



Group for Legal
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Studies



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HOW TO ACCESS THE MONITORING OF THE JUDICIAL AND PROSECUTORIAL SYSTEM MORE EASILY?



Monitoring Manual

How to access the monitoring of the judicial and prosecutorial system more easily?



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Acronyms

KJC - Kosovo Judicial Council

KPC - Kosovo Prosecutorial Council



Introduction

This manual serves as a guide for the organisation, methodology, and form of monitoring court cases in the courts in the Republic of Kosovo.

In addition, the manual addresses the role, tasks, and responsibilities of the monitor while performing their tasks, issues of the methodology of drafting monitoring reports, and provides summarised explanations of aspects, such as data/information collection, how to draft brief and broad analysis, and especially concretely addresses the types and kinds that characterise the monitoring work.

Another aspect of special importance that this manual emphasises is the code of ethics of the monitor, which is summarised in 10 categories that serve to conduct fair, correct, and professional monitoring.

In conclusion, the manual addresses the issue of monitoring the implementation of recommendations that are provided when publishing legal analysis and which mainly serve as an evaluation parameter to measure the effectiveness and productivity of the implemented monitoring. Through this action, the implementation of the recommendations that follow during the drafting and publication of an analysis is monitored as a better way of reflecting the impact of the recommendations in the justice system, namely, the analysis of case law and the fact of how likely it is for a certain recommendation to be implemented in real life.

Audience of the manual

This manual has as a priority purpose to assist non-governmental organisations, citizens, and informal groups that aim to monitor the judicial and prosecutorial system in Kosovo. Through this general manual, readers can gain basic and professional knowledge of the monitoring activity starting from the main principles to the impact they can have and the contribution they can give to the society through this activity.

1. Purpose, key principles, and types of monitoring

1.1. Purpose of monitoring

Monitoring is one of the main tools in democratic societies through which states, civil society, and various international organisations seek to increase access to justice, the degree of efficiency, and transparency within the judicial system. Monitoring can also be seen as a powerful tool in educating and training lawyers on local and international standards. In the narrow spectrum, monitoring can be taken as limited to observing public court proceedings and the attitudes and behaviour of judges, prosecutors, lawyers, and other officials who are physically present during a trial. However, these are only the first steps that a monitor should consider in order to carry out this process.

Nevertheless, direct observation of court proceedings includes only part of the monitoring process. For this process to be more substantial, a monitor should keep in mind that the information gathered from direct monitoring is not sufficient. Other information should be gathered through further sources of information, and then compare concrete actions and challenges to applicable legislation. This way, it can be analysed whether the actions taken during the judicial process are in accordance with the legal regulations provided in the relevant legal acts.



1.2. 1.2 Principles of monitoring

The following are considered main principles:

▶ The principle of objectivity

- This principle determines the objectivity of the monitor during the monitoring process. A monitor should refrain from subjective opinions and base their work only on the applicable legislation. A monitor is prohibited from being influenced by the circumstances of the case or certain subjects in the proceedings. During the reporting, the monitor should refrain from expressing personal opinions and they should only provide legal analysis of the judicial actions they monitor.

▶ The principle of protecting sensitive and confidential data

- This principle stipulates that while performing their duties, the monitor must act in full compliance with Law 06/L-082 on the Protection of Personal Data.¹ While reporting on the monitoring activity, a monitor should be careful in avoiding the publication of personal data of individuals involved in the monitored case, which they may have access to from pre-trial hearings, closed sessions to the public, information that relates to the investigation phase, as well as any other information, the disclosure of which poses a risk to the follow-up of the specific case. Furthermore, during the monitoring and reporting process, the monitor should be extra careful to avoid any situation that could damage the integrity and reputation of the parties.

▶ The principle of interference in the judicial system

- This principle stipulates that while conducting monitoring activities, the monitor must respect the independence of the court and the way judges and staff implement their work. A monitor should avoid any situation in which they could affect the conducting of court proceedings, which would reflect as a violation of the principle of independence of the judiciary.

1 Law 06/L-082 on the Protection of Personal Data, accessible on the following link: <https://gzk.rksgov.net/ActDocumentDetail.aspx?ActID=18616>

1.3. 1.3 Types of monitoring

The following are considered the main types of monitoring:

▶ Systematic monitoring

- Systematic monitoring is the continuous follow-up of various court cases (criminal, civil, administrative).

