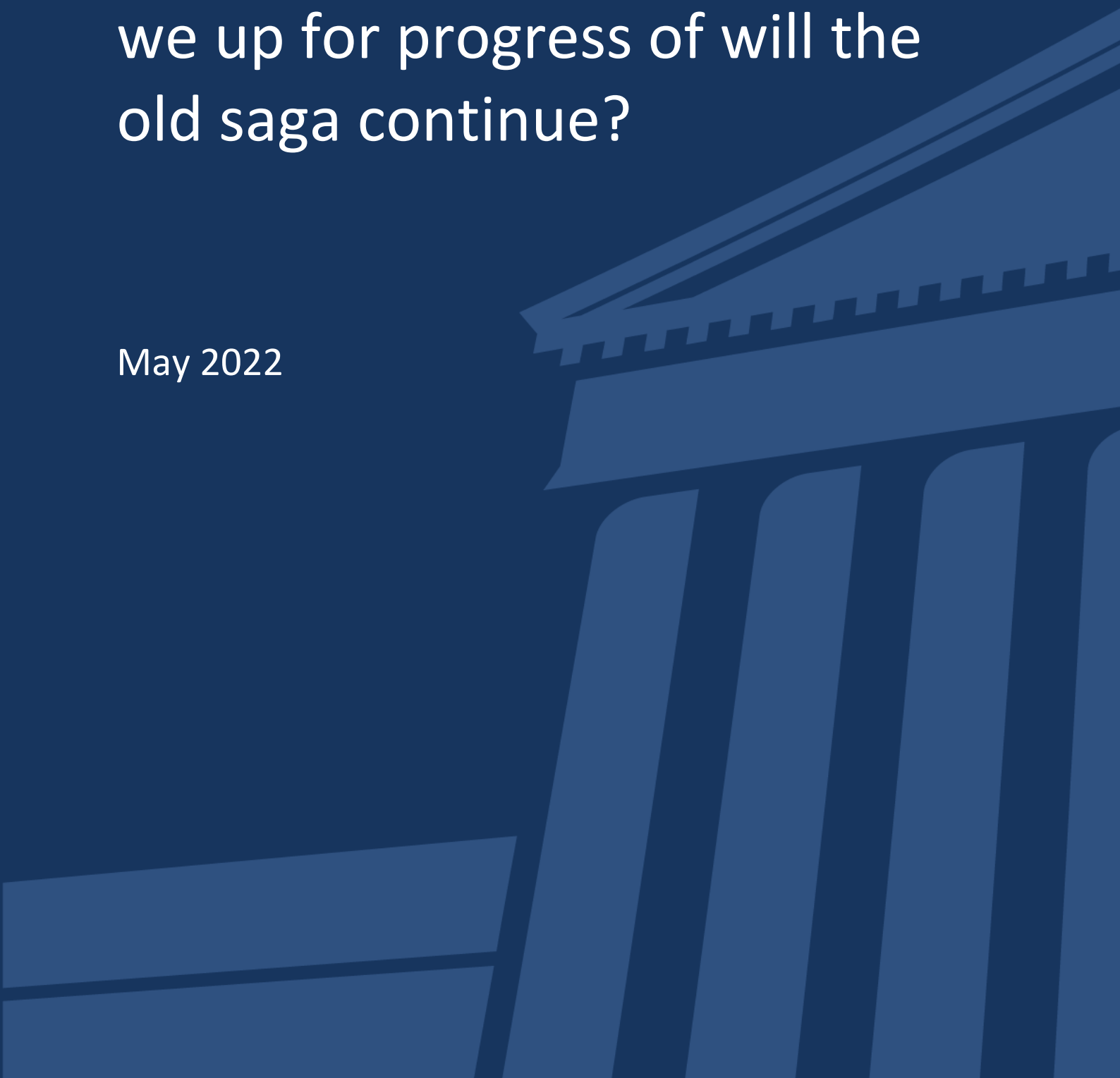


# A Review of the Current State of the Justice Sector in Kosovo: Are we up for progress or will the old saga continue?

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# A REVIEW OF THE CURRENT STATE OF THE JUSTICE SECTOR IN KOSOVO: ARE WE UP FOR PROGRESS OR WILL THE OLD SAGA CONTINUE?

*“I firmly believe in the rule of law as the foundation for all our basic rights.”*

Supreme Court Justice Sonia Sotomayor,  
Supreme Court of the United States

## EXECUTIVE SUMMARY

The Judicial System in Kosovo is still in its early stage of development, facing many shortcomings in the fight against corruption and organized crime. Although the judicial system has been subject to many reforms, those where technical interventions mainly addressing subsidiary rather than essential angles of the problem. Due to the low level of results, the public trust on the justice sector in Kosovo is rather low. In order to better institutionalize the efforts to fight corruption and organized crime, in 2019, the Special Department of the Basic Court and Court of Appeals was established, mandated to hear cases under the competence of Special Prosecution of the Republic of Kosovo (SPRK). Although such a department was established, Kosovo is still faced with lack of concern results on the fight against corruption and organized crime. Moreover, people involved in scandals such as the ‘Pronto Case’, the ‘Fake Veterans’ etc., are rather left unpunished by the judiciary. The existing mechanisms of performance evaluation and disciplinary mechanism are rather inefficient. There are no cases where judges and prosecutors have been dismissed from their duty, and very low number of cases where judges and prosecutors have been evaluated with insufficient performance. This is mainly concerning considering that the judicial system in Kosovo is evaluated to have an insufficient performance especially when it comes to corruption and organized crime, and meanwhile judges and prosecutors are evaluated to have shown satisfactory performance. In order to address the current situation, the Kurti Government has introduced three main initiatives, including the amendments of the Law on Kosovo Prosecutorial Council, the Vetting reform and civil confiscation of unjustifiable assets. All three represent major reforms if they are to be finalized.

## I. INTRODUCTION

*The rule of law is a set of principles, or ideals, for ensuring an orderly and just society – is how the American Bar Association has defined the rule of law.<sup>1</sup> These principles ensure that no one is above the law and everyone is treated equally, everyone is entitled to an independent judiciary and everyone is held accountable to the same laws; there must exist clear and fair proceedings for enforcing law, and human rights are guaranteed for all.<sup>2</sup> In order to ensure that the rule of law is respected, an independent judiciary is necessary. The role of the judiciary is to ensure that all cases before the court shall be decided based solely on the applicable law and facts, and they won’t be subject to any political pressure or influence. To do so, one must ensure that judges are independent and free to exercise their duty independently from any shifting of political climate. All in all, despite resolving disputes between private citizens, the role of the judiciary includes protecting citizens from abuses of other branches of power (the executive and legislative). Therefore, an independent, just, apolitical, impartial judiciary providing equal access to courts for everyone is the standard requirement. Kosovo’s judiciary is no exception to this rule. Yet, is Kosovo’s judiciary as independent as required by these standards?*

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<sup>1</sup> American Bar Association (ABA), “What is Rule of Law”, Available at: <https://bit.ly/3MRDzcG>

<sup>2</sup> *Ibid.*

This paper looks into how and why Kosovo is considered to have failed to fully accomplish the international rule of law standards, and what is the way forward to address the problems identified. Starting from how Kosovo's judicial system is perceived in international and national reports to analyzing specific corruption and organized crime cases, this paper tries to examine where the main issues lie. The performance of existing mechanisms as tools to ensure independence within the system are additionally examined. Moreover, the Government's latest initiatives will be analyzed and concrete recommendations will be offered.

## II. THE JUDICIAL SYSTEM OF KOSOVO: HOW IT IS PERCEIVED AND WHAT ARE THE RESULTS?

"Kosovo is at an early stage in developing a well-functioning judicial system", was the opening line of the European Commission's 2021 Country Report for Kosovo when assessing the rule of law and fundamental rights.<sup>3</sup> Such an assessment presented no difference from previous years.<sup>4</sup> As expected, there was no novelty on the evaluation of the overall administration of justice either. The 2021 report emphasized that the Kosovar system is vulnerable to undue political influence besides being slow and inefficient.<sup>5</sup> On the other hand, the report further defined the vetting initiative - which was introduced by the Government as a tool to ensure integrity and professionalism in the system - as one of 'serious concern'.<sup>6</sup> The utilization of existing tools and strategies to ensure integrity in the judiciary before setting up new mechanisms was highly recommended.<sup>7</sup> Progress was noted with regards to the finalization of the Functional Review of the Rule of Law Sector, which has resulted in the adoption of a Rule of Law Strategy and Action Plan. Regarding the fight against corruption and organized crime, when discussing progress, the report focuses on legislative framework rather than on actual results. Despite encouraging the prosecution to investigate and prosecute high-level cases, there was no room for applause on final results for none was noted. Corruption continues to be widespread and the EU annual report called for a more serious and stronger institutional implementation of the existing legislation.

