

FIRST
EDITION



RoL Checklist for Kosovo:

New Report, Old Crisis?



Group for Legal
and Political
Studies



Embassy of the
Kingdom of the Netherlands

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Executive summary

This report monitors and assesses the current state of the Rule of Law in Kosovo, based on the Rule of Law's Checklist, developed and adopted by the Venice Commission. This Checklist is used as a tool for a systematic and comprehensive assessment of the fundamental pillars of the rule of law. The analysis covers the period May-October 2021, but it is not limited to it.

The average fulfillment score for the Republic of Kosovo during this period is 55.96%, meaning that it is moderately above the threshold of the Checklist under consideration. Out of 5 categories, the one scoring higher is Equality before the Law, (85%). Conversely, the Prevention of Abuse (Misuse) of Powers reached the lowest points (37.5%). Among all other categories, including Legality (44.28%), and Legal Certainty (53, 33%), Access to Justice reached a medium-optimal score, which will be looked at into detail in this report. Based on the last assessment carried out by the Group of Legal and Political Studies (GLPS) in 2018, the overall score was 54.2%. Compared to the current evaluation, this does not show a significant increase (55.96%).

Overall, a considerable discrepancy in the field of Rule of Law exists between the Rule of Law de jure and the Rule of Law de facto in Kosovo. Also, there is a need to build up the trust between citizens and the Rule of Law institutions.

Introduction

Kosovo continues to face challenges in the Rule of Law sector, including a slow and inefficient judicial system, while at the same time engaging in significant reforms in this field. Overall, the lack of serious efforts in implementing the legislation in place is of serious concern. Also, there is a continuous need to improve coordination and oversight of fundamental rights' policies and legislation. And these principles are clearly set forth under the Constitution of the Republic of Kosovo recognizing that the exercise of public authority is based on the respect for human rights and freedoms of its citizens and all other individuals, as well as that the respect for the rule of law is one of its fundamental values. With a view at protecting the human rights of its own citizens, the Constitution of Kosovo foresees that a number of international conventions are directly applicable in the country. Therefore, all laws and other legal acts shall be in accordance with the Constitution. What's more, Kosovo has been part of a long harmonization process of its legislation with the EU *acquis communautaire* (*acquis*). The rule of law is, thus, considered to be among the foundational values of Kosovo's constitutional order.

At the time the new Government started its work in 2021, efforts have been made to reform the rule of law sector in the country. Several initiatives have been undertaken, including the design of a Vetting process, civil confiscation of illegally obtained assets, legislative changes regarding the regulation of the Kosovo Prosecutorial Council (KPC), etc. As for the first initiative, the Government has already approved a concept document for establishing the Vetting process. The Vetting is expected to engender a thorough reform in the rule of law area and weed out corrupt judges and prosecutors from the system. Concretely, it foresees the establishment of a Vetting mechanism through constitutional changes with a temporary mandate to be ended once the first verification period ends. The verification process would be then transferred to the Kosovo Judicial Council (KJC) and the Kosovo Prosecutorial Council (KPC). Subject to the Vetting would be members of the KJC and KPC, the Chief State Prosecutor, all judges and prosecutors, court administrators, directors of the council's secretariat, director of the judicial inspection unit, as well as other officials engaged in courts and prosecution offices.

Along with the initiative above, the Government has also approved, in April of this year, the concept document, on the confiscation of unjustifiable wealth in a civil procedure as a key tool in the fight against organized crime and corruption. The novelty of such a policy is the confiscation of wealthy assets in a civil procedure, and not in a criminal one.

Besides the initiatives above, the Government has also been reforming the regular court system in the country. In July 2021, it approved the draft-law on establishing a commercial court, an initiative started by the previous Executives some years ago. Such a court is intended to deal with all complaints from the business sector, in order to facilitate court proceedings and help the country's economic growth. Simultaneously, the Government, specifically the Ministry of Justice (MoJ), has been very active with other policies as well. At present, the draft Code of Criminal Procedure and other laws are part of the current legislative agenda.

Methodology

GLPS conducted an assessment and evaluation of the Rule of Law sector in Kosovo, based on the Council of Europe's Checklist¹. Such an analysis has been carried out, by duly taking into account Kosovo's constitutional provisions, by-laws and rules of procedure with the purpose of detecting the discrepancy between the written laws and their effective implementation, and/or lack of it.

The Checklist above contains eight major benchmarks encompassing several indicators to effectively monitor and evaluate the current state of play in the Rule of Law sector. The categories mentioned below are considered to contemplate the common core contained in the concept of the Rule of Law. The categories mentioned below have been considered as a sort of compass guiding the common understanding about the concept of the Rule of Law itself. In addition, the Constitution was taken into consideration as the highest source of law, followed by primary and secondary legislation, judicial decisions and relevant CSOs' monitoring reports. Besides the 5 main categories below, this report further elaborates on the examples of particular challenges to the Rule of Law, as the last section displays.

Checklist's 5 categories:

1. Legality;
2. Legal certainty;
3. Prevention of abuse (misuse) of power;
4. Equality before the law and non-discrimination;
5. Access to justice;

The indicators above have been taken as the starting point for a proper assessment in the Rule of Law sector. Concretely, each of them has been further analyzed by attempting at looking for an answer to the specific questions for each element, as provided in the Rule of Law Checklist of the Venice Commission. Therefore, each of the questions of the elements can be found on the Checklist. And, provided that the question A and/or B has been fully answered, 1 has been attributed as a score, whereas 0 has been given in the case of non-answer. Whenever, the situation could not be properly assessed, for a lack of information and/or evidence, 0.5 has been assigned. Besides that, if an indicator contains 6 targeted questions, and 3 only have been answered, the indicator is considered to be fulfilled by 50%. Also, along with the scoring evaluation, the analysis provides for an interpretation and explanation of the results.

