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1. Paper on legislation inconsistencies regulating judiciary in Kosovo

This paper examines the inconsistencies that have arisen between the Constitution of Kosovo and the Law on Kosovo Judicial Council, as well as the discrepancies present between the latter and the bylaws issued by the Kosovo Judicial Council. The focus of this analysis is on Kosovo's judicial system legislation, particularly on the entity responsible for its administration and self-governance – the Kosovo Judicial Council.

The Constitution of Kosovo stands as the supreme legal document, providing the fundamental framework for governance, including the establishment and functioning of various institutions, among them, the Kosovo Judicial Council. This council, vested with significant responsibilities, plays a pivotal role in safeguarding the independence and integrity of the judiciary. However, over time, potential discrepancies have emerged between the principles and guidelines laid out in the Constitution and the provisions of the Law on Kosovo Judicial Council, which is intended to implement and supplement the constitutional framework.

The first part of this paper will delve into the inconsistencies between the Constitution and the Law on Kosovo Judicial Council. It will explore instances where the enacted law may deviate from the fundamental principles outlined in the Constitution, raising concerns about the legal validity and coherence of the judiciary's governance structure.

The second part of the paper will shift focus to examine the possible discrepancies between the Law on Kosovo Judicial Council and the bylaws issued by the Kosovo Judicial Council itself. Bylaws are instrumental in further defining the operational aspects and specific procedures governing the functioning of the council. Nonetheless, if these bylaws are not in alignment with the primary legislation and the Constitution, it could lead to internal contradictions and procedural ambiguities within the judicial system.

This research aims to shed light on the potential implications and consequences of these inconsistencies on the efficacy and credibility of the judiciary in Kosovo. It will delve into possible factors contributing to the emergence of such discrepancies, ranging from legislative loopholes to challenges in implementation and enforcement.

In conclusion, addressing and rectifying these inconsistencies is crucial for upholding the rule of law, preserving the independence of the judiciary, and ensuring equal access to justice for all citizens of Kosovo. Recommendations will be presented to provide a potential roadmap for harmonizing the legal framework and enhancing the overall effectiveness of the Kosovo Judicial Council and its governing statutes. By doing so, the paper seeks to contribute to the ongoing dialogue and efforts to strengthen Kosovo's judicial system and uphold the principles of democracy and justice in Kosovo.

2. Inconsistencies between the Constitution and the Law on Kosovo Judicial Council

This part of the present paper addresses the discrepancies that have surfaced between the Constitution of the Republic of Kosovo and the Law on Kosovo Judicial Council (LKJC). The Constitution, as the fundamental legal framework of Kosovo, enshrines the principle of the separation of powers and emphasizes the vital role of the Kosovo Judicial Council (KJC) in safeguarding the independence and impartiality of the judiciary.

Article 108 of the Constitution establishes the core competences of the KJC, emphasizing its responsibility in ensuring an independent, professional, and impartial judiciary, representing the multi-ethnic nature of Kosovo. Additionally, the KJC is tasked with critical functions such as judicial inspections, court administration, budget oversight, and the appointment of judges in line with the law.

However, the discrepancies arise when comparing the provisions of Article 108 of the Constitution with Article 8 of the LKJC. The latter sets out the composition and election process of the Council, including the appointment of thirteen members with professional qualifications and expertise for a term of five years. The Council members are elected through various means, including representation from the judiciary, the Assembly, and communities such as the Serb community and other minority groups.

The major inconsistency arises in Article 8 (paras. 3 and 4) of the LKJC, wherein the provisions from Article 108 (paras. 9 and 10) of the Constitution are inadvertently reintroduced. These constitutional provisions govern the voting mechanism and nomination of non-majority candidates for judicial positions, ensuring representation of diverse communities within the judicial system (courts).

Article 108, paras 9 and 10 stipulate that:

9. Candidates for judicial positions that are reserved for members of Communities that are not in the majority in Kosovo may only be recommended for appointment by the majority of members of the Council elected by Assembly deputies holding seats reserved or guaranteed for members of communities that are not in the majority in Kosovo. If this group of Council members fails to recommend a candidate for a judicial position in two consecutive sessions of the Council, any Council member may recommend a candidate for that position.
10. Candidates for judicial positions within basic courts, the jurisdiction of which exclusively includes the territory of one or more municipalities in which the majority of the population belongs to the Kosovo Serb community, may only be recommended for appointment by the two members of the Council elected by Assembly deputies holding seats reserved or guaranteed for the Serb Community in the Republic of Kosovo acting jointly and unanimously. If these two (2) members fail to recommend a judicial candidate for two consecutive sessions of the Kosovo Judicial Council, any Kosovo Judicial Council member may recommend a candidate for that position.