On the other hand, out of 4 points, the Freedom House 2020 Report on Kosovo assessed with a mere 1 point its independence of the judiciary.<sup>8</sup> This report further evaluates the judges as not qualified, and as susceptible to political interference and corruption by political and business elites.<sup>9</sup> Moreover, the report stated that the work of the rule of law sector is directly hindered by the interference of the executive.

In order to understand how such results have affected the trust of citizens towards the judiciary, one should consult the Rule of Law Performance Index in Kosovo (RoLPIK), a perception report conducted by Group for Legal and Political Studies.<sup>10</sup> The report finds that around 70% of Kosovar citizens believe that persons with political influence are less likely to be punished by

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<sup>3</sup> European Commission, "Key findings of the 2021 Report on Kosovo", Brussels, 2021. Available at: <file:///C:/Users/Admin/Downloads/Kosovo%202021%20report.PDF>

<sup>4</sup> European Commission, "Key findings of the 2020 Report on Kosovo", Brussels, 6 October 2020, Available at: [file:///C:/Users/Admin/Downloads/Key\\_findings\\_of\\_the\\_2020\\_Report\\_on\\_Kosovo\\_.pdf](file:///C:/Users/Admin/Downloads/Key_findings_of_the_2020_Report_on_Kosovo_.pdf)

<sup>5</sup> European Commission, "Key findings of the 2021 Report on Kosovo", Brussels, 2021, Available at: <file:///C:/Users/Admin/Downloads/Kosovo%202021%20report.PDF> ).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> Freedom House Organization, "Freedom in the world 2021, Kosovo", Available at: <https://freedomhouse.org/country/kosovo/freedom-world/2021>

<sup>9</sup> *Ibid.*

<sup>10</sup> Group for Legal and Political Studies (GLPS), "Rule of Law Performance Index in Kosovo", Available at: <https://www.rolpik.org/>

law.<sup>11</sup> A certain level of public distrust of citizens in the Rule of Law institutions in Kosovo is therefore notorious, and this has been the regrettable result since 2014. No improvements have been noted until 2021 data, which finally showed a small positive difference of 7% from the previous year (2020). More precisely, in this latest assessment, 37.3% of citizens think that there have been positive changes in the justice sector, unlike the previous year (2020) where only 30.7% of citizens believed in such positive effects.<sup>12</sup> Yet again, these results are unsatisfactory and call for extensive and serious reforms across the newborn country.

To discuss more on the current state of the judiciary and to better picture the problems of the sector, the following section elaborates on the main failures of the Rule of Law (RoL) sector, specifically of the justice system. In order to explore the options available to address the situation, the existing legal tools for disciplinary procedures and measuring performance will be analyzed. Further, the three main initiatives of the Ministry of Justice (MoJ) will be examined and recommendations provided to address the identified system gaps.

### III. A STATEMENT ABOUT THE PROBLEM IN PRACTICE

#### a. Handling corruption and organized crime in Kosovo

Being constantly criticized on the failure to fight organized crime and corruption, the latest effort of significance Kosovo put forth to address critics was the establishment of the Special Department of the Basic Court in Prishtina and the Court of Appeals.<sup>13</sup> The establishment of the Special Department was even considered to be “*a turning point for justice in Kosovo*” by the Head of the Court of Appeals.<sup>14</sup>

The Special Department is mandated to deal with cases under the jurisdiction of the Special Prosecution Office (SPRK) which mainly deals with cases of corruption, organized crime, money laundering, terrorism, etc.<sup>15</sup> Prior to the establishment of the Special Department, the Serious Crimes Department in each Basic Court handled these cases.<sup>16</sup> However, that was not sufficient. The key reason behind the establishment of the Special Department was precisely that results on the fight against corruption, organized crime, money laundering and confiscation of illegally obtained assets were not satisfactory. Judges were considered unskilled and not specialized to deal with such cases. As such, it was thought that creating only single department with these particular cases as main focus would help the poor state of affairs. Nevertheless, almost three years in, not much has been done or noticed.

In 2019, the Special Department of the Basic Court in Prishtina solved only 3 organized crime cases, and no decisions were taken related to corruption and money laundering cases being tried.<sup>17</sup> In 2020, 2 corruption cases were solved, one being the case of a former judge of

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<sup>11</sup> Group for Legal and Political Studies (GLPS), “*Rule of Law Performance Index in Kosovo, 7<sup>th</sup> Edition*”, available at: [https://www.rolpik.org/wp-content/uploads/2021/12/RoLPIK\\_botimi7\\_draft3\\_en.pdf](https://www.rolpik.org/wp-content/uploads/2021/12/RoLPIK_botimi7_draft3_en.pdf)

<sup>12</sup> Ibid.

<sup>13</sup> Assembly of Kosovo. “*Law on Courts No. 06/L-054*”, Article 13. Available at: <https://md.rks-gov.net/desk/inc/media/F6BADB4F-6CD7-42F2-9E54-9D01B98A778E.pdf>

<sup>14</sup> Kosovo Judicial Council. “*The Special Department in the Court of Appeals and the Basic Court in Pristina is operational*”. Press Release. July 2019. Available at: <https://www.gjyqesori-rks.org/2019/07/08/funksionalizohet-departamenti-special-ne-gjykaten-e-apelit-dhe-ne-gjykaten-themelore-ne-prishtine/>

<sup>15</sup> Assembly of Kosovo. “*Law on Courts No. 06/L-054*”, Article 13. Available at: <https://md.rks-gov.net/desk/inc/media/F6BADB4F-6CD7-42F2-9E54-9D01B98A778E.pdf>

<sup>16</sup> Assembly of Kosovo. “*Law on Courts No. 03/L-199*”, Article 15. Available at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2700>

<sup>17</sup> Justice Today. “*The performance of the Special Department within the Basic Court in Pristina and the Court of Appeals*”, February 2022. Available at: <https://www.rolpik.org/puna-e-departamentit-special-ne-kuader-te-gjthp-dhe-gjykates-se-apelit/>

the Basic Court in Mitrovica, a case which later resulted in a retrial.<sup>18</sup> With regards to organized crime cases, only 1 of the 13 cases being tried was completed.<sup>19</sup> The sole organized crime case completed in 2020 involved a former judge of Klina, upon which the court rendered a decision to dismiss the indictment which was later confirmed by the Court of Appeals. Looking at 2021 figures, from 17 ongoing corruption cases, only 6 were solved. Regarding organized crime, 5 cases were resolved and all led to convictions.<sup>20</sup> Of the 5 money laundering cases, only one was decided.<sup>21</sup> Inasmuch, while the number of cases has continuously increased, the department's efficiency is not satisfactory. Moreover, the Special Department of the Basic Court in Prishtina department has not managed to complete any high-profile cases, which would indeed distinguish their performance and justify its establishment.

Regarding the performance of the Special Department at the Court of Appeals, there were only 21 cases to be decided.<sup>22</sup> A positive development regarding their work was the supplementary sentences imposed on high profile cases, such as the "Pronto case" and the case known as "Ferronikel".<sup>23</sup> In February 2020, the Special Department at the Court of Appeals department also ruled on the permanent confiscation of around 1 million euros in a money laundering case, which was later returned for retrial by the Supreme Court.<sup>24</sup> Overall, no significant results have been visible so far. The very few numbers of cases decided with a final decision of the Court of Appeals have been returned for a retrial by the Supreme Court and are still ongoing, or in other cases (e.g., Pronto Case) they have been dismissed from the indictment completely. To discuss this practice more, below we elaborate some main cases being handled by the justice sector in Kosovo, which proved to be very scandalous.