¹ Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12 March 2016, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)

Rule of law in Kosovo – data analysis

A. LEGALITY

The principle of legality was first mentioned in the 2004 verdict of the court (Sixth Chamber) on the case of the Commission of the European Communities v CAS Succhi di Frutta SpA.² This principle demands for a transparent, accountable, and democratic process for enacting the law, relying on effectively accountable institutions and a representative decision-making procedure. The principle of legality, as the other principles tackled in this paper, consists of categories which are then considered for their specific elements. As for legality as per the Rule of Law Checklist, it consists on the Supremacy of the Law, Compliance with the Law, Relationship between International Law and Domestic Law, Law-making Powers of the Executive, Law-making Procedures, Exceptions in Emergency Situations, Duty to implement the Law, Private Actors in charge of Public Tasks.

The Supremacy of the Law, being a chief democratic principle requiring both citizens and the Government to be subject to the laws of a country, shows a 50% fulfillment in Kosovo (4 points out of 8). This sub-category deals with the accordance and authorization by the law of the state actions. Moreover, it checks the conformity of the laws with the Constitution as well as adoption of legislation when required by the constitution and the adoption of by-laws when required by legislation in a timely manner.

Kosovo's Constitution³ recognizes this principle, while specifying that all legislation shall be in accordance with the Constitution itself, and every person and entity in the Republic of Kosovo is subject to to the country's highest legal act. However, legislation tends to be adopted with delay when required by the law. Such a case, is the Law on Public Officials where the Constitutional Court stated that the Assembly is obliged to take the necessary actions to supplement and amend Law no. 06 / L-114 on Public Officials in accordance with the findings of this Judgment, regarding the employees of the institutions specifically defined in the Provisions of the Judgment.⁴ However, the Constitutional Court has ruled that the Law on Public Officials needs to be amended, the relevant institutions have not yet taken any action towards this. As for the sub legal acts, there are many cases that they are adopted with delay such as the case with the sub legal acts deriving from the Law on Access to Public Documents. In regards to this, Ministry of Justice took almost five year to adopt the required legal acts and regulations requested by the Law on Legal Protection and Financial Support for Potential Accused Persons in Trials before the Specialist Chambers.⁵

² ECJ, C-496/99 P, Commission v. CAS Succhi di Frutta, 29 April 2004, accessible here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999CJ0496>

³ Constitution of the Republic of Kosovo, Official Gazette, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>

⁴ Constitutional Court Judgement, Constitutional review of specific Articles of Law No. 06/L-114 on Public Officials, July 2020, available at: <https://gjk-ks.org/en/decision/vleresim-i-kushtetutshmerise-se-neneve-te-caktuara-te-ligjit-nr-06-l-114-per-zyrtaret-publike/>

⁵ Law No.05/L-054 on Legal Protection and Financial Support for Potential Accused Persons in Trials Before the Specialist Chambers, Article 9, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=11037>

As for Compliance with the Law, this scored 41, 66 % of fulfillment (2.5 points out of 6). Concretely, this principle aims to reflect the compliance of the public authorities' actions with the existing laws as well as if the powers of the public authorities are determined by the legislation. The Kosovo's Constitution provides for a clear definition of powers of the public authorities, as well as for the exercise of a judicial review by laws and statutes. Besides that, and pursuant to the constitutional provisions, the powers of the public authorities are properly defined by the law, as well as by the secondary legislation. However, the latter (administrative instructions, regulations, etc.) tend to rule, in some cases, those aspects which should have been regulated by the primary legislation instead. Concretely, this practice is particularly evident in matters of restriction of the rights and interests of individuals, which must be set in the law and not in those acts complementing it.

The division of power among the Assembly, the Government and the Justice System is defined in Chapters IV, V, VI and VII of the Constitution. Yet, the Kosovo's authorities fail to respect unconditionally the legal norms in practice. Otherwise said, public authorities often work with delays, without a legal basis and in infringement of their legal obligation to uphold human rights. An eminent and consistent example that does not only pertain to the monitoring period is the lack of respect of human rights and legal norms is the Justice System failing to provide access to justice and timely mannered trials. Another example clearly displaying the infringements by the Executive is the February 2020 decision of the Government to abrogate the highly criticized 2017 decision of the previous Executive to increase the salaries of its officials, a competence falling under the Assembly's responsibility. Despite abrogating such decisions, or involving the Constitutional Court, there was no effective remedy against such an abuse. Even during 2021, no action has been taken by the Assembly regarding the previous Government's decision on increasing the salaries.

As for the Relationship between International Law and Domestic Law, its score is 100%, Article 22 of the Constitution states that international customary law and the obligations derived from the international treaties have priority over the Constitution, although Kosovo is not part to many international and regional treaties and human rights covenants. Hence, domestic law is in alignment with the rules of international law. Moreover, the Constitution as the highest legal act ensure compliance with the human rights law. Article 19 of the Constitution of the Republic of Kosovo clearly states that ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo.⁶ Moreover, the court decisions of the European Court of Human Rights (ECHR) are binding interpretative guidelines on how human rights provisions must be interpreted in the country and should be constantly used by the regular courts of the Republic of Kosovo.

With a look at the Law-making Powers of the Executive, this scored 0%. This sub-category overviews the supremacy of the legislature, general and abstract rules included in the Act of Parliament, effective remedies against abuse and the delegation of the legislative power by the Parliament to the executive. Although the Constitution of the Republic of Kosovo foresees a tripartite division of powers, the supremacy of the legislature is not always ensured. A proper control over the Executive is rarely and duly exercised. Looking at the substance of the Executive's law-making process, it is worth mentioning that this is not evidence-based in most of the cases. In addition, the Government's concept documents, being an important impact assessment mechanism, have not reached the necessary high-level overview of the ideas presented to the central governance's decision-making process. A decision worth mentioning that illustrates this case the best, is the decision of the Government in February 2020 to abrogate the highly criticized 2017 decision of the previous Government to increase the salaries of the Executive, a competence clearly falling under the Assembly. Despite abrogating such decisions or involving the Constitutional Court, there was no effective remedy against such abuse. Even during 2021, no action has been taken by the Assembly regarding this decision on the salaries, which is still in force.

