

The Inseparable Power

An analysis of the independence of the judiciary in Kosovo



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ABBREVIATIONS

| | |
|--------|---|
| CPHRF | Council for the Protection of Human Rights and Freedoms |
| CPSS | Comprehensive Proposal for Status Settlement |
| EULEX | EU Rule of Law Mission in Kosovo |
| ICO | International Civilian Office |
| IJPC | Independent Judicial and Prosecutorial Commission |
| KCA | Kosova Chamber of Advocates |
| KIPRED | Kosovar Institute for Policy Research and Development |
| KJC | Kosovo Judicial Council |
| KJPC | Kosovo Judicial and Prosecutorial Council |
| KPC | Kosovo Prosecutorial Council |
| MF | Ministry of Finance |
| MoJ | Ministry of Justice |
| MPA | Ministry of Public Administration |
| ODC | Office of Disciplinary Counsel |
| SKJC | Secretariat of the Kosovo Judicial Council |
| SRSG | Special Representative of the Secretary-General |
| UN | United Nations |
| UNMIK | UN Mission for Interim Administration in Kosovo |

1. INTRODUCTION

The Republic of Kosovo has consolidated state institutions which operate on the basis of separation of powers. This is guaranteed by the Constitution of the Republic of Kosovo while the basic laws for a judicial and prosecutorial system approved in 2010 have advanced further these provisions of the Constitution.¹

For years, Kosovo judicial system has been criticized for its lack of independence and being corrupt.² Interventions in the work of the judiciary come primarily due to the lack of democratic experience. During the communist era separation of powers did not exist, especially not in Kosovo, where state repression had been exerted. Although in another form, the same practice has continued under the watch of the international administration of Kosovo by the United Nations Mission for Interim Administration in Kosovo (UNMIK). Head of this mission, the Special Representative of the Secretary General (SRSG), has been at the same time the head of legislative, executive and judiciary powers. During the period of UNMIK, interference by one branch of government to another has been an everyday practice.³

After the declaration of independence on 17 February 2008, institutions have taken several steps to improve this practice. It is considered, that an important step in this respect is the reform of the justice system.⁴ However, these reforms could not be implemented because the adoption of four fundamental laws of the justice system has been delayed for years. Eventually, their approval in the second half of 2010 marked the regulation of the status of judges and prosecutors and the complete transformation of both courts and prosecutors. While the status of judicial officials has been arranged after the partial enactment of the provisions of laws that provide decent wages, equivalent to those of the executive, the rest of the provisions will be implemented as from 2013. At the same time, the establishment of the Kosovo Prosecutorial Council (KPC) transferred the responsibility for the management of the prosecution offices, thus eliminating their previous strong dependence on the Ministry of Justice (MoJ). The basic conditions for the rule of law have been secured through the Constitution and adoption of these laws, which have improved the salary status and assured permanent mandate of judges and prosecutors.

A very important issue in ensuring their independence is by ensuring a permanent mandate of appointment after the initial phase of 3 years.⁵ Despite these good initiatives of reform, the

¹ Law on Courts, Law no. 03/L-199; Law on State Prosecutor, Law no. 03/L-225; Law on Kosovo Judiciary Council, Law no. 03/L-223; and Law on Kosovo Prosecutorial Council, Law no. 03/L-224.

² In 2004, Kosovo has been graded with a 6, while in 2011 it was graded with a 5.75, with regard to the democratization of the Judicial Framework and Independence (1 is the highest value, while 7 is the lowest one). In 2011, the average for the Balkans countries in this category has been 4.43. Nations in Transit. Freedom House. 2011.

³ KIPRED interview with an ex-judge in the UNMIK Department of Justice, March 2011.

⁴ Needs and the discussions for reforms of justice system have started since 2003, when also the first evaluations and development of first comprehensive proposals for this system took place. Law on Courts, law no. 03/L-199, as well as Law on State Prosecutor, law no 03/L-225, are two of the laws which have ensured the leveling of the salaries of the judges and prosecutors with the relevant positions in executive and permanent appointment has been enabled. Recommendation for undertaking these measures related to the judicial system have been given in 2003 in the document "*Kosovo Judiciary System, Evaluation and Proposed Options.*" UNMIK and Kosovo Judicial and Prosecutorial Council. 2003-2004.

⁵ Article 105 [mandate and re-appointment], Chapter VII – Justice System. Constitution of the Republic of Kosovo.

justice system continues to face numerous challenges that for the most part, are related to overlapping mandates/powers/interests with the executive.

In this study, the Kosovar Institute for Policy Research and Development (KIPRED) is focused on research of the policies and laws in order to identify legal gaps and harmful practices affecting the independence of the judiciary. The study is focused on legal and practical independence, analyzing the budget issues for the judicial organs, public policy making and legislative initiatives, prosecution and courts administration, the functioning of the governing bodies of this executive power and interference of the executive in judiciary. The study has also analyzed the tendency of the justice system to fall prey to the influences of the executive, as well as cases where prosecutors and judges refuse to handle cases dealing with persons who are part of the executive.

2. METHODOLOGY

KIPRED has used a mixed methodology of research during the drafting of this paper. This is because the judicial and prosecutorial systems in Kosovo are new and the data is incomplete. Another reason is that the independence of the judiciary is perceived in different ways and so far an agreement has not been reached that can be conceded as a universal model in all countries.

Formulation of the problem was done by collecting the initial concerns that were raised in the beginning of the reform of the justice system in Kosovo. During the research, we have consolidated the raised problems by reviewing the literature and legislation in the area of justice systems. In the end, we used the qualitative method of in-depth interviews with officials of institutions, holding key functions in three governments, as well as experts from the field of justice.

Firstly, an analysis of the legal frameworks, including current and previous laws, has been done. Within this context we have also included the Constitution of the Republic of Kosovo, the Law on Courts, the Law on State Prosecutor, Law on the Kosovo Judicial Council, Law on the Kosovo Prosecutorial Council, Law on the Constitutional Court, the Law on Salaries of Civil Servants, the Law on Civil Service, as well as regulations, administrative instructions and different normative acts of the institutions that are obliged to implement them.

After review of these laws related to the work of judicial power, KIPRED has analyzed the independence of the judiciary in other countries as well as recommendations and studies made by the Council of Europe and the United Nations Organization, as two institutions that have developed standards for this field.

At the end of the analysis of various documents, KIPRED has compiled a list of issues that are identified as the most urgent concerns regarding the independence of the judiciary as a branch of power in Kosovo. Upon completion of this preliminary analysis, in-depth interviews were conducted with officials of key institutions in terms of judicial and prosecutorial systems. Included are interviews with directors and various senior officials of the Kosovo Judicial Council (KJC), KJC Secretariat, KPC, State Prosecutor, MoJ, Ministry of Public Administration (MPA), Courts, Prosecution offices, as well as experts of justice issues in Kosovo.

All issues raised by the leaders of institutions of justice are incorporated into this analysis, which is based on detailed research of all legal acts and experiences of other countries, as well as sound basic principles from the developed democracies, according to which independent powers operate.

Governance in various countries of the world is not the same as that of Kosovo due to the long experience of democracy in those countries. Thus, it has been difficult to make a direct comparison of practices. Therefore this study only takes into account the practices that were deemed relevant and beneficial to the Kosovo context.

3. BRIEF HISTORY OF JUDICIAL SYSTEM IN KOSOVO

Frequent and radical change of the government systems in recent decades in Kosovo has had a major impact on the functioning of various state institutions.⁶ Before 1999, Kosovo has been functioning under the Yugoslav Federation, and the organization of state bodies, including here the judiciary system, has been in full compliance with this federation's system. Given that Yugoslavia has been a monist system, it was impossible to think of the separation and proper control of powers. The judicial system in Kosovo has been extremely burdened with the application of violent measures by Milosevic's Serbia, especially after the onset of repression.

The consequences of these acts have led to the rapid professional amortization of judges and prosecutors as well as opportunities to develop new human capacities for the judiciary. Unlike the parallel education system which was able to rise over a decade, the legal system was unable to build and to function, at that time, in such a way so as to produce necessary legal effects. This resulted in the impetus for the development of human capacities in the legal area to stop, while at the same time the largest portion of practitioners of law, judicial, and prosecutorial positions in 1990's reoriented the practice of their profession and became attorneys.

No doubt that pre-war consequences have been reflected in building the judicial system after 1999. During the administration of UNMIK, in the absence of human capacities and adequate evaluations of all candidates interested in becoming part of the judicial system, it was difficult to eliminate judges and prosecutors with dubious pasts. Furthermore, due to the bad practices of some judges, citizens have lost confidence in the judiciary.⁷

In the absence of a political will from local and international actors, concrete steps towards reforming the judicial system, have for years, gone in vain. In 2005, KJC was created to replace the Kosovo Judicial and Prosecutorial Council (KJPC).⁸ After creating KJC, since 2007, efforts have been made to begin the process of reappointment and appointment of judges. This process, considered as the most important for judicial reform, begun only in February 2009.

During the process of reappointment and appointment all candidates have undergone a test of ethics and the Independent Judicial and Prosecutorial Commission (IJPC) has made a detailed investigation of their past, integrity and current assets. In October 2010, the process has been completed, leaving vacant 127 judicial and prosecutorial positions.⁹ Many judges and prosecutors, who had previously served in the justice system, had already fallen in integrity,

⁶ During this period, justice system has passed a long way, full of mishaps, having in mind socialist federation, Milosevic's regime, international administration of UNMIK and now independent local institutions after the declaration of independence.

⁷ Judiciary is placed on top of the lists of most inefficient and corrupted institutions in the country. According to the UNDP Early Warning Report (may-august 2002), 50% of the surveyed declared that corruption is present in courts. See also, Fast Facts(2009) indicates that citizens perceive courts as one of the most corrupted institutions. Early Warning Report (may-august 2002) and Fast Facts (2009). UNDP.

⁸ Regulation 2005/52, on the Establishment of the Kosovo Judicial Council. UNMIK.

⁹ Report on the work of Independent Judicial and Prosecutorial Commission. Independent Judicial and Prosecutorial Commission in Kosovo. October 2010.

no longer being worthy to exercise judicial functions. This has created space to appoint new people to serve justice, with about 60% of positions that have been divided among young judges and prosecutors.¹⁰ The fact that many judges and prosecutors who had served before, have not been appointed, shows that within the justice system there served a large number of people who hampered this system.

In the spirit of reforming the judicial and prosecutorial system in Kosovo, the Kosovo Assembly in 2010 has approved four laws, the Law on Courts, Law on KJC, Law on State Prosecutor, as well as the Law on KPC. With these laws, it is expected that from 2013, we will start with a new system of organization of the courts and prosecution system in the country. Through these laws the leveling of salaries of judges and prosecutors with those of ministers is ensured, and the Constitution of the Republic of Kosovo guarantees their permanent appointment, which together meet the basic requirements of the independence of judicial system. During 2011 and 2012 all preparations will be made so that in early 2013 implementation of these four laws can begin in its entirety.

¹⁰ Report on work of the Independent Judicial and Prosecutorial Commission. Independent Judicial and Prosecutorial Commission. October 2010.