#### **b. Main failures to fight corruption and organized crime by the Rule of Law Sector**

##### **Fake Veterans Case**

On September 2019 the prosecutorial system faced the highest accusation of political influence. A state prosecutor resigned from his position alleging that the Chief State Prosecutor and former Prime Minister of the Republic of Kosovo attempted to interfere in the former's investigations, regarding the case known as "Fake Veterans".<sup>25</sup>

The case saw all members of the Government Commission for the Recognition and Verification of the Status of Martyrs of the Nation, Invalids, Veterans, Members and Internees of the Kosovo Liberation Army investigated for abuse of official position or authority.<sup>26</sup> They were suspected of having unlawfully recognized the status of war veteran to 19,500 people who did not meet the required criteria. In doing so they were suspected of having caused damage to Kosovo's budget in the amount of 88,769,217.04 euros. To note, most of the suspects held high level positions at some point in Kosovo governments.<sup>27</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Justice Today. "Monitoring of the Judicial and Prosecutorial System in Kosovo for the period January-December 2021", April 2022. Available at: <https://bit.ly/3LjVyt>

<sup>23</sup> Justice Today. "The performance of the Special Department within the Basic Court in Pristina and the Court of Appeals", February 2022. Available at: <https://bit.ly/3NyjNCU>

<sup>24</sup> Ibid.

<sup>25</sup> EkonomiaOnline. "Special Prosecutor, Elez Blakaj, resigns due to threats". 2018. Available at: <https://bit.ly/39PWZjr>

<sup>26</sup> JusticeToday. "Fake Veterans Case in a Nutshell". February 2020. Available at: <https://bit.ly/3MWDzbu>

<sup>27</sup> Ibid.

After making his interference allegations public, the state prosecutor fled the country and the case was assigned to someone else. Although an indictment was filed, the entire process proved to be only a formality since it was designed to fail, as a study conducted by Justice Today pointed out.<sup>28</sup> The study found that the indictment had many shortcomings: from failing to explain the incriminating actions of the defendants separately, to not specifying the unlawful beneficiaries of the statues of the war veterans - the indictment was strictly unprofessional. Moreover, during the court procedure, the Code of Criminal Procedure was constantly violated by the court. Legal deadlines were not respected, unlawful decisions were taken and, in the end, all the accused were acquitted in 2021. The court's decision highlighted how the prosecution failed to separate the incriminating actions of the accused committed in collusion, failed to prove intent, failed to prove that the increased number of war veterans relates to the accused actions and, arguably more importantly, it failed to prove whether the 19,500 applicants were, in fact, unlawful beneficiaries or not. Kosovo was therein left with a fatal scandal, a state prosecutor's resignation and colossal allegations of political interference in the system.

### Pronto Case

Another case which caused great concern regarding the integrity and independence of the justice system in the Republic of Kosovo was the case known as the "Pronto Case".<sup>29</sup>

A local news portal published a number of wiretaps unearthing the actions and methods of employment in official positions. Emphasis was put on the exercise of unlawful influence of some major political parties. According to the indictment, the defendants were accused of abusing their official positions by cooperating with each other in providing illegal privileges and advantages to persons who had applied to high level positions, such as: Director of Central Public Enterprises, Chief Executive Officer of Registration Agency, Chief of the Agency for Medicinal Products and Coordinator of the Civil Registration Centre in the Municipality of Klina. This therefore denied and restricted other candidates the freedoms and rights guaranteed by law.<sup>30</sup> According to a study conducted by Justice Today, the prosecution tried to prove that the defendants tried to exercise political influence by acting behind the scenes. The prosecution did not try to prove that the defendants committed the criminal offence of abusing their position or authority during the exercise of their official duties. This, naturally, minimized the damage suspected to have been committed by all defendants. Moreover, the study found the indictment to be unprofessional, ignoring all relevant and required elements showing the inability of the prosecutor to argue with valid and strong evidences. As expected, all defendants were acquitted.

Once one analyzes these two cases in Kosovo, one might easily conclude that they reflect the planned failure of the prosecutorial and judicial system to punish crime in the country, and even more so in cases where high political figures are involved. In both cases, the court found that the indictments were poor when it came to analyzing and presenting the incriminating factors for all defendants; in both cases the indictment was not supported by eligible evidence; and, in both cases the indictment failed to identify the damaged party. Hence, we had two very unprofessional indictments for the two biggest scandals involving high political figures. Both processes prove how the system supports and amnesties the elite, and remains silent and weak against crime and corruption at high levels and beyond. On the other hand, both cases were subject to the 'Ping-Pong' practice of the judicial system in Kosovo. They were both dragged in

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<sup>28</sup> Ibid.

<sup>29</sup> JusticeToday. "The handling of "Pronto" case - an example of failure of the justice system in the fight against corruption". December 2021. Available at: <https://bit.ly/3wPruPm>

<sup>30</sup> The indictment of SPRK with number PPS.no.45/16.



three instances and decisions violating material and procedural criminal provisions were taken. These cases are clearly a reflection of the lack of will, ability and responsibility in office of all prosecutors and judges who through their position serve the narrow interest groups and not the general good for which they are committed.

### **The case of the former Chief of Economic Crimes in the Kosovo Police**

The former Chief of Economic Crimes in Kosovo was accused of abuse of official position, obstruction of evidence and failure to report criminal offences or their perpetrators.<sup>31</sup> When deciding on the appeals of the defendants, the Court of Appeals dropped the indictment and terminated the criminal proceedings against him. The reason behind this decision was the lack of evidence to support the well-founded suspicion that he had committed the suspected criminal offenses.<sup>32</sup> Against such a ruling, the State Prosecutor filed a request for protection of legality to the Supreme Court.<sup>33</sup> The Supreme Court found that that Court of Appeals ruling contained essential violations of the provisions of criminal procedure and violations of criminal law.<sup>34</sup> According to the Supreme Court, the Court of Appeals, in taking on the role of the court of first instance, made it impossible to prove or not the defendants' guilt and the veracity of the evidence presented by the prosecution. Furthermore, the Supreme Court decision stated that the Court of Appeals, at this stage of the procedure, had the task only to assess whether the minimum requirement was met, which is the well-founded suspicion of filing an indictment, and the Appellate Panel could not analyze the assessment of contradictory facts, nor the probative power of these facts. Neither could it conclude that the defendant is not the perpetrator of the criminal offense, as this can only be done at trial.

Furthermore, the Court of Appeals' ruling rejecting the indictment and terminating the procedure was found to be in violation of the criminal code, a violation which was in favor of the defendant.<sup>35</sup> Hence, someone who might have been found guilty was free of charge due to the decision of the Court of Appeals. Not only did the court violate procedural dispositions, but it also violated material ones when deciding in favor of the defendant who, in fact, was the former Chief of Economic Crimes at the Kosovo Police. What's more, this is not an isolated case. Below we will analyze another case wherein the Supreme Court found that the Court of Appeals had violated material and procedural law in favor of the defendant and, in this case as well, the defendant was someone wielding power in the country. It is the case of the former President of the Court of Appeals.

### **The case of the former President of the Court of Appeals**

The case of the former President of the Court of Appeals involves the aforementioned President being charged with the criminal offense of abuse of office or official authority while exercising this duty.<sup>36</sup> During the trial, the prosecution changed the indictment by reclassifying the criminal offense from abuse of office to the criminal offence of exercising influence. The former President of the Court of Appeals was suspected of being engaged in the judicial assignment of two court cases and the legal re-establishment of criminal offenses for these

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<sup>31</sup> Supreme Court of Kosovo, Case No: PML. 341/2018, Decision taken on 1 April 2019.

<sup>32</sup> Court of Appeals in Kosovo, Decision No. PN.nr.681/2018, taken on 18 September 2018.

<sup>33</sup> Office of State Prosecutor in Kosovo, Request for protection of legality, KMPLP.I.no.24/18, date: 15 February 2019.

<sup>34</sup> Supreme Court of Kosovo, Decision No. PML.nr.341/2018 date: 01 April 2019.

<sup>35</sup> Ibid.

<sup>36</sup> Supreme Court of Kosovo, Case No. PML,nr.36/2019, date: 05 June 2019.

cases. The Basic Court acquitted him of the indictment on the grounds that the contact had with the judges of those two cases should not be considered as a criminal offense but rather as violations of the Code of Ethics. This newfound reasoning was owed to the fact that he was the President of the Court and therefore had a duty to be interested in cases of his court. This decision was posteriorly confirmed by the Court of Appeals.<sup>37</sup> Let us recall that the Court of Appeals was headed by the defendant himself until the initiation of this case. With this judgment, the Court of Appeals concluded that in the judgment there were no essential violations of the provisions of the criminal procedure. In addition, according to the Court at hand, the factual situation was fully proven correctly and that there was no violation of criminal law either.