⁶ Constitution of the Republic of Kosovo, Article 19, Official Gazette of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=37029>

Concerning with the Law-making Procedures, the accountability, transparency and inclusivity of the process for enacting the law scored 3 out of 6 points, (50%). There are clear constitutional rules on the legislative procedure and other legal acts ensuring inclusiveness of the public. Although there are cases when recommendations are not considered, the overall process offers the possibility to include all stakeholders and interested parties during all phases, except for the early consultations. In relation to the stakeholders, the relevant ministries do not uphold their role obliging them to give their opinions on a legal act. Besides that, even though early consultations are obligatory for the public institutions, this does not occur in the practice. In legal terms, consultations are regulated by the Governmental Regulation specifying the minimum standards for public consultations.⁷ Beside the abovementioned regulation and the public consultations platform, there are no other channels enabling a civic participation in policy and decision-making processes. As a recommendation, and wherever appropriate, impact assessments shall be carried out before adopting the legislation (i.e., human rights and budgetary impact etc.). They should be drafted and not only green lighted by the relevant parliamentary committees.

As for Exceptions in Emergency Situations, this scored 100%. Such a sub-category is well-defined in Article 131 of the Constitution. This comprehensively specifies the national provisions applicable to emergency situations, the scope, the duration, and the limitations. In other words, it defines the restriction of human rights and freedoms in specific situations, but respecting those rights which are inviolable. Concretely, the Constitution of Kosovo states that the state of emergency can be declared when: "1) there is a need for emergency defense measures; (2) there is internal danger to the constitutional order or to public security; or (3) there is a natural disaster affecting all or part of the territory of the Republic of Kosovo".

Although no state of emergency has been declared in Kosovo due to the COVID-19 pandemic, in relation to emergency situations, during 2021, the former Minister of Health has signed the Administrative Instruction for Amending and Supplementing the Administrative Instruction no. 01/2015 on Marketing Authorization for Medicinal Products, which paved the way for the delivery of anti-COVID-19 vaccines in Kosovo.⁸ This amendment enabled the contracting parties to obtain an emergent Marketing Authorization, therefore excluding the provisions of the Administrative Instruction 01/2015.

The sub-category Duty to Implement the Law by public authorities scored 0%. Public institutions have always been prone to adopt legislation in accordance with the EU framework without ex-ante analysis in order to assess if the draft-law is in conformity with the context of the country. In fact, some ex-post analyses of laws have been carried out in some rare cases such as the ex-post analyses of the Law on Civil Service, Law on Foreign Trade, Law on National Trade and Law on Executional Procedure, Yet, the ex-post analysis are not always considered when drafting the new legislation. Besides that, there are no clear sanctions or even cases that are applied when legislation is not implemented by the public authorities.

With a look at the eighth and final sub-category Private actors in charge of public tasks, the Kosovo's Constitution does not mention about delegating public tasks to non-state entities. Yet, the Law on Organization And Functioning Of State Administration and Independent Agencies states that: "the state administration may delegate specific tasks for the performance of administrative functions according to the law to natural or legal for-profit or not-for-profit persons".⁹ In addition, the same law provides the conditions for delegation (Article 34) and supervision of the delegated tasks (Article 35). Moreover, the Law on General Administrative Procedure¹⁰ is applied whenever a private person acts in the name of a public institution upon an explicit authorization by a law, or based on a law. The

7 Regulation (Grk) No. 05/2016 On Minimum Standards For Public Consultation Process, Official Gazette of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=15036>

8 Administrative Instruction (Ministry Of Health) No. 01/2021 Amending Administrative Instruction No. 01/2015 Marketing Authorization For Medicinal Products, Official Gazette of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=39820>

9 Law No. 06/L-113 on Organization And Functioning Of State Administration And Independent Agencies, Article 33, Official Gazette of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18684>

10 Law No.05/L-031 on General Administrative Procedure, Official Gazette of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=12559>

CoE's Rule of Law checklist stresses that individual rights and their respect, and/or lack thereof, must be assessed not solely on the basis of state authorities' actions/inactions, but of private actors' and internationally organizations' as well.¹¹

As for Kosovo, an example displaying the way the private sector can be in charge of a public task refers to the Government's decision obliging all businesses, mostly dealing with the gastronomy, to allow vaccinated people enter their premises only, or those who can prove to have a negative test. Through such a decision, private actors have been given public tasks.

Altogether, the Legality category scored 44.28% (15, 5 points out 35 points). This result clearly shows that Kosovo needs improvement in terms of compliance with the law, rule-making procedures, as well as law-making powers of the Executive. As for the duty to implement the law, there is an urgent need to address this shortcoming. Currently, with the existing legislative framework public institutions cannot be held accountable for not implementing their duties.

B. LEGAL CERTAINTY

Legal Certainty is the second category of the Rule of Law Checklist, and it includes the following sub-categories: Accessibility of Legislation, Accessibility of Court Decisions, Foreseeability of the Laws, Stability and Consistency of the Law, Legitimate Expectations, Non-retroactivity, Nullum Crimen Sine Lege, and Nulla Poena sine Lege principles, Res Judicata. Overall, the final score of Legal Certainty is 8 points out of 15 (53, 33%).

In regard to Accessibility of Legislation (2 out of 2), draft laws are made available to the public through the official webpage of the Office of the Prime Minister of Kosovo, as well as through the webpage of the Assembly of the Republic of Kosovo. As for the laws, they are available in the Official Gazette of the Republic of Kosovo¹². Also, they are free of charge and accessible in the following languages: Albanian, English, Serbian, Turkish and Bosnian.

As for the Accessibility of Court Decisions, this subcategory scored a total of 1 out of 2. To start with, the decisions of the Constitutional Court are always published in a timely manner on the Court's official webpage.

In order to increase transparency and accountability, in 2020, more than 40.000 (four thousand) decisions were published and accessible to the public¹³. Meanwhile, on September 2021, the Judicial Council of Kosovo decided to publish on its official portal all final decisions of the disciplinary procedures for judges and prosecutors.¹⁴ In fact, this has been a continuous recommendation of Justice Today/Drejtësia Sot, a platform created by GLPS monitoring daily all corruption, organized crime and money laundering cases.

In regard to the sub-category of Foreseeability of the Laws, all laws that are available in the Official Gazette of the Republic of Kosovo are written in an intelligible manner in Albanian, Serbian, Turkish, Bosnian and English. Although generally the language used when drafting laws is technical and bureaucratic, more efforts should be undertaken to render it understandable to the wider populace, beyond practitioners only.