▶ Thematic monitoring

- Thematic monitoring is the follow-up of court cases related to a specific nature (criminal offences against official duty, organised crime, administrative, etc.).

▶ Ad-hoc monitoring

- Ad-hoc monitoring is the follow-up of various court cases where it is suspected that there is a selective approach and inappropriate handling by the institutions of the judicial system, without specifying a certain nature.



2. Responsibilities of a monitor

The following are the responsibilities of a monitor:

2.1. Technical responsibilities of monitoring

- ▶ Monitors should always arrive on time at the institution where they monitor and respect their order;
- ▶ Monitors should respect the dress code of the institution where they monitor;
- ▶ Monitors should carry identification card that identifies them as monitors;
- ▶ Monitors should behave in a dignified manner.

2.2. Professional responsibilities of monitoring

- ▶ Case identification, selection, and monitoring, including ongoing evaluation of judicial actions;
- ▶ Physical monitoring of cases, including participation in court hearings and collection of necessary information;
- ▶ Reporting of monitoring data in compliance with the applicable legislation;
- ▶ Analysis of court decisions and procedures followed in monitored cases in order to identify, expose, and follow up on erroneous practices and improve them in these courts;
- ▶ Provide recommendations to courts/prosecutors on issues to be addressed/improved.

3. What are the five main pillars of monitoring?

1. Data collection
2. Data analysis
3. Data reporting
4. Providing recommendations
5. Follow up on the implementation of provided recommendations

⚠ ATTENTION: The most important step to which the monitor should pay maximum attention is the collection of information because other steps derive from this step!

3.1. What is data collection?

Data collection is the first step, which creates the bridge between the monitor and the judiciary. The collection of information can be done by:

- ▶ Presence of the monitor in the courtroom;
- ▶ Obtaining official data within the framework of requests for access to public documents;
- ▶ Obtaining information from direct contact with employees of the justice system.

3.1.1. How to obtain data through monitoring?

When talking about data collection, we should have in mind that obtaining them represents the initial step in the monitoring process. The accuracy of the data collected during the monitoring process directly affects the quality of monitoring in general, as well as the drafting of legal analysis and monitoring reports in particular. In order to get accurate case data, a monitor must be vigilant, following the court hearing with full attention.

Example:

- ▶ **While monitoring criminal cases, the monitor should:**
 - obtain data on the composition of the trial panel and the parties participating in the proceedings;
 - understand the stage of criminal proceedings and preliminarily conducted judicial activity.

⚠ ATTENTION: The monitor should distinguish between case facts and the allegations of the parties, which are not relevant to the court case. Moreover, the monitor should be careful about potential confrontations between the parties to the proceedings and the trial panel and reflect in their reports only on matters relating to the court case they are monitoring.

3.1.2. How to obtain data through official channels?

⚠ ATTENTION: Obtaining of data through official channels is done by request for access to public documents as per Law 06/L-081 on Access to Public Documents.²

Once the cases to be monitored are identified, the monitor should obtain the following through official channels:

- Criminal charges (if applicable);
- Ruling on the initiation of investigations, extension of investigations, termination of investigations, and any other document relevant to the investigation procedure;
- Indictment filed;
- The court decision to reject or approve the objections of the parties regarding the indictment and admissible evidence;
- Judgment of the first instance (if applicable);
- Appeals submitted by the parties (regular legal remedies) regarding prosecution and court procedural actions (if applicable);
- Decisions of the court of second instance (if applicable);
- Requirements for extraordinary legal remedies (if applicable).
- Decisions of the Supreme Court (if applicable).

3.1.1.1. Access to public documents and applicable legislation

The right of access to public documents is a fundamental right, which is guaranteed by the Constitution, international conventions, and laws. This right is guaranteed by article 41 of the Constitution of the Republic of Kosovo and article 10 of the European Convention for the Protection of Human Rights.

The right of access to public documents in Kosovo is regulated by Law 06/L-081 On Access to Public Documents, entered into force in July 2019, repealing Law 03/L-215 On Access to Public Documents, December 2010.

