

MORE HARM THAN GOOD: An Analysis of the Proposal to Establish the Commercial Court in Kosovo

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Author: Rreze Hoxha Zhuja*

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Group for Legal and Political Studies
“Rexhep Luci” str. 16/1
Prishtina 10 000, Kosovo
Website: www.legalpoliticalstudies.org
E-mail: office@legalpoliticalstudies.org
Tel/fax.: +381 38 234 456

*Senior Research Fellow, Group for Legal and Political Studies



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INTRODUCTION

An **effective justice system** is no less than fundamental to the rule of law.¹ For a justice system to be deemed effective as such, it must be comprised of accessible courts, professional, independent and highly qualified judges and prosecutors, who deliver quality justice and increase public trust and confidence. Among others, the justice system underpins the operation of the markets and commerce. It provides a **sound framework for just dispute resolution, including business disputes**. Commercial disputes are defined as disputes of a commercial or business nature involving businesses or individuals.² Any material dispute (including any alleged dispute on price, invoice terms, quantity, quality or late delivery and claims of release from liability, counterclaim or any alleged claim of deduction, offset, or counterclaim or otherwise) arising in connection with a contract, is considered a **commercial dispute**. A poor performance of the judiciary in dealing with commercial cases will inevitably lead to a loss of **confidence from the public and the business community**. It will negatively impact the private sector and foreign direct investors. It is, in short, essential to economic prosperity.³ The present looks into how and why Kosovo is no exception to this and what is the best way forward to address problems identified.

This paper aims to **discuss and examine the current legal framework of regular courts in Kosovo**, with specific emphasis on the department for Commercial Matters and the department for Administrative Matters, the findings of the FRRLS and the current draft Law on Commercial Court. The analysis starts by providing an overview of the present model and problems identified by the FRRLS. The next section gives an in-depth analysis on the draft Law on Commercial Courts and the need to establish a Commercial Court itself, as well as the associated problems, focused on the alternative to establish a Commercial Court. In the following section, the analysis will target overcoming problems identified and push towards the proper way forward. Lastly, the paper offers policy recommendations for a more efficient commercial justice, one which brings an enabling environment for Kosovo's business community and foreign investors.

I. HANDLING COMMERCIAL DISPUTES IN THE REGION AND IN KOSOVO

How other countries in the region handle commercial disputes

Commercial disputes can be handled in different ways depending on the country at hand's legal framework. One possible way to handle commercial disputes is by **establishing special courts**, such as commercial courts. Commercial courts are the courts whose function is exclusively directed to dealing with disputes related to markets, commerce and their rights.⁴ An effective commercial court enables contracts to be enforced, offers just dispute resolution and enables businesses to resolve their disputes. An example of how commercial disputes could be

¹ DIFC.(2016). 'Commercial Justice in the Global Village: The Role of Commercial Courts'. Available at: <https://www.judiciary.uk/wp-content/uploads/2016/02/LCJ-commercial-justice-in-the-global-village-DIFC-Academy-of-Law-Lecture-February-2016.pdf>

² 'Commercial Disputes' Def. Commercial disputes are defined as disputes of a commercial or business nature involving businesses or individuals. Law Insider. Available at: <https://www.lawinsider.com/dictionary/commercial-disputes>

³ DIFC (2016). 'Commercial Justice in the Global Village: The Role of Commercial Courts'. Available at: <https://www.judiciary.uk/wp-content/uploads/2016/02/LCJ-commercial-justice-in-the-global-village-DIFC-Academy-of-Law-Lecture-February-2016.pdf>

⁴ Ibid.

handled by a special court is demonstrated by the **commercial courts in France, in Croatia and in Montenegro**. Most notably, in France, commercial courts hear disputes between traders, financial and credit institutions, and commercial companies.⁵ In the case of Croatia, commercial courts hear cases in the country's seven first-instance courts and second-instance, the latter which serves as final-instance as well.⁶ The Montenegrin example is based on a single commercial court which hears cases in the first instance.⁷ As for the second instance, in Montenegro all commercial matters dealt by the commercial court are heard by the Appellate Court established for the entire territory of Montenegro to decide on appeals against first-instance, including appeals against decisions of commercial courts.⁸ On the other hand, commercial disputes can be handled by civil courts' commercial departments or sections. These two entities within civil courts deal only with commercial matters and are specialized in this field. Professional judges are engaged and continuously trained in commercial matters. We can find this system being used in Albania, where civil courts have commercial/administrative sections.⁹

This is the **case in Kosovo** as well, only that commercial matters are handled exclusively by the Basic Court of Pristina's department for Commercial Matters. The separation from disputes regarding foreign investors came in 2018 with the purpose to increase the department's efficiency.¹⁰ In 2020, the Ministry of Justice of Kosovo presented a draft Law on Commercial court aimed at establishing a specialized court to deal with all business and administrative disputes initiated by business organizations in the entire country. The establishment of such a court was supported by the findings derived from the Functional Review of the Rule of Law Sector (FRRLS) in Kosovo.