Faced with such decisions, the prosecution submitted a request for protection of legality to the Supreme Court of Kosovo. This request was based on essential violations of the provisions of criminal procedure and violations of criminal law, which the prosecution alleged to have committed in this case. At the same time, through this request, the Prosecution proposed that the violations be ascertained or, instead, that the case be returned for reinstatement. The Supreme Court found that the release of the former President of the Court of Appeals, was done in violation of the law. According to the Supreme Court, should criminal law have been correctly applied, the defendant would have been found guilty of the criminal offense of exercising influence. This is because, according to the evidence in the case file, his actions are an exercise of influence.<sup>38</sup>

The case of the former Chief of Economic Crimes in the Kosovo Police and the case of the former President of the Court of Appeals are amongst many more which highlight the current state of the judiciary in the Republic of Kosovo. Those linked to high institutional positions are treated differently and Kosovar institutions fail to properly implement the law. These are cases where the Supreme Court found that the lower courts violated both procedural and material law, and persons who should have been found guilty, or at least been subject to a fair trial, were acquitted. This denounces a complete failure of the justice sector. In the next section we analyze another case in which justice institutions' actions were lacking with regards to prosecuting and punishing crime.

## The 2021 Wiretaps Scandal

In July 2021, a local news portal published a series of wiretaps where a judge of the Court of Appeals, a prosecutor, and the head of Financial Intelligence Unit are heard in different conversations planning how to exert undue influence.<sup>39</sup> The judge involved was also a member of the Kosovo Judicial Council (KJC). Once the audio recordings were published, the latter resigned from his position at the KJC. Meanwhile, the KJC initiated a disciplinary procedure against him, and decided that he must be transferred from the Court of Appeals to the Basic Court in Prishtina.<sup>40</sup> Right after the decision, the judge filed his irrevocable resignation from his position at the Court of Appeals. He considered his demotion as highly offensive.

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<sup>37</sup> Court of Appeals, Case No. 476/2018, date: 23 October 2018.

<sup>38</sup> Supreme Court of Kosovo, Case No.36.2019, date: 05 June 2019.

<sup>39</sup> Shqip.com. "File: extortion intelligence". Audio recordings. Available at: <https://shqip.com/shenjester/ekskluzive-cka-ki-te-lumezi-fol-me-mu-shkeljet-dhe-fuqia-e-driton-muharremi-ne-sistem-prokurorial-te-kosoves/>

<sup>40</sup> Shqip.com. "Following the publications of Shqip.com, Driton Muharremi resigns from the KJC". Available at: <https://translate.google.com/?sl=sq&tl=en&text=Pas%20publikimeve%20t%C3%AB%20Shqip.com%2C%20Driton%20Muharremi%20jep%20dor%C3%ABheqje%20nga%20KJK-ja&op=translate>

In parallel, the Kosovo Prosecutorial Council (KPC) also started disciplinary procedures against the prosecutor involved in the audio recordings.<sup>41</sup> At present, no final decisions have been published on their webpage regarding this procedure. No indictment has been also filed so far, nor has a decision concluding any investigation been taken by the prosecution. Only disciplinary panels do not fulfill the institutional reaction required against such actions. The entire situation must be subject to thorough investigation and, should it be found that there is well-founded suspicion of any criminal offense, an indictment must be filed and a trial must take place. It is unfortunate that the institutional reaction regarding such acts is inexistent in relation to clarifying the case.

Once one analyzes all these cases, it is important to also consult the existing mechanism in place, which ensures the accountability of the system in its entirety and, especially, the accountability of judges and prosecutors. Below we explore the existing performance and disciplinary mechanism to have a clear picture on how such accountability systems work.

#### **IV. INSTITUTIONAL MECHANISMS IN PLACE TO ADDRESS EXISTING PROBLEMS**

##### **a. Existing disciplinary mechanisms for judges and prosecutors**

As noted in many national and international reports, Kosovo's legislation is of a high standard - the problem lies in its lack of implementation. The same is the case with the existing disciplinary mechanism of judges and prosecutors in Kosovo. The current system, which elaborated on below, is a result of one of the many reforms on regulating disciplinary procedures.

In 2018, a new law was adopted re-structuring the disciplinary procedures and demolishing the old disciplinary system, which was found to have been inefficient.<sup>42</sup> The disciplinary proceedings against judges and prosecutors were conducted within the Office of the Disciplinary Counsel (ODC). The ODC was a separate and independent body serving both the KJC and the KPC, to investigate allegations of misconduct by judges and prosecutors. The new law provided that the disciplinary procedure no longer take place at the ODC. Instead, the KJC and KPC were mandated to create disciplinary panels to investigate and deal with complaints regarding misconduct of judges and prosecutors. The disciplinary procedures are initiated through a complaint of a natural or legal person submitted to either the President of the court, the Chief Prosecutor or, in case of a complaint against the President of the Basic and Appellate Court, the appeal is submitted to the President of the Supreme Court. Whereas, regarding the Chief Prosecutors, the appeal is submitted to the Chief State Prosecutor. As for the complaints against the President of the Supreme Court and the Chief State Prosecutor, the appeal is submitted at the relevant councils.

The novelty of the law was the possibility to utilize the Ombudsperson institutions by submitting the complaint there. Once the complaint is submitted to the relevant authority, they have the competence to decide to take it further and submit it to the relevant council in order to start the disciplinary procedure, or to dismiss it as irrelevant. If the complaint is considered as grounded and is filed by the competent authority to the relevant council, the KPC or KJC (depending where the complaint has been filed) establish a panel composed of 3 judges or prosecutors to deal with the disciplinary case. Once they decide, either party can file a complaint to the Supreme Court. The decision of the Supreme Court is considered to be final and cannot be appealed.

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<sup>41</sup> Kosovo Prosecutorial Council. Press Release. August 2021. Available: <https://prokuroria-rks.org/kpk/lajm/7196>

<sup>42</sup> Assembly of Kosovo, "Law 06/L-057 on Disciplinary Liability of Judges and Prosecutors". Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18336>

Now, there are a few issues regarding the new regulation. First, the Law on Disciplinary Procedures has not defined the competent authority to which appeals regarding disciplinary violations of judges serving at the Supreme Court should be filed. Hence, if a party wants to submit an appeal against a Supreme Court judge, it may very well not know where to file it. Second, the new law foresaw that a voluntary agreement between the panel and the judge or prosecutor subject to the disciplinary procedure is possible. The agreement must be concluded during the investigative procedure and must contain a factual statement of the disciplinary violation and the agreed-upon disciplinary measure. This agreement has the same legal effect as the decision of the panel for disciplinary violations, and has similarities with the plea-bargaining institute in the criminal procedure. Although such regulation may be considered innovative, when analyzing it one can conclude that it will cause several problems in practice. For instance, the law has not clearly defined the type of disciplinary measure imposed for each disciplinary violation, which leaves a discretionary space on the type and severity of the disciplinary measure imposed. Such a situation does not exist in relation to the plea-bargaining institution on the Criminal Procedure Code due to having every sanction specified in relation to the criminal offense. Nevertheless, the Law on Disciplinary Procedure must be amended and must address the situations explained above.

Considering the discussion from another angle, when analyzing how the law was implemented and if it affected the overall situation the judiciary system in Kosovo, one might get disappointed. According to KJC data<sup>43</sup>, during 2019 only 5 complaints were found grounded, and the panels imposed 2 non-public written reprimands to 2 different judges. The disciplinary sanction of temporary wage reduction was imposed to one judge, and 2 of the judges were suspended from work. During 2020, The KJC imposed one public written reprimand to one judge, 2 non-public written reprimands, 3 sanctions of temporary wage reduction, and the disciplinary measure of suspension from work to one judge. While in 2021, the KJC imposed five public written reprimands to five judges, 1 sanction of salary reduction of 30% for 6 months to one judge, and the disciplinary measure of suspension from work to one judge and salary reduction of 50 %. Also, during 2021, the KJC imposed the measure of permanent transfer to the Basic Court in Pristina against a judge of the Court of Appeals. This last disciplinary measure was imposed to the judge involved in the wiretap scandal laid out in the previous section of this paper.

On the other hand, this time according to KPC data<sup>44</sup>, during 2019 the KPC imposed the disciplinary sanction of salary reduction of 30% for 6 months to one prosecutor, the disciplinary sanction of salary reduction of 50% for 1 year to one prosecutor, the disciplinary sanction of permanent transfer of the prosecutor to one prosecutor, and four non-public written remarks. The following year, 2020, the KPC imposed the disciplinary sanction of salary reduction of 30% for 6 months to one prosecutor and one case was concluded with a plea agreement. Unlike in the previous two years, during 2021 the KPC did not find any of the complaints as grounded to impose one of the disciplinary sanctions on prosecutors against whom disciplinary proceedings have been conducted. Thus, in the 4 disciplinary decisions that the KPC took during 2021, it concluded that the claims of the Competent Authority for disciplinary violations of prosecutors against whom disciplinary proceedings have been conducted do not stand, while for 4 other cases for which investigative panels were established, no decisions have been taken so far.