- ▶ Requests for access to public documents or reuse of public documents are handled by any public institution that possesses the required public document.
- ▶ By decision, the responsible official within the public institution grants or denies access to public documents.
- If the public institution does not have the required document, they shall immediately, but not later than five (5) working days from the day of the receipt of the request by the applicant, inform and direct the applicant to the relevant public institution.

² Law 06/L-081 on Access to Public Documents, accessible on the following link: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=20505>

- If the public institution has no knowledge of any other public institution that may possess the public document, it shall immediately, but no later than seven (7) business days from the day of receipt of the request by the applicant, inform and direct the applicant to the Information and Privacy Agency, which is obliged to confirm whether and which public institution possesses that document and immediately, but not later than seven (7) business days from the date of receipt of the application, notify the applicant thereof.
- ▶ The public institution shall, within seven (7) days from the date of recording the request, issue a decision to grant access to the requested document or render a justified decision for the full or partial refusal and inform the applicant of the right to request reconsideration of their request, as well when and where to submit such request.
- ▶ When the requested public document, which based on a reasonable assessment is considered to be necessary for the protection of the life or liberty of a person, the public institution shall be obliged to provide an answer within forty-eight (48) hours.
- ▶ The public institution may extend the deadline set out under paragraph 1 of this article for decision-making on access to public documents to a maximum of fifteen (15) additional days in cases when the document must be searched within a large number of documents or outside the public institution, or the same applicant requests, in a single application, a large number of public documents.



EXAMPLE: Request form for access to public documents

To: Basic Court in Prishtina (depending on the request)

From: XY (monitor name) – Organisation name

I hope you are well and that things are going well!

First let me introduce myself. I am XY, a monitor in the project for monitoring the judicial and prosecutorial system of the Republic of Kosovo led by XY, funded by XY.

We are addressing you with this request to inform us about the convictions in corruption cases, i.e., the following information:

1. In how many cases have additional sentences been imposed in addition to the main sentences for the period of June 2019 – June 2021 by the relevant court?

At the same time, through this letter, we ask you to send us the drafted judgments.

This information is very important for our monitoring activity and since this information comes from public documents, where access to them is guaranteed to every citizen in accordance with applicable law regarding access to public documents, we hope you will treat this request as a priority, so you can inform us correctly and within a reasonable time.

We look forward to your positive response!

XY,

Prishtina, Dated: xx/xx/xxxx

3.1.3. How to obtain data through direct contact?

When information cannot be obtained through a formal request, the monitor establishes

- ▶ Direct contact with judges and prosecutors of specific cases, which results in obtaining source and reliable information.

4. What is analysing of collected data/information?

After collecting information, there is an open way for the analysis to be conducted from the obtained data, which are directly related to the compiling of reports and analyses that can be derived from the collected data.

While analysing, the monitor focuses on two areas:

- ▶ Analysis of procedural actions, as well as legal acts issued by these institutions;
- ▶ Analysis of the impact of these actions on the judicial and prosecutorial system in ensuring the implementation of the law.

While analysing, the monitor focuses on the following principles:

- ▶ Exercise the function independently, fairly, objectively, and impartially and ensure that all persons are treated equally before the law;
- ▶ Make decisions in full compliance with applicable laws:
 - Constitution of the Republic of Kosovo;³
 - International Conventions,⁴
 - Criminal Code;⁵
 - Criminal Procedure Code;⁶
 - Juvenile Justice Code;⁷
 - Law on the Execution of Penal Sanctions⁸
 - Law on Extended Powers for the Confiscation of Assets;⁹

3 Constitution of the Republic of Kosovo online on the following link:
<https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>

4 European Convention on Human Rights on the following link:
https://www.echr.coe.int/documents/convention_sqi.pdf

5 Criminal Code of the Republic of Kosovo 06/L-074 on the following link:
<https://gzk.rks-gov.net/ActDetail.aspx?ActID=18413>, Criminal Code of the Republic of Kosovo 04/L-082 on the following link: <https://gzk.rks-gov.net/actdetail.aspx?actid=2834>, Law 04/L-129 on Amending and Supplementing the Criminal Code of the Republic of Kosovo on the following link:
<https://gzk.rks-gov.net/ActDetail.aspx?ActID=2852>

6 Criminal Procedure Code 04/L-123 on the following link:
<https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2861>

7 Juvenile Justice Code 03/L-193 on the following link:
<https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2698>


8 Law 04/L-149 on the Execution of Penal Sanctions on the following link:
<https://gzk.rks-gov.net/ActDetail.aspx?ActID=8867> and Law 05/L-129 on Amending and Supplementing Law 04/L-149 on the Execution of Penal Sanctions.