Current legal framework and the endeavor to create a Commercial Court in Kosovo

The entire Kosovar judicial system went through a **major reform in 2010 with the Law on Courts**.¹¹ This law regulated the organization, functioning and jurisdiction of the courts in the Republic of Kosovo. It specified that the court system must consist of seven Basic Courts in the seven regions in Kosovo, besides one Court of Appeals and one Supreme Court. More detailed explanation on each is below.

The **Court of Appeals** is established in Prishtina and operates as the second instance court with territorial jurisdiction throughout the Republic of Kosovo, whereas the Supreme Court operates as the highest judicial authority in Kosovo and has jurisdiction over the entire country.

When it comes to the **Basic Courts**, each has its branches and three main departments: the department for Serious Crimes, the General department and the department for Minors. Only the Basic Court of Prishtina has an additional three departments with competency over the entire country: the department for Commercial Matters, the department for Administrative Matters and the department for cases under the jurisdiction of the Special Prosecution of the Republic of

⁵ Daille-Duclos. (2016). "Civil and commercial proceedings in France". Available at:

<https://www.fieldfisher.com/en/insights/civil-and-commercial-proceedings-in-france>

⁶ The Constitution of the Republic of Croatia. Available at: Official Gazette of the Republic of Croatia, Narodne novine, no. 56/90, 135/97, 113/00, 28/01, 76/10

⁷ Law on Courts of Montenegro, Article 17. Available at:

https://www.legislationline.org/download/id/6978/file/Montenegro_Law_on_courts_2015_en.pdf

⁸ Law on Courts of Montenegro, Article 19. Available at:

https://www.legislationline.org/download/id/6978/file/Montenegro_Law_on_courts_2015_en.pdf

⁹ EBRD. 'Commercial Laws of Albania'. 2013. Available at:

<https://www.ebrd.com/downloads/sector/legal/albania.pdf>

¹⁰ Assembly of Kosovo, Law No.06/L-054 on Courts, available at: <https://gzk.rks.gov.net/ActDocumentDetail.aspx?ActID=18302>

¹¹ Ibid.

Kosovo.¹² In order to review and adjudicate all appeals filed against decisions of the Basic Court of Pristina's Commercial Matters department, a Commercial Matters department was created within the Court of Appeals. The law entered into force in 2013, and was later amended in 2018 to create a divide between disputes regarding foreign investors and to increase the new department's efficiency.¹³

The law provides that the **Commercial Matters department** adjudicates disputes between local and foreign business organizations regarding their mutual business issues, the processes of reorganization, bankruptcy, and liquidation. Similarly, the law also regards any such disputes concerning obstruction of possession, harm competition, misuse or monopoly, dominant market position, monopolistic agreements (including the assessment of illegality), protection of copy and industrial rights, and finally disputes involving aviation companies. These aforementioned cases are adjudicated by professional individual judges and are not adjudicated in college bodies in the first instance. In the second instance, these cases are adjudicated by college bodies composed of professional judges.

The **department for Administrative Matters**, on the other hand and as mentioned above, adjudicates and decides on administrative disputes against final administrative acts.¹⁴ What's more, the law provides that within this department the fiscal division regarding lawsuits against final administrative acts in matters related to customs and tax issues, immovable property tax and any tax or other contribution applied in the country operates. The department for Administrative Matters also deals with some commercial disputes involving public institutions as one of the parties. As such, the business community and investors (depending on the nature of their case) may have to address both of these departments for their disputes to be discussed. It has been argued that such a regulation renders mandates and jurisdiction blurry, which in turn directly affects the business community in Kosovo.¹⁵ Due to this, discussions surrounding the establishment of a Commercial Court, as a specialized court with jurisdiction to resolve all cases on an economic nature, started. The Commercial Court as an alternative institution of the Republic of Kosovo is further discussed below.

II. THE FUNCTIONAL REVIEW OF THE RULE OF LAW SECTOR'S FINDINGS ON COMMERCIAL JUSTICE

In 2019, the Ministry of Justice (MoJ) initiated the Process of Functional Review of the Rule of Law Sector (FRRLS). The FRRLS was supposed to provide an overreaching reform of the rule of law sector and address issues related to public satisfaction, accelerate economic development, and facilitate Kosovo's integration to the European Union, including commercial matters.¹⁶ In parallel to the FRRLS reform, the Government launched the National Program for Economic Reform (2019-2021) and put forth a 2019-2021 Concept Paper on Judicial Reform for Commercial Justice, while the Ministry of Justice drafted the Law on Commercial Court in 2020.¹⁷ During the FRRLS, a policy paper (FRRLS policy paper) identifying the problems of the commercial pillar was produced by the experts engaged on the process.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ministry of Justice. *'Justice for development: Policy Note on Commercial Justice'*. April 2019.

¹⁶ Ibid.

