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## **Judicial Independence in Kosovo: A Critical Analysis of Key Components**

### **Abstract**

Judicial independence is essential to the rule of law. States are obliged to guarantee the independence of the judiciary. Independence of the judiciary of Kosovo is enshrined in the Constitution of the Republic of Kosovo, and other laws of the country. It is critical to ensure that judges are free to perform their duties free of influence or control by members of the government, or other actors. This paper addresses issues and challenges related to building the independence of the judiciary of the Republic of Kosovo. Specifically, it looks to the recruitment, training, and salaries of judges. The study demonstrates that the independence of the judiciary in practice remains a matter of concern. More efforts must be invested to ensure independence and effectively shield the judicial system from undue pressure and interference to strengthen the rule of law.

**Keywords:** judicial independence; Kosovo; recruitment of judges; judicial training; salaries of judges; corruption.

### **Introduction**

Judicial independence is key to upholding the rule of law in a democratic society. The current President of the European Court of Human Rights has stated as follows: “*The principle of the rule of law is an empty vessel without independent courts embedded within a democratic structure which protects and preserves fundamental rights... Without independent judges, the Convention system cannot function.*”<sup>2</sup> Although judicial independence is essential to any fair legal system, a precise definition of this principle may be problematic in a world of diverse cultures and legal systems. Simply stated, judicial independence represents the ability of courts and judges to perform their duties free of control or influence by other actors, whether governmental or other.<sup>3</sup> In addition, the judiciary institution as a whole must be independent from the government and other powers. Pursuant to the Basic Principles on the Independence of the Judiciary each state is obliged to guarantee the independence of the judiciary through its constitution and law. In Kosovo, the independence of the judiciary is enshrined in the Constitution of the Republic of Kosovo, which indicates that “judicial power is unique, independent, fair, apolitical and impartial and ensures equal access to the courts.”<sup>4</sup> Similar statements also are found in Law of Courts<sup>5</sup>, as well as Law on Judicial Council.<sup>6</sup>

This paper analyses the main components of judicial independence, and challenges related to building an independent judiciary in the Republic of Kosovo. The paper argues that more efforts must be invested to ensure the independence of the judiciary in practice, and effectively shield the judicial system from undue interference and pressure.

The essay begins by examining key elements of ensuring the independence of the judiciary, focusing on Kosovo. Then it provides some reflections on judicial corruption, as an issue

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<sup>2</sup> Robert Spano, ‘The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary’ n/a European Law Journal 8.

<sup>3</sup> OHCHR Basic Principles on the Independence of the Judiciary (1985) [hereinafter Basic Principles].

<sup>4</sup> Constitution of Republic of Kosovo (2008) Article 102.

<sup>5</sup> Law No.06/L-054 on Courts, Official Gazette of the Republic of Kosovo (2011).

<sup>6</sup> Law No. 06/L-055 On Kosovo Judicial Council, Official Gazette of the Republic of Kosovo (2018) [hereinafter Law on KJC].

related to judicial independence. The paper provides potential actions based on best international practices, aiming to enhance the function of the judiciary.

## **I. Key Elements of Judicial Independence**

International and European actors have set standards concerning judicial independence, and there is a broad consensus that the most relevant components that promote and uphold judicial independence are: the recruitment and appointment process of judges, judicial tenure, training, immunity, removal, disciplinary sanctions as well as judicial salaries.<sup>7</sup> Legislation in Kosovo complies with standards on judicial independence, however, independence of the judiciary in practice remains a matter of concern. Each of the factors mentioned above impact the independence of the judiciary in a specific way, thus specific attention must be given to each one.

### **1. Recruitment of judicial actors**

In order to guarantee the independence of the judiciary, International and European law require states to appoint judges through strict selection criteria and in a transparent process. Otherwise, the function of the judiciary, as well as its independence are undermined. According to the Venice Commission, there is a variety of different systems for judicial appointments, and thus there is no single model that would apply to all countries.<sup>8</sup> Yet, the selection of judges must be based on the candidates' qualifications as well as personal integrity.<sup>9</sup> The Venice Commission advocates for a Judicial Council to have autonomy on the recruitment of judges to exclude political considerations in the appointment process.<sup>10</sup>

In Kosovo, the judicial independence in the appointment of judges is enshrined in the Kosovo Constitution and legal provisions. The Constitution states that judges are appointed and dismissed by the President of Kosovo based on the proposals of Kosovo Judicial Council (KJC). The initial mandate for judges is three years, and the reappointment mandate is permanent until the retirement age unless removed according with the law.