While, Article 8 of the LKJC (paras 3 and 4), stipulate that:

3. Candidates for judicial positions reserved for members of non- majority communities in Kosovo, may be recommended for appointment only by Council members elected by Members of the Assembly who hold the seats reserved or guaranteed for members of non-majority communities in Kosovo. If this group of Council members does not propose a candidate for this position after two (2) consecutive sessions of the Council, then any member of the Council has the right to recommend a candidate for that judicial position.
4. Candidates for judicial positions in the Basic Courts under whose jurisdiction exclusively lies the territory of one or more municipalities where the majority of the population belongs to the Kosovo Serb community, may be recommended for appointment only by the two (2) members of the Council elected by Assembly Members who hold seats reserved or guaranteed for the Serb community in the Republic of Kosovo, acting collectively and unanimously. If these two (2) members do not recommend a judicial candidate for this position during the two (2) consecutive sessions of the Kosovo Judicial Council, then any member of the Kosovo Judicial Council has the right to nominate a candidate for that position.

Therefore, it is apparent that these provisions were mistakenly incorporated into an article that is intended to govern the composition of the Council.

The recommendation put forth is to remove these specific provisions from Article 8 of the LKJC and incorporate them into other relevant sections, such as those addressing quorum and decision-making rules (Article 15) and the process for the proposal and appointment of judges (Article 21) of the LKJC. This reallocation would clarify the legal framework and streamline the mechanism for the nomination of non-majority candidates. Particularly, the Constitution has not explicitly regulated whether the same mechanism should apply during the re-appointment process for judicial

positions reserved for members of non-majority communities in Kosovo. This gap in the constitutional framework calls for further examination and potential amendment to ensure consistency and fairness in the re-appointment process.

An additional flaw that has been identified pertains to Article 108, paragraph 7 of the Constitution of Kosovo which prescribes that the Kosovo Judicial Council (KJC) shall elect a Chair and Vice Chair from its members, with each serving a term of three (3) years. However, the Law on Kosovo Judicial Council (LKJC), in its Article 11, paragraph 1, designates that the Council elects its Chair and Vice Chair exclusively from among the judge members of the KJC.

It is worth noting that all members of the Council, regardless of their appointment entity, assume the same rights and responsibilities upon their appointment. However, this particular provision within the LKJC appears to be in potential conflict with the principles enshrined in the Constitution, as it effectively prevents non-judge members of the Council from seeking candidacy for the position of the KJC Chair. Such a restriction on the eligibility for this crucial leadership role could be perceived as infringing upon the principles of equal representation and non-discrimination among the Council members.

Consequently, this inconsistency gives rise to concerns about the constitutionality of that specific provision of the LKJC, as it appears to deprive non-judge members of the Council of the opportunity to aspire to the Chairmanship of the KJC. To preserve the integrity of the judiciary and ensure equitable participation of all Council members in the leadership selection process, it is imperative that this matter is addressed promptly and appropriate amendments are made to the LKJC.

To remedy this situation, potential solutions may involve amending the relevant section of the LKJC to allow all members of the Council to stand as candidates for the positions of the Chair and Vice Chair, regardless of their professional background. Such a step would uphold the principles of democratic governance and safeguard against any perception of undue bias or favoritism within the Council's leadership election process. In conclusion, the identified inconsistency between the Constitution and the LKJC concerning the election process for the KJC Chair and Vice Chair warrants careful consideration and prompt action to ensure compliance with constitutional principles.

3. Inconsistencies between the law on Kosovo Judicial Council (and other laws) and bylaws issued by the Kosovo Judicial Council

Introduction: Analysis of the legal doctrine and Constitutional scrutiny of secondary legislation

Article 108 of the Constitution of Kosovo underscores the crucial role of the KJC as a fully independent institution, charged with various functions pivotal to the integrity and efficiency of the judicial system. An in-depth examination of the Council's functions reveals its multifaceted responsibilities, which revolve around ensuring the independence, professionalism, and impartiality of the courts, thereby upholding the principles of justice and fair adjudication.

