

DRAFT LAW ON SALARIES

A TENDENCY TO EQUALIZE SALARIES OR TO
INTERFERE?

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INTRODUCTION

The lack of a consolidated legal framework in the salary system within the public sector is one of the key problems faced by this sector for several years. The executive branch has attempted to address this problem through the initiation of legislation aimed at equalizing salaries in the public sector.

One such attempt was the one in 2019, whereby the executive drafted the Law on Salaries in the Public Sector, which had been subject of review by the Constitutional Court (CC). This Court had declared this law invalid, stating that it was contrary to 11 Articles of the Constitution and contained essential violations thereof. While in 2022, the Kurti Government presents a new Draft Law on Salaries which once again tries to harmonize salaries in the public sector.

The biggest discourse that is following the drafting process of this law is the issue of determining salaries for all sectors and, at the same time, equalizing current salaries in the name of achieving "equality" in public sector salaries.

KDI considers that this draft law must necessarily address the issue of interference in the justice system and preservation of the independence of independent institutions, in accordance with the decision of the CC and international standards. In this regard, KDI assesses that the Draft Law on Salaries in the presented version has not fully addressed the remarks found by the CC.

This paper provides a scan of the current situation regarding salaries in the public sector and the history of executive's efforts to harmonize salaries in this sector. Further, the paper addresses the Draft Law on Salaries from the point of view of interference, or lack thereof, in the justice system, as well as the inclusion of independent institutions within it. The analysis also presents the need for determining the salary coefficient in accordance with the proclaimed goals of this draft law, providing examples from the practices of other countries in the issue of salary reduction for the judiciary.

EFFORTS TO UNIFY SALARIES IN THE PUBLIC SECTOR

The Government of the Republic of Kosovo, led by the then Prime Minister, Ramush Haradinaj, on 1 December 2017, decided to increase the salaries of the government cabinet. Through this decision, the monthly salary of the Prime Minister was increased from EUR 1,443 to EUR 2,950, an increase of 100%, the salaries of the deputy Prime Ministers were increased by 90%, from EUR 1,356 to EUR 2,500, while the salaries of Ministers were increased by 60%, from EUR 1,270 to EUR 2,000.

With this decision, the Government of the Republic of Kosovo exceeded the powers defined by the Regulation on Rules and Procedure of the Government, which did not authorize the government to determine salaries or compensation for the government cabinet. Based on the Constitution, the Assembly of the Republic of Kosovo has exclusive competence for the adoption of laws that determine salaries.

In addition to exceeding the competences, this decision also constituted a conflict of interest. This was also ascertained by the Kosovo Anti-Corruption Agency (KAA), which, through an opinion, had ascertained that this decision was contrary to the Law on the Prevention of Conflict of Interest, since the salaries of senior officials cannot be increased by those officials themselves, as this constitutes a conflict of interest.

This decision had produced implications and legal effects not only for the executive, but also for other institutions and powers. Given that the salaries of judges and prosecutors are related to that of the Prime Minister, as a result of the former Prime Minister's decision, the salaries of the judiciary were automatically increased. The Law on Courts¹ provides that the salary of the President of the Supreme Court is equivalent to that of the Prime Minister.

Also, the salaries of the judges of the Supreme Court are worth 90% of the Prime Minister's salary. On the other hand, the decision also affected salaries in the prosecutorial system. Since the Law on the Chief State Prosecutor provides that the salary of the Chief State Prosecutor is equivalent to that of the President of the Supreme Court, as well as the salaries of prosecutors are worth 90% of the Chief Prosecutor's salary, their salaries were almost doubled.

The decision of the executive on the salary increase was challenged in the Constitutional Court (CC) by "Lëvizja Vetëvendosje", however, the CC had left such decision in force considering that it is not within its scope to evaluate or replace public policies determined by the legislative or executive body.