¹⁷ Ministry of Justice. Draft Law on Commercial Court. September 2020. Available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=40935>

The FRRLS policy paper identified **three main problems concerning commercial justice in Kosovo**, here summarized:

- i). The lengthy period of time necessary to solve a dispute (average of three years);
- ii). The unsatisfactory quality of judgments rendered;
- iii). The existing court structure does not correspond to the evolving commercial legislation and private business activity.¹⁸

On the problem of **lengthy dispute-resolution**, the FRRLS policy paper assessed the current number of judges engaged in the department for Commercial Matters to be the main cause. Presently there are 5 judges engaged in the first instance, and 2 judges in the second, which is insufficient. The following problem of **unsatisfactory judgments** derives from a lack of specialization of judges on commercial cases, which naturally affects the quality of decisions. The third problem is considered to derive from the regulation provided by the Law on Courts, which defined that the department for **Commercial Matters does not deal with objections to enforcement of their cases** or other cases between legal persons. Jurisdiction on fiscal and tax-related issues, as well as competition and appeals towards Procurement Review Board decisions, Business Registration Agency and Intellectual Property Agency, are under the department for Administrative Matters. However, this department is also understaffed, leading to delays on settling disputes and dissatisfaction regarding the decisions.¹⁹

On a last note, the study emphasized that **both departments' mixed jurisdiction on commercial issues has hindered the ability for businesses to solve disputes**. According to the FRRLS policy paper, a potential solution could be to establish a specialized Commercial Court encompassing both departments' competences over commercial issues. The Court would offer businesses and international investors a single address for the resolution of all judicial disputes. Furthermore, the new proposed court would disengage commercial disputes from the Basic Court. Another less preferable solution put forth was to expand the department for Commercial Matters' jurisdiction to partly cover administrative disputes where businesses are a party. The study found that it would not necessarily change the situation on the ground, but improve inter-departmental cooperation and rules, management structuring and staffing. This option is not as ideal for it would still leave the department for Commercial Matters (including its staff, budget and administration) under the Basic Court, and expected results would be lesser.

Overall, the FRRLS policy paper argued that **handling commercial matters from one pillar of the justice system increases efficiency**. Not only because cases would be handled by expert judges on the matter, but more importantly it would reduce the risk of doing business, of having disputes and of losing profit because all these aspects would be protected by a court which deals exclusively with these issues.²⁰

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ministry of Justice, (2020), "*Ministri i Drejtësisë, Selim Selimi ka pritur në takim përfaqësuesit e Odave ekonomike, diskutuan për themelimin e Gjykatës Komerciale/ Minister of Justice, Selim Selimi met with the representatives of Economic Chambers to discuss the establishment of the Commercial Court*", [Press release], 13 August.

The establishment of the Commercial Court as the preferred solution

The draft Law on Commercial Court aims on establishing and regulating the organization and functioning of the Commercial court in Kosovo.²¹ The law was drafted in 2020 and in 2021 was subject to some changes. It is based on the **principles of independence and impartiality** stating that the court shall adjudicate all matters in accordance with the Constitution and the Law. The judges' decisions shall be independent, impartial and uninfluenced by natural or legal persons, including public bodies.²² Other fundamentals laid in the Law at hand include the principle of transparency, and the need for the Commercial court's composition to follow the composition of Kosovo's judiciary and reflect the country's Constitutional values of ethnic diversity and gender equality.²³ The law will apply to all legal and natural persons in Kosovo, including business organizations as defined in the Law on Business Organization.²⁴

Unlike the current model, this draft law intends the Commercial Court to encompass **commercial and administrative jurisdiction**, including all business and administrative disputes initiated by business organizations in the entire territory of Kosovo.²⁵ The law offered its own definition of business disputes and involved all disputes between business organizations, business organizations and public entities, and all administrative conflicts of business organizations.²⁶ With regards to its placement, the plan is to seat it in Prishtina.²⁷

The draft law provides that the Commercial Court adjudicate cases within its jurisdiction in both the first **instance chambers and the second instance chambers**.²⁸ The first instance chambers of the Commercial Court shall consist of four separate departments: the Economic Matters Department, the Fiscal Department, the Administrative Matters Department and the General Department.²⁹ The second instance chamber is not foreseen to have any departments but decides in a panel composed of three professional judges.³⁰ The Commercial Court is to have a **minimum of twenty judges**.³¹ The draft law determines that the **President of the Court may decide on the establishment of specialized divisions** in the first instance chambers.³²

Furthermore, it introduces a new structure in the judicial system in Kosovo, referred to as the **legal unit**, which answers directly to the President of the Court.³³ The legal unit performs its tasks in support of judges' work by conducting legal research and analysis, assisting in drafting reports, decisions and other legal materials.³⁴ Another innovation offered by this draft law is the **limited jurisdiction of the Supreme Court** and the limitations on using extraordinary legal remedies. Revision is only allowed if the value of the dispute is over EUR 50,000.00 Euros (fifty thousand Euros), and the request for protection of legality is not included.³⁵

²¹Ministry of Justice. Draft Law on Commercial Court. Article 1. September 2020. Available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=40935>

²² Ibid. Chapter 2.

²³ Ibid. Article 7.

²⁴ Ibid. Article 13.

²⁵ Ibid.

²⁶ Ibid. Article 4.

²⁷ Ibid. Article 3.

²⁸ Ibid. Article 10.

²⁹ Ibid. Article 10.

³⁰ Ibid.

³¹ Ibid.

³² Ibid Article 22, para 3.

³³ Ibid. Article 25.

³⁴ Ibid.

