

INDEPENDENCE OF JUDICIAL AND PROSECUTION SYSTEM IN KOSOVO

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Abstract

Independence of judicial and prosecution system in Kosovo has had a very interesting development and maybe unseen till now, in any country in the European Union or broader. This is because since 1999, the United Nations Mission was deployed in Kosovo which was running the three powers, the legislative, executive and the judicial system and it had the absolute influence in all matters related to functioning of courts and prosecutions in Kosovo, beginning from their establishment to determining the number of judges and prosecutors, their appointment, salaries, their work conditions and buildings where they worked.

Following the declaration of independence of Kosovo in February 2008, Kosovo has undertaken some steps towards independence of judicial and prosecution system from the executive and legislative powers, but not yet in the appropriate level and in harmony with international standards, therefore, in this paper there will be some challenges related to independence of judicial and prosecution system to be discussed, based on constitutional and legal provisions of Kosovo and comparing them with international provisions or documents which have tackled this topic.

This paper shall briefly present the role of Government and institutions under its directives, the role of the Assembly and the role of Presidency in independence of judicial and prosecution system and for the internal independence of this system itself.

Through this paper, the author is going to try to give answer to ten questions which are related to independence of judicial and prosecution system in Kosovo, trying to recover these answers from the powers of executive and legislative power in relation to judicial system.

Keywords: Independence, judicial, prosecution, system, Kosovo

Introduction

The end of the war of the period 1998/99, left Kosovo in an economic crisis, lack of political stability, social inequality, with a presence of many

international representatives with their military, police and civil services. Justice System in Kosovo these 15 years started up from a total collapse situation to come to a relatively good development of this system, but has not yet been consolidated in accordance with the standards of democratic countries of European Union.

For years the justice system of Kosovo has been criticized for lack of independence, hence, the independence of judicial system from external influences, be them from legislative or executive power or any other political influence, is a critical challenge for Kosovo integration into European Union.

Kosovo justice system independence for these 15 years has been challenged not only by locals but also by internationals including the time when international administration of United Nations Mission for Interim Administration of Kosovo (UNMIK) was in place in Kosovo, because the chief of this mission, Special Representative of Secretary General (SRSG), was at the same time chief of legislative, executive and judiciary. During the UNMIK time, interferences from one branch of governance to the other were a daily routine.

Notwithstanding the improvements following the essential reforms of judiciary in Kosovo, the problems related to judiciary independence continue to have negative impact in rule of law and access to justice in Kosovo⁵¹.

According to Universal Declaration of Human Rights, Article 10 it is stated that “Everyone in the same way enjoys the right to objective and public trial process before an independent and impartial court, in determining the rights and obligations and to issue decision on any criminal accusation”. Therefore the right to fair trial from an independent and impartial tribunal is the foundation stone for government systems based on rule of law⁵²

European Commission has also noted a number of challenges in Kosovo judicial system. For instance it has been lately noticed that “along the challenges such as corruption and nepotism, continuous political interferences in different levels and forms, in a number of cases, including here in the work of Kosovo Judicial Council, thus representing a serious concern”⁵³.

According to OSCE Mission in Kosovo, Kosovo Judiciary bears the heritage of judicial system of the former Yugoslavia, especially in regard to lack of possessing or lack of development of a tradition of judicial independence towards the executive power. Functional independence also

⁵¹ Independence of judicial system in Kosovo, institutional and functional dimensions, Published by OSCE Mission in Kosovo, January 2012., p.4

⁵² <http://www2.ohchr.org/english/law/indjudiciary.htm> (accessed on 22 August 2011).

⁵³ European Commission Progress Report for Kosovo, SEC(2010)1329, 9 November 2010, p. 11.

takes into account the social context where judges operate. Justice in Kosovo is also influenced by a culture of close family ties⁵⁴.

Based on the Constitution of the Republic of Kosovo, the judiciary is unique, independent, fair, unbiased politically and ensures equal access to courts, whereas judges, while exercising their function must be independent and unbiased⁵⁵. But, how much is this power independent from two other powers, respectively from the legislative and executive.

Questions related to independence of judicial and prosecution system in Kosovo

The issue of independence of Kosovo justice system represents an issue which continues to have impact on rule of law, access to justice and equal exercising of human rights, therefore, related to the independence of this system in Kosovo, initially two questions are raised, response of which leads to drawing a conclusion which is related to independence of this system.