The Judicial Council is established by the Constitution and has been vested with the responsibility of ensuring the independence, impartiality, and accountability of the judicial system. Hence, from a legal point of view, Kosovo has followed the European bodies' recommendations.

The recruitment process of judges is governed by the law on KJC and respective regulation<sup>11</sup>, which further detail the criteria for procedural rules for the recruitment of judges. The KJC Regulation on Recruitment, Exam, Nomination and Reappointment of Judges specifies the stages of the recruitment process, respectively the preliminary selection, two written exams (one on general knowledge of law and second on practical cases), and the interview. Pursuant to the legislation, the selection of judges is based on the candidates' merits, however, some criteria are vague. Due to this, the appointment process of judges in several

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<sup>7</sup> See Consultative Council of European Judges Magna Carta Judges (2010) [hereinafter Magna Carta of Judges]; Basic Principles; Council of Europe European Charter on Statute of Judges.

<sup>8</sup> Venice Commission 'Report on the Independence of the Judicial System: Part I: The Independence of Judges, CDL-AD (2010) 004, March 2010 [hereinafter CDL-AD (2010) 004].

<sup>9</sup> CoE, Recommendation CM/Rec (2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities, November 2010.

<sup>10</sup> CDL-AD (2010) 004.

<sup>11</sup> Regulation No.05/2016 on the Recruitment, Exam, Nomination and Reappointment of Judges, Kosovo Judicial Council (2016) [hereinafter Regulation No.05/2016].

cases has been a subject of criticism by international stakeholders who monitor and support the justice system in Kosovo, that suggest the process in practice to improve.<sup>12</sup>

First, although the criteria by which the written test on practical cases is evaluated is identified in the respective regulation, the way how the points are awarded within the range available is unclear. For instance, the criteria “analysis of legal issues and application of substantive law” has a maximum score of 15 points.<sup>13</sup> However, model answers to assist in the process are not used. Instead, it is left in the discretion of the Recruitment Committee to evaluate the answers given by candidates.<sup>14</sup>

This situation seems to lack some degree of objectivity, as it relies on the subjective opinion of individual committee members, and it may lead to inconsistency and misuse. Such a process could cause inequality in treatment of candidates, as well as unfairness in the outcome.

Secondly, as a general principal, the legal knowledge of a candidate can be tested at all stages of the process but should not dominate during the interview. Within the current system, legal knowledge and the analytical and problem-solving skills of the candidates are tested through the written tests. The interview should be used as an opportunity to test the candidate’s knowledge and skills that are not tested during the prior stages of the process. However, it appears that the interview is mainly used to test further the legal knowledge of the candidate, rather than to test the qualities and of the candidate such as impartiality, honesty, and responsibility, which are essential qualities for judges, and cannot be tested through questions of a legal nature. As detailed by the Venice Commission, merit also includes character, communication skills, etc.<sup>15</sup>

Such deficiencies could undermine the quality of the recruitment process; thus more attention should be given to introducing a practical way of assessing the personal qualities of candidates. In England and Wales, the use of a role-play exercise, in which candidates can act as a judge and be faced with a range of real-life problems, is arguably the most important part of the selection process.<sup>16</sup> There is a strong need for the introduction of this kind of assessment tool in Kosovo.

Experience in a range of judicial and non-judicial organisations shows that using a combined assessment of knowledge and competence-based improves accuracy in assessing candidates’ suitability or potential for different jobs. This helps interviewers from making hasty decisions and selecting the best candidates. Nevertheless, recently the KJC has been revising the regulation on recruitment of judges aiming to enhance the recruitment process.

## 2. Judicial training

Well-trained judges represent a strong indicator of judicial independence.<sup>17</sup> Training offers preparation for judges to handle properly their jurisdictional functions. Article 8 of the Magna Carta of Judges emphasizes the importance of judicial training as follows: “Initial and in-service training is a right and a duty for judges. It shall be organised under the supervision of

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<sup>12</sup> ‘Project against Economic Crime in Kosovo (PECK II)’ (PECK 2017) <<https://rm.coe.int/peckii-second-annual-progress-report/1680933ba0>>.