³⁵ Ibid. Article 14.

Building off the above, the MoJ proposes the establishment of the Commercial Court under the Draft Law provisions as means to resolve the commercial justice problems identified in the Process of Functional Review of the Rule of Law Sector. The following sections of the paper explore all arguments this belief in depth, and reach the conclusion that it would not solve problems but rather worsen the situation.

IN DETAIL: Assessing the problems identified by the FRRLS

a) Does the period of time necessary to solve a dispute represent a problem for commercial justice?

As elaborated above, the first problem identified by the FRRLS is the period of time necessary to solve a dispute, which on average is three years. In order to analyze such an issue, one should measure the **annual and monthly clearance rate of the departments** and identify where the problem lies. The way to obtain the clearance rate of a department is by calculating the ratio between the numbers of resolved cases by the number of incoming cases in a given period, expressed as a percentage.

The **department for Commercial Matters** consists of five judges, one of them serving on the division for foreign investor's disputes. The department for Commercial Matters in the Court of Appeals consists of two judges. According to the annual report of the Kosovo Judicial Council (KJC), 659 commercial cases were received from this department and 697 solved during 2018. This renders the 2018 clearance rate at 105.77%,³⁶ meaning the Commercial Matters department resolved more cases than it received. In 2019, the number of commercial cases received in was 832 and the number of cases solved was 715. With a clearance rate, therefore, at 85.9%,³⁷ the specialized department resolved less cases than received during 2019. In 2020, the number of commercial cases received was 726 and the number of cases solved was 576, making up 79.33% clearance rate. Looking at monthly rates, the average number of cases solved in the department for Commercial Matters in a month is 12.³⁸ Based on the statistics, the clearance rate of the Commercial Matters department has been **decreasing over the past three years**. Notwithstanding, the performance of the department for Commercial Matters can be evaluated as satisfactory throughout the years.

The **department for Administrative Matters** in the Basic Court of Prishtina consists of 12 judges, 9 of them engaged in the department and 3 engaged in the fiscal division. The department for Administrative Matters in the Court of Appeals consists of 2 judges. According to the KJC report, during 2018, the department for Administrative Matters in the Basic Court received 665 cases, and 784 cases were solved, resulting in a 112.48% efficiency rate. In 2019, the efficiency rate of the department lowered significantly to 79.79%, given that 1034 cases were received and 825 cases were solved. In 2020, 1907 cases were received, and 1949 solved. In monthly figures, the average number of cases solved is 27 cases in the department for

³⁶ Kosovo Judicial Council, 2018, 'Raporti statistikor vjetor I gjykatave 2018/ Yearly Statistical Report of Courts 2018', available at: https://www.gjygesori-rks.org/wp-content/uploads/reports/Raporti_vjetor_statistikor_per_vitin_2018_mbi_punen_gjykatave_Shq.pdf

³⁷ Kosovo Judicial Council, 2019, 'Raporti statistikor vjetor I gjykatave 2019/ Yearly Statistical Report of Courts 2019', available at: https://www.gjygesori-rks.org/wp-content/uploads/reports/37650_Raporti_vjetor_statistikor_per_vitin_2019_mbi_punen_gjykatave_Shq.pdf

³⁸ Ramosaj. Besnik, "Re: Rikujtim_ GLPS_Kerkese per KGJK/ Re: Reminder_GLPS_Request for KJC". Message to Liridon Salihi. February 4, 2021.

Administrative Matters.³⁹ Although, the efficiency rate of the department for Administrative Matters decreased in 2019, it remained satisfactory. There are no separate data available only concerning the fiscal division of the department.

According to the same annual report by the KJC, the average time taken to solve a case in the two departments above (for Commercial Matters and for Administrative Matters) is approximately three years. For specifically, following 2020 figures, 1,033.00 days for the department for Commercial Matters and 998.00 days for the department for Administrative Matters.⁴⁰

In parallel, according to our own **data derived from the European Commission for the Efficiency of Justice (CEPEJ)**'s formula and indicators, the time necessary to solve a case (also dubbed Disposition Time or DT) in the department for Commercial Matters is 933 days (or 2 years and 6 months). While the time necessary to solve a case in the department for Administrative Matters is 11,188 days (or 3 years and 2 months). The formula used according to CEPEJ indicators consists of dividing the number of pending cases at the end of a particular period by the number of solved cases within that period, multiplied by 365.⁴¹

The **two data sets are evidently not matching**: the department for Commercial Matters' DT is longer in KJC data than according to CEPEJ formula, while the department for Administrative Matters' DT is shorter in the KJC data than in results according to CEPEJ indicators. Ultimately, in order to compare the results from the Basic Court in Pristina's different departments, one should rely on the official data present in the KJC report.

Looking at other departments, we note that approximately the same amount of time is necessary to solve a case in the Serious Crimes department of the Basic Court of Prishtina, which, according to official data, is 874.00 days. What is more concerning is the amount of time to solve a civil case on contested procedure, which official data notes as 1,957.00 days. Moreover, for uncontested procedures it takes 1,166.00 days on average. In consideration of other departments' figures, the department for Commercial Matters and the department for Administrative Matters have a **better statistical standing**.

