



Group for Legal  
and Political  
Studies

COMMENTS ON:

# DRAFT LAW ON PUBLIC OFFICIALS

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This document provides numerous inputs and identifies several loopholes during the drafting process of the Draftlaw on Public Officials, provided via the public consultations' platform. First and foremost, GLPS is highly concerned with the lack of inclusive approach by the government, in specific when it comes to specialized civil society organizations that have extensive experience within this area. Lack of inclusiveness in this particular case harms the overall process and is against the transparency principle.

The Law on Public Officials (hereinafter: LPO) entered in force during July 2020, after the Constitutional Court declared it unconstitutional in relation to eight (8) independent constitutional institutions. The Constitutional Court decision issued back then urged the Assembly of Kosovo to implement the necessary changes in order to harmonize the LPO with the Decision No. KO203/19.

CCJ-LPO has also given instructions on which elements LPO should be changed, with special emphasis on ensuring the independence of independent constitutional institutions. In spite of this fact, the Government of Kosovo has undertaken the initiative to make substantial changes and finally prepare a new draft law for public officials (hereinafter DLPO) this time without doing any analysis of the implementation of the current LPO, which is based on evidence, and without offering policy options, which are much needed for such profound changes that have wide and large impact in a filed such as public service.

After analyzing the Draft Law on public officials (hereafter DLPO) which is available on the electronic platform for public consultations, Group for Legal and Political Studies – GLPS offers the following comments and recommendations:

**Inaccurate and incomplete scope.** In terms of horizontal scope, DLPO raises many dilemmas which seem problematic in practice. Providing special status to some categories is both unjustifiable and ambiguous due to the fact that it incorporates all employees in a block as in the case of paragraphs 1.3 to 1.9 of Article 6 of DLPO, leaving it into discretion to exclude typical categories of civil servants. The same applies with the elements that are derogated from being regulated by a special law, where it is foreseen to regulate the career system and the rank system (paragraph 2.3 of article 6) when the DLPO in itself completely eradicate the career system (which we will address later on).

**Admission into civil service.** Contrary to the current LPO, which foreseen external admission only at the entry level (after failure to move within the category) in the professional category and exclusion in the senior management category (if there is no meritorious candidate within), the DLPO foresees open admission for every vacant position in the civil service leaving great discretion for political interference throughout the entire civil service. When it comes to admission to the professional category, there still remains group and centralized recruitment in the state administration, that is accordingly done by DLPO from Ministry of Internal Affairs



Centralized recruitment applies for the middle management category (position: department director) and as well for the lower management category (Division leader) in the entire state administration, while it used to be centralized also for the senior management category. The centralization of recruitment for middle management and low management positions, in addition to not being justifiable and based on evidence, shrinks the autonomy of state administration institutions and leaves open the possibilities for influence by daily politics through "recruitment" from the center and the "delegation" of politically "preferred" candidates. The dilemma that raises has to do with the specialization and readiness of the MIA as the unit responsible for centralized recruitment when it has already been proven that for 2 years with all the legal infrastructure complete (the by-laws for the implementation of the LPO over the civil servants are in power) and technical infrastructure (SIMBNJ), from the Ministry of Internal Affairs has not recruited even a single open position in the professional category for which it is obliged according to the LPO. How would it be possible to carry out this responsibility when more than 1000 positions of middle and low management level will be added to the same one, when up to now has failed, for more than two years, to carry out centralized recruitments and recruitments in professional category? These are real and important dilemmas which definitely and seriously affect the functionality of the civil service. Despite a centralized DLPO system, a 1-year suspension is foreseen, due to the recruitment that will

be done by each institution separately through their human resources unit (HRU). For what reason? Suspension/halt of the centralized system for 1 year except that has no justification and logic behind it, on the contrary, it provides opportunity and discretion for politically based recruitment into all categories of civil servants. An unusual arrangement has also been made regarding admission commissions, where the same ones are proposed to be part of several lists where the members are then assigned to ad-hoc admission commissions and their selection is to be done through the computer system in an algorithmic manner, and then appointed by the responsible unit (paragraph 4 of article 40 DLPO). This solution, apart from the fact that it is not possible to be applicable in practice, it appears to be problematic because it requires a level of preparation for the standardization of the legal requirements of each position separately, and then the creation of lists of committee members based on specialization and specific requirements of each position. This is difficult or almost impossible to achieve. The legal requirement for assessing the suitability for appointment to specific positions of the public official is another concern which also leaves great discretion to the day-to-day politics (par. 3 of article 9). What will be the suitability assessment and for which suitability is unclear!