Firstly: is the judicial system separate from the legislative and executive one and are these three systems equal?

Secondly: who finances the judicial system, so who decides about the number of judges and prosecutors, what conditions will the judges and prosecutors have in their work offices, will they have enough support staff?

Thirdly: Who drafts and adopts the laws which judges and prosecutors are bound to apply, including here the Constitution of the Republic of Kosovo determining not only organization of the judicial system but also duties of the Judicial Council and Kosovo Prosecution Council as the main bodies of judicial system?

Fourth who appoints the president of Kosovo, who further on appoints the judges and prosecutors?

Fifth who nominates and appoints the heads of Kosovo Police, Kosovo Police Inspectorate, Kosovo Tax Administration or Kosovo Customs, or who appoints police officers or police inspectors, customs investigators or customs inspectors who carry out investigations in the preliminary and criminal proceeding stage? So, who do these officials report to for conducting or failing to conduct their duties related to criminal prosecution of criminal offenders?

Sixth: what is the composition of Kosovo Judicial Council and Kosovo Prosecution Council, Why Kosovo Assembly must appoint some of members of Kosovo Judicial Council and why Kosovo Minister of Justice is to be member of Kosovo Prosecution Council?

⁵⁴ Independence of judicial system in Kosovo, institutional and functional dimensions, Published by OSCE Mission in Kosovo, January 2012, p.8

⁵⁵ Constitution of the Republic of Kosovo, 2008, Article 102 paragraphs 2 and 4, p.46

Seventh: what is the role of Kosovo Constitutional Court in relation to decisions of regular courts and who elects or appoints the judges of Constitutional Court?

Eighth: what is the role or impact of international community in independence and functioning of Kosovo judicial system?

Ninth: how much do political parties influence Kosovo judicial system?

Tenth: how much, or what is the impact of political agreement between Kosovo and Serbia in Kosovo justice system?

Division of powers and equality between them

In almost every democratic country it is normal to have a real and honest division of the three powers: legislative, executive and judicial, in order for each system to exercise its functions in as independent as possible manner, within the legal and constitutional framework.

Taking into account the principle of division of powers, the Constitution of Republic of Kosovo, when referring to governance and division of powers⁵⁶, has foreseen division of powers, stressing that: Kosovo is a democratic republic based on the principle of division of powers and control of balance between them, as provided for by this Constitution where the Assembly of the Republic of Kosovo exercises the legislative power, the Government of Republic of Kosovo is responsible for implementation of state laws and policies and is subject to parliamentary control, where the President of the Republic of Kosovo represents the unity of the people and is the legitimate representative of the country within and outside the country as a guarantor of democratic functioning of institutions of the Republic of Kosovo, where the judiciary is unique, independent and is exercised by the courts, whereas the Constitutional Court is only an independent body of protection of constitutionality and makes the final interpretation of the Constitution.

A positive thing seen as tendency for equalization of powers is equalizing the salaries between judges and prosecutors on one hand and the executive branch of the Government on the other hand, because this enables the judiciary as the third power in equal level with that of legislative and executive. But this equalization is related only to high functions of the system of justice, hence for judges of Supreme Court and prosecutors of Chief State Prosecutor, but not for judges of lower levels, because salaries for each category are lower for 10%. However, this equalization can be considered as a great step in improving the position of judges and prosecutors as regards to the matter of their protection from irregularities and

⁵⁶ Constitution of the Republic of Kosovo, 2008, Article 4 paragraphs 1, 2, 3, 4 and 5, p. 7 and 8

on the other hand it is a good stimulation for attraction of young applying professionals.

Role of presidency in independence of judicial and prosecution system

According to the Constitution of the Republic of Kosovo⁵⁷, the President of the Republic of Kosovo is elected by the Assembly of Kosovo, with two thirds (2/3) of votes of all deputies in the Assembly, meaning that it is appointed by political parties represented in the Assembly and one of the competences of President is appointment and dismissal of the President of Supreme Court of Kosovo, appointment and dismissal of judges of the Republic of Kosovo, appointment and dismissal of Chief State Prosecutor of the Republic of Kosovo and appointment and dismissal of prosecutors of the Republic of Kosovo, as per proposal by Kosovo Judicial Council, respectively by proposal of Kosovo Prosecution Council⁵⁸.

