

Guidance on Developing Laws that Promote Rather than Undermine Merit Based Recruitment

The presence of high-quality merit-based practices in public organisations is a key indicator of a healthy, effective, and citizen-orientated administration.

As the British Embassy Project on Senior Recruitment comes to an end there is much that has been achieved. In this article we want to place the focus on:

- ***What needs to happen to continue a path towards merit-based recruitment?***
- ***How to make merit-based recruitment sustainable?***

There are several things that will make a big difference to whether merit-based recruitment continues to improve as it needs to, and whether this becomes a sustainable norm in the future. This may include aspects such as attraction strategies, pay, job security and organisational reputation amongst other influencing factors.

One of the single most important things that Kosovo can do to achieve improvements in merit-based recruitment and make this sustainable into the future is to approach the way laws and regulations are drafted, scrutinised and approved.

In October 2022 the British Embassy Project on Senior Recruitment produced an article outlining *When Laws and Merit Based Recruitment Conflict*. That original article can be found [here](#) and remains relevant.

We are now more than one and half years further on and there have been several legal updates and changes to laws relating to recruitment. However, many of these changes have failed to take opportunities to ensure laws support rather than undermine merit-based recruitment principles and practices. In some instances, there has been a backward step, making processes less merit-based.

It is understood that when there is a lack of progress on aligning merit-based principles and the law this is unlikely to be intentional. Those involved in drafting laws can take care that historic thinking, insufficient understanding of how the laws will work in practice and competing priorities and principles are not overly influencing progress. Ensuring all those at the various stages of making and approving laws understand the principals of merit-based recruiting may be important too.

This document seeks to provide more structured guidance on developing laws that promote merit-based recruitment. The intention is to support better and more effective laws that promote merit-based practices that will ultimately strengthen Kosovo's civil and public institutions.

Why merit-based recruitment is a key cornerstone of an effective civil and public service.

As an EU Accession state, assessments show the areas where Kosovo is making progress. Merit based recruitment practices are one of the EU's indicators of an effective and healthy administration.

Kosovo has been recognised as making some progress to establish merit-based recruitment within public institutions however more is required to ensure this is ubiquitous and sustained into the future – See: [Kosovo EU Report 2023](#) and [Sigma/OECD Report 2021](#).

While these assessments are informative, they do not provide clarity on some of the underpinning factors that are limiting merit-based recruitment. One of these factors is the way in which laws (and regulations/sub-legal acts) are constructed to promote or hinder merit-based practices.

More broadly, the presence or absence of merit-based practices has the potential to ensure that best possible talent is attracted, recruited and appointed. Having the best talent available is a key factor in organisational performance and effectiveness.

The public's belief in whether recruitment processes have been carried out in a fair, transparent, and effective manner has an impact on the reputation of the administration and government. Public trust in how civil and public employees are appointed is a central issue in whether the entire state apparatus is seen as being in service of the country or is being used for personal advantage.

Being able to explicitly demonstrate to civil society, media, governance and accountability structures and the people of Kosovo that laws have been consciously written to promote merit-based principles and practices is arguably more important than any one recruitment process.

So how can this be achieved? Below is a series of considerations, steps, practices and ways of thinking to ensure laws promote merit-based recruitment.

Understanding the three principles of merit-based recruitment

It is not unusual for most people to view merit-based recruitment as simply appointing the highest performing candidate. While this is important this is only the third and final principal of merit-based recruitment:

1. Criteria are objective and justifiable requirements for the role.
2. The assessment methods and practices provide a sufficient and accurate measure of the criteria. This includes the (weightings and the way pass thresholds relate to rating processes)
3. Highest performer is appointed.

For more on these principles please see [here](#).

Only when these three principles are fully understood and are kept in mind as laws are drafted can they be purposefully designed in.

Explicit aims and priorities

Possibly one of the single most important reasons that Kosovo laws and regulations unintentionally compromise merit-based recruitment principles is because of competing priorities and mindsets.

It appears that the prevailing mindset is that without detailed and clear laws people will act in inappropriate ways. This implicitly drives priorities concerned with stopping nepotism and corruption. In turn, this requires the laws and regulations to define as many aspects of the recruitment process as possible.