In these circumstances, there was an increased need to regulate public sector's salaries by law. Moreover, this was also a request of the European Union (EU), deriving from the Joint Conclusions of the Group for Public Administration Reform, in which the need for harmonizing the salary structure in the public sector is emphasized in such a way that equal pay for equal work should be achieved.²

Thus, in 2018, the Ministry of Public Administration (MPA) started drafting the Draft Law on Salaries and then opened it for public consultation from 8 to 28 June 2018. On 25 October 2018, the Assembly proceeded with the first reading of the Draft Law on Salaries, while on 2 February 2019, the Assembly approved it in the second reading. Ten days later, on 12 February 2019, the Law was sent to the President of the Republic of Kosovo for decree and publication in the Official Gazette.

1 Law No. 06/L-054 on Courts, Article 35.
2 EU Office in Kosovo, (2018), The joint agreed EU-Kosovo conclusions of the Public Administration Reform Special Group, held on 26 April 2018, Prishtina: EEAS, available at: https://eeas.europa.eu/delegations/kosovo_en/44545/Kosovo's%20progress%20on%20Public%20Administration%20Reform

Finally, on 1 March 2019, this Law was published in the Official Gazette and was expected to enter into force 9 months after its publication.³

Initially, on December 12 of that year, the Court had set a temporary measure against the entry into force of the Law, which was extended to 30 March 2020. Finally, the Court had declared the Law on Salaries as invalid and contrary to the Constitution, on 30 June 2020.⁵ The Court had found that the Law was not in compliance with 11 Articles of the Constitution, including Article 4 [Form of Government and Separation of Power]; 7 [Values]; 102 [General Principles of the Judicial System]; 103 [Organization and Jurisdiction of Courts] paragraph 1; 108 [Kosovo Judicial Council]; 109 [State Prosecutor]; 110 [Kosovo Prosecutorial Council]; 115 [Organization of the Constitutional Court]; and with Articles 132 [Role and Competencies of the Ombudsperson]; 136 [Auditor-General of Kosovo]; 139 [Central Election Commission]; and 141 [Independent Media Commission] of Chapter XII [Independent Institutions] of the Constitution.⁶

However, the CC had supported the need for the drafting of a Law on the harmonization of salaries in the public sector, with the condition that the latter was in accordance with the Constitution and the laws in force.

However, KDI assesses that the new Draft Law has not fully addressed the findings of the CC. The issues that will have to be addressed are the interference in the salaries of the judiciary, the interference in the independence of independent institutions and the lack of determination of the level of the coefficient, which creates legal uncertainty for the subjects included in this Draft Law.

The Constitution of the Republic of Kosovo guarantees the principle of the separation of power and the independence they have in exercising their functions, without interference from one another. In democracy, this principle aims to avoid the risk of the concentration of power in the hands of a certain body or persons, which practically carries with it the risk of its abuse. This is achieved through constitutional solutions that guarantee mutual control and sufficient balance between branches, without infringing or interfering with each other's powers.

The Constitutional Court, through its judgements, has determined that the concept of independence presupposes, in particular, that the body in question exercises its judicial functions completely autonomously, without being subject

The professor of constitutional law, Enver Hasani, during the interview for KDI, assessed that: "The issue of salaries is a matter of state policies. Equality in this case is about equal pay for equal work, not about other aspects. It is a kind of merit equality rather than a "mechanical" equality. The salaries of the judiciary should remain as they are because this is necessary for the efficient work and an independent judiciary, which is not influenced from outside. This is an international standard and there is no reason for Kosovo to be different. The government has only one option: to make a detailed report, which is approved by the Assembly, where it is announced that Kosovo is in an extraordinary financial situation and that the reduction of salaries in the judiciary will save it from this crisis! Otherwise, it is a question of interference in justice. This is the nature of the work of the judiciary and it must be respected.