4. TOWARDS AN INDEPENDENT JUDICIARY

*"The independence of the judiciary has to be real,
and not apparent merely."*

- Montesquieu

The most common model in democratic states is based on the separation of powers, which under normal circumstances means the three branches of power including the executive, legislative, and judiciary. It is impossible to talk about division in every aspect because there are a number of issues that impose interconnection and interaction of powers. Therefore, a democratic system of governance must ensure that the various powers have equal power and responsibility in order to achieve control and balance between each other.

In countries with immature democracies, where Kosovo belongs, the independence of the judiciary is the core to solving the problems appearing in the rule of law, which would then ensure the functioning of a free economy, freedom of political association, civil society development and promotion of democracy.¹¹ The independence of the judiciary is perceived differently in different states, so it is very difficult to make a comparative assessment and to draw a universal model. However, the report "Nations in Transit" in terms of Judicial Framework and Independence, Kosovo has the lowest level of democratization compared to other countries in the region and also the progress during the years has been very slow.¹² Stagnation or slow progress of Kosovo in this field can be closely correlated with the legal framework which did not ensure the highest level of independence, as well as executive actions that interfere with the work of the judiciary.

System of the Republic of Kosovo is founded on a basis of the separation of powers. This is guaranteed by the Constitution, where it is stated that "Kosovo is a democratic Republic based on the principle of separation of powers, and control and balance among them, as it is provided in this Constitution".¹³ Separate chapters of the Constitution contain clear legal provisions, in which are presented the roles and responsibilities of the legislative, executive, and judiciary.¹⁴ Based on the Constitution, in the spirit of the separation of powers, KJC is the institution which ensures full independence of the judicial system, including recruitment and recommendation of judges, judicial administration, hiring and supervising court

¹¹ High Representative in Bosnia and Hercegovina, Ambassador Paddy Ashdown, emphasized "In Bosnia, we thought that democracy is the highest priority and we measured it with the number of elections we organized. Later on we understood that we should enforce rule of law as a priority, since everything else depends on that; functioning of the economy, free and fair political system, civil society development, and trust of the citizens in police and courts." Can be found at http://www.judicialmonitor.org/archive_0207/interview.html (accessed on 14 July 2011).

¹² See footnote 2.

¹³ Article 4 [Forms of Governance and Division of Power]. Constitution of Republic of Kosovo. Constitution of Republic of Kosovo has set forth provisions that are in compliance with international standards promoted by the United Nations. "Basic Principles for the Independence of Judiciary." United Nations. 1985, see: <http://www.ohchr.org/english/law/indjudiciary.htm> (accessed on 14 July 2011).

¹⁴ Chapter IV [Assembly of the Republic of Kosovo], Chapter VI [Government of Republic of Kosovo], Chapter VII [Justice System], and Chapter VIII [Constitutional Court]. Constitution of Republic of Kosovo.

administrators and developing and overseeing the budget of the judiciary.¹⁵ The highest level of the courts constitute the Supreme Court and beneath it are listed other courts of lower levels. While the Constitutional Court is separate from the rest of the judicial system and functions separately in accountability, additional conditions for the selection of judges, labor organization, and preparation and management of the budget.¹⁶ The Constitution of the Republic of Kosovo has laid the foundations of mechanisms which must independently manage the judicial power in the country. However, there are accompanying laws which to some extent have advanced these dispositions, but there still remains a lot to be done, in order to achieve real independence of the judiciary.

Until the adoption of basic laws of the judiciary there were many delays and vicissitudes which show the impact of executive power in genuine reform of the justice system. The process of appointment and re-appointment of judges and prosecutors had begun in February 2009 prior to the establishment of favorable conditions of work in the courts and the prosecutor offices, because the basic laws were approved only in August and October 2010. Employment Offers within the judiciary and prosecution were not as tempting as to attract a greater number of people who had superior qualifications in the field of justice.¹⁷ Despite these vicissitudes, the basic laws that have been enacted have pushed forward a large part of the Constitutional requirements which are related to the independence of the judiciary and prosecution.¹⁸ From 2011 until the end of 2012, Law on Courts and Law on the State Prosecutor, do not apply in its entirety but only provisions such as permanent appointment of judges and prosecutors reappointed in accordance with the Constitution of the Republic of Kosovo, and the issue of leveling the salaries of judges and prosecutors with relevant positions in the executive.¹⁹ However, except higher wages, to judges and prosecutors, there is no single equivalent benefit, as for the directors of executive institutions. All provisions of these laws are expected to take effect in 2013, when the KJC and KPC are expected to prepare restructuring of the system of courts and prosecutors offices. The current system will change entirely by transforming Municipal Courts into the Basic Courts, Court of Appeals will be established and Supreme Court will be reorganized.²⁰

With the establishment of the KPC in the first half of 2011, there has begun a transfer of competences for the management of prosecutor offices from MoJ to this institution, which is a great achievement towards independence in the administration of the prosecution.²¹ KPC is responsible for recruiting, nominating and the discipline of prosecutors as well as supervision of the work administration in Prosecutor's offices in Kosovo.²² Thus, KJC and KPC are the highest bodies for the management of justice institutions in the country and for ensuring that

¹⁵ Chapter VII [Justice System], Constitution of Republic of Kosovo and the Law on Kosovo Judicial Council, Law no. 03/L-223.

¹⁶ Chapter VIII [Constitutional Court], Constitution of Republic of Kosovo and Law on Constitutional Court of Republic of Kosovo, Law no. 03/L-121.

¹⁷ KIPRED's interviews with legal experts, July 2011.

¹⁸ In 2010 were approved four basic laws such as the Law on Courts, on Prosecution, on KJC, and on KPC.

¹⁹ Legal provisions that are being applied deal with the status of the judges' salaries, Article 29, Judicial salaries and compensation. Law on Courts, Law no. 03/L-199.

²⁰ Law on Courts, Law no. 03/L-199 and Law on the State Prosecutor, Law no. 03/L-225.

²¹ KIPRED's interview with the Chief State Prosecutor, Mr. Ismet Kabashi, June 2011.

²² Law on Kosovo Prosecutorial Council, Law no. 03/L-224.

all laws or other sub-legal acts should reflect the principle of control and balance of powers and at the same time, independence of the justice system.

Under the dome of MoJ some institutions have already been established and are on the road to become operational. As a result, this will greatly facilitate the work of the judiciary and will affect the overall reform, offering better opportunities to citizens for access to justice. In this respect, in the process of becoming functional the notary system, mediation system and the Judicial Academy will be created. After three years of stagnation, Bar exam is operational and is organized on a regular basis, creating opportunities for preparing new generations to join the legal system in Kosovo.

According to the MoJ's plans, reforms in the justice system will be deepened by the adoption of other important laws that will govern certain areas of law such as the Witness Protection Law, Law on Confiscation of Property Acquired by Criminal Offense (Anti-mafia Law), changes in the Criminal Code of Kosovo, changes in the Code of Criminal Procedure in Kosovo, Law on Obligations, amending and supplementing the Law on Notary, Law on Enforcement and Law on Criminal Responsibility of Legal Persons.²³

KIPRED considers that the initiatives and achievements made during the recent years, that were mentioned above contain very positive elements in terms of judicial independence. Despite clear provisions in the Constitution about separation of powers, accompanying laws such as Law on KJC and KPC have determined dispositions that create dependence by the executive power. The main problem has to do with two very important aspects as it is with the budget proposal and the organization of work / non-judicial employees in the courts and prosecutor offices. The Progress Report for 2010 stated that "judicial reform, budget, staffing, and training" are strategic issues for KJC.²⁴ Given that this request is directed to the KJC, this mechanism remains to be implemented in this respect.

²³ Priorities of the Ministry of Justice: Ministry of Justice in the mandate 2011-2014, will have this working concept based on 6 (six) priorities. Ministry of Justice. April 2011.

²⁴ Progress Report 2010. European Commission. 2010.

5. INSTITUTIONAL STRUCTURE AND DECISION-MAKING

The Constitution of the Republic of Kosovo has given full authority and powers to the KJC and KPC to govern the justice system in Kosovo, in order to ensure the independence and impartiality of the judicial and prosecutorial system.²⁵ Composition, scope and powers of the two highest mechanisms in the management of courts and prosecution offices are discussed in detail in the Law on KJC and Law on KPC.²⁶ KJC and KPC have the power to do recruitment, proposal for appointment of judges and prosecutors to the President, determining the number of prosecutors and judges, development of policies and strategies. These two institutions also administer prosecution offices and courts and their personnel, prepare and manage budgets, professional development of prosecutors and judges, and other commitments generally associated with efficient and effective functioning of prosecution offices and courts.²⁷ All these responsibilities represent a very broad scope of the KJC and KPC in the justice system, making them the principal bodies responsible for the degree of efficiency of functioning of the justice system in the country.

| | Member | Who makes the selection | Legal basis |
|----|------------------------------------|---------------------------|--------------|
| 1 | Judge of the Supreme Court | Supreme Court Judges | Law on KJC |
| 2 | Judge of the Supreme Court | Supreme Court Judges | Law on KJC |
| 3 | Judge of the Appeal Court | Appeal Court Judges | Law on KJC |
| 4 | Judge of the Basic Court | Judges of the Basic Court | Law on KJC |
| 5 | Judge of the Basic Court | Judges of the Basic Court | Law on KJC |
| 6 | Judge * | Kosovo Assembly | Constitution |
| 7 | Judge * | Kosovo Assembly | Constitution |
| 8 | Member of the Chamber of Advocates | Kosovo Assembly | Constitution |
| 9 | Person** | Kosovo Assembly | Constitution |
| 10 | Serbian judge | Kosovo Assembly | Constitution |
| 11 | Person from the Serbs community** | Kosovo Assembly | Constitution |
| 12 | Judge from other communities | Kosovo Assembly | Constitution |
| 13 | Person from other communities** | Kosovo Assembly | Constitution |

Table 1 - Composition of the Kosovo Judicial Council

Regarding the composition of these mechanisms, the Constitution of the Republic of Kosovo has specified to some extent the composition of the KJC focusing mostly on members who will be selected by the Assembly, while not making any interpretation of KPC composition,

²⁵ See: Chapter 8, System of Justice. Constitution of Republic of Kosovo.

²⁶ Law on Kosovo Judicial Council, Law no. 03/L-233 and Law on Kosovo Prosecutorial Council, Law no. 03/L-224.

²⁷ Ibid.

leaving such issue to be regulated by law.²⁸ Kosovo's Constitution has foreseen that the Kosovo Assembly will make the selection of eight of the 13 members of the KJC. In the case of Croatia, one of the standards to meet the requirements for accession to the European Union, related to the chapter on the judiciary, is to select the majority of members of the Judicial Council of Croatia by the judiciary itself.²⁹ Therefore, the appointment of seven of the 11 members of the Judicial Council is made by the Croatian judiciary itself.³⁰ Looking at the experience of Croatia and other countries, the independent functioning of the judicial system in Kosovo remains a problem for the future if the Assembly makes the selection of over 60% of the members of KJC.