The Official Gazette's online platform includes the laws abolished or amended for each new law that is published. Although this is very helpful, there are no consolidated versions of the amended laws, except when the law is entirely re-written. Furthermore, on many cases, laws do not express authorization as to what matters of that law should be regulated by the secondary legislation. Also,

11 Decision on general and specific measures for the control, prevention and control of Pandemic COVID-19, Office of Prime Minister of the Republic of Kosovo, 23 October 2021, available at : <https://kryeministri.rks-gov.net/wp-content/uploads/2021/10/Vendimet-e-Mbledhjes-se-41-te-te-Qeverise-se-Republikes-se-Kosoves-1.pdf>

12 Official Gazette of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/default.aspx?index=1>

13 Drejtësia Sot/ Justice Today, available at:

<https://www.rolpik.org/rritet-transparenca-e-gjyqesorit-publikohen-mbi-40-mije-aktgjykime/>

14 Kallxo.com, September 2021, available at:

<https://kallxo.com/ligji/kgjk-do-ti-publikoje-vendimet-e-gjykates-supreme-per-procedurat-disiplinore-ndaj-gjyqtareve/>

as for the authorization of the adoption of bylaws, the law gives authorization, in some cases, to senior managers when, in fact, this authorization should pass through the Government or the relevant ministry. Besides that, laws cannot be considered consistent. For example, the Law NO.03/L-223 on the Kosovo Judicial Council, the Law NO.06/L-056 on Kosovo Prosecutorial Council, etc., have been amended three times in the last six years, and there is not a consolidated version of them yet. Last but not least, the Law NO.06/L-056 on Kosovo Prosecutorial Council is undergoing some new amendments as part of the legislative agenda of the Government, and there is no plan about its consolidation. This subcategory scored 1 out of 2 in total.

As for the Stability and Consistency of the Law, the laws tend to change very often. However, they are mostly changed with a fair warning. As for Legitimate Expectations, this sub-category looks into the fact that if public authorities abide by their promises and raised expectations and not only by the law. In this case, over the last years the public authorities failed to respect the principle of legitimate expectations.

As for the Retroactivity of Legislation, there is no general law that prohibits the retroactivity of the laws, meaning that each law states whether retroactivity applies. An example can be found in the Law on NO.06/L-056 on Kosovo Prosecutorial Council (KPC), where a member of the KPC can be elected for one mandate only, without the right to be re-elected. This law does not foresee a provision explaining whether this law applies retroactively. This being the case, former members of the KPC which have been part of the council, are being elected as new members of this council. Yet, regarding the retroactivity of criminal legislation, the Criminal Code of the Republic of Kosovo¹⁵ explicitly prohibits it.

The other legal principles, such as the Nullum Crimen Sine lege and Nulla poena sine lege are listed as principles in the Constitution of the Republic of Kosovo and the Criminal Code. Therefore, there is no crime or no person that can be punished for doing something that is not prohibited by the law. In reviewing if the doctrine of Res Judicata (no person should be disputed twice for the same reason), the same one is ensured in Kosovo. This principle is formally provided by the Criminal Code, and it is applied in the practice. However, regarding civil cases there is no effective enforcement system in place, despite the existence of private and court enforcement agents.

C. PREVENTION OF ABUSE (MISUSE) OF POWERS

The category of Prevention of Abuse (Misuse) of Powers consists of one sub-category only, namely the existence of legal safeguards against arbitrariness and abuse of power by public authorities. The overall score is 1.5 points out of 4 (37, 5%). Legislation and provisions exist in this regard. Yet, there has been a clear lack of action during the last years, when it comes to mechanisms for preventing, correcting and sanctioning abuse of discretionary power in the practice. But the only way to combat misuse of powers is to ensure that adopted laws are fulfilled and implemented.

During the last years, many cases of abuse of power have been recorded by the President, the Prime Minister and other high rank officials. Among them, once case deserves particular attention. The former Minister of Foreign Affairs illegally appointed a Consul General in the Czech Republic, based in Prague.¹⁶ Later on, such a decision was withdrawn by the then acting President, but no sanction against the Minister was taken at the time¹⁷.

However, during this 6-month period of monitoring/assessment there has been no case validating the prevention of abuse of powers. Yet, combating this phenomenon with criminal prosecution and sanctioning people abusing of the public authority/power has almost failed in its entirety.

¹⁵ Criminal Code of the Republic of Kosovo, Articles 2 and 3, available at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=18413>

¹⁶ Koha.net, November 2020, available at: <https://www.koha.net/arberi/247024/djali-i-deputetit-haxhi-shala-emerohet-konsull-i-pergjithshem-ne-prage/>

¹⁷ Koha.net, November 2020, available at: <https://www.koha.net/arberi/247185/osmani-shfuqizon-kater-dekrete-per-konsujt-ne-prage-lubjane-shkup-e-tirane/>

D. EQUALITY BEFORE THE LAW AND NON-DISCRIMINATION

In relation to this category, Article 24 of the Constitution of the Republic of Kosovo states that: "Everyone enjoys the right to equal legal protection without discrimination". In harmonization with the Constitution and complementary to it, the Assembly of Kosovo has adopted, in 2015, the Law No. 05/L-021 on the Protection from Discrimination which prohibits both direct and indirect discrimination.

The Kosovo's Constitution provides a good example on how to ensure equality before the law and non-discrimination. Both these principles are expressed in multiple ways and on multiple grounds. Almost every chapter of the Constitution promotes the above-mentioned principles, especially Articles 21 to 62 which are dedicated exclusively to human rights. As mentioned above, Kosovo has a specific law fighting discrimination.¹⁸ However, this is often not used in the practice with the prosecution showing many shortcomings in its implementation. Moreover, in parallel to the Rule of Law and existing equality before the law safeguard, the marginalized groups, with emphasis on people with disabilities and special needs, as well as the LGBTQ+ community still face discrimination in many aspects society wide. Not only Kosovo cannot ensure non-discriminatory treatment for these groups Also, it cannot guarantee equality between genders. Just as an example, as for the maternity leave women tend to be discriminated in the private sector due to minimal work arrangements. Therefore, there is an urgent need to review the existing laws on labor and anti-discrimination in this regard.