**Complex and time-consuming process for developing recruitment procedures.** Only in the ministerial systems (ministry and agency) there are about 1000 positions of middle and low managerial levels.



At its best this means that 1,000 recruitment procedures have to be processed by 1000 ad hoc committees that ought to be created.

### **Promotion Vs Demotion in civil service.**

The current LPO has a clear career system by having established two very effective mechanisms which are assignment within the category and promotion. These two mechanisms are arranged under the assumption that the external employment that is done in the professional category, and later on the basis of merit and then gradually develops in the career accordingly to adjustment into within the category and promotion is done through the transition from one category to another. For both promotion mechanisms, there are criteria and procedures that ensure professionalism and merit by gradually strengthening the civil service to face challenges both in terms of policy development and their implementation, and mostly to ensure continuity in performance of responsibilities and non-interference from day-to-day politics. Unlike LPO, DLPO eliminates the career system and its mechanisms (movement within the category and promotion) turning it into open recruitment for all candidates and setting a term of 4 years (fixed-term contracts are addressed in the section below). Open recruitment means that each position that remains vacant in the civil service will be open to all candidates both internally and externally and will be filled by the candidate who has received the most points. Such similar system existed before in 2010 (in theory it is known as the position system)

and has proven not to be a good system by leaves space and discretion for great political influence.

The degradation mechanism in DLPO is the rule and not the exception. Demotion is used as a tool to demotivate civil servants, especially those in the middle and lower management category, until the reason/intention for the termination of the employment is achieved (read together paragraph 4 and 5 of article 46 and article 66 of DLPO) as a reason for the definite leave from the civil service and the opening of vacant positions for people close to politics.

**Fixed-term employment relation.** Another novelty brought by DLPO is the transition from indefinite employment to 4-year contracts for all employees without exception in all central and local level institutions where civil servants are employed in the middle and lower management category. Initially, the first problem in this aspect, that possibly opens a constitutional dispute, is the arbitrary termination of the employment relation according to the law (ex lege, paragraph 1 of article 98 of the DLPO) and without any based justification for all civil officials in middle and management level regardless if their annual performance was good or not. In terms of legal certainty and predictability, this violates these principles, which are the main principles of the rule of law, since the creation of the employment contractual relations for these civil servants was done precisely under the guarantees given by the entire legal framework from 2010 over civil



servants (LSCK earlier and LPO now).

Establishing the employment relationship for the middle and lower category with a 4-year term leaves a lot of political discretion and offers no guarantee that these positions will be recruited on the basis of professionalism and merit, moreover it produces mass departure during the change of governments and disengagement from the continuity of daily work that is characteristic only in the civil service and has a direct impact on citizens.

A legal dilemma that you can raise is that of the status of employees in middle and lower management category positions, when they have a mandate, do they have the status of a civil servant or not? This is very important because of the rights and duties that are authentic for them. Indirectly under this, it is understood that the status of a civil servant is only available to the persons who take these positions and who are from the civil service (the right to return to the professional category), therefore the question that arises is whether the persons who come from outside the civil service have that status or not, and what rights and duties are applicable for them?

The 4-year mandate is the end of the employment relationship even for civil servants who have an indefinite employment contract (except in the professional category) in the civil service because after the end of the mandate, even though a redundancy mechanism (waiting list) the same leaves onto discretion a massive release of the civil

servants from these categories (paragraph 4. of Article 66 of DLPO).

**Acting officers.** another problem identified in the DLPO is the return of the regulation for Acting Officials that was deliberately removed with the current LPO to prevent the misuse that has previously occurred in practice. The setting of the term of 6 months (par. 3 of article 35 of DLPO) is quite artificial and it has been proven that it has been misused in practice regardless of the terms (in practice there are people who have been acting up for now 7 years). This regulation is quite problematic due to the fact that there is a rather fragile relationship between politics and the civil service (especially at the high management level) when the former "uses" the temporary legal status of the person exercising the duty, while the person exercising the duty must "obeys the policy of showing loyalty and potential advantage in the recruitment process when the position needs to be filled. Quite problematic and legally inexplicable is the regulation in paragraph 5 of article 35 where the actions performed after 6 months of the incumbent are declared illegal. This contradicts the nature of the exercise of public authority that is given by law to a public body and in no case to the person within it. The appointment of acting officials should be only as an exception and in very rare cases, but it is never to become a rule.