9 Law 06/L-087 on Extended Powers for the Confiscation of Assets on the following link:
<https://gzk.rks-gov.net/ActDetail.aspx?ActID=8651>

- Law on the Prevention of Money Laundering and Combating Terrorist Financing.¹⁰

In this way, after receiving information/data from the monitoring, the monitor should analyse this data in terms of compliance with these basic principles. Thus, given the importance of this type of legislation, each monitor should focus on identifying violations of fundamental human rights in court proceedings. Because this corpus includes many rights, monitors must exercise particular caution in accurately identifying the type of human rights violation.

In a court proceeding, several fundamental rights may be violated jointly or separately. There are specific cases where the principle of a fair trial may be violated, but not the principle of a fair trial within a reasonable timeframe, although the legislation stipulates these two rights, which are closely linked. In this regard, there is a possibility that the court will fail to provide a trial that respects the principle of equality of the parties, contradiction, or proper evaluation of evidence, but the trial has ended within a reasonable period of time. Given that these basic principles are included in the legislation of most countries, including Kosovo, then it should be considered that violations of concrete procedural and substantive norms most likely constitute violations of basic principles.

 **ATTENTION:** Each monitor should carefully analyse the data to see if institutional actions taken are in accordance with the legislation of the pertinent field and the principles of court proceedings.

5. What should a monitoring report contain?

The monitoring report is compiled after the court hearing is held and it should contain:

1. Date of judicial activity conducted;
2. The court where the court hearing is held;
3. Relevant department of the court;
4. Name of the single trial judge or names of the trial panel;
5. Name of the state prosecutor representing the case;
6. Names of the accused or their initials;
7. Names of the injured party (if applicable);
8. Description of the developments in the court hearing;
9. Evaluation of the monitor regarding the legality of the procedural actions taken in the hearing;
10. Description of the enacting clause of the indictment.

¹⁰ Law 05/L-096 on the Prevention of Money Laundering and Combating Terrorist Financing on the following link: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=12540>

EXAMPLE: An example of a journalistic report

Two witnesses are heard in the trial for money laundering in the amount of over 65 thousand Euro
Basic Court Prishtina, 03 September 2021

At the Special Department of the Basic Court in Prishtina, this Friday, two witnesses were heard in the trial of the accused M.G. for money laundering, reports Justice Today.

In today's hearing chaired by Judge Musa Konxheli, D.T. and A.B. answered questions from prosecutor Naim Abazi and the defendant's defence attorneys.

D.T. testified before the trial panel regarding the purchase of a property by the now accused M.G. He explained how this procedure went from the signing of the contract to its certification in court.

While the other witness, the customs officer A.B., testified before the court about the checking of the vehicle of the accused, in which money was found in the amount of over 64 thousand Euro. He has clarified this circumstance in detail in the answers he provided to the questions of the parties in the procedure.

After hearing the two witnesses, Judge Konxheli said that the court would schedule the next hearing after the financial expert drafts a special expertise if the accused had legal sources for the money found in his vehicle while crossing the border at Merdare.

We recall that the case was returned for retrial by the Court of Appeals, because they found that article 76 of the Criminal Code of the Republic of Kosovo (CCRK) was not respected, which deals with the sentence for joining criminal offences, because sentences were not imposed for each offence separately but only a cumulative sentence was imposed for both offences, for which the defendant is accused.

At the preliminary hearing, M.G., had reached an agreement with the Special Prosecution to plead guilty, which was approved by the court imposing the same sentence of imprisonment for a period of 6 months, which with the consent of the accused can be replaced with a fine in the amount of 3,600 Euro, and was also fined with 1,500 Euro as a special punishment, thus permanently confiscating the cash in the amount of 65,450.00 Euro.