Pertaining to Equality in Law and Equality before the Law, Kosovo is a multi-ethnic state with six major ethnic groups: Albanians, Serbs, Turks, Gorani, Roma and Bosnians. All of them have reserved places in the Kosovo's Assembly as in every public institution, meaning that equality and non-discrimination standards are met. The mandated quotas are respected. In order to include all ethnicities in policy-making, every constitutional change shall occur with the double majority vote only, ensuring the approval of the minority representatives in the Assembly. Nonetheless, there is still a long way to go for the full integration of the minority groups in every aspect of society in the practice.

The fourth category Equality before the Law and Non-Discrimination reaches a final score of 8.5 out of 10 (85%). This result reflects that Kosovo stands very good in this indicator, but there are remaining challenges and obstacles in implementing the legislation in its entirety.

E. ACCESS TO JUSTICE

Access to justice remains one of the fundamental principles of the Rule of Law, and therefore it is listed as a category of the Rule of Law Checklist. It consists of the following subcategories: Independence and Impartiality, Fair Trial and Constitutional Justice.

As for the independence and impartiality of the judiciary this scored 64, 28% (9 points out of 14). Chapter VII of the Constitution of Kosovo assures all its principles. In addition, Chapter IV of the Law No. 06/L-054 on Courts¹⁹ lists the qualifications, rights, and duties of judges. As for the grounds for the disciplinary measures, they are clearly defined and there are sanctions to intentional offences and gross negligence. Regarding the disciplinary responsibility, the same is determined with the Law No. 06/L-057 on Disciplinary Liability of Judges and Prosecutors,²⁰ f the regulations of the Kosovo Judicial Council (KJC) and the Kosovo Prosecutorial Council (KPC) have derived from. Based on ongoing reports, including the 6th edition of the ROLPIK (Rule of Law Performance Index in Kosovo)²¹ which is based on public perception, 63.7% of citizens trust the courts and the prosecution the least, because, in their view, they are the mostly influenced by the politics. In order to address this public concern

18 Law No. 05/L-021 on the Protection from Discrimination, Official Gazette of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=10924>

19 Law No. 06/L-054 on Courts , available at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=18302>

20 Law No. 06/L-057 On Disciplinary Liability Of Judges And Prosecutors, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18336>

21 Rule of Law Performance Index in Kosovo, 6th edition, Group for Legal and Political Studies, available at: <https://www.rolpik.org/justicetoday/?fbclid=IwAR2xXKA598QB1xuxEOXs95WJ9-qCm5uOdIKdhO5bhNNZgH1Ya3KEt5oaX0>

and increase transparency, the KJC started to broadcast, on July 2021, all meetings online.²² This has been seen as a very positive step in boosting transparency and accountability of the justice sector countrywide.

Regarding sufficient constitutional and legal guarantees for the independence of individual judges, this subcategory scored 2 points out of 4. Each court has its president and vice-president, whose competences and responsibilities are set forth under article 14 of the Law on Courts.²³ The presidents of higher courts have no supervision on lower instance courts regarding the judicial activity, but for the appeal process only. With a look at the conflict of jurisdiction between courts, article 13 on the Law on Courts determines the competence of the higher court as final.²⁴ As for the disciplinary proceedings and performance evaluation of the judges, KJC is entitled to use these mechanisms which are meant to improve the system. Yet, these tools are not usually applied effectively, and they do not deliver the necessary results. In September of this year (2021), the KJC has obliged all courts' presidents, to publish the decisions regarding the complaints filed against the judges on their respective websites.²⁵

The same lack of standards applies for specific constitutional and legal rules providing for the impartiality of the judiciary (0 points out of 2). In line with this, there is a widespread perception of corruption and lack of trust in the judiciary and its institutions. For the period 2019-2021, 4 indictments for corruption were reported against judges.²⁶

Another matter within this category is the autonomy of the prosecution service. In Kosovo, both the judiciary and the prosecution system are challenging. This sub-category scored 5 out of 12 points (41, 66%). Yet, with the entry into force of the Law on the Disciplinary Liability of Judges and Prosecutors, the legislative framework regarding the control of the prosecution has improved. However, the result above shows that there are many legal provisions missing in order to guarantee a consistent control of the office of the public prosecutor. Yet, some positive developments must be welcomed. For instance, in August 2021, the Basic Prosecution in Pristina filed an indictment for corruption against the Director of the Secretariat of the Kosovo Prosecutorial Council (KPC). Later on, the KPC decided to dismiss him from his position.²⁷

At the same time, in July 2021, strong suspicions of abuse and corruption scandals in the State Prosecutor's Office were made public through a wiretapping.²⁸ Concretely, a judge serving at the Court of Appeals and a member of the KJC has been suspected.²⁹ In August 2021, the KJC established an ad hoc commission to review the disciplinary liability against the judge. Afterwards, he resigned from his post as a member of the KJC.

The impartiality and independence of the Bar as a legal profession is sufficiently assured in Kosovo (score 4.5 out of 5). Under article 111 of the Constitution, being a lawyer is defined as an independent profession. The same is also determined by the Law No. 04/L-193 on the Bar.³⁰ Regarding the supervision of the Kosovo Bar Association by the Ministry of Justice (Moj), this chamber is currently not accountable before any institution, and the supervision by the Moj is not clearly defined. Based on Article 44 of the Law No. 04/ L-013 on the Bar, "the Ministry of Justice monitors the work of Bar Association and the conditions for its work".³¹ However, the Moj should take into consideration the administrative autonomy of the Association.