As such, the FRRLS commercial justice finding on lengthy period of decision time is **not sufficiently argued to justify the establishment of a specialized court**. If a specialized commercial court were to be set up for this reason, then the same thought process would render needed the establishment of other specialized courts on organized crime, corruption and civil service disputes for instance. Specialized commercial and administrative departments within the Basic Court in Pristina and Court of Appeals have duly already been set up in light of the importance of commercial and administrative matters. Moreover, while civil service disputes also represent a very important topic as well, cases remain handled by the department for Administrative Matters and there is no initiative to establish a specialized court either. This paper argues the time argument used in favor of the establishment of the Commercial Court lacks a strong basis.

b) Is the quality of judgments rendered a problem for commercial justice?

The second problem argued by the FRRSL is the lack of quality of judgments rendered. Their conclusion was based on an EBRD assessment of judicial commercial decisions in Kosovo. The assessment concluded that the quality and predictability of court judgments in commercial law matters is generally poor and with weak reasoning. The FRRSL policy paper deems it a **result**

³⁹ Ibid.

⁴⁰ Ministry of Justice. 'Justice for development: Policy Note on Commercial Justice'. April 2019.

⁴¹ Council of Europe. 'European Judicial Systems CEPEJ Evaluation Report'. 2020. Available at: <https://rm.coe.int/evaluation-report-part-1-english/16809fc058>

of judges' lacking knowledge and experience in the specialized areas of law.⁴²This is indeed undeniable and a prevalent issue, not only for judges engaged in dealing with commercial issues, but for the entire system altogether.

This is a problem which must be addressed by improving the **KJC's performance evaluation process and the Academy of Justice's training of judges**. Firstly, the KJC is responsible for individually evaluating the performance of judges every three years. Over the years, all judges have received good, very good, or excellent evaluation and no dismissal cases based on the judge's incompetence took place. Moreover, because the Academy of Justice's mandate includes the development of trainings and needs based on KJC requirements, **the lack of quality problem lies more in addressing it within the KJC than by establishing a specialized court**. After all, just because the court will be named after a subject matter and established as specialized does not guarantee the proper specialization of judges. This is due to the fact that all judges undergo the trainings of the Academy of Justice, the same trainings the current judges follow, and in line with a lacking KJC performance evaluation system.

c) Does the existing court structure correspond to the evolving commercial legislation?

The third problem identified by the FRRSL refers to the existing court structure in not supposedly corresponding to the evolving commercial legislation and private business activity. More concretely, the current regulation is seen as problematic in providing that jurisdiction on matters related to fiscal and tax issues, competition and appeals towards Procurement Review Board decisions, Business Registration Agency and Intellectual Property Agency be under the Administrative department. The abovementioned structure regarding the department for Administrative Matters' jurisdiction owes to the public institutions being a party of the dispute.

It is important to note that the **rationale behind establishing the Commercial Court** is specializing judges to adjudicate commercial disputes, not administrative conflicts. It is further proposed that the court's judges will decide on both private and public/private disputes, or administrative and contested procedures - this regulation contradicts the *ratione materiae* of the Court. If the proposal is followed, the Commercial Court would produce judges hearing both, commercial issues and administrative conflicts whereas, in principle, there are **considerable differences between civil/commercial and administrative law**. Commercial law represents the legal rules and principles bearing on commercial transactions and business organizations,⁴³ while administrative law is the body of law dealing with the establishment, duties and powers of available remedies against authorized agencies in the executive branch of the government.⁴⁴The status of the parties involved, for instance, varies between the two types of law: Commercial law concerns only private parties (natural and legal persons) and Administrative law concerns both private parties and public authorities, such as natural and legal persons on one side and a public authority on the other. Hence, a commercial dispute between two private legal entities is in essence different from disputes between a private legal entity and a public institution. To hear cases involving a public authority, it is required to have specialized knowledge in administrative law and procedure, different from the one concerning disputes between private entities. The right of the party claimed to be violated by the public institution falls under another pillar of justice, concerning administrative justice, not commercial.

⁴² Ibid.

⁴³ "Commercial law." Merriam-Webster.com Legal Dictionary, Merriam-Webster, <https://www.merriam-webster.com/legal/commercial%20law>. Accessed 1 Mar. 2021.

⁴⁴ Administrative law." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/administrative%20law>. Accessed 1 Mar. 2021

Therefore, the idea to unify the jurisdiction on handling commercial issues between two private legal entities and between a private legal entity and a public institution in one court, with shared judges, is contrary to the very rationale of the establishment of the specialized Commercial Court.

III. IS THE ESTABLISHMENT OF THE COMMERCIAL COURT THE BEST OPTION?

As argued in the previous section, the issues pertaining the time period for resolving commercial disputes, the quality of judgments rendered and the current structure of the judicial system prove insufficient to justify establishing a new court. When proposing such a big undertaking, authorities must consider the effect it will have on Kosovo's overall justice system. Once considered, policy-makers must decide if the benefits outweigh the damages before proceeding.

