



Tendencies of politicizing the IOBCSK



**(Analysis of the Draft Law on Supplementing and Amending
the Draft Law on the Independent Oversight Board
of the Civil Service of Kosovo)**

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Author: Gzim Shala

Editing team: Ehat Miftaraj and Betim Musliu

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KLI

Str. Ilaz Agushi
Pristina
E: info@kli-ks.org
www.kli-ks.org

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1. Executive summary

The Independent Oversight Board for the Civil Service of Kosovo (Hereinafter: IOBCSK) is a constitutional institution that ensures compliance with the rules and principles that regulate the civil service and that reflects the diversity of the people of the Republic of Kosovo.

On September 30, 2022, the Republic of Kosovo adopted the Draft Law No.08/L-180 for supplementing and amending Law No. 06/L-048 on the Independent Oversight Board for the Civil Service of Kosovo (Hereinafter: Draft Law). Currently, this Draft Law is being reviewed in the Assembly of the Republic of Kosovo

Contrary to the Constitution, the Draft Law aims to narrow the function of the IOBCSK, limiting the powers and responsibilities guaranteed by the Constitution in terms of respecting the rules and principles that regulate the civil service in the Republic of Kosovo. Such an approach seriously violates the authority of this constitutional mechanism, and paves the way for the politicization of the public sector in Kosovo, legal uncertainty and arbitrariness towards public officials. Unfortunately, this legislative initiative was initiated by the Prime Minister's Office.

According to the Draft Law, the IOBCSK will not have the authority to decide on appeals against the Government's decision for civil servants in senior management positions. Against these decisions, the party has the right to open an administrative conflict in the competent court in accordance with the relevant law on administrative conflicts. This provision is contrary to several articles of the Constitution. In addition to the constitutional violation, the reflection of this provision in practice represents a very high potential for violation of human rights, political influence in the recruitment of these positions and damage to the budget.

The draft law aims to take away the functional immunity of the Chairman and members of the IOBCSK. Obtaining immunity for the chairman and members of IOBCSK directly violates the independence of this institution as well as violates the rights of the parties. It is absurd to consider that for each case, the members of IOBCSK will also bear civil liability. This legal uncertainty will affect the reluctance of professionals to become part of the IOBCSK and will create great potential for the politicization of this commission by the political parties that have the majority in the Assembly.

According to the Draft Law, in each case when a lawsuit is initiated against the decision of the IOBCSK in court, the decision of the IOBCSK will not be implemented until the court issues a final decision. When this is added to the fact that judicial procedures in administrative cases take more than three years to be handled, it turns the IOBCSK into a worthless institution without any influence, taking the constitutional powers of this institution. For this, KLI finds that as long as the decisions of the IOBCSK (in cases where a lawsuit is initiated) are not enforceable, the procedure before the IOBCSK practically represents only procedural delays without any relevant weight. Thus, in practice, the Draft Law completely excludes the relevance of IOBCSK in the civil service. This legal solution is contrary to the practice of the Constitutional Court of the Republic of Kosovo. Beyond harming the interests of citizens, the

length of administrative judicial procedures in practice fundamentally affects the normal functioning of the civil service.

The Draft Law in its entirety is contrary to the Constitution of the Republic of Kosovo. This Draft Law made completely irrelevant the role of a quasi-judicial institution which takes care of the protection of standards in the field of civil service. With this draft law, an entire army and tens of thousands of civil servants are left without effective legal protection and their constitutional rights are reduced.

In this Draft Law, there is not a single provision which does not conflict with the Constitution of the Republic of Kosovo and the judgments of the Constitutional Court. In other words, there is no provision in this Draft Law that is worth approving by the Assembly of the Republic of Kosovo. For these reasons, in order to protect the Constitution of the Republic of Kosovo and the protection of the main institution that protects the rules of the civil service, the Assembly of the Republic of Kosovo should reject this law.

2. Role of IOBCSK

The Independent Oversight Board for the Civil Service of Kosovo is an institution that takes care of compliance with the rules in the field of civil service. IOBCSK is a constitutional institution. The provision of Article 101 of the Constitution is a provision that relates to civil service. Paragraph 1 of this article defines the main constitutional principles on which the civil service must be built, while the second paragraph defines the obligation to establish a council that ensures compliance with the rules and principles that regulate the civil service. Article 101.2. of the Constitution has determined that "An Independent Supervisory Board for the civil service ensures compliance with the rules and principles that regulate the civil service and which reflects the diversity of the people of the Republic of Kosovo".