From the manner of election of the president and his/her competences which are related to appointment and dismissal of judges and prosecutors, it results that there is possibility of interference by president to the independence of justice system, as depending on who proposes and by votes of which political party the appointment took place, then the president may make the appointment and dismissal of judges or prosecutors of Kosovo.

This intervention in Kosovo, or this exercise of influence has happened several times and it is worth mentioning here that failure to appointment of the person proposed by Kosovo Judicial Council for the position of President of former Municipal Court in Prishtina, only because he was the son of a former minister from a political party that at that time was not part of political power any more.

Also as regards to the (re)appointment procedure, the verification process of 2010 which included judges and prosecutors of Kosovo may be seen as positive in general, although refusing of some verified and proposed candidates by the Judicial and Prosecution Council of Kosovo by the President of Kosovo for unknown reasons had a detrimental effect in the process, in particular in the aspect of perception of the public for the process⁵⁹.

Role of Assembly in independence of judicial and prosecution system

Like in any other country, in Kosovo too, the role of the Assembly is drafting and issuing laws and in this context is issuance of laws which are related to justice system, therefore this competence of the Assembly

⁵⁷ Constitution of the Republic of Kosovo, 2008, Article 86 paragraphs 1 and 4, p.39

⁵⁸ Ibidem, Article 84 paragraphs 15, 16, 17 and 18, p. 38

⁵⁹ Independence of judicial system in Kosovo, institutional and functional dimensions, Published by OSCE Mission in Kosovo, January 2012., p.4

indicates that the Assembly through adoption of these laws is able to intervene in the independence of justice system, thus impacting on organization of courts and prosecution offices, manner of selection of members of Judicial and Prosecution Council of Kosovo, as highest bodies of judicial and prosecution system and in the salaries of judges and prosecutors and their supportive staff.

Another concern is general composition of Kosovo Judicial Council, because this composition does not fully meet the international standards, because the judges themselves appoint an insufficient percentage of its membership⁶⁰.

According to the Law on Kosovo Judicial Council⁶¹, from 13 members that this council has, four of them are appointed by Assembly members, who keep the seats gained in the process of general allocation of the seats, two members are appointed by Assembly members, who hold their reserved or guaranteed seats for representatives of Serb community in Kosovo and two members are appointed by Assembly members, who hold their reserved or guaranteed seats for representatives of other communities.

From this competence of Kosovo Assembly it is seen that eight from eighteen members of Kosovo Judicial Council are appointed by Kosovo Assembly, which implies that political parties may have various political interests to have its own people within Kosovo Judicial Council, therefore the fact itself that the president is appointed by Kosovo Assembly and at the same time this Assembly appoints the majority of members of Kosovo Judicial Council, then the conclusion may be drawn that for independence of judicial system there may be political impacts through selection or appointment which are made by Kosovo Assembly.

Role of Government in independence of judicial and prosecution system

When talking about reports of Kosovo Government and the justice system, then the first to be thought is about the budgetary implications of Government in the budget of Kosovo Judicial Council or Kosovo Prosecution Council, considering that Kosovo Assembly approves only the law on budget which is proposed by the Government of Kosovo, implying that the fate of a part of Kosovo budget allocated for judiciary or prosecutions depend on the will of the Government.

A positive side must be mentioned here which has been identified in the Law on Kosovo Judicial Council⁶², because if the Minister of Economy and Finance allocates a budget for Judicial Council and courts which is

⁶⁰ Independence of judicial system in Kosovo, institutional and functional dimensions, Published by OSCE Mission in Kosovo, January 2012., p.4

⁶¹ Law on Kosovo Judicial Council no. 03/L-223 dated 30 September 2010, Article 5 paragraph 3, p. 5

⁶² Ibidem, Article 15 paragraph 1, p. 10

different from the one that was proposed by Judicial Council, the Minister of Economy and Finance shall be obliged to send for review to Kosovo Assembly the recommended budget as from the beginning from the Council and any other comment on this, but this, as seems remains again a ministry with the competence of Judicial Council.