22 Drejtesia Sot/ Justice Today, "261st Meeting of the Kosovo Judicial Council", July 2021, available at: <http://www.rolpik.org/takimi-i-261-te-i-keshillit-gjyqesor-te-kosoves/>

23 Law No. 06/L-054 on Courts , article 14, available at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=18302>

24 Ibid, article 13

25 Drejtesia Sot/Justice Today, "263rd Meeting of the Kosovo Judicial Council", September 2021, available at: <http://www.rolpik.org/takimi-i-263-te-i-keshillit-gjyqesor-te-kosoves/>

26 Drejtesia Sot/Justice Today, available at: <https://www.rolpik.org/>

27 Drejtesia Sot/Justice Today, "Lavdim Krasniqi is dismissed from the position of General Director of the Secretariat of the KPC", August 2021, available at: <http://www.rolpik.org/lavdim-krasniqi-shkarkohet-nga-pozita-e-drejtorit-te-pergjithshem-te-sekretariatit-te-kpk-se/>

28 Shqip.com, Audio Recording: Exclusive: "What do you have in Lumezi talk to me" - Violations and power of Driton Muharremi in the prosecutorial system of Kosovo, July 2021, available at: <https://shqip.com/shenjester/ekskluzive-cka-ki-te-lumezi-fol-me-mu-shkeljet-dhe-fuqia-e-driton-muharremi-ne-sistemin-prokurorial-te-kosoves/>

29 Shqip.com, August 2021, available at: <https://shqip.com/pas-raportimeve-te-shqip-com-keshilli-gjyqesor-themeloi-komisionin-per-shqyrtimin-e-pergjegjesise-disiplinore-ndaj-driton-muharremi/>

30 Law No. 04/L-193 on the Bar, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8673>

31 Law No. 04/ L-013 on the Bar, Article 44, paragraph 2, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8673>

The next sub-category, within Access to Justice, is Fair Trials. The issues of insufficiently resourced legal aid systems, lack of coordination among institutions to ensure an optimal use of existing resources for access to justice and an excessive backlog of cases hamper the effective functioning of the judicial system in Kosovo. Regarding the legal aid, Article 29 of the Constitution, Article 53 of Code No. 04/L-123 on the Criminal Procedure,³² as well as the Law No. 04/L-017 on Free Legal Aid guarantee the right to defense.³³ Yet, there are cases in the practice with a free legal representation being only offered if the sanction for the indictment is up to 10 years imprisonment or more. As for the other cases, with a punishment of less than 10 years imprisonment, the free legal representation is more limited. And this scenario inevitably constitutes a human rights violation by the state.

Regarding the Presumption of Innocence, Article 3 of the Criminal No. 04/L-123 on the Procedure Code assures the presumption of innocence of defendants charged with a criminal offence. The first paragraph of this Article reads as follows: "Any person suspected or charged with a criminal offence shall be deemed innocent until his or her guilt has been established by a final judgment of the court". However, reports on criminal cases in Kosovo continue to be accompanied by irregularities and violations of rights in most cases, including violations of the principle of presumption of innocence.

Other aspects of the right to a fair trial based on the Rule of Law Checklist include if the additional fair trial standards are applied such as: equality of arms, rules excluding unlawfully obtained evidence do proceeding start and are judicial decisions made without delay, access to court documents for litigants, right to be heard, well-reasoning of the judgments, availability of appeal procedures, court notifications delivery and are the hearing and judgments public. Equality of the parties is guaranteed by Article 9 of the Code of Criminal Procedure. Nevertheless, there are cases when in practice this principle does not apply.³⁴ As for inadmissible evidence, this aspect is defined in Article 249 of the Criminal Procedure Code. According to this, the court cannot make a decision based on inadmissible evidence. Regarding the start of the proceedings and if the judicial decisions are made without delay, the trials usually do not end within the set deadlines.³⁵ At the same time, the reasoning about the decisions shows that these are not always sufficiently justified.³⁶ From the monitored criminal cases, such as the case in the Basic Court of Prizren, the court did not reason its judgment. Also, it appears that court hearings fail to be held because court summonses are not delivered in time to the parties.³⁷ On the other hand, the hearings are public and can be monitored. This is also determined in article 293 on the Code of Criminal Procedure.

The last indicator of the sub-category Fair Trials is effectiveness of judicial decisions. Particularly, the tremendous backlog of cases, the execution of judgments and decisions, especially for the criminal procedure, is problematic. With a look at the civil procedure, for the final decisions, if these are not executed voluntarily, individuals can start the execution procedure. Meanwhile, in the criminal procedure, the decisions are in principle executed, except in those cases when individuals submit requests for postponement of the sentence's execution.

The last sub-category of Access to Justice is Constitutional Justice. According to the principle of hierarchy, the Constitution is above all other legal acts. Therefore, the Assembly and the Government, when drafting legislative and Executive acts, should take into account the opinions of the Constitutional court on concrete issues.. Failure to do so, would classify them as unconstitutional. As for the citizens' access to constitutional justice, the individuals can raise issues, pursuant to 113 of the Constitution, in terms of violation of their fundamental rights, and not general acts, only. Moreover, a citizen can bring a case before the Constitutional Court, if he or she finds that the decision adopted by the Supreme Court (as the last instance in the hierarchy of regular courts) is unacceptable.

32 Code No. 04/L-123 on the Criminal Procedure , article 53, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2861>

33 Law No. 04/L-017 On Free Legal Aid, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2803>

34 Drejtesia Sot/ Justice Today, January 2021, available at:

<https://www.rolpik.org/si-deshtoi-gjykata-ne-prishtine-te-respektoje-parimin-e-barazise-se-paleve-ne-procedure/>

35 Drejtesia Sot/Justice Today, Application of a fair trial within a reasonable time in the courts of the Republic of Kosovo available at: (<https://www.rolpik.org/aplikimi-i-gjykimit-te-drejte-brenda-nje-afati-te-arsyeshem-ne-gjykatat-e-republikes-se-kosoves/>)

36 Drejtesia Sot/ Justice Today, July 2021, available at: [https://www.rolpik.org/pas-kthimit-ne-rigjykim-gjykata-e-prizrenit-perseri-nuk-e-arsyeton-aktgjykimin-denues-ndaj-ish-inspektorit-te-ndertimit/Drejtesia Sot/ Justice Today, June 2021, available at: https://www.rolpik.org/gjykata-e-pejes-nuk-e-arsyeton-aktgjykimin-denues-ndaj-haki-rugoves/](https://www.rolpik.org/pas-kthimit-ne-rigjykim-gjykata-e-prizrenit-perseri-nuk-e-arsyeton-aktgjykimin-denues-ndaj-ish-inspektorit-te-ndertimit/Drejtesia%20Sot/Justice%20Today,%20June%202021,%20available%20at%20:https://www.rolpik.org/gjykata-e-pejes-nuk-e-arsyeton-aktgjykimin-denues-ndaj-haki-rugoves/)

37 Drejtesia Sot/ Justice today, October 2021, available at: <https://www.rolpik.org/parashkruhet-nje-pike-e-aktakuzes-ne-rastin-ndaj-ilir-tolaj-dhe-te-tjereve-te-akuzuar-per-keqperdorim-te-detyres-zjrtare/>

As for the fifth category being the broadest category of all, Access to Justice, the final score is of 59.70% (40 points out of 67 points). Even though, a slight improvement has been recorded, the Rule of Law sector must still provide effective access to justice for all as well as accountability, transparency and inclusivity amongst all public institutions at all levels.