IOBCSK operates through Law No.06/L-048 for the Independent Oversight Board for the Civil Service of Kosovo. The scope of this law [Article 2] includes the Board and all public administration institutions that employ civil servants. This law had been the object of treatment by the Constitutional Court, which through its judgment had abolished some of the provisions of this law ¹.

On September 30, 2022, the Government of the Republic of Kosovo approved Draft Law No. 08/L-180 to supplement and amend Law No. 06/L-048 on the Independent Supervisory Board for the Civil Service of Kosovo. In the public consultation phase, this draft law contained only four articles, while the same draft law in the Government has been approved with nine articles. Currently, this Draft Law is being considered in the Assembly of the Republic of Kosovo. On October 17, 2022, this law was approved in principle by the Committee for Public Administration, Local Governance, Media and Regional Development. This law is the subject of this analysis.

¹ Constitutional Court of the Republic of Kosovo, Judgment KO171/18, 20 May 2019.

3. Unconstitutional interference in powers of IOBCSK

The law on IOBCSK has defined the functions of the Board, where it is determined that [Article 6.1.1.14.] this Board examines and makes decisions on complaints of civil servants and candidates for admission to the civil service. The Draft Law aims to narrow this IOBCSK function. According to the Draft Law, IOBCSK will not have the authority to decide on appeals against the Government's decision for civil servants in senior management positions. Against these decisions, the party has the right to open an administrative conflict in the competent court in accordance with the relevant law on administrative conflicts. This provision is contrary to the spirit and purpose of Article 101 of the Constitution, limiting the powers and responsibilities of the Board by law, while the same are guaranteed by the Constitution.

Article 101 of the Constitution talks about a unique civil service system and a single Board that takes care of this service. This article does not allow legal avoidance of the council from this role. Thus, while the IOBCSK is a constitutional institution and as such takes care of the entire civil service, reducing the powers of this Council by law is in direct contradiction with the Constitution.

The meaning of Article 32 of the Constitution, the defining of the IOBCSK as a constitutional institution to protect the rules on the civil service aims, in addition to the protection of meritocracy in civil service, to guarantee effective legal remedies for entities that are part of procedures where civil service rules apply. Therefore, this provision of the Draft Law is not only seen as a reduction of constitutional powers of IOBCSK in terms of a part of the civil service but as a denial of a part of civil service in their constitutional rights, respectively in their right in using administrative remedies. Thus, this provision of the Draft Law reduces human rights [Article 32] guaranteed by the Constitution. The right of citizens to initiate court proceedings does not remedy this violation, as Article 32 of the Constitution guarantees the right to apply both administrative and judicial remedies.

The Draft Law excludes the right to appeal to the IOBCSK by a part of public officials while it allows the opportunity of appeal to other public officials. This selective approach is contrary to Article 24 of the Constitution, which guarantees equality before the law. In a similar situation, the Constitutional Court also assessed the same, where it emphasized that “*the unequal treatment of civil servants in relation to the competence of the Council for the supervision of the selection of civil servants, defined by Article 6, paragraph 1.2, of the disputed Law is not compatible with Article 24 [Equality before the Law] of the Constitution*”².

In addition to the constitutional violation, the reflection of this provision in practice presents an extremely high potential for violation of human rights, political influence in the recruitment of these positions and damage to the budget. According to the data of the Judicial Council of Kosovo (hereinafter: KJK), the duration for handling an administrative case from the day of

² Ibid, par.186.

the filing of the lawsuit to the moment of the finality of the decision is 3.2 years³. Therefore, while a person had the opportunity to exercise their right administratively at the IOBCSK, they must wait 3.2 years for a court decision to be rendered. In this situation the accountability of the institutions that elect these officials is very low, since the consequences come too late. Under this situation, the potential for political influence is very high. Whereas, if after such a long time the court decision gives the appellant the right, in addition to the violation of the appellant's right to a trial within a reasonable time, considerable damage will also be caused to the state budget, where the appellant now will be compensated for the entire period of time until the moment when the court decision was issued.

Thus, this provision that clearly is contrary to the Constitution and creates unreparable damages in the civil service, must be removed from the Draft Law.