4 Judgment of the Constitutional Court, Case No. KO 219/19, published on 07.09.2020. "Case Object 3. The object of the case of the request is the evaluation of the constitutionality of the contested Law, which, according to the claim of the applicant, is not in compliance with paragraph 2 of Article 3 [Equality before the Law], Article 4 [Form of Government and Separation of Power], paragraph 1 of Article 7 [Values], Article 10 [Economy], Article 21 [General Principles], paragraph 1 of Article 22 [Direct Applicability of International Agreements and Instruments], Article 23 [Human Dignity], Article 24 [Equality before the Law], Article 46 [Protection of Property], Article 55 [Limitations of Fundamental Rights and Freedoms], paragraphs 3 and 7 of Article 58 [Responsibilities of the State], paragraph 2 of Article 102 [General Principles of the Judicial System], paragraph 1 of Article 109 [State Prosecutor], Article 119 [General Principles], paragraphs 1 and 2 of Article 142 [Independent Agencies], Article 130 [Civilian Aviation Authority] of the Constitution of the Republic of Kosovo (hereinafter: Constitution); Article 1 of Protocol No. 1 (Protection of Property) of the European Convention on Human Rights (hereinafter: ECHR); as well as paragraph 2 of Article 23 of the Universal Declaration of Human Rights (hereinafter: UDHR)."

7 Ibid.

9 Judgment of the Constitutional Court, Case No. KO 219/19, published on 07.09.2020.

The reduction of the current salaries of judges and prosecutors, which the Government is justifying as achieving "equality" of salaries in the public sector, as necessary as it may seem, does not coincide with the right constitutional path to achieve this goal. In this Draft Law, the salary reduction must be strongly justified with the need and the result it brings for each of the positions, which are subject to the salary reduction. Thus, it is necessary that the justification given for salary reduction is even more grounded than the justification given for salary increase. Added to this is the fact that the provisions of the Law on Courts clearly state that judges' salaries cannot be reduced during the mandate in which they are appointed, except in cases where disciplinary sanctions are imposed by the Kosovo Judicial Council.¹⁰

The issue of reducing the salaries of judges and prosecutors has also been followed with concern by the experts of the European Commission and the EU Office in Kosovo. They have considered that the reduction of the salaries of judges and prosecutors with the new Draft Law, especially in such a considerable amount, is very disturbing and risks violating the principle of independence of the judiciary.¹¹

In the current case and context of Kosovo, the reduction of judicial salaries does not coincide with any known economic crisis or extraordinary situation. On the contrary, this year, Kosovo is expected to have the highest budget ever, in the amount of about EUR 3.2 billion.¹³

10 Law No. 06/L-054 on Courts, Article 35

12 Venice Commission, *European Standards on Judicial Independence*, 2008.

In this regard, progress is also needed regarding the approval of the Draft Law on Minimum Salary, which is currently approved by the Assembly of Kosovo only in principle. The Draft Law foresees the increase of the minimum salary to EUR 264, from EUR 130-170 as it is currently.

13 Law on Budgetary Appropriations for the Budget of the Republic of Kosovo for Year 2023

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HOW MUCH DOES THE DRAFT LAW ON SALARIES AFFECT INDEPENDENT INSTITUTIONS?

Independent institutions are a basic component of a democratic system. They have been created with the aim of promoting rights and strengthening constitutional democracy in a country. Independent institutions, including their mandate, funding, reporting and election, are constitutional categories.

The Constitution of Kosovo, in Chapter XII¹⁵, defines them as independent institutions:

- a. *Ombudsperson Institution;*
- b. *Auditor-General of Kosovo;*
- c. *Central Election Commission;*
- d. *Central Bank of Kosovo;*
- e. *Independent Media Commission; and*
- f. *Independent Agencies*¹⁶

The Constitution stipulates that every independent institution has its own budget, which is administered independently and in accordance with the law. In the framework of the interpretation of the constitutional provisions that address the functions and work of these institutions, it is noted that the constitutional independence of an institution is translated as decision-making, organizational and financial independence.