While this seems a sensible approach, it can lose sight of the other priorities that a recruitment process must also seek to achieve. These may include:

- Be able to identify the candidate most likely to perform well in the role (see the three principles above). There are examples within Kosovo's current laws and regulations that work against these principles.
- Create accountability in those undertaking the recruitment process – currently commissions may feel little responsibility or accountability as they simply follow the process and there are limited instances where they have to make decisions for which they are accountable. A key aspect of this is requiring transparent reporting of their rationale why candidates are either appointable or not, and potentially providing the commission with final responsibility for the appointment decision where possible

While laws can be initiated in several ways within Kosovo, the drafting tends to be done by setting up a working group. Prior to beginning the drafting of the law a working group could begin with making its aims explicit and recorded. An example of what this could look like is provided below:

- We will construct this law/regulation based on the following priorities and principles:
 - Ensure that all aspects promote merit based practices and principles (including job-related criteria, assessment methods that accurately measure those criteria and decision making processes that reflect the assessment rating processes used).
 - Minimise the potential for nepotism and corruption.
 - Transparency and accountability at all decision-making points in the process. Driving commission and final decision maker's responsibility taking and ensuring public access to information supported by clear communication practices.
 - Emphasising strategies to attract as many well qualified and suited applicants as possible, especially those from under-represented groups or based on gender.
 - Ensure alignment with constitutional legal requirements.

- Refer to, rather than restate, other existing legal requirements (e.g. Data protection, gender equality) to ensure that the law does not become obsolete as other laws change.
- Provide a level of detail that provide the necessary safeguards to effective implementation but avoid over specifying anything that may hinder the application of the law in practice.
- Adopt an approach that has carefully considered the wide range of contexts the law will need to operate within (e.g. individual versus volume recruitment).

Start with the end in mind

Laws and regulations in Kosovo are drafted from a place of good intentions. Part of the reason they often undermine merit-based principles and practices is because the laws are written without sufficient and full appreciation of how they will work in practice.

This means that requirements stated in laws are forced to work in practice rather than having been designed to work in practice in a way that promotes merit-based practice.

An example of this is the requirement for a 70% pass threshold in recruitment – a common feature of Kosovo recruitment laws and regulations. This is an arbitrary pass requirement that has no meaning in and of itself. The relevance and meaning of this requirement is determined by the assessment criteria, the methods or assessment and rating processes used in the process. Whether 70% is meaningful is only determined by the difficulty of the assessment and therefore the difficulty in achieving this score. In turn, what 70% represents is largely driven by aspects of the assessment approach (e.g. the number of points and definitions within the rating scale being used to assess candidates). When a requirement of this type is arbitrarily included, those designing the assessment approach have to make it work because it is a requirement of the law rather than being something that supports effective practice. This is achieved by compromising aspects of the process and practices. By doing this, merit-based principles are hindered rather than promoted.

Rather than creating requirements within the law that make sense in the mind of those drafting it, an application-centred /user-centred approach should be adopted. This is to work through what a requirement is likely to mean in practice to test whether it makes sense. In doing so, this provides an opportunity to determine whether it is promoting or hindering the achievement of merit. It is acknowledged this may take longer to draft the law – however, it will save much more time in subsequently.

Direction versus accountability

This is a case of when less can become more. Within Kosovo the approach to laws and regulations tends to create clear process requirements, clear timelines and clear gateways from one stage to another. While the intention here is to provide clarity and reduce the potential for things to go wrong it has a potential unintended set of consequences too.

This high 'control' approach results in processes failing as a result of not neatly falling within the administrative parameters set out in the law or regulation. This occurs often because those writing the laws have used a limited mental-model of how the process will work in practice.

This can happen when those drafting the law have thought about a recruitment process being a single role with a likely number of applicants. This mental model then does not work for any process which has different contextual factors.