In line with this, below we present a detailed discussion of the consequences of the establishment of the Commercial Court, other alternatives to address the problems identified, and the way forward. For reference, the discussion related to the establishment of the Commercial Court relies on how the MoJ envisaged it in the current draft Law on Commercial Court.

a) The establishment of the Commercial Court would affect the right to a fair trial

The Law on Commercial Court stipulates the Court will act as a court of first and second instance through the creation of two chambers. The first instance will adjudicate disputes are initiated by the claims, and the second instance will decide according to the appeals exercised against the judgments and rulings of the first instance. This paper argues that the regulation proposed violates the right to a fair trial in connection to the right to an appeal.

The **right to appeal** is a general principle of law - Article 14 (5) of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to an appeal by a higher court according to law. In its general sense, the right to an appeal includes the right of an individual to appeal the decision of a lower court to a higher one. This right is thus a procedural right which, in legal theory, is known as a legal remedy permitting the court decisions' review by a higher court. The right to an appeal is also guaranteed by well-known principles of the judicial system: the principle of due process refers to a fair judicial process, which includes a fair trial, qualified legal representation and, notably, the ability to appeal.

In Kosovo, the well-known principle of due process is embodied in Article 31 of the Constitution (the right to a fair and impartial trial). The Article provides that one of the procedural guarantees of a fair trial is the right to an appeal. Moreover, the right to an appeal is a constitutional right guaranteed also in Article 102, which foresees the right to appeal a judicial decision in a higher court as one of the principles of the judicial system. Article 102 also establishes the principle of duality of courts in obliging that for all cases there be a higher court to review the court of first instance's decision. The right to an appeal to a higher instance court is also guaranteed by Article 21 of the Law on Courts, which foresees that all appeals filed against decisions of the Basic Courts shall be received by the Court of Appeals. The Law on Courts showcases the Assembly has enriched the word of the Constitution, considering the law cannot regulate the content of the right but only its realization. Furthermore, the right to an appeal includes also **the right to have an independent body reviewing the appeal**. The Law on Courts distinguishes the Basic Courts from the Court of Appeals and has guaranteed the independence of each when adjudicating cases by locating the second instance court in a different institution.

On the other hand, the draft Law on Commercial Court follows the unorthodox model used on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters, often criticized as unsuccessful. The draft Law on Commercial Court foresees that appeals be **adjudicated by second instance chambers judges, but from the same court as the first instance chambers judges** - no clear division between the two instances has been made. This is in direct violation of the rule providing that appeals be handled by a higher court, independent and impartial from the court of the first instance. In fact, the 'higher court' expression is stressed both in national and international legislation one given the duality of courts principle's key role in guaranteeing a fair trial.

Such a regulation does not offer the level of independence required by Kosovo's Justice System. The right to an appeal as a guaranteed individual right and specified to be exercised by a second instance court is established in the Kosovar justice system, and, attempts to deny it violate the duality of courts principle, a principle well established in democratic states.

b) The establishment of the Commercial Court might affect the principle of the uniformity of the law

The Law on Commercial Court stipulates the Court will act as a court of first and second instance, to all legal and natural persons in the Republic of Kosovo, including business organizations as defined in the applicable Law on Business Organizations, in business disputes.⁴⁵ All business and administrative disputes initiated by business organizations thus fall within the jurisdiction of the court. Any dispute between business organizations, business organizations and public entities and all administrative conflicts of business organizations (including administrative disputes initiated by business organizations against decisions relating to permits, licenses or any authorization under the authority of a national public body, including local self-government units), are defined as business disputes according to the draft law.⁴⁶ In other words, as opposed to the present model, all **administrative conflicts initiated by a business organization will fall under the jurisdiction of the Commercial Court**, leaving all administrative conflicts initiated by individuals under the jurisdiction of the department for Administrative Matters. It is not very clear under whose jurisdiction claims coming from the public institutions fall under.

The proposed regulation would fragment the same branch of law into two sections and threaten the law's practice by disharmonizing its practice. For instance, an individual could appeal and file a claim for an administrative conflict against the Tax Authority with the department for Administrative Matters, and the department's interpretation be different than that of the Commercial Court when deciding on similar situation. This regulation would **create inconsistencies and would directly affect the right to a fair trial** by not being in conformity with the claimant's expectations - the same cause might not produce the same effect under similar circumstances. A second example could be the procedure to apply for a construction permit: if an individual wants to file a claim against the public organ, it should file it with the department. If a business organization, for instance a construction company, wants to file a claim against the public organ, it should file it with the Commercial Court -what happens when it is the public organ (the Ministry of Interior Affairs) who wants to file a claim against the public organ for denying their request for a construction permit? Should the Commercial Court hear the case or, should another

⁴⁵ Ministry of Justice. Draft Law on Commercial Court. Article 1. September 2020. Available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=40935>

⁴⁶ Ministry of Justice. Draft Law on Commercial Court. Article 4 and 13. September 2020. Available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=40935>

court based on the status of the claimant be created? On the other hand, both parties (the individual and the business organization) are prone to the same legal rules and obligations, and the same contest will be adjudicated by both the department and the Commercial Court. As such, the contest is of an administrative nature based completely on administrative law, and thus senseless to bring an administrative conflict to a commercial court considering the subject matter jurisdiction is totally different.