The primary functions vested in the KJC encompass the recruitment and proposal of candidates for appointment and reappointment to judicial office. This pivotal responsibility ensures the selection of qualified and capable individuals who are committed to upholding the rule of law and preserving the independence of the judiciary.

Moreover, the KJC is entrusted with the critical task of conducting judicial inspections, a mechanism through which the performance and adherence to legal standards of judicial activities are assessed. This oversight function serves to promote transparency and accountability within the judiciary, safeguarding against potential malpractice or procedural deficiencies.

The governance of judicial administration stands as another crucial aspect of the Council's functions. By formulating and implementing comprehensive administrative policies, the KJC strives to optimize the operational

efficiency of the courts, thereby facilitating improved service delivery and access to justice for the citizens of Kosovo.

The development of court rules in accordance with the law is instrumental in promoting uniformity and consistency in the legal processes, ensuring a coherent and standardized framework for adjudication.

In its capacity as an administrative body, the KJC is also vested with the authority to hire and supervise court administrators, ensuring competent and efficient management of court operations, and fostering a conducive working environment for judicial personnel.

Another key responsibility entrusted to the KJC involves the development and oversight of the budget of the judiciary. This financial oversight is essential in ensuring the proper allocation of resources to maintain a robust and effective judicial system capable of meeting the demands of justice administration.

Additionally, the KJC plays a pivotal role in determining the number of judges in each jurisdiction, a function closely tied to the optimal distribution of judicial resources and workload management across different courts.

Furthermore, the Council serves as a significant actor in the process of recommending the establishment of new courts. However, it is vital to emphasize that the establishment of new courts can only be realized through primary legislation, highlighting the Council's advisory nature in this regard.

It is essential to highlight a well-established legal doctrine that dictates the scope of bodies established by the Constitution must be strictly defined within the Constitution itself and cannot be altered, restricted, or extended through implementing legislation, whether primary or secondary in nature. The only exception to this principle occurs when the Constitution explicitly allows for the expansion of an institution's scope through law, as exemplified by Article 113, paragraph 10, which permits the Constitutional Court's scope to be expanded by Law. In the absence of similar provisions in the Constitution pertaining to the KJC, any new competency introduced by the Law LKJC or any other legislation necessitates constitutional scrutiny.

In conclusion, Article 108 of the Constitution delineates the multifaceted functions of the Kosovo Judicial Council, cementing its pivotal role in upholding the principles of independence, professionalism, and impartiality within the judicial system. By discharging its diverse responsibilities with diligence and integrity, the Council plays a vital role in advancing the rule of law and ensuring equitable access to justice for the citizens of Kosovo.

Hence, any secondary legislation issued by the Council that falls beyond the scope prescribed in Article 108 of the Constitution, irrespective of its approval by the Law, should be approached with utmost caution and evaluated from a constitutional standpoint. Considering this doctrinal perspective, this paper will undertake an examination of several bylaws issued by the KC.

Regulation no. 07/2023 on the certification procedure, conditions, rights, obligations, service and discipline of court translators and interpreters

KJC has issued the Regulation No. 07/2023, promulgated on 21 June 2023. This regulation establishes principles for the certification process of court translators and interpreters. While the legal basis and procedural aspects outlined within the regulation are commend-

able, a notable concern arises regarding Article 4, paragraph 1.15, which defines the pair of languages, upon which certification is required.

According to the definition provided in Article 4, paragraph 1.15, the pair of languages includes the official languages of Kosovo. However, it is crucial to bear in mind that Article 5 of the Constitution designates only Albanian and Serbian as the official languages of the Republic of Kosovo. Consequently, every citizen of Kosovo has the right to communicate with public institutions in one of these two official languages, and it is the responsibility of the institutions to provide translation services as required.

Hence, organizing certification processes for interpreters between the two official languages, where they are not practically needed in interactions with public institutions, warrants careful consideration. This perspective should be assessed not only from an organizational standpoint, considering the allocation of resources in such endeavors – especially, in light of the fact that courts do have in-house interpreters for official languages with no pre-certification requirements - but also from a constitutional perspective. The requirement to certify interpreters for interactions between official languages, which is not demanded in practice, may raise constitutional implications.