<sup>13</sup> Regulation No.05/2016 Article 18.

<sup>14</sup> Improvement of integrity of judges and prosecutors (Ministry of Justice Kosovo 2019) Policy note.

<sup>15</sup> CDL-AD (2010) 004.

<sup>16</sup> ‘Selection Day’ (*Judicial Appointments Commission*, 24 August 2020)

<<https://judicialappointments.gov.uk/guidance-on-the-application-process-2/selection-day/>> accessed 24 October 2021.

<sup>17</sup> *Maktouf and Damjanovic v. Bosna and Hercegovina*, Grand Chamber decision (18 July 2013), no.2312/08 and no.34179/08; the fact that international judges appointed in the State Court were professional judges from their countries represented a guarantee against external pressures.

the judiciary. Training is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system.”<sup>18</sup>

In Kosovo, the Academy of Justice is in charge of training of judges and prosecutors, as well as support staff in courts and prosecution offices.<sup>19</sup> In terms of judges, the training program of AJ covers initial and continuous training. The trainings curriculum covers a broad range of subjects, including national and international legislation, as well as ethics.

Historically, providing quality training to judges has been a challenge in Kosovo. The Kosovo Judicial Institute, the predecessor of the Academy of Justice has faced difficulties in providing effective judicial training. The most notable challenge was that many trainers were either unqualified or appeared to be unqualified.<sup>20</sup> Moreover, International trainers often used their work on judicial training from other countries, without tailoring it accordingly to the context of Kosovo.<sup>21</sup> Approaches from developed countries may be suitable in some cases, however, this “copy and paste” approach to judicial training was not effective in Kosovo, particularly for the ethics training that must greatly focus on examples drawn from the real life.<sup>22</sup>

Sadly, AJ faces similar challenges. The Annual Report 2020 of AJ acknowledged that one of the main challenges was the lack of specialized trainers.<sup>23</sup> Judges, especially newly appointed judges need training that is more advanced than training provided during their studies.

Training is effective only if trainers are well-qualified for the task. Thus, trainers must be hired based on their level of competence and expertise. In case of a lack of specialized trainers in Kosovo, it is essential to hire experts from abroad. Under no circumstances trainers cannot be selected for the sake of convenience, or because of their connections. Although, the general public perception in Kosovo is that Kosovo’s civil service is “... riddled with nepotism, favoritism, and patronage”.<sup>24</sup> As mentioned above, ensuring that the qualified individuals are selected for positions of trainers is crucial for conducting effective training sessions. Hence, if trainers are not selected based on merit, the training process could be undermined.

Another central issue is to determine that trainers offer sessions that are designed for the context of Kosovo. This can be done by using best practices and concrete examples based on the real judicial cases, as well as taking into consideration the socio-economic reality in Kosovo. For example, in Italy, initial training of judges include in-depth analyses of the political, social, and economic context in which the judiciary operates.<sup>25</sup> This combined disciplines approach makes judges better aware of the political, culture, social, and economic context in which their judicial activity take place.<sup>26</sup>

Providing quality judicial education to judges is a vital step in having a professional and independent judiciary. An indicator that shows the training offered to judges, especially initial training needs improvement is the fact that the Court of Appeals of Kosovo sends to retrial a high number of first instance judgements. According to the latest statistics, approximately 40

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<sup>18</sup> Magna Carta of Judges (n 6).

<sup>19</sup> Law no.05/L-095 on Academy of Justice, Official Gazette of Republic of Kosovo Article 6.

<sup>20</sup> Charls Ericksen and Lavdim Krasniqi, ‘The Challenges of Capacity Building in Judicial Training Institutions- The Kosovo Experiiece’ (2015) 4 Journal of the International Organization for Judicial Training 66.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*

<sup>23</sup> ‘Annual Report 2020’ (Academy of Justice of Kosovo 2020) 71.

<sup>24</sup> ‘Public Pulse on Corruption’ (UNDP 2016) 17.

<sup>25</sup> ‘Best Practises in Training of Judges and Prosecutors-Italy’ (European Commission, 2014).