Relation of Government and justice system must also be seen from another aspect which is essential. It is thought here of the impact that Government has on the justice system through police, which in absence of judicial police which was foreseen by Criminal Procedure Code of Kosovo of the year 2004, but it has been omitted in the Criminal Procedure Code of Kosovo of the year 2012, which was authorized to conduct criminal investigations.

Although similar to other countries, in Kosovo also there is a principle of hierarchy at decision making, and in this hierarchy we must see the manner of appointment of the General Director of Kosovo Police who in turn appoints his/her subordinates who lead various directorates, including the Director of Investigation Department, who further on has influence on appointment of police officers who directly deal with investigation of criminal cases and prepare the criminal reports and provide other evidence for the needs of state prosecution and in addition they prepare the case for proceeding at court.

Although according to the Law on Kosovo Police⁶³ Police functions under the authority of the minister of Ministry of Internal Affairs and under control and supervision of General Police Director, whereas the General Director reports to the minister on administration and management of police and the same is appointed and proposed by the commission which is established by the minister, and this Commission proposes the candidate for appointment in the position of General Director of Police to the minister, then, in one of Government meetings the minister proposes that candidate for this position, whereas the Government recommends the candidate to the Prime Minister for the position of General Director of Police. According to the same law, the General Director of Police is appointed by the Prime Minister⁶⁴, and then the General Director of Police appoints the directors of departments, where the department of criminal investigation falls.

From this manner of appointment of general director of police and other officials to the officers dealing directly with criminal investigation, it is indicated that police can be influenced by politics through Minister of Internal Affairs and such an influenced police may not carry out the appropriate and honest investigations in certain criminal cases thus not

⁶³ Law No. 04/L-076 on Kosovo Police ,02 March 2012, Article 5 paragraph 1, p. 3

⁶⁴ Ibidem, Article 37 paragraph 1 and 4, p. 20

supporting state prosecution with evidence, whereas the prosecutor may be totally uninformed about such cases, and may only be informed for as much as police is willing to inform him/her, because in the end of all, the police which would violate or would not properly implement any request or order issued by prosecutor, will report to his/her police supervisors and not to the prosecution unless a criminal case is to be dealt with.

To be clearer, it is the right of police to collect information on the perpetrators of criminal offenses, but also in cases when prosecution does not have such information, police is able to inform the prosecutor or abide by any order from higher ranks not to inform the state prosecutor about information they possess. In Kosovo case law, criminal files are mainly created and completed by police, in some cases by their own initiative and in some cases based on requests or orders from state prosecutor or court, but the implementation of such requests or orders is still in hands of police, what means that police has the possibility of implementation in accordance with their plans or under influence of orders from the higher ranks.

Like with the police, the prosecution is in a similar situation or relation also with Kosovo Police Inspectorate, Kosovo Tax Administration or Kosovo Customs carrying out some investigations in preliminary or criminal proceeding stage. These institutions are independent, and this independence gives them the possibility of evaluating the information and evidence which may be delivered to state prosecution and this way the prosecutor may remain uninformed about the evidence these institutions possess for as long as such information and evidence is not delivered to prosecution, and this implies that state prosecution always depends on provision or failure to provide of such information and evidence. It is also worth mentioning here the issue of responsibility of officials of these institutions, because none of the officials of these institutions report to prosecution for failure to accomplish their duties, unless they are qualified as criminal offenses, but they report to their chain of command who may be the ordering officials or they may suggest their officials to withhold some of information or evidence from going to prosecution.

Another fact that at first glance seems like a technical issue, but that has a high importance for the independence of the justice system is the fact that the Government is the one that determines the work conditions for the prosecutors, because it has under its management the buildings where courts and prosecutors are located. This means that it is the will of the Government to decide whether two or more judges or prosecutors will work in the same office or they will have the possibility of accommodating in his/her own office each of them. The nature of work of judges and prosecutors must be taken into consideration, which in many cases it is confidential, therefore it is nearly impossible to maintain this confidentiality where several people are in

the same office who are not working in the same criminal case. The best example of all this is Mitrovica Basic Court, where all the staff, including judges and the supportive staff are accommodated in two offices and the Government has not made any solution to create the work conditions, at least in one building in order for them to exercise functioning as required by legal provisions.