The need for independence in exercising the functions of independent institutions is also recognized by the Constitutional Court in some of its judgments.¹⁷ In the sense of the term "independent", the Court refers to the position of these institutions in relation to the other three powers and the need for these institutions to be

independent and autonomous in the exercise of their function. These institutions have a specific constitutional status, since they are outside the three branches of power, and as such, they are not and cannot be included in the interaction of the separation of powers and the checks and balances that characterizes the three branches of power.¹⁸

The Constitution also recognizes independent agencies as part of independent constitutional institutions. There are about 30 independent agencies in Kosovo¹⁹, which report directly to the Assembly, as a supervisory body of their work. Independent agencies are not part of the competencies of the executive power of the government.²⁰ Although independent agencies have their own budget approved by the Assembly, they also generate their own revenues, but are administered independently.

Independent agencies as a constitutional category in the framework of Article 142 of the Constitution can only be established if they meet two conditions; initially, they should not be part of the competencies of the executive power of the government according to the Constitution and should serve the Assembly for exercising specialized parliamentary oversight/control of legality and integrity in specific areas of administrative activity.²¹ This legal definition highlights the basic condition for the establishment and operation of such an agency, which is the independence of that same agency from the executive branch and its competencies.

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This further strengthens the principle of independence of independent agencies and institutions in the exercise of their functions. Despite the independence guaranteed by the Constitution and the legislation in force, independent institutions and agencies have again been included in the Draft Law on Salaries in Public Sector, the same as in the previous law²², which, in June 2020, was declared invalid by the decision of the Constitutional Court. The current Draft Law determines the coefficients, namely the salary level for the employees of these agencies.

If the current Draft Law on Salaries in Public Sector is compared with the previous version of the law; no substantial change can be observed in terms of the extent of the coefficients and the ranking of the positions.

The current Draft Law does not include the Central Bank of Kosovo (CBK) and the Kosovo Intelligence Agency (KIA). The exclusion of these two institutions was made without any legitimate reason, or at least such a reason was not disclosed. Therefore, even if there is a reasonable need – assurance or otherwise – that excludes these institutions from the Draft Law on Salaries, making public the salary of the director of the KIA and the governor of the CBK is still a matter of public interest. Thus, it is necessary to determine at least the coefficient for the position of the director of KIA and the governor of CBK. Moreover, following the logic used for other institutions, coefficients can also be set for other positions in the form of “Senior Manager, Middle Manager and Junior Manager”, in accordance with the mandate and the need to protect the confidentiality of positions in these institutions. The definition of the scope of this Draft Law in relation to independent institutions also remains problematic.

Regarding the issue of justification for the exclusion of institutions, the professor of constitutional law, Mr Hasani, during this interview considers that “it is necessary that the list of institutions that are excluded from the scope of this law be given in full within this law, even in the form of an appendix at the end of the law”.

The Draft Law is determined to apply to employees in independent constitutional institutions, insofar as it does not infringe the functional and organizational independence guaranteed by the Constitution.²³ But the definition “*insofar as it does not infringe the functional and organizational independence*” leaves a lot of room for interpretation, especially in terms of guaranteeing the independence of institutions. Such inclusion of independent institutions in this law, while not defining their position and authorizations, represents a risk to their “independent” position vis-à-vis the executive. Such a risk is emphasized by the Constitutional Court itself in some of its judgments, and in particular in its latest judgment on the evaluation of the constitutionality of former Law on Salaries in Public Sector. The Court there has assessed that the staff of independent institutions cannot be identically compliant with the system of recruitment, job classification, categorization and determined salaries

15 Constitution of the Republic of Kosovo, Chapter XII.
16 Articles 38, 40 of Law No. 06/L -113 on Organization and Operation of State Administration and Independent Agencies.
17 Judgments of the Constitutional Court, with case number KO73/16, KO171/18, KO203/19, KO219/19
18 Judgment of the Constitutional Court, Case No. KO 219/19, published on 07.09.2020
19 List of Independent Institutions and Agencies, [Last accessed on 08.11.2022 at the link: <https://kuvendikosoves.org/shq/per-publikun/agjensio- net-e-pavarura/lista-e-agjensioneve-te-pavarura/>]
20 Article 38, Law No. 06/L -113 on Organization and Operation of State Administration and Independent Agencies.
21 Article 38, Law No. 06/L -113 on Organization and Operation of State Administration and Independent Agencies
22 Law No. 06/L-111 on Salaries in the Public Sector
23 Article 2.3. Draft Law on Salaries in the Public Sector