As it can be easily observed, the new disciplinary mechanism has shown no results in its attempt to address the identified problems. There are no cases where judges and prosecutors have been dismissed from their duty. Moreover, there are only a few permanent transfers to

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<sup>43</sup> Justice Today. “Disciplinary measures against judges and prosecutors”. May 2020. Available at: <https://bit.ly/3wMNN8o>

<sup>44</sup> Ibid.

lower courts or basic prosecution offices, and most cases are either dismissed or finalized with the imposition of non-public written reprimands. The new system has proved to be no better than the previous one, unfortunately.

#### **b. Performance evaluation for judges and prosecutors**

The Law on Kosovo Judicial Council (KJC) has mandated the KJC with the competence to evaluate the performance of the judges of the entire system.<sup>45</sup> In order to do so, there is a permanent commission for the performance evaluation of judges. This process serves as a basis for promotion or demotion, as well as for initiating the procedure for dismissal of a judge. During the evaluation process, the panel evaluates: the professional knowledge, work experience and performance, understanding of, and respect for human rights; the capacity of judges for legal reasoning; the professional ability; the capability and capacity for analyzing legal problems; the ability to perform duties impartially, honestly with care and responsibility; conduct out of office; personal integrity; and finally also the number of cases returned to re-trial or re-decision, or cases removed by the highest court.<sup>46</sup> Considering that these are the basis for evaluating a judge, one should consider analyzing the results of the performance evaluation process thus far. Having that in mind, in the 2019-2021 period, 341 judges were evaluated. 56 of them were evaluated as having performed in an excellent manner. 217 of them were evaluated to have performed very well. And 25 of them were evaluated to have performed well.<sup>47</sup>

On the other hand, similarly to the KJC, the KPC also conducts the performance evaluation of all prosecutors through its permanent commission.<sup>48</sup> The performance evaluation results serve the same cause as in the KJC, and the same criteria apply. When analyzing the data of such a mechanism, one finds that during the 2019-2021 period, 206 prosecutors were evaluated. 91 of them were evaluated with a very good performance; 70 of them with a good performance; 42 of them with a sufficient performance and 3 of them were evaluated as having had an insufficient performance.<sup>49</sup>

Considering all the criteria that judges are evaluated for and, in parallel, analyzing the results of the performance evaluation mechanism, one expects to have an excellent judicial system. After all, if only 3 prosecutors have been evaluated with an insufficient performance and all judges are evaluated with 'well' and beyond, the overall evaluation of the justice sector should clearly be different from how it is currently. As explained above, all international and national reports find that Kosovo's judiciary is not performing well. An immediate need exists for thorough reforms in order to improve access to justice. The system is known to be politically influenced and highly unprofessional. Moreover, comparing the results of the disciplinary mechanism and the current state of the judiciary, there is an immense imbalance on how the system is perceived and 'evaluated' from within. The current existing mechanisms have failed to fulfill their duty and ensure the justice sector is independent, just and apolitical.

Bearing in mind all of the above, it has long been required that a vetting reform should take place. Starting from the regular courts and prosecution offices, councils, police, customs,

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<sup>45</sup> Assembly of Kosovo. "Law on Kosovo Judicial Council No. 06/L-055". Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18335>

<sup>46</sup> Assembly of Kosovo. "Law on Kosovo Judicial Council No. 06/L-055". Article 7. Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18335>

<sup>47</sup> Kosovo Judicial Council, Performance Evaluation Committee, "Judges' performance evaluation reports for the period 2018-2021". February 2022.

<sup>48</sup> Assembly of Kosovo. Law on Kosovo Prosecutorial Council No 06/L-056". Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18920>

<sup>49</sup> Kosovo Prosecutorial Council. "The process of the evaluation of prosecutors for the years 2014 – 2021". Available at: <https://bit.ly/3Gm5QFB>

Tax Administration, and other institutions pertaining to the Rule of Law sector, a verification process must be set up in Kosovo. One must eliminate the existing factors causing the failure of the Rule of Law sector to secure that no one is above the law and everyone is treated equally, everyone is entitled to an independent judiciary and everyone is held accountable to the same laws. We must have clear and fair proceedings for enforcing the law and ensuring human rights are guaranteed for all. As a 'reformist government', the new government formed by Vetevendosje! has promised to initiate this reform. This will be explored on the section below.

## V. THE MINISTRY OF JUSTICE'S (MoJ) INITIATIVES TO REFORM THE RULE OF LAW SECTOR IN THE COUNTRY

Despite the COVID-19 pandemic being a novelty for the past two years and deepening the justice sector problems, the triumph of Lëvizja Vetëvendosje (VV) in the snap elections of October 2019, and once more in February 2021 elections has created some positive momentum for continuous fight against corruption and organized crime in Kosovo, being considered a reformist government.<sup>50</sup> The first Kurti Government which was formed on February 3<sup>rd</sup> 2020 and lasted for only 50 days, presented three very important initiatives as tools to fight corruption and organized crime: 1) the vetting process, and 2) the civil confiscation of illicit wealth. Notwithstanding the developments with the first Kurti Government, the Hoti Government which was voted on June 3<sup>rd</sup> 2020, brought, the second iteration of the Kurti Government which was voted on March 22<sup>nd</sup>, 2021. The same has continued to work on designing these two initiatives. Moreover, the MoJ also initiated the process of amending the Law on Kosovo Prosecutorial Council. It is considered a priority for this Government and public expectations are very high. Nevertheless, the success of such initiatives, including their design, parliamentary approval and implementation, are followed with high skepticism by different stakeholders. Besides the expectations and skepticism, one thing we can all agree on is the immediate need for a reform on the RoL sector across Kosovo.

### Vetting reform

The MoJ has already taken steps regarding the Vetting reform. First, the MoJ composed a narrow Vetting group composed of MoJ officials to draft a concept document, which would analyze the necessity of the reform and the available options to tackle the problems identified.<sup>51</sup> This concept note was later on approved by the Government.<sup>52</sup> The proposed option to be followed has been the one recommending constitutional amendments.<sup>53</sup> Moreover, a first draft of how the constitutional amendments might look has already been produced and the working group regarding the Vetting law already composed. On the other hand, the MoJ has requested an opinion from the Venice Commission regarding the proposed option followed on the concept document.<sup>54</sup> The Venice Commission Opinion is expected to be published on May 2022.<sup>55</sup> While

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<sup>50</sup> EkonomiaOnline. "Kusari-Lila: The Kurti government will be a reformer, great work awaits it". October 2019.

Available at: <https://bit.ly/3PlwrBb>

<sup>51</sup> GazetaAloo. "The working group for vetting in the justice system is formalized". April 2021. Available at:

<https://gazetaalo.com/formalizohet-grupi-punues-per-vetting-ne-sistemin-e-drejtises/>

<sup>52</sup> Telegrafi.com "The Government adopts the concept paper on Vetting". October 2021. Available at:

<https://telegrafi.com/qeveria-miraton-koncept-dokumentin-per-vettingun/>

<sup>53</sup> Ministry of Justice. "Draft Concept paper for the development of the Vetting Process in the Justice System".

Available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=41154>

<sup>54</sup> Lajmi.net. "The Ministry of Justice will receive the opinion of the Venice Commission on vetting in March".

December 2021. Available at: <https://bit.ly/3wWINlg>

<sup>55</sup> Ibid.

awaiting the opinion of the Venice Commission, the MoJ already produced a draft on how the constitutional amendments might look like. First, the draft amendments foresee that the vetting process' subjects will only be judges, prosecutors and some other positions within the regular court system, excluding judges of the Constitutional Court. The draft also notes that the vetting process will be conducted by a mechanism to be created and regulated by these constitutional amendments. The mechanism consists of evaluation panels, the Appellate Panel and the Secretariat. The members of the Vetting mechanism will be recruited through an open and transparent process under the office of the President of Kosovo. Once recruited they will be appointed by the Kosovo Assembly. On the other hand, all persons subject to the vetting reform, will be verified once and their verification will include: professional knowledge, work experience, knowledge and observance of the law and human rights, ability to reason, and other professional competencies defined by law. It has been specified that the verification process will take place within 5 years, from the moment the amendments are approved. Nevertheless, a period of 2 years has been foreseen to be added to the 5-year period, in case it is decided by law. Depending on the results of the process, the mechanism may impose one of the following sanctions: 1) for judges and prosecutors, demotion to another lower court or prosecutor; 2) for certain positions in the justice system, permanent transfer to a lower position within the institution they serve; 3) compulsory training, in the manner prescribed by law, and 4) proposal for dismissal. Moreover, they foresaw that if a person resigns before the verification process starts, they won't be subject to vetting. But, if the person resigns during the verification process, they may not be appointed as a judge or prosecutor, member of the KJC or KPC for a 10-year period. Of note that these only reflect the draft amendments and are therefore susceptible to changes.