Independence of Kosovo Judicial Council and Kosovo Prosecution Council

Kosovo is amongst the rare countries which has made the division of competences of bodies leading the judicial system on the one hand and the prosecution system on the other. This division took place following adoption of specific laws for Kosovo Judicial Council and Kosovo Prosecution Council in 2010.

According to the Law on Kosovo Judicial Council⁶⁵, the Council is completely independent in conducting its functions in order to ensure an independent, fair, apolitical, accessible, professional and unbiased justice system which reflects the multi-ethnic nature of the Republic of Kosovo and abides by the Constitution and internationally accepted principles for human rights and gender equality.

Also according to the Law on Kosovo Prosecution Council⁶⁶ State Prosecutor – independent institution authorized and responsible for prosecution of suspected persons for committing criminal offenses and other acts as provided for by law.

As to how independent these two institutions are in leading and management of judicial and prosecution system, it is indicated by appointment of majority of members of Law on Kosovo Judicial Council by the Assembly of Kosovo and determining the budget of these two councils by the Government and Assembly, because while the Government has the possibility of determining the budget for its own needs, and the Assembly to adopt such a budget, the judicial system does not have this possibility, but this depends on two other powers – the executive and legislative power, which till now, in no budget year have not approved the requests of Judicial Council and Prosecution Council of Kosovo.

European Card on the Statute of Judges in its Article 1.3 "provides for interference of an independent authority from the executive and legislative power in which at least half of them are judges appointed by their colleagues, following methods which guarantee broader representation of the judiciary." This means that independence of this body is necessary and it

⁶⁵ Law No. 03/L-223 on Kosovo Judicial Council, 2010, Article 3, p. 2 and 3

⁶⁶ Law No. 03/L-224 on Kosovo Prosecutorial Council, 2010, Article 2, paragraph 1. point 1.6 p. 2

reflects on the decision for selection, recruitment or appointment of judges, their career development or terminating their function.

The same principle has been raised for Recommendation of Council of Europe (2010) 12 in paragraph 27, which provides that: "Not less than half of members of such councils must be judges appointed by their colleagues from all levels of judiciary respecting the pluralism within the judiciary."

Also the opinion of Venice Commission (CDL-AD (2007) 028) states that: majority of members of judicial council must be appointed by the judiciary itself, in order to ensure the democratic legitimacy for Judicial Council, whereas other members must be appointed by the Parliament amongst the persons with appropriate legal qualifications.

Similar formulation, though it goes further in the recommendation for composition of the Council is provided in Article 7 of the recommendations of Kiev (2010)¹⁵ which stress that "When Judicial Council is established, its member who are judges shall be appointed by their colleagues and will represent the judiciary in general, including judges and courts of first instance. Judicial councils shall not be dominated by judges of court of appeals. When the president of a court is appointed in the council, he or she must resign from his/her position of court president. In addition to a considerable number of members appointed in the judiciary by the judges, the Judicial Council shall also be composed by law professors and possibly members from chamber of advocates, in order to promote broader inclusiveness and higher transparency".

As regards to it, there is also an opinion from OSCE Mission in Kosovo⁶⁷ which has established that appointment of members of Kosovo Judicial Council do not fully meet the international standards and gives three recommendations, as follows: number one, to submit for amendment of constitution in the process of appointment of members of Kosovo Judicial Council where at least 8 members are appointed from their colleagues within the judiciary, and such recommendation has not been accomplished till now, under two, the Judicial Council in its composition not to have court presidents or at least if appointed they should decide to take one of the positions that they want to keep and under three, the Council in its composition not to be dominated by judges of high level courts only, but to rather have broad representation of judges from all court instances.

As it is shown, the composition of Kosovo Judicial Council is not in compliance with any of above mentioned international documents, because as mentioned above the majority of members of the Council do not consist of

⁶⁷ Independence of judicial system in Kosovo, institutional and functional dimensions, Published by OSCE Mission in Kosovo, January 2012, p.18

members appointed by judges themselves but it consists of members appointed by Kosovo Assembly, therefore this condition lets us understand that the legislative power has the possibility of intervening into judicial power through people it appoints as members of Kosovo Judicial Council.