In conclusion, adhering to the legal doctrine that strictly defines the scope of bodies established by the Constitution, any secondary legislation introduced by the Kosovo Judicial Council should be rigorously assessed from a constitutional standpoint. The example of Regulation No. 07/2023 serves as a reminder that constitutional scrutiny is imperative, particularly when provisions in secondary legislation may diverge from the constitutional framework or give rise to potential conflicts. By upholding these principles, the KJC can contribute to the preservation of constitutional integrity and ensure the efficient functioning of its regulatory measures within the broader legal system of Kosovo.

Regulation 14/2022 for the organization and operation of the judicial inspection unit

An instance of inconsistent implementation of constitutional provisions concerning Article 108 (5) is evident in the context of judicial inspection. The judicial inspection existed in Kosovo since 2005 during the transitional international administration. The Constitution of Kosovo (re-) established the KJC, built upon entities and mechanisms that were present, including judicial inspection.

Before 2010, the Judicial Inspection Unit held the responsibilities of investigating judges for misconduct and conducting audits of court activities. However, with the enactment of the new Law on Kosovo Judicial Council (LKJC) in 2010, these authorizations were assigned to the Office of Disciplinary Counsel (ODC) for investigating judges' misconduct and the Court Performance Review Unit for court activity audits. Subsequently, in 2019, the new Law No. 06/L-057 on Disciplinary Liability of Judges and Prosecutors transferred all investigatory competences from the ODC back to the KJC.

Nonetheless, the LKJC and the Law No. 06/L-057 on Disciplinary Liability of Judges and Prosecutors failed to explicitly address the term "judicial inspection" as referred to in Article 108 (5). The LKJC reintroduced this term and reestablished the Judicial Inspection Unit to assist the Committee for Court Administration and the Committee on Performance Evaluation of Judges in assessing court work. However, the LKJC did not grant these committees any authorizations to conduct investigations of judges, as implied by the term "inspection."

Moreover, the Regulation 14/2022 for the Organization and Operation of the Judicial Inspection Unit exceeds the scope of the Law by requiring this Unit to assist entities in investigating potential misconduct. This contradicts the requirements set forth by the Law.

Article 4 of this Regulation outlines that the actual Judicial Inspection Unit assists the Council and relevant committees of the Council in inspecting and evaluating court work and other judicial activities to enhance effectiveness and professionalism within the judiciary.

Similarly, Article 11 of the same Regulation mandates the Unit to support the Council's entities in disciplinary proceedings, which runs counter to the Law's prescriptions.

In conclusion, the case of the Judicial Inspection Unit exemplifies an error in the materialization of constitutional provisions within the Kosovo judicial system. The reintroduction of the term "judicial inspection" in the LKJC, along with the formation of the Judicial Inspection Unit with additional responsibilities beyond those stipulated in the Law, raises concerns about legal coherence and adherence to the constitutional framework. This discrepancy necessitates careful examination and alignment with constitutional principles to ensure the effective functioning and integrity of the judicial system in Kosovo.

Council regulations related to Court Administrators and legal professionals

Analysis in the Implementation of Regulation No. 04/2022 for Court Administrators' Recruitment and Employment (amended with Regulation 06/2023)

Regulation No. 04/2022 on the Procedure of Recruitment, Selection, and the Establishment of the Employment Relationship for Court Administrators, was promulgated by the KJC on 31 May 2022. The regulation empowers the Council to directly recruit court administrators, aligning with the mandate set forth in Article 108 (5) of the Constitution, which designates the Council as responsible for hiring and supervising court administrators.

Given that the Constitutional Court abolished the Law on Public Officials for certain independent institutions including the KJC, this Regulation - although not explicitly based on the abolished Law on Civil Service - it indirectly draws on the Constitutional Court Judgment KO213/19, which curiously allows implementation of an abolished law.

However, several flaws emerge in the implementation of this provision, warranting critical examination and potential amendments. The first concern pertains to the delegation of constitutional prerogatives, which is widely acknowledged as impermissible. The LKJC appears to have somewhat misdirected this provision by stipulating that "the Council, in accordance with the Law on Civil Service, conducts recruitment and supervision procedures for Court Administrators," keeping them accountable to the Court Presidents. A similar requirement is also enshrined in Article 29 (2) of the Law on Courts, indicating that court administrators are accountable to the Court President.