KJC is composed of 13 members, with qualifications and professional expertise who are appointed for a five year term.³¹ From 13 members, eight (8) of them are appointed by the Assembly of Kosovo, while only five (5) of them are appointed by the judiciary itself. Chairman of the KJC, which is elected by members of the KJC, addresses the Parliament of the Republic of Kosovo at least once a year to report on the judicial system.³² As it seems, the Kosovo Constitution and laws related to this issue, have created a very large correlation between the KJC with the Assembly. Although some of the members that shall be elected by the Assembly will be judges, the role of the Assembly in the selection of members of KJC has been overestimated and creates the danger of politicizing this mechanism. Furthermore, the tendency of the members of the Parliamentary Committee for Legislation to change the method of selecting members of the KJC, so that in the future, all members of the KJC are selected by the Assembly,³³ contradicts the principles and practices of the separation of powers. Similar concern is shared also by the high representatives of KJC and International Civilian Office in Kosovo (ICO), for whom this represents a violation of the separation of powers.³⁴

The Assembly may abuse its role in the selection of members of the KJC and may seek to expand its influence beyond its competence in the selection of members, aiming to have the last word in the decisions taken by the KJC. Based on the aspirations of Kosovo to build a legal state where powers are separated, the independence of the judiciary would grow if the Assembly of Kosovo selects a smaller number of members of the KJC, allowing the judiciary to select from its members the majority of the KJC members. This should always be in

²⁸ Based on the Constitution of the Republic of Kosovo, KJC should have 13 members, where five (5) of them are selected by the judiciary while eight (8) other members are selected by the Assembly of Kosovo. On the other hand, with regard to the KPC it foresees neither the number of its members nor who will do their selection. Constitution of Republic of Kosovo.

²⁹ Achievement of the objectives in the chapter 23 – Judiciary. National Committee. Parliament of Croatia.

³⁰ Law on National Judicial Council, law number 3051. Parliament of Croatia.

³¹ Law on Kosovo Judicial Council, Law no. 03/L-233.

* Based on the transitional provisions, these two members will be selected from the EULEX with the approval of ZCN. It is required that only one of the members is judge, while for the other member there is a higher freedom of selection but in practice, both internationals selected are judges.

** Based on the Law on KJC, article 5, paragraph 4, Members of the Council can also be persons that are judges or prosecutors, but external lawyers, university professors or professional with relevant experience of at least ten (10) years and who are familiar with the Kosovo judiciary. Professionals may be appointed also out of the legal area and may include persons with expertise in management, finances, IT and social sciences.

³² Article 108 [Kosovo Judicial Council], Structure of the members of KJC; Law on Kosovo Judicial Council, no. 03/L-223;

³³ Telephone communication between KIPRED and members of Parliamentary Commission for Legislation, august 2011, as well as email communication of KIPRED with ICO officials, august 2011.

³⁴ Ibid.

accordance with certain provisions specified in the Comprehensive Settlement Proposal (CSP), which requires filling of vacancies or reserved seats reserved for members of non-majority communities.

The Model of the composition of KPC is different from that of the KJC, since the Constitution of the Republic of Kosovo has allowed flexibility, based on which the Law on KPC will determine the composition of this council. Most members of the KPC are selected by the prosecution service itself, representing different prosecution offices to ensure greater independence in decision-making of the Council. In the table below is presented the composition of the Council and the way members are selected.

| Members | Proposal | Selection |
|---|---|---------------------|
| 1 Chief State Prosecutor | | Ex-officio |
| 2 Prosecutor of the Special Prosecutor's Office | | Special Prosecution |
| 3 Prosecutor of the Appeal Prosecution | | Appeal Prosecution |
| 4 Prosecutor from Basic Prosecution | | Basic Prosecution |
| 5 Prosecutor from Basic Prosecution | | Basic Prosecution |
| 6 Minister of Justice | | Ex-officio |
| 7 Member of the Kosovo Chamber of Advocates | Executive Council of the Chamber of Advocates | KPC |
| 8 Professor of Law Faculty | Department of the Higher Education | KPC |
| 9 Representative of civil society | NGOs | KPC |

Table 2 - Composition of the Kosovo Prosecutorial Council

One of the biggest decisions in the justice system is the selection and dismissal of judges and prosecutors. Judicial and Prosecutorial system has full independence in the selection of judges and prosecutors, which is done through the KJC and KPC and is guaranteed by the highest legal act of the country. These two mechanisms of justice themselves organize criteria and make proposals for appointments and dismissals of judges and prosecutors, while their appointment is subsequently done by the President of the Republic of Kosovo³⁵, whose role is limited to a formal one.

Viewing the crucial role of the KJC and KPC in the appointment and dismissal of judges and prosecutors it is necessary to divorce decision-making roles, of members coming from the attorney's and executive fields, during the process of selection and or dismissal. Such a thing would create room for conflict of interest in the case when the lawyer selects the judge or prosecutor as well as for the interference from the executive that might condition selection of a judge or prosecutor. Minister of Justice and the representative of the Kosovar Chamber of Advocates (KCA) have decided to withdraw from the participation in the Disciplinary Commission.³⁶

³⁵ Article 104 [Appointment and Dismissal of Judges]; “Judges are appointed, re-appointed and dismissed by the President of Republic of Kosovo, based on the proposal from Kosovo Judicial Council” – Chapter VII, System of Justice; Constitution of Republic of Kosovo;

³⁶ KIPRED's interview with the Deputy Prime Minister and the Minister of Justice, Mr. Hajredin Kuçi, July 2011.

In practice, the formal appointment by the President of the country was sufficient to be used for direct influence in the elimination of certain names, for not decreeing them as judges without providing any explanation, as required by the Law on the Kosovo Judicial Council. Former Acting President Jakup Krasniqi, had removed from the list for decree the only candidate for President of the Municipal Court in Prishtina, and three other names, without giving any reason for such refusal, making this decision quite mysterious, contradictory to the legal provisions, which oblige the President to state the reasons for refusal to KJC within 60-days period.³⁷ Reasons for refusal to decree these are still unknown and the case becomes even more disturbing due to the fact that these four candidates' files are missing from the shelves of the Presidency, despite the fact that the leaders of the KJC had submitted them to the Presidency, at the time when judges and prosecutors were appointed in October 2010.³⁸ Such action is beyond the authority of the President of the Republic of Kosovo or any other officer, but so far we have not seen any investigation that is undertaken to highlight the disappearance of these files.

³⁷ KIPRED's interview with KJC members, June-July 2011. Also, TV show "Jeta në Kosovë" – Interferences in the judicial system, October 2010 - <http://www.jetanekosove.com/shikovideo/590/AI>. This practice contradicts article 18, paragraph 2: *"If the President of Kosovo refuses appoint or re-appoint any of the candidates, Presidents presents to the KJC the reasons for such refusal within a period of sixty (60) days. Council can propose once again the refused candidate to the President, with written justification, or Council may propose another candidate"*. Chapter III – Recruitment, appointment and re-appointment of the judges. Law on Kosovo Judicial Council, Law no. 03/L-223;

³⁸ KIPRED's interview with the officials of the Presidency of Kosovo, July 2011.

6. POLICY AND LAW MAKING

Kosovo Constitution regulates the issue of legislative initiatives where this right is given to a range of institutions including the Presidency, Government, Parliament, even to the citizens if they can collect ten thousand signatures, but not the justice system respectively KJC and KPC.³⁹ Leaders of the justice system in Kosovo remain dependent to other powers to ensure laws, amendment and supplementation of laws that have direct impact on their daily work. Despite the lack of this right, KJC and KPC are called upon to develop policies for better functioning of courts and prosecution offices.⁴⁰ In the Law on KPC, it is required that KPC sends proposals related to the prosecutorial system and crime prevention to the Assembly of Kosovo and the Government⁴¹, which is a positive direction in terms of designing appropriate policies and laws in this area.

Despite numerous approaches to legislative initiatives, executive institutions have been the main bodies that have drafted and sponsored laws. In the absence of legal space for the judiciary to initiate legislation, space of these bodies to develop appropriate legislation for this sector is limited. Which consequently, the Government through the MoJ has regulated the scope of the judiciary through drafting and sponsorship of the laws, provided to them by law.⁴² Even when laws are in the process of drafting, amendment, or supplementation by the executive bodies, the invitation is sent selectively to judges or prosecutors to participate in working groups, bypassing this way the hierarchy of these institutions.⁴³ Thus the contribution of judges and prosecutors in drafted legislation may not to be the official position of the institution.

This lack of inter-institutional communication has resulted in participation in, the participation of judges who have failed the ethics test, in the working groups drafting the legislation for the judiciary.⁴⁴ This is a disturbing fact, which should be raised among these institutions, as it is paradoxical that individuals who were declared unworthy of being part of the judiciary, to make policy for the judiciary through legislation. The judicial authority that can address these problems in existing laws or creating of new laws is the MoJ in whose jurisdiction is the compilation of legislative agenda. In the past, the capacity of MoJ to develop and implement policies in the field of justice has not been at a satisfactory level. This practice has improved significantly during the current term of government, where priority was given to the quality of laws and public policies.⁴⁵

Needs and requirements for regulation of the legislative framework in the field of justice depend solely on the executive and their political willingness to incorporate the laws of this field in the legislative agenda. After a decade, the field of justice still limps in legislative

³⁹ Article 79 [Legislative Initiative]. Constitution of Republic of Kosovo.

⁴⁰ Article 21, Functioning of Courts. Law on Kosovo Judicial Council, Law no. 03/L0-223. and article 4, Duties, Competences and Limitations of the Council. Law on Kosovo Prosecutorial Council, Law no. 03/L-224.

⁴¹ Article 4, Duties, Competences and Limitations of the Council. Law on Kosovo Prosecutorial Council, Law no. 03/L-224.

⁴² Regulation no. 02/2011 on areas of administrative responsibility of the Prime Minister's Office and the ministries. Part 1, Annex 1, Ministry of Justice.

⁴³ KIPRED's interviews with the members of the Kosovo Judicial Council and Kosovo Prosecutorial Council, June 2011.

⁴⁴ KIPRED's interviews with the members of the Kosovo Judicial Council, June 2011.

⁴⁵ KIPRED's interviews with Deputy Prime Minister of Kosovo and the Minister of Justice, Mr. Hajredin Kuçi, July 2011.

terms, and also lacks the basic laws to combat organized crime and deep investigation of illegally obtained property. In this spirit, we have the case of the Law on Combating Organized Crime, or otherwise known as Anti-Mafia Law⁴⁶, where senior representatives of the judiciary and the Parliamentary Commission on Legislation have requested that this law be processed as quickly as possible. Even though in practice this process is being dragged out by the executive bodies. A lack of specific laws against organized crime and corruption, have contributed to the lack of results in this struggle, which is emphasized by the leaders of the judiciary.⁴⁷ In this respect, the judicial bodies are then handicapped to undertake any significant measure to improve the rule of law.