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Regarding the inclusion of Independent Institutions in the Law on Salaries, Arta Rama - Hajrizi, in the interview given for KDI, says that there are two possibilities:

- First, that Independent Institutions cannot be ignored by any type of specific and adapted regulation that takes into account the nature and specific conditions of their work and independence. This approach is necessary if the Government and the Assembly want to maintain the exclusivity of regulating the salaries of these institutions with **the new Draft Law**.
- Second, do not go with the approach of **eliminating all norms** of special laws for the regulation of salaries of Independent Institutions, recognizing the fact that they are not identical to each other and each of them has its own specifics, and which can only be guaranteed by recognizing self-regulatory powers in terms of salaries.

According to the Constitution and special laws, civil service rules apply to the personnel of independent constitutional institutions. Despite this, independent institutions are authorized to issue regulations, orders and other legal acts, to regulate the specifics regarding the working relationship of their personnel, which differ from the general norms established by other laws, including the Law on Salaries. This point of view is also supported by the Constitutional Court, whenever it refers to the position of independent institutions in its judgments. Moreover, in one of these judgments, the Court requires the Government to refrain from applying criteria which are identical to those applied to Government Agencies when setting salaries for employees of independent institutions.²⁵ And this request is also presented when we are dealing with the application of the criterion *“Equal pay for equal work”* where, in any case, the constitutional position of these institutions, the specific job descriptions and the duties of the recruited staff must be taken into account.

The definition of the current Draft Law that it will be applicable to independent institutions *“insofar as it does not infringe the functional and organizational independence”* creates ambiguity, both in the question of categorization and classification of jobs, and in the question of determining salaries. Therefore, it is necessary for the Draft Law to specify whether these issues remain its prerogative, or are left to the autonomous discretion of the institutions themselves.

salaries determined by a general act issued by the Government, regardless of the specifics and uniqueness of the institutions in question.²⁴

From such an assessment, it appears that the Government cannot classify all positions and include within a law the salaries for all categories, as is proclaimed to be the very purpose of this law. Thus, the issue of job classification and categorization of positions is seen as much more problematic when referring to independent institutions, precisely because of the specifics and particularities of the institutions in question.

INTERNATIONAL STANDARDS AND PRACTICES REGARDING THE REGULATION OF SALARIES IN THE JUDICIARY

The issue of salary equalization in the public sector has been the subject of consideration by the courts and jurisdictions of different countries, which have built international standards regarding the limits of salary determination within a power, as well as for other powers.

Furthermore, the Venice Commission states that the remuneration of judges has to correspond to the dignity of the judicial profession and that adequate remuneration is indispensable to protect judges from undue external interference.²⁶

The Venice Commission, through its opinions, has set standards regarding the financial autonomy of the judiciary and the issue of determining salaries for the judiciary. According to the Venice Commission, judges' salaries cannot be reduced during their mandate, except in the case of a major financial crisis and only after a proportional reduction in salaries in all other sectors of the public service. If such a reduction must be made due to an economic crisis, the reduction must be proportionate and must involve everyone equally, so that no particular sector suffers a greater reduction in salaries than the other sector.

An approximate standard is also set by the Consultative Council of European Judges (CCJE), which, as a consultative body of the Council of Europe on issues related to the independence, impartiality and competence of judges, recommends that the remuneration or salary of judges should be guaranteed by law and correspond to the dignity of the profession and the burden of their responsibilities. CCJE also considers that it is generally important (and especially so in relation to the new democracies) to guarantee, through specific legal provisions, the prohibition of reducing the salaries of the judiciary and to ensure the increase of their salaries in line with the cost of living²⁷.