4. Waiver of immunity of IOBCSK members

Article 11.3. of the Law on IOBCSK has determined that "*The Chairman and the members of the Board regarding decision-making within the constitutional and legal functions of the Board, enjoy immunity from criminal prosecution, civil lawsuits or dismissal*". With the Draft Law, this article is intended to be deleted. So, according to the Draft Law, the chairman and members of the IOBCSK will not have immunity regarding decision-making within their functions.

First of all, it should be emphasized that this very article had been the subject of treatment by the Constitutional Court. This Court considered that the same article is not contrary to the Constitution⁴.

As for the immunity guaranteed in Article 11.3 of the Law, which article is intended to be deleted through the draft law, we must bear in mind that in the present case we are only dealing with functional immunity, which is limited only to the exercise of official functions by a certain person. Accordingly, through this type of immunity, the chairman and members of the IOBCSK are protected only in terms of their actions taken during the exercise of their functions. These actions are manifested in the views they express, the way they vote and the decisions they make. Officials who are guaranteed this type of immunity, which continues even after the official finishes their duty, are not obliged to answer to anyone for their actions undertaken while exercising their official function. All other actions that exceed their scope, which scope is manifested by the views expressed, the way of voting and the decisions made, are not covered by this type of immunity⁵.

³ **Note:** Calculation is done based on KJC data and formula that KJC uses to measure the length of judicial proceedings.

⁴ Constitutional Court of the Republic of Kosovo, Judgement KO171/18, 20 May 2019, paragraph 253.

⁵ Constitutional Court of the Republic of Kosovo, Judgement KO98/11, 20 September 2011, paragraph 54.

According to the Constitutional Court, in terms of the role that it has, IOBCSK has prerogatives of a court in relation to Article 6 of the European Convention on Human Rights⁶, despite the fact that this court has determined that the immunity of the Chair and members of the Board is not an immunity that is afforded to judges according to the constitution⁷.

According to the European Court of Human Rights, functional immunity is important both for the independence of judges and for the rights of the parties. In the first case, functional immunity enables judges to perform their duties without fear that the exercise of their powers may result in them being held responsible for the damages caused. Also, this type of immunity allows judges to focus on their work and not to be constantly disturbed by lawsuits filed against them. In addition, according to the European Court of Human Rights, functional immunity enables parties to appeal court decisions at a higher level without the need to open a separate civil case. So, under this spirit, the fact is understood that the citizens will attack the issued decisions and not the decision makers⁸.

When evaluating this article, the Constitutional Court emphasized that "what is important is whether the parties have the right to use legal remedies against the decisions of the Board without the need to raise personal responsibility"⁹. Also, according to this court, "taking into account the limited immunity guaranteed to the members of the Board through Article 11, paragraph 3 of the disputed Law, as well as the fact that the parties have the right to open an administrative conflict against the decisions of the Board, the Court assesses that the measure used is proportional to the goal that is desired to be achieved as the interested parties have the opportunity to effectively protect their rights against the decisions of the Council by opening an administrative conflict"¹⁰. Pursuant to these and other reasons, the Constitutional Court concluded that this article is in accordance with the Constitution.

On the other hand, according to the Law on IOBCSK [article 15], members of IOBCSK are dismissed by the Assembly with a majority of votes. In the absence of functional immunity, which protects the members of this council from, among other things, dismissal, special cases can also be considered grounds for dismissal. Based on the fact that only a simple majority is required for the dismissal of the members of the IOBCSK, this basis creates a high potential for the capture of this institution by the government which has the majority in the Assembly.

For these reasons, the granting of immunity for the chairman and members of the IOBCSK rightfully violates the independence of this institution as well as violates the rights of the parties. It is absurd to consider that for each case, the members of IOBCSK will also bear civil liability. This legal uncertainty will affect the reluctance of professionals to become part of the

⁶ Constitutional Court of the Republic of Kosovo, Judgement, Aktgjykimi KI33/16, 04 August 2017, paragraph 54.

⁷ Constitutional Court of the Republic of Kosovo, Judgement KO171/18, 20 May 2019, paragraph 227.

⁸ European Court of Human Rights, case Gryaznov vs. Russia, 12 June 2012, paragraph 78.

⁹ Constitutional Court of the Republic of Kosovo, Judgement KO171/18, 20 May 2019, paragraph 249.