<sup>26</sup> *ibid.*

percent of cases are sent to retrial due to the erroneous or incomplete determination of the factual situation.<sup>27</sup>

To this end, AJ must secure that training sessions are held by experts, as well as the training approach is designed according to the needs of participants. Only in this way AJ will fulfill its mission as prescribed by law, and contribute to strengthening the performance of judges.

### 3. Compensation of judges

In order for the judiciary to perform its functions properly, sufficient funds must be granted. Principle 11 of the Basic Principles provides that “[T]he term of office of judges, their independence, security, adequate remuneration, [ ], shall be adequately secured by law.”<sup>28</sup>

In Kosovo, until the end of 2010, there was a significant disparity in compensation packages between the judicial, executive and legislative branches. The salaries of judges were lower than the salaries of senior legislative, and executive branch officials. In 2011, judicial compensation increased ensuring that salaries of judges are equivalent to their counterparts in the government.

According to Article 35 of Law on Courts, the President of the Supreme Court shall receive a salary equivalent to that one of the Prime Minister. This is a strong provision that emphasizes that the role of the President of the Supreme Court and the Prime Minister are equivalent. Other justices of the Supreme Court shall be equivalent to that of a Minister of the Government. The judges of the Appellate Court shall receive a salary equivalent to 90% of the compensation of the President of the Court of Appeals, etc. However, the current Kosovo government has cut salaries across the government, whereas the judicial compensation has not been affected.

Are Kosovar judges well-paid or not? If we pay judges more will that improve the decision-making? These questions are debatable. The compensation of Kosovar judges is low compared to the countries in the region, as well as to countries in the Council of Europe.<sup>29</sup> However, from a domestic viewpoint the gross annual salary of Kosovar judges is three times higher than the national gross average salary.<sup>30</sup>

Raising the salaries of judges attracts more qualified candidates willing to be justices, but better judicial independence depends on other factors also, such as the quality of the appointment process and the training.<sup>31</sup> In this regard, the recruitment process of judges in Kosovo and their training requires to be enhanced, as elaborated earlier in this paper. As regards to judicial performance, some studies show that higher pay leads to more effort and better decision-making. For example, in New York State, the rate of appealed convictions that were modified or sent to retrial decreased by 4.2 percent after raising the judges’ salaries, due to the higher quality of first instance decisions.<sup>32</sup> Nevertheless, it must be emphasized that there is no certain link between high judicial pays and better performance and independence of judges. Whether high salaries improve the judiciary depends on the social, cultural, political, and economic context of the country.

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<sup>27</sup> ‘Loja me kthimin e rasteve në rigjykim, dy dekada në kërkim të drejtësisë’ <<https://demokracia.com/loja-me-kthimin-e-rasteve-ne-rigjykim-dy-dekada-ne-kerkim-te-drejtësisë/>> accessed 24 October 2021.

<sup>28</sup> Basic Principles (n 2).

<sup>29</sup> ‘In-Depth Assessment Report of the Judicial System in Kosovo’ (The Council of Europe 2018) 60.

<sup>30</sup> *ibid.*

<sup>31</sup> Stephen Choi, Mitu Gulati and Eric Posner, ‘Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate’ 47 57.

<sup>32</sup> Gregory DeAngelo and Bryan C McCannon, ‘Judicial Compensation and Performance’ (2017) 25 Supreme Court Economic Review 129.

Generally speaking, non-adequate remuneration could make judicial actors discouraged<sup>33</sup> or vulnerable to external pressures.<sup>34</sup> While there are certainly many factors that lead to corruption, Van Rijckeghem and Weder emphasize the correlation between inadequate salary and corruption in the public sector.<sup>35</sup> It is said that low compensation of justices could affect on judges' decision making, respectively misuse their entrusted power to supplement their outcomes. Thus, different countries in the world have applied various techniques to tackle this issue. In recent years, Georgia has increased the salaries of judges in a bid to reduce corruption. As a result, the bribery acts have decreased, but the executive pressure on judiciary remains a challenge.<sup>36</sup> This demonstrates that higher judicial compensation alone is not the panacea of judicial corruption. There is also a correlation of corruption with other factors such as judicial appointments, poor training on ethical behaviour, disciplinary procedures of judges, lack of transparency in courts, etc. Also, important to note is that judges are one part of the long chain of people engaged in the judicial decision-making procedure, therefore anticorruption efforts need to involve the police, lawyers, prosecutors, and those responsible for enforcing judicial decisions.