**Temporary contracts** are subject to paragraph 4 and 5 of Article 37 of DLPO within a period of 2 and 3 years are quite problematic and somehow, they are a replacement of contracts for special services that were earlier in LSHCK. The main problem with these types of contracts is that from an exception they turn into a rule, as a way for the employment of persons close to politics, and gradually to be installed into civil service positions. The causes defined in paragraphs 4.1 and 4.2 of Article 37 leaves great discretion and opportunity for misuse.

**The withdrawal of competence from the Department for the Management of Public Officials (DMZP) to the ministry** according to the DLPO beside that there is no justification it is also against delegation and specialization as well the establishment of accountability lines. Such an approach undermines responsibility and leaves it solely to of the ministry to organize the centralized unit that will be responsible for majority of the elements defined by DLPO.

**Wrong categorization of civil servants** (para. 2.4 and 2.5 of article 38 of DLPO) specifically the addition artificial category such as "category of specialists" beside that there is no logic (because specialists as a rule should be part of the professional category) is also unknown in any practice of other countries. This category becomes even more problematic during the definition of casts and their description and their differences with professional category, which actually includes the "category of specialists in itself".

Unclear criteria for transfer. Absolute discretion in the permanent transfer of a civil servant without any criteria and procedure that ensures competition and transparency (paragraph 2 of article 63). This arrangement can easily be used as a tool for political revenge to transfer civil servants arbitrarily when they refuse their "illegal orders". Returning the transfer by agreement (Article 64) which existed in the LSHCK and has been constantly criticized because of the lack of competition and transparency. This mechanism has been exploited until 2019 by politicians to place people close to them in key civil service positions or to remove civil servants who have not accepted illegal orders from daily politics. The transfer procedure "by agreement" is not clear for which categories it will be applicable since it is already known that DLPO determines that the three management categories will have a 4-year term.

In addition to these general comments, below you will find specific comments:

- Uncertainty in performance evaluation ("specific evaluation" paragraph 15, article 52, what is to be understood by "specific evaluation")
- Incomplete prediction of disciplinary responsibilities (since the main elements are missing, such as "the existence of an illegal act the performance of a culpable act or omission; the occurrence of a consequence, the occurrence of damage; and the causal relationship between the action performed and of the consequence/damage). The lack of these elements into definition of disciplinary responsibility leaves great



possibility for discretion during the decision-making of the disciplinary body.

- Determination of the scale of the violations from facile to serious without any logic and interconnection of the civil servants, the others are repletion of the disciplinary violation ore penal violations that are predefined by special laws (action or omission that have caused consequences; inappropriate behavior that harms the civil service reputation; consumption of the tobacco is general compulsion). Such a provision beside being inadequate it also provides for unlawful interpretations and narrows the legal protections of the civil servants
- Inappropriate and incorrect disciplinary measures such as a written warning for minor violations while the prohibition of promotion for a period of one (1) to five (5) years and demotion still exist when the career system no longer exists. Disciplinary measures include suspension from the position without pay for up to six (6) months and suspension from the position with a deduction of up to 50% of the basic salary, up to one (1) year, which in fact are preventive measures (security measures) and in no case disciplinary measures (sanctions).
- Uncertainty in the initiation of the disciplinary procedure (based on anonymous information, how are the evidence secured, leaves great scope for abuse)
- The return of the surplus list as a very dangerous mechanism to make

fictitious restructurings (politically intended) and to dismiss civil servants en masse and with the aim of recruiting people close to politics. This is in line with the return of open recruitment and the establishment of the 4-year mandate as a mechanism to pave the way for massive politicization of the civil service.

- The suspension of the position of the civil servant is unclear and exceeded when the three management categories (low, middle and high) are mandated, therefore the suspension for these categories does not provide any reasonable justification
- Non-objective and unconstitutional criteria (in opposition to the presumption of innocence) for suspension from the job (especially paragraph 1.5 of article 67).
- The effects of the suspension are mixed with regard to the return mechanism (it does not provide separation in between the categories) and the method of payment is very unclear.
- Subjective criteria for termination of the employment relationship (especially paragraph 1.3 of Article 73, the so-called "special evaluation")
- Large area for regulating the working relation with the special law for public service employees
- Fictitious and unnecessary categorization of public officials (part VI: creators and performers of art and culture)

- Large and double cost without any justification (paragraph 5 of article 98). Unclear calculation!
- Uncertainty about what the payment is when they are placed on the surplus list
- Erroneous reference in already replaced law respectively in Law No. 03/L-149 for the Civil Service of the Republic of Kosovo, repealed by LPO.
- Regulation of the unclear Article 99 regarding the reassignment in case of emergencies (this issue is assumed to be or ought to be regulated in the transfer)