In April of 2011, the Government of Kosovo took the decision to establish Consultative Council for Justice. This will comprise of only five representatives from the judiciary and prosecution, while the remaining 13 members will come from other institutions.⁴⁸ This government's decision is a great concern in relation to the separation of powers in Kosovo and the continuing tendency of the executive to have control over other branches of power.⁴⁹ Naming the Justice Council as Consultative, based on the composition and its provisions, reflects an advisory role to the third power in the country. In Article 9 of this decision by the Government it is specified that for every action in the aspect of policy-making in MoJ, KPC and KJC, the opinion of the Justice Council should be considered first, an opinion which should be supported by most of the Council members. The government's decision determines the obligations of the institutions of judicial prudence. This in effect obliges institutions of justice, including the MoJ, KPC and KJC that any proposal for legal project-acts in the field of justice, must first be sent to the Consultative Council to get an opinion.⁵⁰ Any legal act, including strategies, drafts-laws, and different policies have to go through this committee and the opinion of the council is decided upon by a majority of members present.⁵¹ Although it is envisaged that 18 members of the Council of Justice come from different institutions, they will all be appointed by the Government of Kosovo.⁵² In the beginning, members foreseen to

⁴⁶ Based on the legislative strategy for the year 2011 of the Office of Prime Minister, Law on Prevention and Combat of Organized Crime is foreseen to be proceeded in the Office for Legal Aid Services at latest on 1st November 2011. Legislative Strategy 2011. Office of the Kosovo Prime Minister. Can be found at http://www.kryeministri-ks.net/repository/docs/Strategjia_Legjislative_2011-finale-_e_plotesuar_me_25.05.2011_.pdf (accessed on 14 June 2011).

⁴⁷ According to judges, prosecutors and investigators current legal infrastructure represents a major problem on collection of proofs if specific materials are acquired in illegal way since the burden of the proof remains with the prosecutorial services and those of law enforcement. Strengthening the Rule of Law in Kosovo II: Confiscation of illegally obtained property. KIPRED. Prishtina: April 2011.

⁴⁸ Decision for Establishment of Consultative Council for Justice, Decision no. 04/13. Government of Republic of Kosovo. 29 April 2011.

⁴⁹ In addition to the dependency of judiciary, also the independence of legislative is doubtful, since the Government continuously is criticized for exerting control. Llapashtica, Jeton. Assembly under the "heels" of Government. Zëri. Can be found at <http://www.zeri.info/artikulli/1/1/27951/kuvendi-nen-thundrat-e-qeverise/> (accessed on 15 July 2011).

⁵⁰ Article 9, Decision on Establishment of the Consultative Council for Justice, Decision no. 04/13. Government of Republic of Kosovo. 29 April 2011.

⁵¹ Article 4, paragraph 2 Decision on Establishment of the Consultative Council for Justice, Decision no. 04/13. Government of Republic of Kosovo. 29 April 2011.

⁵² Article 3, paragraph 2, of the Decision of the Government for the Council for Justice emphasizes clearly that the appointment of the members will be done by the Government of Kosovo. But, MoJ in the notification sent to the relevant institutions for participation in the Council for Justice asked from them to select their own representatives in the Council. Decision on Establishment of the Consultative Council for Justice, Decision no. 04/13. Government of Republic of Kosovo. 29 April 2011. Also KIPRED's interview with high officials of the institutions invited to participate in the Consultative Council for Justice, June-July 2011.

be part of the Council of Justice were asked to make the appointment of their representatives on their own, but provisions in the Government's decision clearly states that government itself will appoint these members.⁵³ Seeing that the majority of the Council will be composed of representatives that do not come from the judiciary, this can be seen/translated as direct interference in judicial affairs. As representatives of this branch will not be able to take any steps in the legal regulation of their area, including the legal, regulatory or normative acts, without consulting the opinion of the Consultative Council. This executive's effort represents the direct interference in areas which are dedicated exclusively to the judiciary and prosecution.⁵⁴

⁵³ KIPRED's interviews with high officials of the institutions that were invited to participate in Consultative Council for Justice, June –July 2011.

⁵⁴ According the article 4 of Law on Kosovo Judicial Council, which deals with the competences and responsibilities of KJC, the latter, is the highest institution with the mandate for policy-making with regard to the work of judicial system. Also article 4 of the Law on Kosovo Prosecutorial Council foresees that KPC will be the body which develops policies and strategies for the prosecutorial system in the country. See also the statement of Mr. Fejzullah Hasani in the article of newspaper *Zëri*. See Bajrami S., "Government also above the judiciary". *Zëri*. 1 July 2011.

7. INADEQUATE REPRESENTATION

In April 2011, the Minister of Justice signed a memorandum of understanding with the Council for Protection of Human Rights and Freedoms (CPHRF), which granted access in the monitoring of the judicial processes⁵⁵. This being, also the area of competence of the KJC creates overlapping institutions.⁵⁶ Chairman of the KJC considers that the signing of this memorandum and others like it by the representatives of the executive for the judicial sphere is unacceptable and represents interference in the work of the judiciary.

During 2010, within the Office of Special Prosecutor of Kosovo (OSPK) there was created the Task Force against Corruption. This Task Force has been created after a decision by the Government of Kosovo, with minimal consultation with the State Prosecutor and the KJC, which at that time was responsible for policies related to the judiciary and state prosecution.⁵⁷ Despite the huge publicity in connection with the formation of this task force, financial support by the Government was still missing almost eight months after its formation.⁵⁸ On the other hand, with a decision from the Chief State Prosecutor another task force within the office of the prosecutor was created. In each prosecution office there has been appointed a prosecutor that will be dealing with corruption cases.⁵⁹ The Kosovo Government, through its decisions mentioned above, directly interferes in the criminal prosecution of certain offenses by the State Prosecutor. Good practices indicate a more equitable approach in relation to the judiciary and prosecution, where the other branches offer possibilities for good working conditions and sufficient budget to the judiciary to combat different phenomena. However, the executive does not make decisions to assess current capabilities and the methods for capacity building in order to achieve the expected results, without prior consultation with relevant institutions, as is the case with the Government of Kosovo in relation with the Task Force against Corruption.

In its named priorities 2011 - 2014 the MoJ plans to deal with issues that are not considered within its scope and competences, by extending its fields of influence to the judiciary. The MoJ's first priority is to coordinate the rule of law, which it had planned to coordinate through the establishment of the Consultative Council of Justice. This kind of policy-making practice of the executive branch should change, since KJC and KPC are the current mechanisms that are called to deal with the coordination of the rule of law in Kosovo. In the wake of these 2011-2014 priorities the MoJ raised several issues related to the KJC and KPC. The MoJ vows to work on implementation of the basic laws of the judiciary such as the Law on Courts, on State Prosecutors, the Law on KJC, the Law on KPC and enabling the

⁵⁵ "Ministry of Justice and CPHRF sign a memorandum of understanding". Ministry of Justice. Can be found at <http://www.md-ks.org/?page=1,8,349> (accessed on 1st June 2011). And KIPRED communication with Mr. Behxhet Shala, Executive Director, Council for Protection of Human Rights and Freedoms. 14 June 2011.

⁵⁶ Article 4, paragraph 1.22. Law on Kosovo Judicial Council, Law no. 03/L-223.

⁵⁷ KIPRED's interview with the Chief State Prosecutor, Mr. Ismet Kabashi, and President of the Kosovo Judicial Council, Mr. Enver Peci, June and September 2010. See also, "Strengthening the Rule of Law in Kosovo: Fight against corruption and organized crime." KIPRED. Prishtina: November 2010.

⁵⁸ KIPRED's interview with the Chief State Prosecutor, Mr. Ismet Kabashi, June 2010. See also , Qosaj-Mustafa, Ariana. "Strengthening the Rule of Law in Kosovo: Fight against corruption and organized crime." KIPRED. Prishtina: November 2010.

⁵⁹ KIPRED's interview with the Coordinator for Corruption Cases, Mrs. Drita Hajdari, June 2011.

structuring and functioning of courts and prosecutors. Furthermore, MoJ sees as its own responsibility to increase the number of judges and prosecutors in the country in accordance with needs and international standards. Based on the legal framework, KJC and KPC are the institutions which make planning based on the needs and requirements presented by the courts and prosecutors' offices, in order to serve the citizens in the most efficient way. Therefore, any tendency of the MoJ to get involved in the implementation of these laws will be executive interference in the judiciary.

One of the positive aspects in law and policy making is the possibility for the Constitutional Court to review laws. Based on the Constitution of the Republic of Kosovo, the Constitutional Court of the Republic of Kosovo is responsible for providing judgment about the compatibility of laws, Government regulations and other matters related to the Constitution of the Republic of Kosovo.⁶⁰ Decisions of the Constitutional Court are final and are above the laws or any other legal act. While at the same time, institutions such as the Assembly of Kosovo, President of the Republic of Kosovo, Government, Ombudsperson, Municipalities, Members of Parliament, individuals, or the courts can call for certain issues to be raised to the Constitutional Court. Such a system ensures that the justice system in Kosovo is enabled to do the revision of legal and sub-legal acts. The Constitutional Court has already applied these legal provisions, as is the case with the Bill of Rights and Responsibilities of the Members of Parliament. In which the Constitutional Court ruled on a temporary measure with regard to the pensions for Members of the Assembly.⁶¹ This practice has only added credibility to the CC for dealing with cases of major political and institutional profiles. Local and international opinion has already seen the courage and independence of the judges of this court, which among others have tried two cases over the first office of the state, that of the President of the Republic of Kosovo.

⁶⁰ Article 113 [Jurisdiction and Authorized Parties], Constitution of Republic of Kosovo.

⁶¹ Decision for the temporary measures in the case no. KO 119/10. Constitutional Court of Republic of Kosovo.

8. BUDGET PREPARATION AND MANAGEMENT

A lack of adequate financial support for the judiciary is best illustrated when evaluating the budget that is allocated to this branch of power. Until 2011, when wages for judges were increased, was approximately 14 million, or less than 1.15% of the total state budget.⁶² The current practice shows that the budgetary proposals of KJC have never been approved as such, but the Parliament has always approved the proposal for the judiciary which has been drafted by the Government of Kosovo⁶³, which has been a minimal budget. A similar situation can be observed in relation to the prosecution offices, which during 2010 the institution of State Prosecutor has spent only 6.094 Euro per month.⁶⁴ A small budget for the courts and the prosecutor's offices has brought many problems. These include the major needs of non-judicial professional staff, court renovations, inadequate security for judges and other parties who participate in trials, as well as other issues which have direct impact on the effectiveness of the judiciary and access to justice for citizens.

The KJC and KPC in combination with the relevant laws are obliged to submit a budget directly to the Government, and then their proposal will be attached to the proposal of the Ministry of Finance and submitted jointly to the Assembly of Kosovo.⁶⁵ This is a new way of submitting the budget proposal for the KJC, since in the past the Assembly received only the proposal prepared by the Government of Kosovo. Despite changing the way the budget proposal for judicial and prosecutorial system is submitted to the Assembly, it is not expected to have any changes in the budget allocation for the KJC and KPC. This is due to the fact that the ruling coalition constitutes the majority in both the Parliamentary Committee for Budget, as well as in the Assembly of Kosovo. The Assembly, having the opportunity to choose between the budget proposed by the KJC and the KPC, and the one proposed by the Government of Kosovo, with regard to the judicial and prosecutorial system, will act as it did in the past. The version proposed by the Government of Kosovo was approved with no changes, thus ignoring the requests coming directly from the judiciary and prosecution.