Furthermore, what directly affects the right to a fair trial is the regulation of the appeals system foreseen by the draft law, which is completely different from the one foreseen in the Law on Courts. The individual filing the claim to the department will have different legal mechanisms and remedies than the business organization filing its claim to the commercial court. This **promotes a discriminatory situation *per se***. The draft law has limited the competences of the Supreme Court on reviewing decisions rendered by the first and second instance chambers of the Commercial Court - limiting the jurisdiction of the regular courts and the rights of the parties, without amending the original legal basis, raises deep concerns regarding the principle of legal certainty and predictability.

In conclusion, right to a fair trial is directly affected when creating a court based on the status of the claimant. Courts are created based on the subject matter jurisdiction – courts must focus on the nature of the claim and not who filed it. In the case at hand, there is no certainty of the legal interpretation which affects the process of building court practice in adjudicating administrative conflicts of the same nature.

c) Kosovo does not have a clear division between civil and commercial jurisdiction

Kosovo's civil legislation regulates commercial issues given that commercial justice being an integrative part of civil law. Although development of a modern commercial legislation framework has been part of many rule of law reforms, **commercial legislation remains a novelty for the body of law**.

Furthermore, there is still a great lack of laws to create a comprehensive legislation on commercial matters. On the other hand, the **insufficient implementation of the existing laws** has contributed to creating numerous practice ambiguities. Hence, designation of borders between material jurisdictions produces a great challenge in practice. It takes time to create precedents on how to resolve borders of material jurisdiction between civil and commercial issues. Therefore the creation of a Commercial Court with mixed material jurisdiction and without a comprehensive commercial legislation may cause **overlap between civil and commercial cases**. With no precedent in place or clear legislation providing the borders of civil and commercial issues, it is likely the parties will get caught up in so many ambiguities that more problems rather than solutions would arise.

d) The establishment of the Commercial Court would create a detached judiciary and hurt the integrity of the unitary appeals system

The establishment of a special court for Commercial Matters would further establish a delicate precedent considering the political atmosphere in the country. The Brussels Agreement created an unparalleled division of the Court of Appeals established in Mitrovica, which created a detached judiciary for a certain district of the country.⁴⁷ The **establishment of such a district**

⁴⁷ BalkanInsight. 'Kosovo and Serbia Reach Key Deal on Judiciary'. 2015. Available at: <https://balkaninsight.com/2015/02/10/belgrade-pristina-reach-deal-on->

along ethnic lines changed the unitary competence of the Court of Appeals based in Prishtina with territorial jurisdiction throughout Kosovo, and the organizational structure of Kosovo's court system. Currently, all appeals regarding decisions of the Basic Court of Mitrovica are handled by the division of the Court of Appeals in Mitrovica. Its establishment has destroyed the unitary appeals system and instead created an entity based on ethnicity. Moreover, its establishment has created an overlapping territorial jurisdictional problem between the Court of Appeals in Prishtina and the division of the Court of Appeals in Mitrovica. Getting back to the issue at hand, the proposed option to include an appeal division within the Commercial Court is similar to the establishment of the division of the Court of Appeals in Mitrovica. The **Commercial Court should be a unique part of the Kosovar judicial system** - otherwise, instead of providing solutions to the identified problems, it would create constitutional problems. Although the purpose behind the establishment of the Commercial Court relies on subject matter issues and not ethnicity, this paper argues that both the Commercial Court and the division of the Court of Appeals established in Mitrovica, are redundant - they both create a detached judiciary and hurt the integrity of the unitary appeals system.

In conclusion, the establishment of the Commercial Court in general and according to the draft law **creates more problems for the justice system than solutions**.⁴⁸ All in all, if the aim of the Government is to improve access to justice for the business community, the Government must clearly change its methods otherwise their efforts render no concrete impact.

e) Is expanding the jurisdiction of the department for Commercial Matters to cover a part of administrative disputes where businesses are a party a good solution?

The FRRLS's findings have listed as a second less preferable solution option the expansion of the jurisdiction of the department for Commercial Matters, in order to partly cover administrative disputes where businesses are a party. The FRRLS policy paper is less hopeful this option would change the situation on the ground, which requires improved inter-department cooperation, management structuring, inter-departmental rules and staffing.

Circling back to the above argument on the **department for Commercial Matters' *ratione materiae* differing from that of administrative matters**, we can apply it here as well - considerable differences exist between civil/commercial and administrative law, and between the disputes where business are one party and public institutions the other. Under this second option put forth by the FRRLS findings, the substantive jurisdiction of the department for Commercial Matters would include administrative disputes involving companies and public bodies, implying a name change and jurisdiction expansion for the department. In this line, judges would need to also be specialized in administrative disputes. More cases would therefore be added to the department for Commercial Matters and the time period to solve a case can be expected to increase.