Herein lies the first flaw, as the Council has retained only the recruitment part of the process while it should also be accountable for supervising court administrators. Therefore, it is recommended that the Council assumes responsibility for both recruitment and supervision of court administrators to ensure coherent implementation.

The second issue relates to the status of court administrators as civil servants. Both the LKJC and the Law on Courts refer to the Law on Civil Service when addressing the recruitment of court administrators, thereby establishing their classification as civil servants. However, the Law on Civil Service specifies different recruiting entities for various categories of civil servants. As court administrators do not hold Chief Administration Officer (CAO) duties, they fall within the management level (Director of Department level), making Article 15 of the Law on Civil Service inapplicable to their recruitment. As a result, Article 7 of the Regulation 02/2010 on Recruitment Procedures of Civil Servants, issued by the Ministry of Public Administration, mandates that the Committee overseeing court administrators' recruitment should be composed solely of civil servants. The formation of committees with Council members (non-civil servants) violates the Law on Civil Service and its implementing bylaw, necessitating a careful professional review for compliance.

The third concern pertains to the issue of acquired rights. All incumbent court administrators hold permanent working contracts (Letter of Appointments). The regulation's stipulation to limit their mandate to a five-year term raises dilemmas due to the potential impact

on acquired rights and the continuity of administrative functions within the judiciary.

This significant change in contract status should have been regulated by a primary law, not just a bylaw; the matter of acquired rights is a constitutional concern, and changes like these should have been made through a law, so that people affected by this change could have questioned whether it's constitutional or not.

In conclusion, the analysis of Regulation No. 04/2022 for Court Administrators' recruitment and employment reveals three significant flaws in its implementation. Addressing these concerns is crucial to ensure constitutional adherence, uphold the principles of coherent governance, and safeguard the rights of court administrators. By revisiting and amending the regulation accordingly, the Kosovo Judicial Council can enhance the effectiveness and fairness of the recruitment process and foster a conducive working environment for court administrators within the judiciary.

Analysis of Implementation of Regulation No. 15/2022 and Regulation No. 04/2021: Expanding Authorization beyond the Law

The enactment of Regulation No. 15/2022 on the Status, Rights, Obligations, Performance, Discipline, Transfer, Training, and Termination of the Employment Relationship of the Professional Associate, and Regulation No. 04/2021 for the Recruitment and Selection Procedure of Professional Associates, is founded on the authority granted to the Kosovo Judicial Council (KJC) by the Law on Courts, specifically Article 39, which delegates the Council the responsibility to determine the selection and appointment procedure, criteria, rights, and obligations for professional associates.

The Law on Courts indeed empowers the Council to create such regulations, thereby validating the Council's actions in drafting and enacting them. However, an aspect of concern arises from the Council's expansion of this authorization beyond its original scope. The

regulations introduce rights and entitlements usually regulated by distinct legal frameworks, such as the Law on Civil Service or the Law on Labor. For instance, Regulation No. 15/2022 addresses rights like leave entitlements, including annual, maternity, sick, and unpaid leave, alongside other disciplinary and dismissal rules. These are typically subjects regulated by specific laws rather than sub-legal acts like regulations.

A significant observation can be drawn from Article 33 of Regulation No. 04/2021, which mandates that all legal professionals who previously held civil service contracts (based on the Law on Civil Service) shall be offered new contracts based on the Law on Labor. Consequently, any provisions in Regulation No. 15/2022 that pertain to matters already regulated by the Law on Labor should be reconsidered and potentially repealed, with the implementation of relevant provisions from the Law on Labor.

Similarly to Regulation on Court Administrators, issues related to the recruitment of professional associates by panel of judges, change of the contractual status and the 'vetting' of candidates are issues of concern.

In conclusion, while the Kosovo Judicial Council has the legitimate authority, as conferred by the Law on Courts, to enact Regulation No. 15/2022 and Regulation No. 04/2021, it is essential to recognize the potential overlap and extension of rights usually governed by distinct legal instruments.

To ensure coherence and adherence to established legal frameworks, it is recommended that provisions in Regulation No. 15/2022, which already find their regulation in the Law on Labor, be revised and replaced accordingly. By aligning the regulations with the appropriate legal statutes, the Council can foster a more robust and harmonized legal framework for the employment relationship of professional associates within the judiciary.