The Law on the KJC as well as the Law on the KPC requires that the Office of Disciplinary Counsel (ODC), proposes its budget directly to the Assembly of Kosovo.⁶⁶ So, the case of this office clearly shows the continuing tendency to establish the independence of the judiciary and prosecution mechanisms in terms of independence in budgetary aspect. However, it is paradox that the KJC and KPC must initially address their budget proposal to the Government, whereas the ODC, which is a mechanism within these institutions, is more independent than the central institutions of justice itself. This only complicates the situation in the planning and management of the ODC by the leaders of the judiciary.

⁶² For 3 years (for the year 2009, 2010, and 2011) the judiciary has been allocated a budget of app. 44 million euro. See table Financial requirements of the KJC and the allocation of funds.

⁶³ Government of Kosovo for the mandate 2008-2011, had declared that the rule of law is one of the main priorities, placing it immediately after the energy and mines and transport. Programme of the Government of Republic of Kosovo 2008-2011. Office of the Prime Minister. April 2008.

⁶⁴ KIRPED's interview with the Chief State Prosecutor, Mr. Ismet Kabashi, June 2010.

⁶⁵ Article 15, Proposal of the annual budget. Law on Kosovo Judicial Council, Law no. 03/L-223. Also, article 13, Budget. Law on Kosovo Prosecutorial Council, Law no. 03/L-224.

⁶⁶ Article 49, Budget for the Office of Disciplinary Counsel. Law on KJC, Law nr. 03/L-223. Also, article 39, Budget for the Office of Disciplinary Counsel. Law on KPC, Law no. 03/L-224.

The Law on KJC requires that KJC drafts a budget proposal for 2012, and submits it to the Government. Despite this, the Government of Kosovo has sent budget limits for the various budgetary lines. This indicates that rather than dealing with a planning process by the KJC the same practice of governmental budgetary control will continue in the future. Budgetary limits set by the Government never responded to the judiciaries needs as assessed by the KJC.⁶⁷ In order to ensure effective functioning of the courts in 2012, the KJC has requested a budget of 20.8 million Euros which is higher than that allowed by circulars sent by the Government.⁶⁸ Each year, KJC requirements have been much higher than that of the approved budget. For example, in 2009 10 million euros were approved, less than the initial request by approximately 4 million Euros, while in 2011 it was close to 2 million euros.⁶⁹ By analyzing the financial requirements of the KJC and the approved budget, it can be noticed that there are major cuts to the lines presented by the KJC.

| Year | KJC Requirements | | Approved Budget | Changes of the approved budget from the initial requirement | Budget for KJC within the state budget |
|------|------------------|---------------|-----------------|---|--|
| | Ist (initial) | IInd (final) | | | |
| 2009 | 24,387,209.20 | 15,234,488.73 | 13,420,708.00 | 10,966,501.20 | 1.18% |
| 2010 | 17,527,166.60 | 15,901,140.00 | 14,088,590.00 | 3,438,576.60 | 1.14% |
| 2011 | 18,914,466.00 | - | 17,000,892.00 | 1,913,574.00 | 1.20% |
| 2012 | 20,872,115.00 | - | - | - | - |

Table 4 - Financial Requirements of KJC and allocation of funds⁷⁰

The Budget for the KJC plays a major role in the overall organization and oversight of the proper functioning of the courts, judicial administration, with particular emphasis on management of the court administrators and administration.⁷¹ The KJC is responsible for planning and proper implementation of the budget so as to ensure efficient functioning of the courts. The law requires that the court staff be trained by the KJC in cooperation with the Kosovo Judicial Institute (KJI), associations and other training organizations. In this capacity it is required that the KJC ensures court affectivity and efficacy. Basic Court Presidents have the power to authorize hiring, disciplinary action and dismissal of judicial staff.⁷²

⁶⁷ KIPRED's interview with the President of the Kosovo Judicial President, Mr. Enver Peci, June 2010.

⁶⁸ Ibid.

⁶⁹ See table 4 – Financial Requirements of the KJC and the allocation of funds.

⁷⁰ KIPRED's email communication the KJC Secretariat, august 2011.

⁷¹ Article 4, Law on KJC.

⁷² Article 24 on the Responsibilities of the President of Court, Law on KJC, law number 03/L-223.

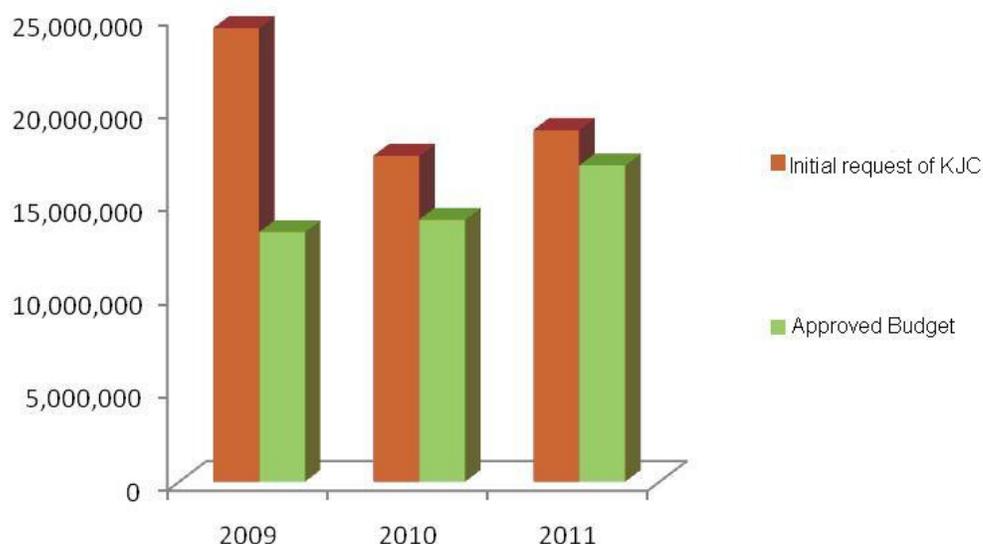


Figure 1 -Comparative Chart about requirements of the KJC and the approved budget

Because of the increased salaries for judges, as required by the new Law on Courts, the total KJC budget for 2011 has been increased by 3 million Euros compared to that of 2010.⁷³ Besides this increase, no other improvement in the financing of courts can be identified. Furthermore, it is worrying that for 2012 and 2013, the Ministry of Finance has foreseen funding reduction for the judiciary. As indicated in the budgetary tables for 2013, it has foreseen a reduction of funding for the courts to 15.96 million.⁷⁴

Example:

Constitutional Court enjoys independence in preparing and managing its budget and as such regulates all matters independently. The independence of the Constitutional Court is greater than any other organ because its budget is sent directly to the Assembly and no interference by the Government or any budgetary organization is allowed.⁷⁵ In practical terms, the freedom enjoyed by the Constitutional Court is reflected in full independence and effectiveness of their work.⁷⁶

As for the prosecution, management of all administrative and budgetary functions so far has been performed by the MoJ. With the formation of the KPC, these functions are at the end of the transfer to the General Directorate within the State Prosecutor, and until the consolidation of this Directorate is done, the MoJ will continue to support it. One of the positive things in the formation of the General Directorate and other mechanisms that will serve KPC is the

⁷³ See table for financial requirements of KJC and allocation of funds

⁷⁴ Tables of Budget for 2011. Ministry of Finance.

⁷⁵ Article 14, Budget. Law on the Constitutional Court of Republic of Kosovo, Law no. 03/L-121.

⁷⁶ KIPRED's interview with the legal official at the Constitutional Court of the Republic of Kosovo, June 2011.

transfer of officials from the MoJ to the State Prosecutor. This is inherently beneficial due to the acquired knowledge in the working process and management of the state prosecution, which they have been doing since the establishment of the MoJ. Despite this phenomenon, it is very important that the previous MoJ staff assimilate into the environment of the institution of the State Prosecutor. Bear in mind that this institution is independent from the executive so that in all their activities, this independence should be reflected.

Infrastructure investments for the prosecution are the executive's responsibility. Until March 9, 2011 projects of this nature have been under the management of the Ministry of Justice, and thereafter the funds have been transferred under the management of the Ministry of Public Administration. This institution has a qualified staff consisting of engineers and other professionals who would best manage the process of writing specifications, tendering, and project supervision.⁷⁷ Given that an important role that is played by the capital investments in the functioning of the prosecution offices, this justification may not be sustainable and one cannot hide the effect of dependency in these activities. This dependence presents a problem and creates room for interference in the justice system, as is the example of a project to build the District Prosecution in Peja⁷⁸, which is being dragged out over a long time, while means have been provided.

Also in this regard, different countries follow different practices. Hungary was the first country in Central Europe which has transferred the competences from the MoJ to the Council, formed by the judicial authorities for management and administration of the judiciary. Until 2002, budget planning was done by an independent judiciary mechanism and then submitted to the government for review and then processed to the Parliament for approval. Seeing that this budget was continually being reduced by the government, it was decided to change the practice of budgeting for the judiciary, thus allowing the KJC to send the budget proposal directly to the Parliament.⁷⁹ The same report shows that the efficiency has been increased and at the same time, the greater independence of judicial institutions was ensured, as discussed "... The new system operates efficiently and has resulted in significant independence of the judiciary".⁸⁰

Bad experiences in the past of Kosovo's judiciary as well as the experiences of other countries that have practiced the same method of budget proposal, gives clear signals that the best method is that the budget proposal goes from the judicial authorities directly to those of the legislature, without any executive interference. This is the only way to ensure that the judiciary's needs assessment is being done properly and that the responsibility for funding the judiciary will be held directly by the publicly elected legislature.

⁷⁷ KIPRED's interview with the Secretary Permanent of the Ministry of Public Administration, Mr. Fitim Sadiku, July 2011.

⁷⁸ KIPRED's interview with Chief State Prosecutor, Mr. Ismet Kabashi, July 2011. Based on the budget tables of the Ministry of Finances for the year 2010, there are allocated financial means for the project of District Prosecution Office in Peja. Secretary Permanent of MPA declares that this investment is in the process of tendering and soon the bids will be opened. July 2011.

⁷⁹ "Analysis of the Draft Law in the Department of Judicial Administration in the Republic of Moldova." ABA CEELI. Can be found at http://apps.americanbar.org/rol/publications/moldova_analysis_draft_law_jud_%20admin.pdf (1 July 2011)

⁸⁰ Ibid

To transfer, entirely in to the hands of those who are called to manage the justice system in Kosovo, it is reasonable to pass the capital investment to the mechanisms such as KJC and the State Prosecutor. In this way, unjustifiable delays in establishing working conditions, as is the case with the District Court in Peja, will be avoided. Regardless of the expertise of the MPA employees or any other government branch, the expertise for construction and maintenance of court and prosecutions buildings requires more specialized knowledge, such as advancing the security and other issues connected with these buildings.