¹⁰ Ibid, paragraph 252.

IOBCSK and will create great potential for the politicization of this commission by the government, which has the majority in the Assembly.

Based on these reasons and starting from the lack of justifications on the need to remove this article from the Law, the perception of a negative trend is created, for the deliberate politicization of this institution. This perception fundamentally undermines public trust in this institution and consequently undermines the civil service system as a whole.

5. The absurdity of postponing the execution of the IOBCSK decision

In administrative procedure, IOBCSK acts as the second instance. In each case when a decision is taken by the institution in the first instance administrative procedure, the dissatisfied party has the right to appeal to the IOBCSK. According to Law 05/L-031 on the General Administrative Procedure [Article 130], the filing of the appeal suspends the implementation of the decision of the first instance. According to the Law, the decision of the IOBCSK is considered final and is an enforceable decision. The initiation of the administrative conflict does not stop the execution of the decision of the IOBCSK, except if the court assesses that in a specific case this should happen and imposes a temporary measure¹¹.

According to the Draft Law, in each case when a lawsuit is initiated against the decision of the IOBCSK in court, the decision of the IOBCSK will not be implemented until the court issues a final decision. In this regard, the Draft Law [Article 7] has determined that "In cases where an administrative conflict is initiated against the decision of the Council in the competent court, the execution of the decision for the case is done only when there is a final decision of the competent court".

This legal solution is contrary to the conceptual differences between administrative procedure and judicial procedure. These two procedures are different and separate procedures. The administrative procedure, which ends at the second instance within the administrative institutions, is regulated by a different law from the administrative conflict that takes place in court. For this reason, the correlation of the applicability of the decision of the IOBCSK with the court's decision, as long as the court has not imposed a temporary measure, is a mixture of the basic differences between the administrative and the judicial procedure.

The existence of the IOBCSK as an administrative body for the protection of judicial rights is aimed at solving problems within the administration as well as increasing the efficiency in handling these cases. The ex lege suspension of the decision of the IOBCSK until the issuance of a final court decision practically excludes the IOBCSK from its constitutional role and makes it impossible to resolve complaints within the administrative procedure. This is because in cases where an administrative conflict is initiated, the relevance will be only to the court decision and not to the board decision. This is because the decision of the council will never be implemented until there is a court decision.

¹¹ Law No. 03/L-202 on Administrative Conflicts, Article 22.

The initiation of the administrative conflict would be possible even if the IOBCSK did not exist at all. Thus, under this situation, as long as the decisions of the IOBCSK (in cases where a lawsuit is initiated) are not enforceable, the procedure before the IOBCSK practically represents only procedural delays without any relevant weight.

This legal solution is contrary to the practice of the Constitutional Court of the Republic of Kosovo. The decisions of the IOBCSK by the Constitutional Court have been described as "*final, binding and enforceable*"¹² decisions. Thus, the Draft Law in this part conflicts with the practice of the Constitutional Court of the Republic of Kosovo, therefore with the Constitution of the Republic of Kosovo. Thus, the Draft Law in this part conflicts with the practice of the Constitutional Court of the Republic of Kosovo, therefore with the Constitution of the Republic of Kosovo

It should be emphasized that according to Law 05/L-031 on Administrative Conflicts, if the circumstances of the case require the postponement of the execution of a decision of the IOBCSK, then the court can set a temporary measure¹³. Under the regulation of provisions according to the Draft Law, the temporary measure does not make any sense.

According to this absurd solution of the draft law, each person who submits a complaint must first extend the now irrelevant procedure at the IOBCSK and then must wait for the court decision. According to the data of the KJC, the duration of handling an administrative court case from the moment of initiation of the lawsuit until the final decision is 3.2 years. This is due to the fact that, while the cases in the IOBCSK would be handled within an optimal period, each citizen must wait 3.2 years for his case to receive an epilogue. So, in this situation, there are practically no administrative remedies at all while judicial remedies are not effective.

Beyond harming the interests of citizens, this length of time essentially harms the normal functioning of the civil service. In the civil service, there are constantly different procedures, such as recruitment procedures, promotions etc. In all these cases, when an institution takes a decision, upon submitting a complaint to the IOBCSK, that decision is suspended¹⁴. This suspension does not end after the issuance of the IOBCSK decision, but must wait for the final court decision. Therefore, in order to complete a procedure within the civil service, institutions must wait 3.2 years. This occurs in every case where a lawsuit is submitted. Waiting, presents a total blockade of the civil service and objective impossibility for any kind of strategic planning of the institutions, since the system for human resource management, civil service, is already blocked.