#### **Draft Law on the State Bureau for Verification and Confiscation of Unjustified Assets**

In addition to the Vetting initiative, the MoJ has also advanced with the draft Law on the State Bureau for Verification and Confiscation of Unjustified Assets, currently being discussed in line with the European trend of extending the possibility of civil confiscation and trying to link its justification with suspicion of committing a criminal act, particularly corruption.<sup>56</sup> Civil confiscation is essentially related to the effective possibility of deprivation of property illegally obtained by certain persons, and not so much as to finding illegality in itself (the latter more so pertains criminal procedure). Hence the difference would be the fact that civil confiscation is a consequence of the suspicion of the existence of illegality, and not the proof of it.

Before entering into the details of the draft Law on the State Bureau for Verification and Confiscation of Unjustified Assets, one must clarify that such an initiative must consider the principle of enjoying, without any violation, the right of property. Similarly, it must consider the principle that deprivation of property can take place only in presence of special conditions, and the principle of intervention according to which states have the right to control the use of property in accordance with the general interest. These principles are foreseen in Article 1 of the First Protocol of European Convention of Human Rights.<sup>57</sup> In order to assess if the legal norms of a state constituting interference with or deprivation of one's property are in accordance with the principles above, the European Court of Human Rights (ECtHR) has foreseen a number of criteria through its jurisprudence: 1) interference must be provided by law; 2) temporary seizure and confiscation must have a legitimate aim; 3) a reasonable relationship of proportionality between the means used and the purpose intended to be achieved must exist.<sup>58</sup> The principle of

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<sup>56</sup> Ministry of Justice. "Draft Law on the State Bureau on Verification and Seizure of Unjustifiable Property". December 2021. Available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=41293>

<sup>57</sup> European Convention of Human Rights, Protocol I, Article I. Available at: <https://bit.ly/3wOyCub>

<sup>58</sup> G.I.E.M. S.R.L. et al. vs. Italy [GC], §§ 292-293

proportionality consists of maintaining a fair balance between the requirements of the general interest of society and the requirements of the protection of the fundamental rights of individuals.<sup>59</sup> Meaning that the measures applied are appropriate and limited to what is necessary to achieve the purposed regulatory objective.

The first question that arises is: what is considered an unjustifiable asset? The draft law includes all assets that are not in line with legal income or assets, the legitimate origin of which fails to be established.<sup>60</sup> It foresees application to assets acquired unjustifiably by official persons, their family members, politically exposed persons and third parties since 17 February 2008.<sup>61</sup> Moreover, this draft law foresees the establishment of the State Bureau as an independent public institution having legal entity status. The Bureau will be the institution to initiate the verification procedure based on information collected ex officio or information received from all of Kosovo and foreign institutions, natural or legal persons exercising public authority, as well as from other natural and legal persons, both local and foreign.<sup>62</sup> It is specified that the institution will report to the Assembly once a year.<sup>63</sup> The draft law foresees that the Bureau will be supervised by an oversight committee with the power to review reports, as well as elect, dismiss, oversee and periodically evaluate the performance of the Director General.<sup>64</sup> Once the procedure is initiated, the Bureau puts special attention to verify if the value of discrepancy between income and assets exceeds the amount of 25.000 euro according to the data collected. If so, it takes the case to a court where it files a proposal for confiscation.<sup>65</sup> It is set that the entire procedure shall not last longer than 90 days from the day a decision to start the procedure is issued. Only in complicated matters can the bureau officer handling the case request the Director General to extend the deadline for an additional period, yet no longer than 45 days.<sup>66</sup> During this period, the draft law foresees the possibility to impose interim security measures.<sup>67</sup>

On the other hand, although not specified with a concrete article, the draft Law on the State Bureau for Verification and Confiscation of Unjustified Assets defines certain positions which will be those party to the procedure. **The official persons** are those performing official duties in a state body, a person elected, appointed or nominated to a state body, a local government body or a person who permanently or temporarily performs official duties or official functions in those bodies, a person in an institution, enterprise or any other entity entrusted with the exercise of public authority who decides on the rights, obligations or interests of natural or legal persons or in the public interest, a person entrusted with the actual performance of certain official duties or affairs; **the politically exposed persons** are those who are foreign or local natural persons who are or have been in charge of senior public functions (i.e. heads of state, government, ministers, deputy ministers, political advisors, chief of staff, members of parliament and members of similar bodies), and those elected by the parliament, members of the central governing bodies of political entities, members of the Constitutional Court, Supreme Court or any other high-level judicial or military tribunal whose decisions may not be appealed. In this second category we also have members of the National Audit Office, the Court of Auditors and the Board of Central Banks, natural persons who are or have been promoted to senior positions in

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<sup>59</sup> Ibid.

<sup>60</sup> Ministry of Justice. "Draft Law on the State Bureau on Verification and Seizure of Unjustifiable Property". Article 1.10. December 2021. Available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=41293>

<sup>61</sup> Ibid. Article 2.

<sup>62</sup> Ibid. Article 16.

<sup>63</sup> Ibid. Article 8, para 1.6.

<sup>64</sup> Ibid. Article 15.

<sup>65</sup> Ibid. Article 20.

<sup>66</sup> Ibid. Article 20.

<sup>67</sup> Ibid. Chapter IV.



diplomatic missions or high-ranking military officers, board members, administrators, managers or supervisors of state-owned enterprises, directors, deputy directors and board members or equivalent functions in international organizations, any person known as a close associate or a joint beneficial owner of legal persons or legal agreements, or any close business relationship, or any natural person who is a beneficial owner of a legal person or legal agreement which is recognized as having been established for de facto benefits of the person specified **as the politically exposed persons**. Another category is **the family members**, including the spouse or extramarital spouse, regardless of whether they are still in a marital relationship, respectively cohabiting or divorced, children, and spouses of children or extramarital spouses, regardless of whether they are in a marital relationship, respectively cohabiting, or divorced, parents. Also **the purchaser** who, regardless of the price paid, knew or should have known that the purchased property was sold for the purpose of avoiding confiscation through its transfer or appropriation. Finally, **the third parties**, meaning those to whom the assets of the official or politically exposed person have been transferred.<sup>68</sup> This is a short introduction to the regulation proposed, of which further details are not relevant for the purposes of this paper.

### Draft amendments of the Law on KPC

Lastly, the MoJ has also initiated the process of amending the Law on the KPC.<sup>69</sup> In order to combat the corporatism within the prosecution system, the first draft of the amendment included several issues. First, the proposal foresaw downsizing the number of KPC members from 13 to 7, where the majority of the new membership would be composed by lay members. Second, the Chief State Prosecutor was removed from his ex officio KPC membership. Third, changes to the appointment procedures were proposed, rendering the act of electing KPC members a part of a simple majority vote of the Assembly. More concretely, the draft proposes that 4 of the 7 members would be voted by the Parliament, amongst which 3 have non-prosecutorial background and 1 of them will be a prosecutor. The remaining 3 KPC members would be selected by an Electoral Commission (EC), composed of: 1 non-prosecutorial member, 1 from the Office of the Chief State Prosecutor, and 1 member from the KPC Secretariat. The main proposal the draft put forth was the dismissal of the current KPC members and their immediate replacement. In this way, if this draft was to be approved and the appointment of the first 4 members via simple majority in the Parliament indeed materialize, the mandate of all 13 existing members would seize immediately, regardless if some just started their mandate. Moreover, until the last 3 members coming from the prosecutorial system are elected, the other 4 retain the same power as a fully-functional KPC membership.<sup>70</sup>

The draft law amending the Law on the KPC was sent to the Venice Commission for an opinion, which was published on December 2021.<sup>71</sup> The Venice Commission found the proposed amendments regarding the new composition of the Council as not contrary to European standards. More concretely, the Commission found that the new proposed balanced between prosecutorial and lay members of the KPC satisfies standards considering that prosecutors elected by their colleagues are a substantial part of the KPC.<sup>72</sup> Nevertheless, the opinion also

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<sup>68</sup> Ibid.