Some points on corruption and independence of the judiciary are elaborated in the section below.

## II. Corruption and Judicial Independence

Corrupt behaviours in the judicial sector vary, however, all question the independence of judges. Independence of the judiciary is founded on public confidence. The perceived integrity of the institution is important since it underpins trust in the institution.

Surveys show that experiences with perceptions of corruption in courts are high. Globally, 30% of those surveyed by Transparency International perceived their judiciary system corrupted.<sup>37</sup> In Bulgaria, Croatia, and Albania judiciary is seen as the most corrupted of all public institutions.<sup>38</sup> Whereas in Kosovo, courts remain corrupt in the eyes of citizens where approximately 40 percent of respondents believe that corruption is present in judiciary.<sup>39</sup> Main features that influenced the opinion of citizens were primarily related to the inefficiency in fighting corruption and the delay in resolving cases. Such perception could be considered legitimate since many reports show the inefficiency of the judiciary. The latest European Union Country Report indicates that "The overall administration of justice continues to be slow, inefficient and vulnerable to undue political influence."<sup>40</sup>

Most research shows that judicial corruption is influenced by many factors such as legal, social, economic, political, and cultural. Beneath these complexities, the most common

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<sup>33</sup> See Frederica Viapiana, 'Pressure on Judges: How the Budgeting System Can Impact on Judge's Autonomy' (2021) *Laws* 7.

<sup>34</sup> James Anderson and Eric Helland, 'How Much Should Judges Be Paid? An Empirical Study on the Effect of the Judicial Pay on the State Bench' (2012) 64 *1277*, 1303.

<sup>35</sup> See Caroline Van Rijckeghem and Beatrice Weder, 'Bureaucratic Corruption and the Rate of Temptation: Do Wages in the Civil Service Affect Corruption, and by How Much?' (2001) 65 *Journal of Development Economics* 307.

<sup>36</sup> Stefan Voigt, 'When are judges likely to be corrupted?' in *Global Corruption Report 2007 Corruption in Judicial Systems* (Transparency International 2007).

<sup>37</sup> 'Global Corruption Barometer - 2017' (*Transparency.org*)

<<https://www.transparency.org/en/gcb/global/global-corruption-barometer-2017>> accessed 28 October 2021.

<sup>38</sup> 'Annual Report 2019' (Transparency International).

<sup>39</sup> 'Kosovo Citizens' Trust Towards Security and Institutions Western Balkans Security Barometer' (Kosovar Centre for Security Studies 2020) 21.

<sup>40</sup> 'Report on Kosovo 2021' (European Commission) 56.

problems identified are merit-based judicial appointments, training, judicial salaries, disciplinary procedures, etc.<sup>41</sup>

In order to prevent corruption in the judiciary, the recruitment procedure of judges must be regulated in a way that election criteria are clear for both candidates and selectors, and those who demonstrate the highest quality are selected. As regards to judicial training, it must be ensured that judges receive quality initial and continuous training through their careers, giving emphasis to ethical and anti-corruption training. Moreover, strict and exacting standards must be applied to investigate complaints against judges and give reasons for decisions. Whereas salaries must commensurate with judges' position, experience, and performance. Also, fair pensions should be provided on retirement.<sup>42</sup>

As it has been elaborated in this paper, judicial independence also depends on the factors above, thus it can be confirmed that there is a strong connection between corruption and judicial independence.

In conclusion, enhancing these areas will not only help to prevent corruption in judicial systems and increase the public trust in the judiciary, but it will also contribute to strengthening the independence of the judicial system.

## **Conclusion**

Judicial independence represents the ability of courts and judges to exercise their judicial powers without control or influence by other actors. Judicial independence is essential to any fair legal system in the world. The most relevant components of the independence of the judiciary are the recruitment and appointment process of judges, training as well as judicial salaries. The domestic legislation of Kosovo complies with international standards relating to the independence of the judiciary. Yet, more efforts must be invested to strengthen judicial independence in practice. Respectively, to enhance the selection, training, and compensation of judges. Additionally, special attention must be paid to fighting corruption as there is a connection between judicial independence and corruption.

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<sup>41</sup> 'Executive Summary: Key Judicial Corruption Problems' (Transparency International) 64–72.

<sup>42</sup> *ibid.*

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