An example of this was when a large public organisation had to recruit approximately 200 new starters for an entry level role. The anticipated application to vacancy ratio was 10:1. Timescales and process requirements in the law and regulation made this an impossible exercise to do properly and in a merit-based manner. The need to receive approximately 2000 applications and then undertake initial verification within the required number of days was impossible. Either the timescales have to be compromised or the assessment approach. This creates an uncomfortable situation where the need to remain within the law wins out at the cost of merit-based practices.

Another implication of over-specifying requirements within law and regulation is that it removes the accountability of those carrying out the recruitment process. People may tend to take less personal ownership and accountability for ensuring MBR principles are applied. It may become too easy to say 'that's what the law requires and I'm just following the law'. An example of this may be when a process is timed out by some aspect of the law and needs to be re-run. While the respect for remaining within the law is entirely correct, it promotes low responsibility taking and create huge additional and unnecessary costs within the Kosovo administration.

The alternative is to be clear about the criteria requirements, assessment methods and that pass thresholds should reflect the rating process, where a commission must document the pass requirement before starting the assessment process. In this way the pass requirement can accurately reflect the assessment and rating methods where rating scales should determine whether a candidate has reached the point of acceptable performance to be suitable for the role.

In addition, the requirements relating to timescales for different aspects of the process should be written in a manner that allows them to be extended where there is a legitimate reason to do so and there has been appropriate governance and oversight of that decision. This will avoid processes failing because laws have been drafted with insufficient consideration about the range of scenarios they may need to apply within.

Include cross-functional expertise

Working groups are often convened to draft laws. These already contain a cross section of people with various expertise who input to the creation of the laws and regulations. While this is useful, it is often those with the legal experience in drafting laws that drive the process. This is appropriate however, it can also mean there is insufficient notice

taken of those with experience and expertise of what it may mean to apply the law in practice.

It is recommended that there should be HR and Recruitment Experts who are made an integral part of the drafting process. There should be several representatives of this community and they should have an explicit role in highlighting where the law may promote or limit merit-based principles and practices.

In turn this requires that this expertise is valued as equal to the legal expertise of those carrying out the majority of the drafting.

Other key success factors for working groups may include the effectiveness of the person chairing the process. In addition, the attendance of members of working groups can at times fluctuate and people can be sent to deputise. Having the right people present consistently is likely to influence whether the group makes continuous positive forward progress and avoids re-opening and re-visiting aspects that were previously agreed.

Apply a merit-based recruitment quality assurance process

There should be an individual with recruitment expertise who is provided with the role to critique and verify that the way the law is being constructed will promote and not hinder merit-based principles and practices.

This relies on them being given dedicated time to review all clauses against merit-based principles and practices in doing so they should remain focused on the following questions:

- How does the law seek to attract and ensure fairness towards those from minority groups and on the basis of gender?
- Does the law make it possible to run processes for individual and volume recruitment?
- Has the law provided mechanisms where timescales can be extended with appropriate rationale from those responsible for the recruitment and with the right oversight/governance sign off?
- Does the law promote the need to provide a written and published rationale for decisions made by the commission and where relevant others involved in the process?
- Is the law clear about the criteria required and its need to be directly relevant to the role being recruited for?
- Has the law ensured that the recruitment methods (application, testing, interview, etc) to be used have clear relevance to the criteria being measured and the requirements of the role?
- Does any weighting place most emphasis on the criteria and methods of assessment that are most likely to predict performance in the role?
- Have pass-thresholds been set in a meaningful manner that relate to the rating process within the recruitment?

- Is there a clear requirement to appoint the highest performing candidate?
- Are there clear requirements regarding transparent communication and the need for the commission (and other decision makers) to provide written rationale for their decisions and actions?

Educate those approving the law

While it is important that those involved in drafting the laws consider this guidance, often the laws require the approval/passing of others.

It is important that those providing any oversight, governance, input or approval of the laws also understand the principles laid out in this and the previous ([click here](#)) paper on Laws and Merit Based Recruitment. Only then will they know whether the law or regulation they are approving will have a positive impact in building a stronger, more prosperous and fairer Kosovo for the future.

Other Resources

- [Process Map](#)
- [Guidance and Articles on Merit-based Recruitment](#)