9. PERSONNEL AND ADMINISTRATION

KJC's role in regulating the work of the courts is further limited when it comes to organizing and managing non-judicial staff. Problems that cause dependency and obstacles to the proper functioning of judicial and prosecutorial system arise in the Law on Civil Service, part of which are non-judicial employees of the courts and prosecutors. No action in terms of internal restructuring of staff or changes to their coefficients can be done by the leaders of the KJC and KPC without executive approval.⁸¹ This undoubtedly reflects the independence and poor performance of the justice system. Independence in human resource management is decreased even in the case of a lower position such as that of a cleaner, for which approval from the MPA is necessary, and the request for such approval will pass through shelves of several officials within the ministry until the final decision is reached.⁸² The influence of the executive in courts, with regard to the non-judicial employees may be illustrated by the case of 2 May 2011 when officials of Prishtina Municipal Court decided to strike because a salary increase that was promised by Prime Minister did not materialize.⁸³ The worst misfortune in this case is that the communication took place between the court and executive employees, and KJC had a minimal role. This happened due to the fact that the executive had developed policies for dealing with court employees.

Based on the internal regulation of the Constitutional Court for administrative matters, such as budget, personnel, employment conditions, compensation, internal organization and functioning of the court and other matters, decisions are made in administrative hearings governed by judges.⁸⁴ In practical terms, the freedom enjoyed by the Constitutional Court is reflected in their full independence and effectiveness of their work.⁸⁵ Internal Regulation also specifies the methods and conditions for the selection of the Secretary-General, where the evaluation committee is composed of three judges.⁸⁶ Apart from employees who are qualified as civilian staff, the Constitutional Court may also recruit Legal Advisors, who get a special contract and it is left outside of the Law on Civil Service, and the decision on the appointment or dismissal of legal advisors is made with the majority of votes of the judges present in the Constitutional Court.⁸⁷ Also in terms of setting the salaries, the freedom of Constitutional Court is quite high, where a legal adviser has a fixed salary of 505 euros and 300 euros supplements, all this is based on the right of this court to independently and effectively manage the budget. This court is the only institution of the judiciary which enjoys this right due to the importance of the institution. Consequently, this court stimulates and attracts staff that are inappropriate, such as lawyers who are involved as professional

⁸¹ KIPRED's interview with the Director of KJC Secretariat, Mr. Albert Avdiu, as well as Acting Director of the General Directorate of the State Prosecutor, Mr. Shkëlzen Maliqi, June 2011.

⁸² Ibid.

⁸³ Administration in strike. Klan Kosova. Can be found at <http://klankosova.tv/index.php/lajme-nga-vendi/7055-administrata-ne-greve.html> (accessed on 1 July 2011).

⁸⁴ Rule 14 Administrative Sessions, Regulation no. 185/1/2010, Regulation on the Work of Constitutional Court of the Republic of Kosovo.

⁸⁵ KIPRED's interview with the legal official in the Constitutional Court of Republic of Kosovo, June 2011.

⁸⁶ Rule 16 Secretary Permanent, Regulation no. 185/1/2010, Regulation on the Work of Constitutional Court of Republic of Kosovo.

⁸⁷ Rule 14 Legal Advisors, Regulation no. 185/1/2010, Regulation on the Work of the Constitutional Court of Republic of Kosovo.

associates and legal advisors. Therefore, it is highly necessary that the entire judicial system have the possibility to recruit and develop career strategies for these valuable human resources, which in the future could be potential candidates for holding and exercising high judicial functions.

Example:

Administrator of the District Court in Prishtina, in 2010 demanded 10 employees but he was allowed to hire only one. As for 2011 due to increased number of judges, a request for 14 additional employees has been done and there is still no response to this request.⁸⁸ In 2005, the District Court in Prishtina had 63 employees, and with the Government decision in 2008 this number was reduced for 12 positions in this court.⁸⁹ This certainly has affected the work of the court, resulting in work overload of the employees. Reduction of staff was due to the contraction of the line for wages and per diems in the budget proposal that Kosovo Government had sent to the Assembly.

In the table below is presented the ignorance of the requests of the judiciary for administrative positions, otherwise known as non-judicial positions. In these positions are included professional associates.

| Year | Number of administrative positions (non-judicial) | | |
|------|---|--------------------|---|
| | KJC Request | Approved by budget | Difference between the request and approval |
| 2008 | 1629 | 1383 | 246 |
| 2009 | 1609 | 1383 | 226 |
| 2010 | 1846 | 1530 | 316 |
| 2011 | 1969 | 1530 | 439 |

Table 5 - Comparison of requests and allowed positions for the non-judicial staff

In order to fill the gap related to the low salaries of the civil servants, the executive power has created a fund allocated to the stimulation of persons holding strategic positions. The Prime Minister's Office reserves the right to allocate this fund where deemed necessary. Past practice shows that strategic interest of the executive has not been building and maintaining capacities in the judicial system. Based on the mission and importance of the justice system in ensuring the rule of law, the main dilemma in Kosovo arises about why it has less importance than the executive.

⁸⁸ KIPRED's interview with the Administrator of the District Court of Prishtina, Mr. Feriz Berisha, June 2011.

⁸⁹ District Court in Prishtina covers 50% of the general caseload of the district, serving around 1 million inhabitants of Kosovo. KIPRED's interview with the Administrator of the District Court of Prishtina, Mr. Feriz Berisha, April 2011. See also -Strengthening the rule of law in Kosova II: Confiscation of illegally obtained property. KIPRED. Prishtina: April 2011.

The complexity of the issue of non-judicial employees is spread in several areas, including here the unequal treatment of the executive and judicial employees. The MPA uses double standards for determining coefficients. Such a paradox is also noticed when for the same position they apply different coefficients, regardless of the fact that the duties, responsibilities and qualifications are the same. This paradox can be noticed if we compare requirements for the same positions, made by the KJC and KPC.⁹⁰ From the comparison of salaries for similar positions among the powers, it is noticed that there is no rational leveling. The only position that is advanced with regard to the coefficient in relation to the executive is position of the Director of KJC Secretariat, which is equivalent to that of the Permanent Secretary in the Ministries. Besides this, other positions are disproportionate and the discrepancy between powers is obvious, where representatives of the judiciary are in disadvantaged position in relation to the coefficients. If we take a director of a department in a ministry, he/she has a coefficient of 10, while the court administrators have the coefficient of 8.5 and 8. If duties and responsibilities are analyzed, it is noticed that the work of the court and prosecution employees is far more sensitive and complex than the work of the employees in the executive institutions. However, the executive continues to use the means available in favor of its administration and pays lesser attention to the officials in courts.

| | Coefficient |
|---|-------------|
| Permanent Secretary (Executive) | 20 |
| Secretary of KJC (Judicial) | 20 |
| Director of the Department (Executive) | 10 |
| Administrator in the Supreme Court | 9 |
| Administrator of District Court (Judicial) | 8.5 |
| Administrator of Municipal Court (Judicial) | 8 |

Table 5 - Comparison of coefficients of the judiciary and the executive

Such practices of calculating wages have undoubtedly had the impact within the judicial system. Administrator of the District Court has the coefficient of 8.5 while those of the Municipal Court have coefficient of 8. Coefficient does not differ based on the court caseload.⁹¹ Thus, the approximate monthly salary of the Administrator amounts to 400 Euros which is approximately 30% of the salary of the President of the Court. In the period 1974 - 1989, Secretary of the Court has performed the function of today's Administrator. One of the main requirements for the position of Secretary has been higher qualifications in the relevant field. The salary of the Secretary of Court has been 80% of the salary of the President of the

⁹⁰ MPA for the same position in two institutions KJC Secretariat and the State Prosecution, has set different coefficients whereas in the KJC for the position of transport officer has approved the coefficient of 8.5, for the same position in the General Directorate of the State Prosecutor, it has initially approved the coefficient 6, which only after the insisting of the latter, it has been increased in 7. KIPRED's interview with high officials of the KJC Secretariat and State Prosecutor office, June-July 2011.

⁹¹ Municipal Court in Prishtina during the first trimester of 2011 has a caseload of 57,580 cases. Municipal Court in Dragash during the first trimester of 2011 has a caseload of 911 cases. However, administrators of both this courts receive the equal salary, despite the disproportionate volume of the work. Statistics of regular courts, three-months report 2011. KJC Secretariat.

Court, or the same as that of the Municipal Court Judges.⁹² The salary of the professional associate was 70% of the salary of judges.

The tendency to keep the institution of prosecution dependent on the executive has existed since the beginnings of drafting the Law on KPC. In various drafts of this law it was constantly insisted by the drafters to have competences of the administration and management of the prosecution not clearly separated from the MoJ. In one of the drafts of Law on the KPC it was even suggested that the Head of the KPC should be the Minister of Justice.⁹³ At the same time, it has been foreseen that MoJ has management power with the support staff of Prosecution.

As it seems, the consequences of these tendencies have left their mark and ambiguities in current law which does not specify the manner of selection of the KPC Director, thus leaving the dependency to have this issue regulated by the Law on Civil Service. Law on the State Prosecutor requires that the Chief State Prosecutor provides administrative support for KPC.⁹⁴ Since the law does not specify the selection of the Director of Secretariat, it has left room for such a director to be elected based on the Law on Civil Service. Therefore, there is uncertainty about the functioning of the KPC Secretariat, since the model of KJC could not be applied in the case of KPC, because the Law on State Prosecutor states that administrative support should be provided to KPC through a secretariat located in the institution of the State Prosecutor.⁹⁵ The only case in which the word of the KPC Secretariat is mentioned is in Article 14 of the Law on KPC, and in no other part of the law.

Under the mandate of the State Prosecutor, the KPC is currently in the process of developing human resources and working conditions. Initial problems in this regard relate to or unveil the interference of the executive in development of the KPC. For any request related to the structuring of organizational structure of the General Directorate of State Prosecutor, approval should be requested from the executive bodies, namely the MPA.⁹⁶ This dependence is not transitory but it is based on the provisions of Law on Civil Service and a lack of clarity in the Law on the Prosecutor Council. In the latter, in no provision is the method clarified for selection of the Director, who will perform the function equivalent to that of the Director of KPC Secretariat, but he will officially be Director of the General Directorate of the State Prosecutor. Selection of the director should be done in full compliance with the Law on Civil Service. According to this law, for the appointment of senior positions of civil servants, committee composed of seven members, including three Permanent Secretaries, one law school professor from the relevant field, one representative of the civil society, and two officials selected by the institution of the employer. Accordingly, it turns out that during the selection of the General Director of the State Prosecutor, the commission reflects the interests of the executive more than the interests of prosecution's own institution. This presents interference in the independence of the State Prosecutor.

⁹² KIPRED's interview with the Administrator of the District Court in Prishtina, Mr. Feriz Berisha, June 2011.

⁹³ KIPRED's interview with members of the working group in drafting the Law on KPC, June 2011.

