

SECOND
EDITION

*Rule of law findings in Kosovo –
based on the rule of law checklist*

“Same Old Crisis”



Group for Legal
and Political
Studies



Embassy of the
Kingdom of the Netherlands

Rule of Law Findings in Kosovo - based on the Rule of Law Checklist

"Same Old Crisis"
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Executive summary

This report provides a six-month assessment of the current state of the rule of law delivery in Kosovo on the basis of the Rule of Law Checklist developed and adopted by the Venice Commission¹. This Checklist serves as a tool for systematic and comprehensive assessment of the fundamental pillars within the rule of law field. The present assessment report provides detailed information concerning the period from November 2021 to April 2022.

During this period, the average fulfillment score for Kosovo was 56,05%, meaning that it is still moderately above the "passing grade", yet is slightly higher compared to the previous assessment (May-October 2021).² Out of the five (5) categories that were evaluated, the one which scored the highest points is Equality Before the Law, with a score of 80%, but compared to the last assessment report, the same category dropped in points, having scored 85% in the last report. On the other hand, the Prevention of Abuse (Misuse) of Powers category amounted to the lowest result with 37.5% fulfillment, same as the previous assessment. All other categories – Legality (47,14%), Legal Certainty (56,66%) and Access to Justice (58.95%) - had a medium-optimal score, which is thoroughly analyzed in this report. It is important to note that both Legality and Legal Certainty had a moderate increase.

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

2 Rule of Law Checklist for Kosovo: New Report, Old Crisis, Group for Legal and Political Studies, November 2021, available at: <http://www.legalpoliticalstudies.org/rule-of-law-checklist-for-kosovo-new-report-old-crisis/>

Introduction

Challenges and setbacks in the rule of law sector delivery in Kosovo remain persistent, layered over the years. This assessment report does not offer up an exception, nor substantial improvements are evident. During the reporting period, the Ministry of Justice (MoJ) continued to work with the initiatives started from last year, including the vetting reform, the amendment of the Kosovo Prosecutorial Council Law, civil confiscation, etc.. Moreover, Kosovo Prosecutorial Council (KPC) and Kosovo Judicial Council (KJC) imposed the disciplinary sanction of demotion to a judge³ and a prosecutor⁴, due to the wiretaps exhibiting misuse of power and authority of the above-mentioned. Later on, following these sanctions, the same judge⁵ and prosecutor⁶ resigned from their respective positions. In April 2022 the recruitment processes for 54 judges and 16 first instance-level prosecutors/prosecutors were completed, with all stages monitored by civil society organizations and other international actors. Despite the large number of applicants, KJC has not managed to fill all positions announced in the vacancy. Furthermore, out of 54 positions for new judges, 8 were reserved for candidates from the Serb community, with only 3 of them having been filled while the other 5 remain vacant. In parallel, in the competition for the 16 positions for state prosecutor within the Basic Prosecutor's Offices, despite the prolongation of the process due to its re-announcement, the KPC submitted the names of only 7 candidates in the final list of candidates or appointment by the President, rendering 9 other positions as remaining vacant.

During the first half of 2021, the MoJ finalized the Concept Document on the Vetting process, later approved by the Government. In November 2021, a working group to finalize the necessary legislation was established. Out of the five (5) options in consideration, the MoJ went for the one concerning constitutional changes – this option aims to conduct an assessment of the performance, wealth and integrity of judges and prosecutors. Performance evaluation includes professional knowledge, ability for legal reasoning. On the other hand, the transitional assessment of wealth includes the assessment of the declaration of assets as well as identifying instances of discrepancy between income and wealth. Transitional integrity assessment includes the assessment of unnecessary contacts that may affect the performance of one's duties and responsibilities. At the present time, the Ministry of Justice is awaiting the Venice Commission's opinion. The next challenge is to secure 81 votes in the Assembly of Kosovo for these constitutional changes, wherein 2/3 of minority parties MPs are necessary. In addition, the Concept Document on the Confiscation of Unjustifiable Wealth in a Civil Procedure was approved in April 2021, followed by the approval of the draft law on the State Bureau for verification and confiscation of unjustifiable wealth in a civil procedure in December 2021. This draft law provides for the establishment of a State Bureau for Verification and Confiscation of Unjustifiable Assets, an independent body that would enable verification of assets of all those public officials suspicious of ill-gotten assets. The verification and confiscation of unjustifiable property will also be extended to their family members and third parties potentially involved. The scope concerning the parties involved in the scope of the law is quite narrow. On the other hand, the law enables the confiscation of unjustifiably acquired property even in the absence of a judgement.