As a conclusion, it is essential to underscore that any alterations in the employment status, transitioning civil servants to employees governed by the Law on Labor, should have been formally authorized through primary legislation. Permitting such a transformation via a subsidiary act represents a profound transgression of legal certainty within the legal framework of Kosovo. Adherence to the principle of legal certainty is of paramount importance in maintaining a stable and predictable legal environment, and any deviations from this principle risk undermining the foundations of the legal system and jeopardizing the rights and obligations of affected individuals and entities. Thus, upholding the primacy of primary legislation in matters of employment status changes is imperative to safeguard the principles of legal order and coherence in Kosovo's legal landscape.

Recommendations:

1. Addressing Inconsistencies with the Constitution

For the inconsistency regarding the election process for the KJC Chair and Vice Chair, it is recommended to amend the relevant section of the Law on Kosovo Judicial Council (LKJC) to allow all members of the Council to stand as candidates for these positions, irrespective of their professional background. This will ensure equal representation and non-discrimination among Council members in the leadership selection process.

Moreover, in pursuit of preserving the constitutional integrity, it is imperative to effectuate a prudent transfer of the provisions found in Article 8 of the Legislative and Judicial Conducts Act (LKJC), specifically paragraphs 3 and 4, to the pertinent Articles governing quorum and decision-making rules (Article 15) and the procedural aspects concerning the proposal and appointment of judges (Article 21) within the LKJC. This strategic reallocation of constitutional stipulations seeks to bolster the efficacy and coherence of the legislative framework while ensuring the faithful adherence to established constitutional norms.

2. Ensuring Constitutional Scrutiny of Secondary Legislation

To uphold the legal doctrine that the scope of bodies established by the Constitution must be strictly defined within the Constitution itself, any secondary legislation introduced by the Kosovo Judicial Council should be rigorously assessed from a constitutional standpoint.

For Regulation No. 07/2023 on the certification process of court translators and interpreters, it is recommended to evaluate the requirement to certify interpreters for interactions between official languages where they are not practically needed in interactions with public institutions. The regulation should be aligned with the constitutional provisions regarding the official languages to avoid potential constitutional implications.

3. Rectifying Flaws in the Implementation of Court Administrators' Recruitment Regulation:

The Kosovo Judicial Council should take responsibility for both recruiting and supervising court administrators to ensure coherent implementation.

For the issue of court administrators' status as civil servants, the relevant provisions of the Regulation No. 04/2022 should be revised to align with the Law on Civil Service and ensure that the Committee overseeing court administrators' recruitment is composed solely of civil servants, as required by the law.

Careful consideration should be given to the potential impact on acquired rights and the continuity of administrative functions when limiting the mandate of incumbent court administrators to a five-year term. The regulation should be amended accordingly to safeguard acquired rights and ensure the smooth functioning of the judiciary.

4. Harmonizing Professional Associates' Regulations with Appropriate Laws

For Regulation No. 15/2022 and Regulation No. 04/2021, provisions that duplicate matters already regulated by the Law on Labor should be revised and replaced accordingly. The regulations should focus on aspects that complement and enhance the employment relationship of professional associates while adhering to the relevant legal statutes.

5. Ensuring legal certainty

It is proposed that the Law on Constitutional Court be subjected to an amendment that broadens its case jurisdiction to encompass all decisions and regulations issued by the Council, ensuring that they undergo constitutional validation. This expansion should mirror the process applied to legal acts of other key institutions, such as the President, Prime Minister, Government, or the Assembly of Kosovo. By incorporating such a provision, the Law on Constitutional Court would extend its purview to encompass the assessment of the constitutionality of Council decisions and regulations, thereby reinforcing the constitutional framework and fostering consistency in the examination of legal acts across different governmental bodies.

By implementing these recommendations, the Kosovo Judicial Council can address the identified inconsistencies and strengthen the legal framework governing the judiciary. This will contribute to upholding the rule of law, preserving the independence of the judiciary, and ensuring equal access to justice for all citizens of Kosovo. Additionally, careful attention to constitutional scrutiny will ensure that any secondary legislation aligns with the fundamental principles enshrined in the Constitution.