⁹⁴ Article 12 on the administrative role of the office of Chief State Prosecutor, Law on the State Prosecutor, law number 03/L-225.

⁹⁵ KIPRED's interview with the Acting General Director of the State Prosecutor, Mr. Shkëlzen Maliqi, June 2011.

⁹⁶ Ibid.

In the spirit of dependence on the executive, the General Director of the State Prosecutor is obliged to obtain approval from the executive even in relation to staff transfers. Lack of flexibility for independent management of their employees urges the supervisors to burden their employees with duties outside those specified in the job description.⁹⁷ Treatment of the employees of courts and prosecutor offices, based on the provisions of Law on Civil Service and complicated functioning for these employees from KJCS and General Directorate of the State Prosecutor in relation to MPA, presents serious obstacles to the effectiveness of their work and thus interference in the internal functioning.

Another segment, in which the MoJ has direct authority in the field of the judiciary, is connected to the Court Liaison Offices, in the small centers of Kosovo. Although these offices are almost never fully operational, it should be analyzed whether they should be closed completely or transferred to come under the authority of the KJC. The MoJ in 2005 had established 11 Courts Liaison Offices, whose function was supposed to be the provision of better access to justice through the provision of services to citizens of minority communities in Kosovo, including the sending of judicial decisions, calls for the court, and other issues. These offices are seen to function within the Ministry of Justice, while their role is exclusively in the domain of the judiciary.

A series of issues that can be characterized as technical for the Judicial Council and Prosecutorial Council, as for example the issue of e-mails, servers, telephone lines etc., should be treated with urgency, because they basically reflect a kind of subordination to the power of the executive. Currently, both the KJC and the KPC have electronic addresses with the same suffix of executive institutions, such as @ks-gov.net, while servers are placed in the premises and managed by MPA. Also, prefixes of telephone lines do not differ from those of the Government. Seeing this seemingly technical dependency, representatives of the State Prosecutor and KJCS have already begun to take steps related to these issues to finally have each power owning its assets and to be identified as an independent.

⁹⁷ KIPRED's interview with the employees of the courts and judicial offices, June 2011.

10. POLITICAL INTERFERENCES IN JUDICIAL PROCESS

Political interferences in the justice system of Kosovo are not a new phenomenon. In fact, European Commission progress reports, as well as many other studies of international organizations, have mentioned the political interference as one of the main challenges for strengthening the rule of law in Kosovo.

Such interferences are initially due to the mentality of the past, according to which the executive retains primacy on everything. From 1999 to date, there have been dozens of cases where prosecutors and judges were subordinated to the government for any decision, even though they did not necessarily agree with them. A similar case is the case of Chief State Prosecutor, who has decided to accept the Consultative Council for Justice, even though the existence of this council proved to be unnecessary and participation in the council is boycotted by other relevant institutions of justice. In addition, three specific cases will be analyzed, which at the same time are the best indicators of the phenomenon of political interference in the judiciary.

10.1. The subordination of the judiciary

Thanks to the mentality of the past, lack of courage and lack of professional ethics, many prosecutors and judges fall prey of self-censoring or subordination during the exercise of their functions. Thus, many cases of serious criminal offenses, even murder, are rejected by prosecutors and courts of Kosovo only because powerful figures of political life were involved in them. An illustrative case is the recent case in the Municipal Court of Prishtina, in which the local judge Anita Krasniqi-Prenaj has refused to hear a case. The subject of this case was Prime Minister of Kosovo, Hashim Thaci, who was privately sued for defamation and the revealing of personal and family matters, by the Member of Parliament coming from the Movement "Vetevendosje" Florin Krasniqi. Krasniqi - Prenaj had requested that the case be judged by international judges of EULEX, with the justification that the main actors in this criminal case are persons of high political functions in Kosovo. For the trial of this case, the Prishtina Municipal Court has held meetings of the collegium of judges, which again lacked the courage to deal with the case. After that, Acting President of this court, Ms. Makifete Saliuka, has asked EULEX to take on the case, providing the same justifications as judge Krasniqi - Prenaj.⁹⁸ This indicates a situation where law principles are not applied equally by local arbitraries. The phenomenon is so widespread, that the courts have begun to share the subjects by selection, and not based on their order or with any other system of labor division.⁹⁹ All this is primarily evidence of lack of courage among professional judges, but also an indicator of an unfavorable atmosphere to hold the position of a judge in Kosovo.

In this case, the judge contradicts the oath taken on the occasion of his/her decree as a judge for equally serving the justice and applying the law to all citizens of Kosovo, among which is

⁹⁸ KIPRED's interview with judges in the Municipal Court of Prishtina, July 2011.

⁹⁹ KIPRED's interview with judges in the Municipal Court of Prishtina, July 2011.

also the current Prime Minister of the country.¹⁰⁰ The case in question is a classic example of political influence, regardless of whether there has been indirect interference of politics with the judge, or if the judge herself withdrew from hearing the case and whatever the cases accountability should be requested.¹⁰¹ Thus, the dependence of the powers discussed throughout this paper instills fear in the judges, who give up and withdraw without being directly interfered with at all. In this regard the impact of full independence which was enjoyed by the Constitutional Court during the exercise of its functions, should be emphasized

10.2. Policy of interference

Politics did not withhold itself from interference even in the most important process of reform in the justice system, the reappointment and appointment of judges and prosecutors in Kosovo, which was led by internationals through IJPC.

After the process of testing and investigation of all candidates for judges and prosecutors, committed by IJPC, the latter has recommended to the KJC the most suitable candidates for appointment. After a selection, KJC made the final recommendations of judges and prosecutors to the office of President of Republic of Kosovo. In October 2010, the former acting President, Jakup Krasniqi had removed from the decree list four judges and prosecutors, who according to officials of the office of President were not worthy of being decreed.¹⁰² Four candidates excluded from the list were Driton Muharremi, which at the same time was one of most highly valued candidates by IJPC and KJC, Agron Çalaj, Florije Shamolli, and Vehbi Hajdini.¹⁰³ Despite this, the Presidency is obliged to announce to KJC if it doesn't appoint any of the candidates,¹⁰⁴ which has not been done by the Presidency officials, leaving the reasons for not decreeing them, officially mysterious.¹⁰⁵ Even now, when this issue is being analyzed, those reasons are still unknown. What remains worrisome is in the case of these four candidates, are that their files, have disappeared from the shelves of the office of the Presidency. The files of these candidates are not in the office, despite the fact that KJC executives had delivered them at the time when judges and prosecutors were appointed in October 2010.¹⁰⁶

The main responsibility for the lack of notification to KJC and disappearance of files falls on officials of the Presidency of Republic of Kosovo. However, the KJC was very slow to deal with this issue and at the same time it has shown that it is subordinated to the politics. This is concluded due to the lack of commitment by KJC members to require an official response

¹⁰⁰ On the occasion of taking the oath, judges and prosecutors vow that they will serve justice based on the universal principles of the Law and that before the Law we are all equal.

¹⁰¹ KIPRED's interview with legal experts, July 2011.

¹⁰² From the KJC list submitted to the Presidency, for appointment of the judges and prosecutors in the last moment, were removed four candidates, despite the KJC recommendation.

¹⁰³ Justice in Kosovo. Project for Monitoring of the Courts– Monthly informative bulletin. November 2010.

¹⁰⁴ Article 2, paragraph 19, Administrative Decision for Implementation of the UNMIK Regulation number 2006/25 on the regulative framework for the system of justice in Kosovo, Administrative Decision number 2008/2.

¹⁰⁵ "Interferences in judicial system", October 2010, TV Show "Jeta në Kosovë". See

<http://www.jetanekosove.com/shikovideo/590/A1>.

¹⁰⁶ KIPRED's interviews with officials of the Presidency of Kosovo, July 2011.

from the office of the Presidency, despite the fact that legal provisions do not adequately specify how the notification by the latter has to be done, in written or orally. However, in case of not appointing any of the candidates as has occurred, the office of the Presidency is obliged to notify the KJC.¹⁰⁷ The lack of official response as well as the disappearance of files of these four candidates is a sufficient basis for criminal investigations against the responsible officials within the institution of the Presidency, because the latter have overlooked the mandate and did not work according to legal provisions regulating this field.

10.3. Political Privileges

Another phenomenon of political interference in judiciary is that of the privileges enjoyed by political officials in the implementation of justice. This phenomenon knows no measures or limits, since in many instances of the judiciary, politicians and representatives of executive in particular, are superior. The most illustrative of this phenomenon is the assault on the house of the Prime Minister of Kosovo, Hashim Thaci, event which continues to be a topic of discussion in legal circles.

Pressing of the charges and qualification of the criminal offense as an attempted murder by the prosecutor is unprecedented case in the judicial practice.¹⁰⁸ The defendant, Mr. Fazli Sejdiu, had entered the house of the Prime Minister of Kosovo, which at that time had not been present there. On this occasion there was exchange of fire between the security of the house of Prime Minister and the accused, and both of them were wounded. Statement of Fazli Sejdiu indicates an attempt of robbery at the house of Prime Minister, while the prosecutor's approach has gone up to the official indictment for attempted murder of Prime Minister.¹⁰⁹

Court practice shows that nowhere in the world happens that someone attacks someone in the absence and gets charged with attempted murder, but that in this case there was pure political influence.¹¹⁰ Since the beginning of this case, there were indications that the politics in one way or another interfered with this trial.

Despite the interest of the EULEX judges on this case, it remains in the hands of local judges, who so far had expressed willingness to serve justice in this case, despite the fact that in this case one of the parties is the country's Prime Minister. Unlike in this case, in the case of Prishtina Municipal Court was acted differently, where the judge did not have the courage to proceed with the lawsuit against the Prime Minister. This example proves of a series of judges who are interested and who are proving credibility and the ability and courage to work on cases dealing with high political profiles in Kosovo.

¹⁰⁷ Article 2, paragraph 19, Administrative Decision for the Implementation of the UNMIK Regulation number 2006/25 on the regulative framework for the system of justice in Kosovo, Administrative Decision number 2008/2.

¹⁰⁸ KIPRED's interview with legal experts, July 2011.

¹⁰⁹ Criminal Code of Kosovo foresees criminal offence of the murder in the Chapter 15 – Criminal offences against the life and body, respectively article 142 – Murder. To qualify this act as attempted murder, this offence is related to the article 20 – Attempt, Criminal Code of Kosovo. Abovementioned case gets complicated based on the elements that need to be fulfilled for the commitment of criminal offence attempted murder.

¹¹⁰ KIPRED's interview with legal experts, July 2011. Also KIPRED's interview with judges of District Court of Prishtina, August 2011.

Until now, when this report is being drafted, trial of this case did not start yet, while officials in the District Court in Prishtina have announced that the trial is expected to be held in September 2011.¹¹¹ At the conclusion of this case, the ODC should assess the action of the prosecutor who has made such qualification as it is the attempted murder in this case, and highlight the source of this anomaly.

¹¹¹ KIPRED's interview with the Administrator of the District Court in Prishtina, Mr. Feriz Berisha, July 2011.