F. EXAMPLES OF PARTICULAR CHALLENGES TO THE RULE OF LAW

The Rule of Law's Checklist provides some examples of particular challenges in this sector, namely Corruption and Conflict of Interest, Collection of Data and Surveillance.

The fight against corruption involves both preventive measures and criminal law measures. The new Criminal Code of the Republic of Kosovo, entered in force in 2019, prohibits all major forms of corruption, including abuse of office, active and passive bribery, extortion, attempted corruption, trading in influence, and money laundering. The criminal penalty for bribery ranges from one to eight years' imprisonment and an additional fine. As for the criminal offense of "Abusing official position and authority", the individual committing the offense should be punished by a fine, and by imprisonment of three to ten years. All corruption-related offenses are punishable by imprisonment or/and fines as additional sanctions.

As for the preventive legal framework against abusive exercise of public duties, Kosovo's legislation includes the Law No. 04/L-050 on Declaration, Origin and Control of Property of Senior Public Officials and on Declaration, Origin and Control of Gifts of All Public Officials. In addition, there is the Law on Conflict of Interest³⁸, which seeks to prevent corruption. However, dozens of suspected corruption cases are not being processed by the prosecution due to the absence of the director of the Anti-Corruption Agency (ACA), whose mandate expired in September 2021.³⁹

With a look at the indicator on effective compliance and implementation of preventive and repressive measures, this scored 2.5 points out of 6. Overall, laws enforcement remains low. One of the cases clearly displaying the poor result above is the so-called "Pronto Case", with the former chairman of the parliamentary group of the Democratic Party of Kosovo (PDK), along with other public officials, being accused for corruption. In May 2021, the case was returned for retrial to the Supreme Court on the basis of the violations found in the decision of the Court of Appeals.⁴⁰ In September 2021, the Court of Appeals acquitted the two main defendants, while the third defendant was found guilty.⁴¹ In the period January-September 2021, the 7 Basic Courts, or first instance courts, have issued 48 convictions only, out of approximately 350 ongoing corruption cases, based on the monitoring of Justice Today.

With a look at the sub-category Collection of Data and Surveillance, this includes personal data protection, targeted surveillance, strategic surveillance, and video surveillance. The legal framework is provided by: Law No. 05/L -030 on Interception of Electronic Communications and the Law No.06/L – 082 on The Protection of Personal Data. The latter entered in force at the beginning of 2019, and it is in compliance with Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and the free circulation of such data. After a saga of tentative, the Commissioner of Information and Privacy was selected in July 2021.⁴²

The legal framework for the collection of personal data and for targeted surveillance are linked and applicable to strategic surveillance, with no specific law on this matter. As for the video surveillance and with regards to the guarantees against abuse of video surveillance, the Law No.06/L – 082 on The

38 Law No. 06/L-011 On Prevention Of Conflict Of Interest In Discharge Of A Public Function, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=16314>

39 Radio Evropa e Lire, October 2021, available at: <https://www.evropaelire.org/a/drejtore-agjencia-kunder-korrupsionit-/31492114.html>

40 Drejtësia Sot/Justice today, May 2021, available at: <https://www.rolpik.org/gjykata-supreme-i-kthen-ne-rigjykim-apelit-rastin-pronto/>

41 Drejtësia Sot/ Justice today, September 2021, available at: <https://www.rolpik.org/apeli-liron-nga-te-gjitha-akuzat-adem-grabovcin-per-rastin-pronto/>

42 Kallxo.com, June 2021, available at: <https://kallxo.com/lajm/krenare-sogojeva-dermaku-zgjidhet-komisionere-e-agjencise-per-informim-dhe-privatesi/>

Protection of Personal Data embodies the general provisions on this system. The main challenge with the surveillance practice is its presence in public places. Based on the legislative framework, the police only can authorize preventive video surveillance of a public space, while specifying the standards for retaining the data and informing the individuals. All the other public institutions are not authorized to act in this matter.

As for the fight against corruption, this remains a priority for the Republic of Kosovo. And whether data collection thereupon has been duly targeted, much more efforts and attention should be given to this issue.

Concluding remarks

The Rule of Law sector has been the result of the international and domestic political developments in Kosovo. Whether some improvements have been recorded, more efforts should be channeled into regaining the trust between the citizens and the State, especially in the justice sector. However, a system lacking political stability and consistency make the citizens feel their rights are neglected. Therefore, ensuring transparency, accountability, inclusiveness, and efficiency, by abiding by the principles of the Rule Law is crucial for the public institutions. Also, the Rule of Law is a duty to be continuously assessed, even in well-established democracies.

This report has shown that there is a gap between the legal framework and its effective implementation. Several sub-categories scored 0, while the others performing better, were those sub-categories relying on the legal framework mostly.

Following this general overview, some recommendations for improvement, in terms of implementation, for the relevant institutions dealing with the Rule of Law sector are provided below.

Recommendations

- Ensure conformity between the Constitution and the primary legislation, including secondary legislation;
- Ensure the adoption of the legislation, without delay, when required by the Constitutional Court;
- Incorporate the new amended legislation in a consolidated version of the law;
- Guarantee an appropriate implementation of the tripartite division of powers, with a focus on Kosovo as a parliamentary state, where the Assembly should step up by upholding its competences;
- Improve the Committee on Legislation's monitoring capabilities pursuant to the competencies given by the law;
- Ensure the protection of the judiciary and the prosecutors from political manipulation and other external factors;
- Push for an extended transparency and accountability of KJC and KPC;
- Facilitate the access to justice of women, minority communities, elderly, children and the poor, while ensuring that the law on non-discrimination is being implemented.

