialogue between Kosovo and the European Union for the implementation of the Stabilization Association Agreement. ERA has defined 22 priorities and 130 actions to be implemented by the institutions of the Republic of Kosovo, based on four main pillars: good governance and rule of law, investment climate, employment and education. ERA was approved by the Kosovo Assembly in February 2017.

Within the obligations that Kosovo institutions have taken in the area of rule of law was the continuation of the strengthening of the register on fight against corruption and organized crime, including through the strengthening of the capacity of the Special Prosecution Office of the Republic of Kosovo (SPRK) that investigates and prosecutes high-level cases. It was foreseen that through the amendment of the Law on State Prosecutor to increase the number of prosecutors in SPRK for the investigation and prosecution of corruption and high level crime. Respectively, it was required within a timely procedure the amendment of the Law on State Prosecutor be proceeded only with regard to the reduction of the legal criteria for the admission of prosecutors to SPRK.

Despite the fact that ERA did not request other amendments to this Law, the Ministry of Justice, during the amendment of this law, had proposed other amendments that go beyond the requirements of ERA.

Below are the specific findings from the Ministry of Justice proposals that contradict the Kosovo Constitution, ERA and the obligations Kosovo has undertaken to meet the criteria for visa liberalization. KLI has analysed the findings and has offered recommendations for each of them.

III. Proposal 1: MoJ proposes to unlawfully empower the Chief State Prosecutor with additional competencies for raising indictments

1. The MOJ in the draft law has proposed that the Office of the Chief State Prosecutor - as a third instance prosecution to take competencies in the investigation and prosecution of perpetrators of criminal offenses in Kosovo, the competencies that are exercised by the Basic Prosecution Offices and SPRK in Kosovo as the first instance.
2. The applicable law in Kosovo provides that state prosecutors in Basic Prosecution Offices have substantive and territorial competencies to file indictments or conduct criminal investigations before the Basic Courts, to which they have been established.
3. The Law on Special Prosecution of the Republic of Kosovo stipulates that prosecutors in this prosecution office will have the competence and responsibility to exercise their functions, including the competencies and responsibility to conduct investigations and criminally prosecute crimes that are in special or complementary competence to the SPRK, in all Prosecutions and Courts operating in Kosovo.
4. The applicable law in Kosovo does not foresee that State Prosecutors in the Office of the Chief State Prosecutor - as a third instance - conduct investigations and raise indictments against perpetrators of criminal offenses.
5. The State Prosecutor's substantive and territorial competence is determined according to the legal provisions that determine the competence of the courts, before which they exercise their authorizations.
6. The competencies of the Chief State Prosecutor, State Prosecutors in the Office of the Chief State Prosecutor - as a third instance - are limited only to the exclusive competence of a third instance case before the Supreme Court and on all cases involving extraordinary legal remedies, which fits the culture and legal practice in Kosovo since its beginning.
7. The Law on Courts and the Criminal Procedure Code have not foreseen legal provisions that enable Prosecutors of the Office of the Chief State Prosecutor - as a third instance - to raise indictments before Basic Courts - in the first instance.
8. Article 20 of the Criminal Procedure Code of Kosovo, inter alia, sets the subject matter competence of the courts. According to this article, the substantive competence and territorial competence of the Basic Court for Criminal Procedure is defined in Article 11 of the Law on Courts. The substantive competence of the Court of Appeals for Criminal Procedure is set out in Article 18 of the Law on Courts. The substantive competence of the Supreme Court for criminal proceedings is set out in Article 22 of the Law on Courts.
9. Article 11 of the Law on Courts sets the Jurisdiction of the Basic Court according to Case. The Basic Courts are competent to judge in the first instance all matters, unless otherwise provided by law. Article 5 of the Law on Amending the Law on State Prosecutor defines the competencies and organization of the State Prosecutor. This article stipulates that the State Prosecutor in the Republic of Kosovo shall be organized and function in accordance with this Law, as well as with the Law on Special Prosecution.

Paragraph 3 of this Article sets that the State Prosecution's substantive and territorial competence is defined according to the legal provisions that define the competence of the courts before which they exercise their authorizations, unless otherwise provided by this law. This means that subject matter and territorial competence to file an indictment or criminal investigations at the Basic Court in Pristina is a sole competence of the Basic Prosecution in Pristina and SPRK - the first instance.