<sup>69</sup> Ministry of Justice. “Draft Law on Amending and Supplementing Law No.06/L-056 on the Prosecutorial Council of Kosovo”. February 2022. Available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=41322>

<sup>70</sup> Group for Legal and Political Studies. “How to Read the Venice Commission Opinion on the Draft Amendments to the Law on the Prosecutorial Council of Kosovo”. December 2021. Available at: <https://bit.ly/3NC5Q6Z>

<sup>71</sup> European Commission for Democracy through Law (Venice Commission). “Opinion on the Draft Amendments to the Law on the Prosecutorial Council”. December 2021. Available at: <https://bit.ly/3PCdkIS>

<sup>72</sup> Ibid.

highlighted the need to ensure KPC independence from any form of subordination to the ruling parliamentary majority.<sup>73</sup> The proposed election method of lay members by a simple majority in the Assembly was considered to increase the risk of undue political influence over the KPC. Regarding the ex officio membership of the Chief State Prosecutor, the Venice Commission recommended the MoJ consider keeping him, but with further adjustments. Finally, regarding the proposal for terminating the mandate of current KPC members and allowing the renewed KPC to function only with lay members in its composition, the Venice Commission considered this as dangerous for prosecutorial independence. As such, they offered a two-element test in order to satisfy the international standards.<sup>74</sup> The two-element test includes the necessity of elaborating how such an act would serve a vital public interest, and how it will lead to the overall improvement of the system.<sup>75</sup> Currently, the MoJ is working on addressing these comments while trying to include the KPC and state prosecutors in the process.

#### a. Problematic aspects of these three initiatives

##### Vetting reform

As elaborated above, the Vetting reform has long been discussed to be the response to the essential problems of the Rule of Law sector in Kosovo. Internally, a general opinion exists that the Vetting reform is more than necessary and all discussions have been focused as to how, who and whom shall be vetted.<sup>76</sup> On the other hand, the European Commission 2021 country report for Kosovo found it to be “a source of serious concern”.<sup>77</sup> Hence, the vetting reform does not have the necessary international support considering the skepticism around it. It is yet to be seen how this will affect the entire the process of the reform, if there is going to be one. Nevertheless, it is considered to be a huge failure of the Kosovar Government to not be able to argue the necessity of the vetting reform’s and it’s importance for the broader Justice sector.

In designing the reform, a specific civil society request has been that including all institutions falling under the Rule of Law sector category, similarly to how the reform was designed in Albania and Bosnia and Herzegovina.<sup>78</sup> In Kosovo that would encompass the Constitutional Court, Tax Administration Office, Customs, Kosovo Intelligence Agency and Kosovo Police. Nevertheless, the MoJ has decided to undertake a narrower reform, wherein those subject to vetting will only be members of the judicial system (i.e. judges of regular courts, prosecutors, heads and members of the KPC and KJC, their secretariat and some other justice sector positions).<sup>79</sup> Such a narrowed scope of the initiative already affects the reform by making it partial. As such, expectations are low for the reform to duly address justice system deficiencies regarding the quality in delivering justice, independence and impartiality from political actors, and effectiveness in implementing laws.

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.-

<sup>76</sup> Group for Legal and Political Studies. “*Five Integral Questions about the Vetting Process*”. April 2021. Available at: [http://www.legalpoliticalstudies.org/wp-content/uploads/2021/04/GLPS\\_EI\\_FiveIntegralQuestionsVetting.pdf](http://www.legalpoliticalstudies.org/wp-content/uploads/2021/04/GLPS_EI_FiveIntegralQuestionsVetting.pdf)

<sup>77</sup> European Commission, “*Key findings of the 2021 Report on Kosovo*”, Brussels, 2021, (link: <file:///C:/Users/Admin/Downloads/Kosovo%202021%20report.PDF> ).

<sup>78</sup> Group for Legal and Political Studies. “*Five Integral Questions about the Vetting Process*”. April 2021. Available at: [http://www.legalpoliticalstudies.org/wp-content/uploads/2021/04/GLPS\\_EI\\_FiveIntegralQuestionsVetting.pdf](http://www.legalpoliticalstudies.org/wp-content/uploads/2021/04/GLPS_EI_FiveIntegralQuestionsVetting.pdf)

<sup>79</sup> Ministry of Justice. “*Draft Concept paper for the development of the Vetting Process in the Justice System*”. Available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=41154>

Second, it has been argued that the mechanism which will do the verification shall be composed of international members as well as national ones.<sup>80</sup> The aim is appeals on sanctions imposed be decided by a group of international composition. This design would guarantee that required standards on transparency and legal certainty are respected. This point has also not been considered by the MoJ, which in turn has specified that both levels of the mechanism will be composed by local experts.<sup>81</sup> Third, considering the political consensus a profound reform (like vetting initiative) requires for approval and proper implementation, the MoJ has neglected to garner support by dismissing the need for cooperation with Councils, opposition parties and non-majority representatives in the Parliament. The double majority required in the Assembly represents the main impasse for this initiative to be approved. What's more, the votes of the opposition majority parties might also be a problem and, along the entire process, the MoJ and the Councils have had major clashes which potentially affect the reform's effectiveness. All in all, the design of the reform and the challenges awaiting its approval increase the cloud of doubt surrounding this initiative.

### **Draft Law on the State Bureau for Verification and Confiscation of Unjustified Assets**

The civil confiscation of unjustifiable assets has been a longstanding electoral promise of the party in power. During the first Kurti Government, such an initiative was presented as the so-called anti-mafia law to help confiscate the unjustifiable assets of powerful people who gained them in suspicious ways, which cannot always be proven in a way that satisfies criminal procedure principles. The Draft Law on the State Bureau for Verification and Confiscation of Unjustified Assets was presented as a tool to fight corruption and organized crime, which for years has been present and growing in the country. Considering that criminal confiscation of unjustifiable assets is a key weakness in Kosovo, civil confiscation has been considered as a tool to deal with high-level political figures with suspicious assets.

The current regulation is not in line with the principle of legal certainty, the principle of enjoying without any violation the right of property, the principle that deprivation of property can take place only in presence of special conditions, and the principle of intervention according to which states have the right to control the use of property in accordance with the general interest. Yet many problems can be found in the law proposed. First, the draft law specifies that those to it are only official persons, the politically exposed persons, their family members and third parties related to them. Only a certain category will be subject to investigation from the Bureau, and that category is mainly civil servants. This denounces two problems: 1) it discourages those interested in joining the civil service; 2) these categories do not exhaust the problem of unjustified assets. As is currently proposed, the right to enjoying their property without any violation is being legally denied only to a certain category of people based on their job, yet subjects should be anyone suspected of having unjustified assets, regardless of their job. In fact, the scope of the draft law is so narrow that it might even endanger the right of enjoying the right of property only because someone has a position on public institutions. The investigation procedure must be initiated through an objective procedure by clearly specifying the reason why and when someone can be subject to this law, and it should be applied to anyone failing to pass a probability test which should also be foreseen by the law. For example, if someone's salary is 800eur and they does not have other legitimate income yet lead a luxurious lifestyle, they might be someone of interest

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<sup>80</sup> Group for Legal and Political Studies. "Proposal for a Justice System Reform through Vetting in Kosovo: An initial model for further thought". 2020.

<sup>81</sup> Ministry of Justice. "Draft Concept paper for the development of the Vetting Process in the Justice System". Available at: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=41154>

for investigation. Another example would be that of someone who has 100.000.00eur in their bank account and, from that amount, 25.000.00eur cannot be justified. In this case they should be subject to this procedure regardless of their position. Therefore, it should be applied to everyone as a rule. However, as it currently stands, the law has a discriminatory approach.

The horizontal scope of the law is not clearly specified, as mentioned above. The law provides some definitions but, considering it is a specific law switching the burden of proof from prosecution to the parties subject to the procedure, such a law must clearly define its subject. For example, the definition of politically exposed person includes a person known as a close associate of politically exposed persons. The term 'close associate' is too general and offers a vague definition of whom might be subject to this category.

Second, it is still not clear what can be considered as an incentive which will trigger the investigation procedure from the Bureau. This is the most important aspect of the procedure, and unfortunately it is not clearly defined by law. What is the reason which will be used to start the procedure? Or how will the Bureau identify the persons against whom they must start the procedure? Are there any probability tests? The draft law fails to define all this. This is directly related to the exception on the right to property, which must be defined by law as the special condition depriving someone from their right to enjoy their property without any violation.