After returning to retrial, the accused had not pleaded guilty to the criminal offences imposed on him. Whereas during the phase of controlling the indictment, according to Judge Konxheli, the Appeal with its ruling had requested that the criminal proceedings be conducted only for money laundering and not for the criminal offence of prohibited trade.

Otherwise, according to the initial indictment, on 14.08.2020, M.G. committed the criminal offence, "Forbidden Trade," after he was found exercising an economic activity without authorisation and without the relevant permit, in such a way that hidden cash in Euro currency, undeclared, was found in his vehicle in the total amount of sixty-five thousand four hundred and fifty Euro (65,450.00 €).

Also, on 14.08.2020, the defendant M.G. committed the criminal offence, "Money laundering," after knowing or having reason to know that he was carrying this cash, hidden in his vehicle, he tried to hide or disguise the true nature of the source, location, settlement, movement, and rights in relation to the ownership of these assets, in order to avoid legal consequences or possible legal consequences.

Monitored by XY.

Case No.: XY

6. What should a legal case analysis contain?

A legal case analysis contains the following:

- ▶ Brief description of case facts;
- ▶ Description of judicial procedural actions taken while handling that case;
- ▶ Violations identified during monitoring;
- ▶ Analysis of these violations and their impact on the specific case;
- ▶ Conclusion and recommendations for relevant institutions.

⚠ ATTENTION: The monitor should ensure that when drafting an analysis, they use certain writing methodologies that include the use of analytical, comparative, and applicable methods.

6.1. EXAMPLE: Structure of a legal case analysis

A legal analysis that discusses a monitored case may consist of the following structure:

▶ Introduction

- Representation of the issues to be addressed in the analysis:
 - Main problem;
 - Selected case or cases;
 - Research method (indicates which documents were analysed, hearings that were monitored).

▶ Legal basis

- Explanation of the legal basis that applies to the specific case:
 - Article of the Code that defines hearings are public;
 - Relevant articles that define how court proceedings should be conducted. At this point, it is essential to reflect the legal basis that corresponds to the respective case/phenomenon.

Example: If it is addressed that court cases are not being completed on time, then the legal deadlines set by the relevant laws for the completion of the main trial and the constitutional principles in this regard should be elaborated. Thus, the legal basis depends directly on what the analysis specifically addresses and which legal area covers that point.

▶ Legal violations identified

- Violations identified:
 - The main argument and explanation why it is a legal violation;
 - Argument 2 (if a second violation has been identified);
 - Argument 3 (if a third violation has been identified), etc., depending on the number of violations identified.

⚠ ATTENTION: The argumentation part of the legal violations is the most important part of an analysis. This section presents a combination of case facts and legal basis and ascertains when a certain legal violation was found and the reasons why it is considered as such.

In this regard, the ability of the monitor in the proper interpretation of legal provisions and ample argumentation to support the conclusion of legal violations is expressed.

► **Conclusion**

- This section presents a brief description of the entire analysis, its findings, and all conclusions of the analysis, including the final assessment of the impact of judicial and prosecutorial actions in handling the specific case/phenomenon.

► **Recommendations**

- The part of the recommendations should be written clearly and concisely and it should contain the recommendations listed for each institution.
- Recommendations are compiled as follows:
 - **Recommendation 1** (your recommendation if the legal framework needs to be changed);
 - **Recommendation 2** (your recommendation for KJC and KPC);
 - **Recommendation 3** (your recommendation for prosecutors);
 - **Recommendation 4** (your recommendation for judges).

⚠ ATTENTION: When compiling the analysis, the monitor ensures to reveal the negative phenomena of the judicial processes in particular, or to reflect the overall challenges of the judicial system in general.

7. What is the follow-up of the implementation of recommendations?

The last step of the monitoring process is to follow up on the implementation of the recommendations that are provided within the work of justice system institutions.

⚠ ATTENTION: Implementing the recommendations given by the monitors to the respective institutions is the best way to reflect their impact on the justice system.

- To monitor the implementation of the recommendations, the following steps should be taken:
- Create a database of recommendations provided;
 - Monitor the implementation of recommendations by the relevant institutions and their reflection in the database;
 - Continuous cooperation with relevant institutions, to which recommendations have been provided.

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