This paper argues this option would go against the rationale of solving the existing problems of the commercial justice, as identified by the FRRLS. Not only because it would increase the number of days necessary to solve a dispute since more cases would be added, but also because it would decrease the quality of decisions rendered by the department for Commercial Matters. If inexperienced judges in administrative disputes hear cases on that matter, it

judiciary/#:~:text=Isa%20Mustafa%20and%20Aleksandar%20Vucic%2C%20Prime%20Ministers%20of,on%20normalising%20relations%20between%20Belgrade%20and%20Pristina%20

⁴⁸Koha.net. 'Gjykata Komerciale: Shume probleme, pak zgjidhje! / Commercial Court: Many problems, few solutions'. November 2020. Available at: https://www.koha.net/veshtrime/244971/gjykata-komerciale-shume-probleme-pak-zgjidhje/?fbclid=IwAR0PzK2t8Db3Qr_4Oot_2TES9ytKYQnTFWbhjcmzuVnwKDIXDDR_FzVJcb0

would **bruise the established court structure by mixing the jurisdiction** of Commercial Matters department with that of administrative disputes.

IV. WAY FORWARD: How to address the commercial justice problems in Kosovo?

Addressing the commercial justice problems in the country is not an easy task. The prevailing problems of the Kosovar judicial system - the time period necessary to solve disputes, the lacking specialization of judges and lacking quality of decisions rendered - are not only concentrated on commercial justice. In order to address them, a **substantive reform should be applied in the entire judicial system of Kosovo**. If the Government's purpose is to increase the efficiency of the justice system in handling commercial matters, positively impact the private sector and attract foreign direct investments to propel prosperity, the Government must offer means to address existing problems and not create new ones. Insofar the tendency has proven to be to misplace the root of the problem by identifying and targeting subsidiary angels rather than core issues.

It has been long argued that the essence behind the justice system's malfunctioning is human behavior, not structure nor laws or procedures. This applies to commercial justice, where the **issue is of professionalism and will**. A solution which appropriately addresses that claim must review judges' professional standing and build back better from there. The solution must ensure **enhanced professionalism of judges on commercial matters**, for there can be no improvements on the commercial justice of the country if judges continue to be appointed with the same education and training on hearing commercial disputes. Increasing the number of judges, mixing court departments' jurisdictions and establishing a new mechanism or changing the venue will not alter the final result - let alone improve it.

The main problem relies on the lack of professionalism and specialization which is transmitted on low quality decisions. If the judges were to be specialized in the appointed fields, the overall period necessary to resolve a dispute will be condensed. On this point, there are two **alternatives to address the issue of the lack of specialization of judges on commercial disputes**.

I. The first, and most preferred, alternative focuses on **increasing the professional capacity of judges without changing the court structure**. In order to increase the overall performance of the judiciary, especially commercial justice focused on the performance of judges hearing commercial cases, effective professional development and training must be delivered. The **training curricula of the Academy of Justice must be updated** to increase the professional capacity of judges serving in the department for Commercial Matters.

In addition, given that one of the main identified problems is the low number of judges engaged, increasing the number of judges would be a good option. Moreover, judges and court officials should have the **opportunity to exchange information** on the court system, legal issues and judicial role of other countries. To permit this, the KJC should engage on creating partnerships with other judicial bodies to ensure that judges engaged in the department for Commercial Matters have the opportunity to get valuable insights about the administration of commercial justice from key partner countries (i.e. arrangement of visiting delegations and/or short placements).

Furthermore, the Law on Court should be changed regarding the competencies of the President of the Basic Court in Prishtina. If a President with expertise in commercial matters is important to improve commercial justice in the country, then a Head of the Department for Commercial Matters could be assigned within the Basic Court of Prishtina. This new figure would have the same competencies as the President of the Court regarding the department for Commercial Matters, but within the court. This would engage the Head in all matters concerning

the department and allow him/her to represent them in front of the President of the Court and the KJC, if necessary.

2. The second alternative concerns **changing the regular court system by establishing new mechanisms, such as the Commercial Court**. This alternative does not necessarily guarantee quality. As explored throughout the paper, the draft Law on Commercial Court is a contradiction which could hinder implementation. A **paradox is evident** when noting that the proposal looks to establish a Commercial Court to increase efficiency in handling commercial cases by expert judges and reduce the risk of having disputes or losing profit, yet at the same time looking to create a centralized court with the President playing a key role in all matters.

This alternative would only contribute to the collapse of the system. Moreover, this **proposal is not evidence-based**. It is not clear how conducting partial reforms where commercial matters are treated differently from administrative, civil, criminal matters would be beneficial rather than destructive of the overall judicial system.

In considering the two alternatives detailed above, the Government must be attentive to shortcoming and potentially harmful consequences. The Government must be reminded that, instead of improving the commercial justice system in Kosovo, it could deteriorate it by making wrong choices. In a similar way, should a policy be approved the Government must ensure it will not weaken the overall justice system of the Republic of Kosovo.

Policy Analysis

Policy Analysis in general is a policy advice paper which particularly aims to influence the key means through which policy decisions are made in both local and central levels of government. The purpose of Policy Analysis is to address, more in-depth, a particular problem, to examine the arguments related to a concerned policy, and to analyze the implementation of the policy. Through Policy Analysis, Group for Legal and Political studies seeks to stimulate wider comprehensive debate on the given issue via presenting informed policy-relevant choices and recommendations to the key stakeholders and parties of interest.



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