Third, one can notice some problems with the temporal scope of the law. It specifies that the law will be applied to persons for the period exercising the function of the subjects effective 17 February 2008 and within 10 years from the period when the subjects cease to exercise their function. Yet one cannot understand how the Bureau will classify the assets gained before and after 2008. What if all factors delivering to the unjustifiable assets occurred before 17 February 2008, and the assets are found after this date? Will the law have a retroactive effect? On the other hand, how will the bureau solve the problem of cash flow and money from diaspora? These are all practical problems which, if not clearly defined, will raise considerable issues when implementing the law.

Considering all issues identified above, another factor is very important. The draft law has not foreseen that a court preliminary review must take place before the investigation procedure starts. This preliminary review would involve the court on the procedure's initial phase by ensuring the proportionality test has been satisfied, and would serve as indication to start the procedure given a legitimate reason suggesting someone might possess unjustifiable assets. Finally, regarding the material scope of the draft law, the current draft is rather focused on specifying the establishment and modus operandi of the Bureau than on explaining how the civil confiscation will work in practice. It lacks in explaining how the independence of the Bureau is ensured and will not be compromised by politics. This is all due to the lack of accountability mechanisms (such as disciplinary and performance mechanisms), which would ensure the Bureau completes its mandate. There are clearly some aspects of the law which should be more carefully drafted, considering all political, social and economic factors of the country. Therein, it should best ensure the principle of legal certainty, the principle of enjoying, without any violation, the right of property, the principle that deprivation of property can take place only in presence of special conditions, and the principle of intervention according to which states have the right to control the use of property in accordance with the general interest. Let us recall that this law will make it possible to seize and confiscate property and assets without a final decision of a criminal court.

## Draft amendments of the Law on KPC

The necessity of amending the Law on KPC has been one of the findings of the 2021 Functional Review of the Rule of Law sector.<sup>82</sup> Considering that the composition of the KPC is not regulated by the Constitution explicitly, the MoJ used the opportunity to reform the institution thoroughly. Nevertheless, the first draft of the amendments was not very well thought. As explained above, while the amendments proposed did present a way to fight corporatism with the Council, they also represented a great risk of transitioning from a corrupt Council to a politicized one. The amendment proposed foresaw a Council which would be controlled entirely from the ruling majority in the Assembly by enabling them to appoint the majority of the new composition. This has been received with high criticism to the principle of independence. Even the Council of Europe's Venice Commission elaborated thoroughly on how such a principle is crucial, and offered different examples on how to ensure it.<sup>83</sup> On the other hand, the proposal to dismiss all current members of the Councils without their mandate expiring directly affected the legal certainty and also presented a very dangerous precedent for the future of the country. Despite the present culture of corporatism and the alleged political interference and corruption in the Council, such a proposal was considered to be in accordance with European standards only if it serves a vital public interest, which in turn would lead to the overall improvement of the system. Hence, the MoJ should abandon any idea which may be in violation of these standards and follow the instructions provided. If not, Kosovo would be taking steps backwards regarding the independence and impartiality of the KPC. Allow us to highlight that the prosecutorial system is of essence when it comes to the rule of law functioning in a country.

## VI. CONCLUSIONS AND RECOMMENDATIONS

The current state of the Rule of Law sector has impacted the international community's perception of Kosovo and bilateral agenda towards the country in a significant manner. In the least, one can conclude it is being used as a political argument against Kosovo's statehood by state critics or non-recognizers. Kosovo has been left out of the EU integration process agenda for many years. The complex relationship between the EU and Kosovo is known to be a result of the Western Balkan country's ignored calls from EU Member States to fight corruption and organized crime in order to then move forward with its integration process. A case in point is that European Commission has for over three years recommended visa liberalization for the citizens of Kosovo, yet the governments of the EU Member States have yet to vote in favor of the visa-free regime, creating a deadlock.<sup>84</sup> The fight against corruption and organized crime has become an EU condition for the visa liberalization process, turning a technical process into a political one and rendering Kosovo as the only country with a visa imposition in the Western Balkans region.

Despite the effect that the performance of the Rule of Law sector has on an international level, a failing sector affects the lives of all citizens in the country domestically. The poor performance of Courts and Prosecution offices leads to weak economic development, high levels of crime and an unstable democracy. It is time to stop acting as if we believe in the 'divine right of politics' - it is time that the judiciary is called on to uphold limitations on the Government, and protect against abuses by the other authority branches. It must ensure that human rights are respected and that everyone is treated equally before the law. The judiciary's mission is to serve

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<sup>82</sup> Ministry of Justice. "Rule of Law Strategy 2021 – 2026". July 2021. Available at: <https://bit.ly/3wPVDhP>

<sup>83</sup> European Commission for Democracy through Law (Venice Commission). "Opinion on the Draft Amendments to the Law on the Prosecutorial Council". December 2021. Available at: <https://bit.ly/3NwFIKw>

<sup>84</sup> Balkan Insider. "European Commission Recommends Kosovo for Visa Liberalization". July 2018. Available at: <https://bit.ly/3PGKtmj>

for the good of the country, not for political interests. With this in mind, no one can be deemed inferior or more privileged than the other. Considering that currently Kosovo is being led by a government known as 'reformist', a number of recommendations are provided below to assist the MoJ in shaping policies aimed at improving the state of the judiciary in Kosovo.

- **Vetting reform:**

- In no way should Kosovo's Government step back from the Vetting reform. On the contrary, it should follow up on its design by means of a constitutional amendment. More efforts should be made towards creating a dialogue with non-majority parties in order to satisfy the double majority required to amend the Constitution. In addition, the Government must seriously engage the international element on the entire reform. Only this way shall the reform be successful and not doomed to fail. The Constitutional amendment and also the Vetting law must foresee that such verification ensures only those with high integrity and professional standing will continue to be part of the system.
- The vetting mechanism should be composed of international experts who ensure the required standards on transparency and legal certainty are being respected. It should be foreseen that even if a judge, prosecutor, professional staff, etc., may have been adjudicated for a certain disciplinary action or omission, the finality nature of the decision of the competent authority will not be deemed relevant when reviewing their figure under the vetting process. Moreover, subject to vetting must be expanded to all other institutions pertaining to the rule of law sector. Only this way can a thorough reform take place and concrete results be achieved.

- **Civil Confiscation:**

- Civil confiscation presents a legal way to meddle with property rights. The main legal conflict created by its implementation consists in interfering with the property right of persons subject of the law or who might be affected by its implementation. As such, specific procedural guarantees must be foreseen for all persons subject to such proceedings. It must be explicitly stated what will be the reason to start the investigation and verification procedure. The pool of people subject to this procedure must be clearly defined and vague definitions are unacceptable. The law should not target only the public sector but anyone suspected of having obtained and possessing unjustifiable assets. Hence, the material and temporal scope of the law should be strictly foreseen in the legal norms.
- Moreover, the law must clearly enumerate what can be the incentive triggering the investigation procedure from the Bureau, and should foresee a preliminary review from the court to start the investigation procedure. On the other hand, the law must ensure the independence of the Bureau by ensuring its impartiality and independency from different factors by guaranteeing that only professional people with high integrity and moral values are engaged - it is not sufficient to declare the Bureau will be established as a new independent mechanism. Moreover, clear accountability tools must be presented in the law: performance evaluation, disciplinary mechanisms and reporting process should be treated carefully in order to ensure that this mechanism will meet its aim. If these issues are not addressed, the principle of legal certainty is threatened and the adoption

of such a law would serve opposite purposes. Instead of fighting corruption and organized crime, it would be a tool to ensure these phenomena are present and growing. Moreover, the law would risk to be in violation of European standards and jurisprudence of ECtHR.

- **Draft amendments of the Law on KPC**

- The MoJ must carefully consider all recommendations provided by the Venice Commission Opinion No. 1063 / 2021. First and foremost, the independence of the KPC must be ensured and considered as the highest priority of the MoJ. Besides its composition, the appointment procedures play a crucial role in this regard. The KPC can in no way be subject to political interests which could arise from the appointment procedure. If the MoJ does not design the reform to ensure full independence from partisan interest, it will be a failed reform. Hence, the appointment formula of the lay members must change from a simple majority of the Assembly to a proportional system of election, if the majority of the KPC will be composed of lay members. In addition, the MoJ must justify the dismissal of current members by fulfilling the two-elements test provided by the Venice Commission Opinion. Lastly, the Ministry should introduce strong ineligibility criteria which would ensure the political neutrality of the system in a continuous way.

## **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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