¹² Constitutional Court of the Republic of Kosovo, Judgement KO127/21, 21 December 2021, paragraph 102.

¹³ Law 05/L-031 on Administrative Conflict, Article 22.

¹⁴ Law Nr.05/L-031 on the General Administrative Procedure, Article 130.

6. Lack of explanations for the adoption of this law

The Draft Law is drafted by the Office of the Prime Minister¹⁵. On the official website of the Assembly of Kosovo, in addition to the draft law, other accompanying documents of the draft law have been published, such as the explanatory memorandum, the statement on the assessment of the financial impact, the statement on the alignment and harmonization with the legislation of the European Union and the legal opinion¹⁶.

These documents seem to have been attached to the Draft Law more as a formality than as documents through which the Draft Law and the intention of the drafters of this Draft Law can be clarified. The explanatory memorandum of this very important Draft Law, translated into three languages, is less than 3 pages¹⁷. In the matter of this memorandum, general sentences and procedural actions are repeated, but the reason for the approval of this Draft Law is not indicated. In this memorandum it is stated that "This draft law aims to eliminate some legal deficiencies so that the IOBCSK can exercise its constitutional and legal powers in accordance with the Constitution and the legislation in force" but that it is not clarified what these deficiencies are. Thus, although the explanatory memorandum is attached to this Draft Law, this memorandum does not really explain anything about this Draft Law.

7. Assembly to respect the Constitution

As elaborated above, the Draft Law in its entirety is contrary to the Constitution of the Republic of Kosovo. This Draft Law made completely irrelevant the role of a quasi-judicial institution which takes care of the protection of standards in the field of civil service. In this Draft Law, there is not a single provision which does not conflict with the Constitution of the Republic of Kosovo and the judgments of the Constitutional Court. In other words, there is no provision in this Draft Law that is worth approving by the Assembly of the Republic of Kosovo.

For these reasons, in order to protect the Constitution of the Republic of Kosovo and the protection of the main institution that protects the rules of the civil service, the Assembly of the Republic of Kosovo should reject this law. Due to, as explained above, the absence of a single positive provision in this Draft Law, the Assembly of the Republic of Kosovo must reject this Draft Law in principle, despite the fact that the Committee for Public Administration, Local Government, Media and Regional Development has done the opposite. Moreover, it would be good for the Government of the Republic of Kosovo to withdraw this from the Assembly.

¹⁵ "Law on Supplementing and Amending Law No.06/L-048 on the Independent Oversight Board for the Civil Service of Kosovo". Public consultation platform, Office for Good Governance, (see link: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=41464>). (Last accessed on 26 October 2022).

¹⁶ "Draft Law no.08/L-180 on Supplementing and Amending Law No.06/L-048 on the Independent Oversight Board for the Civil Service of Kosovo, Kosovo Assembly". (See link: <https://www.kuvendikosoves.org/shq/projektligjet/projektligji/?draftlaw=419>). (Last accessed on 26 October 2022).

¹⁷ "Explanatory Memorandum of the Draft Law on Supplementing and Amending Law NO. 06/L -048 for the Independent Oversight Board for the Civil Service of Kosovo". Kosovo Government. (See link: https://www.kuvendikosoves.org/Uploads/Data/Documents/memorandumishpjegues_SuwjnkFBYr.pdf). (Last accessed on 26 October 2022).

If this does not happen, based on the Constitutional provisions and the judicial practice of the Constitutional Court, this law is unlikely to pass the filter of the Constitutional Court. Based on the practice of the Constitutional Court in relation to the IOBCSK, any contestation of this law in the Constitutional Court will lead to the repeal of the same, due to the violation of the constitutional provisions.

In conclusion, if the Government and the Assembly do not reflect and approve the Draft Law, it is up to all parties authorized in the sense of Article 113 of the Constitution of the Republic of Kosovo to commit themselves to forward this Draft Law for evaluation to the Constitutional Court. If this does not happen, the IOBCSK as a constitutional body will practically have no role and this will necessarily be reflected in the violation of the rights of the parties, but especially in the violation of the meritocracy of the civil service in Kosovo.