10. Article 22 of the Law on Courts sets the competences of the Supreme Court. The Supreme Court is competent to decide on:
 - the request for extraordinary legal remedies against the final decisions of the courts of the Republic of Kosovo, as foreseen by law;
 - revision against second instance court decisions in contested matters, as foreseen by law;
 - defines the principled attitudes and legal opinions on matters which are of importance for the unique implementation of laws by courts in the territory of Kosovo;
 - other matters foreseen by law.
11. Based on this, the lawmaker has defined that in relation to the courts in Kosovo, the Office of the Chief State Prosecutor - as a third instance, exercises its competencies and responsibilities before the Supreme Court of Kosovo, where it has exclusive competence for the third instance cases before the Supreme Court and on all cases involving extraordinary legal remedies.
12. The proposal regarding providing of additional competencies to the Office of the Chief State Prosecutor to investigate and prosecute perpetrators of criminal offenses, builds standards and practices that seriously damage the hierarchy of the prosecutorial system in Kosovo, as in the case of raising indictments by the Office of the Chief State Prosecutor, the same office should file a complaint through a lower level prosecution, in this case through the Appellate Prosecution.
13. Through this proposal, public confidence in the independence and impartiality of the Office of the Chief State Prosecutor is seriously damaged in the cases of filing requests for protection of legality. How can in practice that the same office that raises an indictment also submits a request for protection of the legality of the same?!
14. How will the conflict of competency between the Office of Chief State Prosecutor and SPRK be regulated in practice?

IV. Proposal 2: MoJ proposes in contradiction with the Constitution to strengthen the Chief State Prosecutor as an individual with KPC competencies as a collegial body

1. MoJ has proposed that the Chief State Prosecutor appoint prosecutors to the Special Prosecution Office of the Republic of Kosovo, according to urgent needs and caseloads in this prosecution. The appointment of prosecutors under this paragraph may be made for a period of one year, with the possibility of an extension for a maximum of one (1) year.
2. Also, the MoJ has proposed that the Chief State Prosecutor appoints with the decision the prosecutors to support the Chief State Prosecutor in the exercise of his supervisory and administrative competencies.
3. These proposals are directly contradictory to Article 110 of the Constitution, which stipulate that the KPC will recruit, propose, advance, transfer, discipline prosecutors in the manner regulated by law. The KPC will give priority to appoint prosecutors to members of underrepresented communities in the manner stipulated by law. All candidates must meet the criteria set by law.
4. The Constitution does not define such competence to the Chief State Prosecutor.
5. The Constitution does not recognise the term "assignment". The Constitution recognizes advancement and transfer terms. Advancement and transfer is the competence of the KPC.
6. Installing a new institute regarding the assignment of prosecutors by the Chief State Prosecutor seriously damages the career institute in the prosecutorial system. Prosecutors from Basic Prosecutions through the appointment to SPRK by the Chief State Prosecutor enter into career advancement and would also damage competition and equal treatment of prosecutors.
7. By law and regulation of the KPC, the transfer over a month to a prosecution of the same level and advancement must be regulated through the competition institute. The MoJ proposal bypasses the competition institute.
8. By law, the competences guaranteed by the Constitution to a collegial body such as the KPC, cannot be transferred to an individual institution such as the position of the Chief State Prosecutor. Practice has shown that there are many cases of abuse when it comes to the transfer of prosecutors.. KLI whilst monitoring the KPC has identified cases when prosecutors were transferred to the SPRK despite the fact that they did not meet the legal criteria to exercise the prosecutor's function in this prosecution office.

V. Proposal 3: MoJ proposes the removal of limitations for compensation of prosecutors, opens the way for “supermen prosecutors” with many positions and compensation

1. The Ministry of Justice has proposed removing the limitation for prosecutors who receive reward for professional activities in the amount of over twenty-five per cent (25%) of the basic salary and the obligation to notify the Kosovo Prosecutorial Council (KPC) for this award.
2. This obligation was set as a criterion for visa liberalization while the amendment of the law package for the judiciary during 2015.
3. This Ministry of Justice proposal is in contradiction with the draft law sent to the Assembly of Kosovo on the prevention of conflict of interest, a law that is also a requirement within ERA.
4. Amending the Law on Prevention of Conflict of Interest while exercising public functions aims to address and limit cases in practice where high state officials hold several positions at the same time. By repealing the legal provision for a 25% limit from the Law on State Prosecutor, prosecutors may hold some positions and the KPC not be informed at all.
5. In the absence of legal control and control by the KPC, prosecutors can easily take additional income from private or public institutions more than the basic salary.
6. Opportunities for abusing the repeal of this provision are extremely large.

VI. Recommendations

- KLI recommends to members of the Kosovo Assembly that during the debate and voting for this draft law to take into consideration the respect of the Constitution of the Republic of Kosovo, the obligations arising from ERA, findings, assessments and recommendations of the KLI in this paper as well as comments and recommendations sent by the international factor that support justice institutions in Kosovo.