Annex 1

RULE OF LAW INDICATORS BY CATEGORY

A. *Legality*

1. Supremacy of the law
2. Compliance with the law
3. Relationship between international law and domestic law
4. Law-making powers of the Executive
5. Law-making procedures
6. Exceptions in emergency situations
7. Duty to implement the law
8. Private actors in charge of public tasks

B. *Legal certainty*

1. Accessibility of legislation
2. Accessibility of court decisions
3. Foreseeability of the laws
4. Stability and consistency of law
5. Legitimate expectations
6. Non-retroactivity
7. Nullum crimen sine lege and nulla poena sine lege principles
8. Res judicata

C. *Prevention of abuse (misuse) of powers*

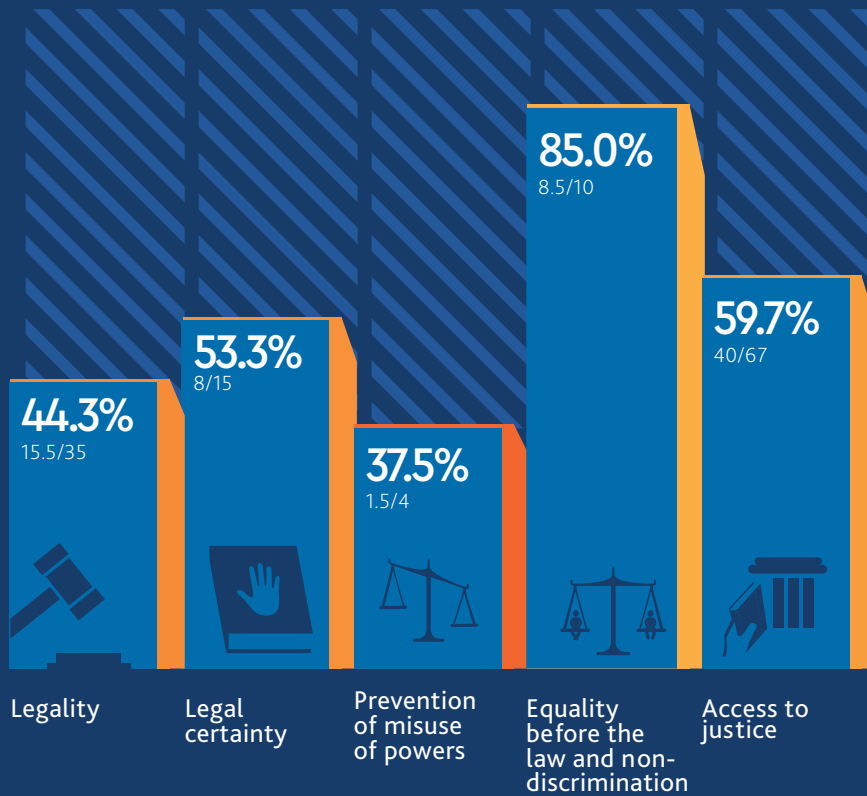
D. *Equality before the law and non-discrimination*

1. Principle
2. Non-discrimination
3. Equality in law
4. Equality before the law

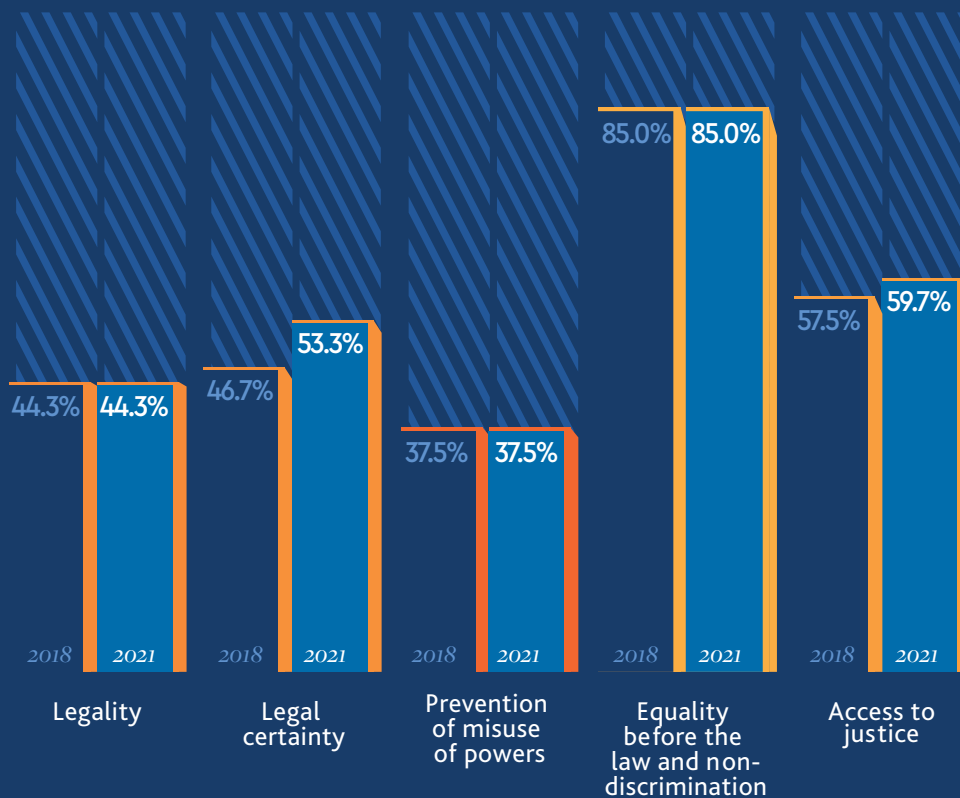
E. *Access to justice*

1. Independence and impartiality
 - a. Independence of the judiciary
 - b. Independence of individual judges
 - c. Impartiality of the judiciary
 - d. The prosecution service: autonomy and control
 - e. Independence and impartiality of the Bar
2. Fair trial
 - a. Access to courts
 - b. Presumption of innocence
 - c. Other aspects of the right to a fair trial
 - d. Effectiveness of judicial decisions

Rule of Law Checklist 2021 findings



Rule of Law Checklist Comparison 2018/2021





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