11. CONCLUSIONS

The Separation of powers in the Republic of Kosovo is guaranteed with the highest legal act of the country. The Constitution in separate chapters clearly separates the roles and responsibilities of the Legislative, Executive, and Judiciary. Unlike the Constitution, basic laws of the justice system in the country, even though they have pushed forward to some extent by the separation of powers, still creates dependence among them. The justice system is equal in importance, but so far it has never been treated as such in Kosovo. In terms of unloading the courts and prosecutors' offices from the overwhelming tide of work in both breadth and depth, and due to lack of suitable working conditions and insufficient number of judges and prosecutors, the MoJ is in the process of creating non-judicial mechanisms. These proper and important steps in the justice system will be facilitated through bringing into function the notary system, system of mediation and the Court of Arbitration.

Troubling for the future remains the composition of the KJC, in the structure of which there are 13 members, five of whom are appointed by the judiciary and eight others come from the judiciary and other areas, but are appointed by the Assembly of Kosovo. In the way it is currently regulated, it could cause trouble in the future, given the fact that the majority of members are appointed by the Assembly. This is because the KJC is the only institution, which will be doing the organization, selection and proposal of judges to be appointed by the President of Kosovo. If the majority of the representatives are elected by the Assembly, may create dilemmas about the possibility of political interference in this important process, that of the appointment of representatives who will serve justice in the country.

Interferences as in the case of non-nomination of candidates for judges and prosecutors without giving any legal explanation by the President of the country are unacceptable. This results in a loss of trust by citizens for the establishment of a system which puts forward names of judges and prosecutors that have proven integrity, as the President is obliged to disclose them for any candidate not worth of getting decreed.

On the occasion of the division of rights, the Constitution has deprived the judiciary from legislative initiatives. Primacy in the drafting of laws in the field of justice is held by MoJ, who is at the same time the compiler of the legislative agenda. The biggest problem in this regard lies in the minimal consultation with the judiciary in terms of making the laws that are interrelated to the judiciary. As a result, we have a lack of laws that would better regulate the work of the judiciary and also have laws without policy and therefore inapplicable in practice. Therefore, the community of lawyers who work on the judicial and prosecutorial system could contribute immensely in supplementing the necessary legal framework.

Problems of dependency of the judiciary on the executive are also a result of the mentality of the past, according to which the executive retains primacy on everything. MoJ has established the Consultative Council for Justice comprised of 18 members, appointed by the Government of Kosovo. Without its approval, which means receive votes of the majority of members in the Council, no document can be proceeded in order to regulate the field of justice. Priori this shows that the executive tends to have under control any judicial action, and this is

unacceptable based on constitutional principles and aspirations of the country for a legal state where powers are separated. Such interference is not allowed to the executive, although this does not justify the leaders of institutions of justice to take steps for the establishment of their own advisory mechanisms.

Functions and powers of the MoJ should not be inflated by its Minister. They must be exercised within the law and Constitution. Contrary to them, in the priorities of the Ministry of Justice, in addition to the creation of Consultative Council of Justice, are foreseen a series of events that are not within its field of competence, based on the mandate of this ministry. In the wake of the priorities for the period 2011-2014, MoJ takes over some responsibilities which are primarily the responsibility of the KJC and KPC, and where the role of the MoJ is normally quite limited. MoJ vows to work in the implementation of the basic judicial laws, such as the Law on Courts, Law on State Prosecutor, Law on KJC, on KPC, enabling the structuring and functioning of courts and prosecutors offices. Furthermore, MoJ sees as its own responsibility to increase of number of judges and prosecutors in the country, in accordance with the needs and international standards. Based on the legal framework, KJC and KPC are the institutions who make the planning based on the needs and demands set forth by the courts and prosecutors for a proper functioning of the justice system. Any tendency of MoJ to be involved in the implementation of these laws will be executive interference in the judiciary, and therefore those forecasts should be eliminated and MoJ should stay within the limits of its competences.

The judicial system of the country is continuously allocated less than 1.5% of the Kosovo Budget, despite the announcement that the rule of law is one of three key government priorities. This in fact testifies to the undermining of the judicial branch of power by the executive. After the Constitution, the right and important step for the independence of powers are basic laws such as Law on KJC and Law on KPC. But these two laws have made the budget proposal dependent on the executive, unlike the Constitutional Court, which communicates directly with the Assembly. This inter-institutional dependence of KJC and KPC limits the freedom of the judiciary and the prosecutorial power in the management of their resources. For the leaders of judicial institutions it represents interference in their power and directly affects the poor performance of this system. A good example on how the budget for judicial and prosecutorial system should be regulated is the Constitutional Court, and even the mechanisms within the KJC itself, such as the Office of Disciplinary Counsel. Otherwise, relation of powers as it is currently regulated in Kosovo was previously regulated in the member state of EU, Hungary. Until 2002, the judiciary in this country, used to send the budget initially to the executive who repeatedly showed a tendency to decrease the proposed amount. With such an approach the Executive had direct impact on the efficiency of the judiciary and its independence, it was later decided that the budget be sent directly to parliament. This example should be followed in Kosovo.

Partial implementation of two basic laws of justice, that on the Court and State Prosecutor, dealing only with the rise of salaries of judges and prosecutors, is a crucial step towards the creation of balance of power, thus eliminating the evasion of the judicial system. Equivalent

salaries between the judiciary and other branches of power, are welcome and it is expected that they directly affect the efficiency of the justice system. The increase of salaries alone and only for judges and prosecutors, is not sufficient to draw a conclusion that a balance of powers has been achieved. A series of privileges enjoyed by the ministers of the Government, cannot be even closely compared to the very unfavorable working conditions of the judges and prosecutors. Thus, the balance of powers should be achieved when the judiciary shall enjoy the same rights as the executive. The Budget allocated for the judicial and prosecutorial system cannot be managed independently, without the approval of the executive power, when it comes to non-judicial and non-prosecutorial staff. Employees of these institutions of justice are treated as civil staff, therefore, everything about them must first pass approval by the Ministry of Public Administration. Therefore, an important step that must be addressed urgently is to regulate the status of the support staff of courts and prosecution offices, for whom working conditions should be created as well as the increase of their salaries in such a way so as to be equivalent with their responsibilities at work. Regulation of their status based on the Law on Civil Service will continue to create problems, interference and direct or indirect influence in the independent work of courts and prosecution offices.

The tendency of the executive to keep the KPC under its umbrella, have left large ambiguities in this law, which does not foresee the appointment and dismissal of the director of its secretariat. Now after the KPC has become functional, the State Prosecutor is obliged to select the director through the commission where the majority is comprised by the executive representatives, based on the Law on Civil Service. Support staff of the courts and prosecution offices, whose status should be regulated through two special Laws for the administration of courts and prosecution offices, should be exempt from the Law on Civil Service.

Concerning issues remain, such as the political interferences in the judiciary and the judicial proceses. Political and institutional leaders should stay away from the judicial processes in order to allow judges and prosecutors to feel free in exercising their profession while serving the judicial system of Kosovo. This certainly does not justify in any way the judges and prosecutors who are influenced by political pressure, or even without pressure withdraw from serving the law, as is the case with lawsuit in the Municipal Court where the subject is the Prime Minister himself. It's too late, even to conclude that it is the final time when citizens of Kosovo expect that local judges and prosecutors to uphold and abide by the oath they have made, by not allowing anyone to be above the law.

12. RECOMMENDATIONS

After completing the research, analyzing findings and consulting relevant institutions and experts, KIPRED Institute has issued the following recommendations in order to improve the overall separation of powers and ensure the independence of the judiciary in particular.

- 1) Selection of members of the Kosovo Judicial Council should be changed so that the number of members selected by the Assembly should be lowered, thus allowing that majority of the members to be selected by the judiciary itself. Therefore, out of a total of 13 members, the judiciary should have the right to select 7 or more members. This way an impartial judiciary will be divorced from political interference, but at the same time accountable to the Assembly. During these changes, the requirements of the Comprehensive Proposal for Status Settlement, which requires minority representation, should always be taken into account.
- 2) The President of the Republic of Kosovo, in the process of appointing judges and prosecutors has a limited role and is not allowed to refuse an appointment without a sound justification, always in accordance with Article 18 of the Law on the Kosovo Judicial Council and the same provisions in the Law on the Kosovo Prosecutorial Council. This would eliminate cases such as those that occurred earlier and which have become quite mysterious where files have gone missing and no explanation was given for not appointing some prosecutors and judges. At the same time, the President should set the issue of appointment as a priority and must not allow the issue to be stalled for months, as it happened during 2010.
- 3) The bodies of the executive, judicial and prosecutorial system should increase inter-institutional communication for the appointment of judicial and prosecutorial representatives in the working groups that for drafting legislation in the field of justice, so that the judicial representatives express their institutions opinions and not, as has happened in the past, the opinions of an individual.
- 4) The government of Kosovo must cancel the decision to establish the Consultative Council of Justice, since such a mechanism presents executive interference in the judicial and prosecutorial system, which contradicts the Law on the Kosovo Judicial Council and the Law on Kosovo Prosecutorial Council. The Government of Kosovo and the MoJ should refrain from creating the institutions of justice mechanisms, be they only advisory. On the other hand, the institutions of justice such as KJC and KPC should create a joint mechanism of the institutions of justice, with an advisory mandate, which will serve to identify problems in the field of rule of law and prosecution policy coordination and trial of cases arising.
- 5) KJC and KPC should make the budget proposal directly to the Assembly of Kosovo, without interference of any public authority. This approach would provide a lower degree of influence of the executive in budget allocation for the judiciary and

prosecution, since the past indicates for a minimal budget, inconsistent with the requirement of the judiciary itself, and priorities promulgated by the executive.

- 6) MoJ should initiate a law on judicial and prosecutorial Administration, as non-judicial staff of courts and prosecutors should be shared by other officials of the civil service in Kosovo. Efficiency and professionalism of the courts and prosecution depends largely on non-judicial and non-prosecution staff, which currently experiences worse treatment than civilian staff in the executive. Furthermore, in order to ensure greater independence in the selection of the staff, executive interference should be avoided, and a request for urgent change of the method for election of the Director General of the State Prosecutor, should be raised.
- 7) By amending the Law on the Kosovo Judicial Council and that on the Kosovo Prosecutorial Council, it should be ensured that a same member should be in the composition of both Councils. This should be done in order to avoid errors due to lack of coordination between the two mechanisms of justice as is the case with proposing the same candidate for appointment as a prosecutor and a judge at the same time.
- 8) Executive power must refrain from political interference in judicial processes. Meanwhile, the judiciary and prosecution should not allow interference in the functioning of the justice system. Prosecutors are obliged to serve the justice equally, without distinction, including among all high political profiles.
- 9) Liaison Offices of the Courts shall be closed down and necessary capacities of the courts and branches of the courts should be developed, in order to provide fast and efficient services for all the centers in Kosovo.
- 10) Civil society should focus more in in-depth studies of judicial independence and continuous monitoring of the implementation of this independence. Also, civil society organizations dealing with issues regarding of rule of law, have to communicate directly with the KJC and the KPC, and not only use the information they receive from the executive.

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