Potential influence of other institutions in judicial and prosecution system

In addition to two other powers, the executive and the legislative one and institutions appointed by these two powers, it is worth mentioning the possibilities of influence from other local and international institutions. Recently there have been several cases when the Constitutional Court of Kosovo annulled some regular court decisions by reasoning that during the procedure the human rights have not been respected, this would be correct as if the constitutional court would not indirectly go into evaluation of evidence. To clarify the possibility of influence, it is stressed that all judges of Constitutional Court are appointed by Kosovo Assembly, consisting of representatives of various political parties.

Influence of international community has also played and continues to play an important role in relation to independence and functioning of judicial system in Kosovo, because since 1999 until the declaration of independence of Kosovo, the international community referred to as UNMIK, (United Nations Mission in Kosovo)⁶⁸ was the organization that had all competences over the judicial and prosecution system in Kosovo, whereas following the independence declaration, the European Mission for Rule of Law - EULEX continued the international presence in Kosovo⁶⁹, therefore, the European Union may have its impact on the judicial and prosecution system of Kosovo, because through judges and prosecutors appointed by EU is a part of the judicial and prosecution system of Kosovo.

In addition to the above mentioned, the impact in the judicial and prosecution system comes also from the political agreements between Kosovo and Serbia, where part of these agreements is also the judicial and prosecution system because the constitution and the laws of Kosovo foresee participation of the percentage of judges and prosecutors of Serb minority in Kosovo justice system, because till now judges and prosecutors of of Serb minority in Kosovo under the influence of the power in Serbia did not have the courage to apply for the vacant positions for judges and prosecutors in Kosovo.

⁶⁸ Resolution 1244, S/RES/1244 (1999) Adopted by Security Council in its 4011st meeting, on 10 June 1999

⁶⁹ Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, amended with COUNCIL DECISION 2014/349/CFSP of 12 June 2014

Individual independence of prosecutors

In addition to independence of judicial and prosecution system from external influences or from executive and legislative power, important is also to mention the internal independence, where judges and prosecutors must decide only based on the laws and not based on obligatory instructions, pressure, threats or direct or indirect interventions from court or prosecution leaders of higher level towards the lower level.

According to recommendation from Council of Europe (2010) C / MRec (2010) 12 paragraph 22 provides as follows: "Principle of judiciary independence means independence of every judge individually in exercising the function of adjudication. In taking their decisions, judges must be independent and unbiased, and able to act without any limitation, improper influence, pressure, threat or direct or indirect intervention from any authority, including the internal authorities in judiciary. Hierarchical court organization shall not undermine the individual independence".

Also paragraph 23 of this recommendation foresees that: "The highest courts shall not issue instructions for judges related to the manner how they must decide in individual cases, except the preliminary decisions or when it is decided about legal instruments according to the law".

Similar principle has been foreseen also in Kiev principles according to recommendation 35 for internal independence: "Issuance of directives, explanations or resolutions by higher instance courts should be discouraged, but for as long as they exist, they must not be mandatory for the judges of lower courts. Otherwise they represent violation of individual independence of judges. Moreover, excellent decisions of higher courts and decisions determined in specific manner as precedents from these courts shall have the status of recommendations and will not be mandatory for judges of lower courts in other cases. They must not be used in a way that they limit the freedom of lower courts in their decision making and their responsibilities. Uniformity in interpretation of law shall be encouraged through studying the case law which also lacks the mandatory force".

Conclusion

Notwithstanding the very positive developments of the judicial and prosecution system in Kosovo, since 1999 up to date this system needs to insist in functional independence in the individual aspect, and also in institutional point of view from external impacts, be them from two other powers – executive and legislative, so that Kosovo citizens have a greater legal safety to accomplish and protect their legitimate rights. This may be achieved by amending the Constitution and other laws which are related to independence of the judicial and prosecution system in Kosovo.

Although Kosovo is facing such challenges, the perspective for independence of justice system in Kosovo is positive. However, except the northern municipalities of Kosovo, where agreement is needed to be reached between Kosovo Government and Serbia, justice system in Kosovo in general can be described as functional and operates within an acceptable institutional framework, whereas the structural reforms of the justice system in 2013, along with the verification of judges and prosecutors during the recruitment process may give the opportunity for a broader independence of this system, not only in individual but also in the institutional one.

A thing to be clarified is that, when it is insisted in independence of judicial and prosecution system, it must be noted that independence is a very important guarantee but that must not be used as a shield behind which the judges and prosecutors can hide their unethical and non-professional behaviors.

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