24 Judgment of the Constitutional Court, Case No. KO 219/19, published on 07.09.2020.

25 Judgment of the Constitutional Court, Case No. KO 73/16, published on 08.12.2016.

26 Venice Commission, Report on the Independence of the Judicial System: Independence of Judges, 2010.

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CCJE considers that the adequate level of remuneration is a key element in the fight against corruption of judges and aims to protect them from any such attempt to be corrupt.²⁸

According to the CCJE, the issue of determining the budget of the courts, despite the fact that it is a process that takes place through the Assembly and the Government, should not be subject to political fluctuations. Although the level of funding of a court is essentially a political decision, care should always be taken when dealing with a well-established system of separation of powers, to ensure that neither the executive nor the legislature will exert any pressure on the judiciary in determining its budget. This means that whenever we have decisions that affect the financial independence of this power, it is very important that the judiciary is involved in them.

Another international standard that expressly affects the issue of judicial salaries is the Rule of Law Report presented by the Venice Commission, which also defines a checklist for assessing the state of the rule of

law. This checklist defines that sufficient resources are essential to ensure the independence of the judiciary from state institutions and private parties, as well as to ensure that the judiciary performs its duties with integrity and efficiency, thereby promoting public confidence in justice and the rule of law. Therefore, a sufficient salary for a judge also implies a concrete aspect of the financial autonomy of the judiciary. The criteria defined by the Venice Commission show that “salary” is one of the ways to prevent corruption, which can endanger not only the independence of the judiciary from other branches of government, but also from the individuals themselves.

Such an approach is also followed by Transparency International, which emphasizes that strengthening the independence of the judiciary through high salaries and better legal protection is an effective way to prevent corruption, hold the corrupt accountable and provide justice to victims.²⁹

27 Venice Commission, European Standards on Judicial Independence, 2008.

28 Committee of Ministers of the Council of Europe, Recommendation CM/Rec (2010)12, Judges, independence, efficiency and responsibilities and explanatory memorandum, 2010. [Last accessed on 08.11.2022 at <https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilities-of-judges/16809f007d>]

29 Transparency International “Judiciary and Law Enforcement”, [Last accessed on 08.11.2022 at <https://www.transparency.org/en/our-priorities/judiciary-and-law-enforcement>]

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Another practice related to the reduction of the salaries of the judiciary can be seen in the decision of the Supreme Administrative Court in Portugal, where this court had decided in favour of reducing the salaries of the judges of the “De Contas” Tribunal, due to a temporary budget deficit situation. The European Court of Justice had supported such a decision on the grounds that the independence of the judiciary is not being violated through the measure of salary reduction, since this measure was not only applied to these judges but also included other public officials. This decision is also based on the fact that it was applied as a temporary measure due to the difficult budget situation. Therefore, this measure as such is justified since it included all sectors and was a consequence of the budget deficit.³⁰

On the other hand, Croatia regulates the issue of judges' salaries with a separate law, which autonomously determines the salaries of judges and prosecutors. The Judges' and Other Judicial Officials' Salaries Act regulates the salaries of judges, including presidents of courts, as well as prosecutors and deputy prosecutors.³¹

Judges' salaries are also protected in the Republic of Malta. The Constitution of Malta protects judges from salary reduction, providing that judges' salaries cannot be reduced in any way.³²

Also, the Federal Constitutional Court of Germany applies strict standards of review regarding the laws on salaries of civil servants and members of the judiciary. The Federal Constitutional Court attaches particular importance to the financial and personal independence of members of the judiciary or civil servants. In a 2015 decision, the Federal Constitutional Court found that the independence of the judiciary must also be ensured by judges' salaries. A case of the intervention of the Federal Constitutional Court of Germany was the case of the reduction of salaries for judges and civil servants in the federal state of Baden-Württemberg, where this court found that this was unconstitutional because it violated the principle of alimony.³³

30 European Court of Justice, Press release “The salary reductions applied to the judges of the Tribunal de Contas in Portugal do not infringe the principle of judicial independence”, 2018.

31 Judgment of the Constitutional Court, Case No. KO 219/19, published on 07.09.2020.

32 Ibid.

33 Ibid.

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