3 Kallxo.com, December 2021, available at:

<https://kallxo.com/ligji/gjykata/per-shkak-te-shkeljeve-disiplinore-degradohet-gjykatesi-driton-muharremi/>

4 Justice Today/Drejtësia Sot, March 2022, available at:

<https://www.rolpik.org/gjykata-supreme-konfirmon-vendimin-disiplinor-ndaj-prokurores-shemsije-asllani/>

5 Justice Today, Drejtësia Sot, December 2021, available at:

<https://www.rolpik.org/driton-muharremi-jep-doreheqje-te-parevokueshme-edhe-nga-pozita-e-gjyqtarit/>

6 Justice Today, Drejtësia Sot, March 2022, available at: <https://kallxo.com/lajm/jep-doreheqje-prokurorja-te-ciles-iu-publikuan-audio-incizimet-duke-biseduar-me-nje-person-per-nje-rast-ne-prokurori/>

However, this draft law on the State Bureau for verification and confiscation of unjustifiable wealth in a civil procedure has not yet been approved the opposition parties in Kosovo sent it to the Venice Commission, requesting an opinion. The opposition has expressed concerns that the establishment of the bureau is conducive to the establishment of parallel judicial institutions. Moreover, they did not agree that the bureau should be headed only by a director.

On March 2022, the Assembly of the Republic of Kosovo failed to approve the draft Civil Code. Amongst other issues, this Code adjusts the statutory part for legal entities, prohibits early marriages and foresees that common wealth/property be divided as equal between spouses. The Civil Code regulates same-sex unions, which was the primary reason why it was only voted only 28 MPs and therefore did not pass. It is important to note that this Code does not foresee same-sex marriage since this is to be provided by a special law. This Civil Code has stirred much controversy and even been followed by condemning notes from the EU Office in Kosovo and other embassies. As a reaction, the Minister of Justice, Albulena Haxhiu, stated that they will continue their work on the Civil Code and it will be sent once again to the Assembly.⁷

Also in March 22, following the Kosovar Government's decision to not allow Serbian parliamentary and presidential elections to take place in Kosovo, the President of Serbia held a meeting in Belgrade to coordinate reactive actions. The President of the Basic Court in Mitrovica was part of this meeting and, as such, was later on suspended by the KJC. As a result, Serbian judges and administrative staff of the Basic Court in Mitrovica boycotted their work at the court.

Regarding the fulfillment of the legislative agenda, in March 2022 the Assembly approved the Draft Law on International Legal Cooperation in Criminal Matters, the Draft Law on International Legal Cooperation in Civil Matters, the Draft Law on Compensation of Crime Victims and the Draft Law on Public Property. The Amendment of Law No. 04 / L-213 on International Legal Cooperation in Criminal Matters intends to improve access to justice, strengthen the rule of law by means of easier and more efficient implementation of international and domestic law in the criminal field. Additionally, the draft law foresees streamlining extradition procedures for a rapid advancement of legislation in the field of international legal cooperation in criminal matters. The draft law on International Legal Cooperation in Civil Matters aims to facilitate the execution of requests submitted by foreign judicial bodies to the domestic judicial bodies. With regards to the Draft Law on Compensation of Crime Victims, it aims to advance the mechanism for compensation of victims of crime and procedures, as well as its efficiency. The Draft Law on Public Property aims to regulate public property rights and other property rights of the Republic of Kosovo and local self-government units. In April 2022, the KPC voted Blërim Isufaj as Chief State Prosecutor - although the KPC itself considered the selection legitimate, the EU Office in Kosovo, the US Embassy, the German Embassy and civil society in Kosovo expressed their disappointment with the process. In March, a Coalition of NGOs composed by the Group for Legal and Political Studies (GLPS), the Kosovo Law Institute and FOL published an analysis⁸ of their findings from the monitoring process noting procedural violations during this selection process.

Back to the legislative agenda, in April, the Assembly approved the laws on Draft Law on Execution of Criminal Sanctions, Draft Law on Kosovo Correctional Service and Draft Law on Kosovo Probation Service, Draft Law on Kosovo Prosecutorial Council in the first reading. The Draft Law on Kosovo Prosecutorial Council foresees the reduction of Council members from 13 to 7 members, including 3 non-prosecutor members, where 2 will be elected by the Assembly of Kosovo and 1 will be delegated by the Ombudsperson.

⁷ Rtklive.com, April 2022, available at: <https://www.rtklive.com/sq/news-single.php?ID=605474>

⁸ Integrity of the selection of the Chief State Prosecutor (Monitoring and evaluation report on the selection of the Chief State Prosecutor), March 2022, available at: <https://kli-ks.org/integriteti-i-procesit-te-perzgjedhjes-se-kryeprokurorit-te-shtetit/>

Methodology

The Group for Legal and Political Studies (GLPS) conducts regular assessments and evaluations of the rule of law application in Kosovo, based on the Council of Europe's Checklist for evaluating the Rule of Law from the viewpoint of its constitutional provisions, laws, by-laws, and rules of procedure to evaluate the difference between written law and implementation. The Checklist contains eight major benchmarks, which in turn encompass several indicators to monitor and evaluate the current state of play. The categories mentioned below are considered to contemplate the common core Rule of Law concepts. The Constitution was taken as the highest ranking source of law, followed by primary and secondary legislation, judicial decisions and relevant CSOs monitoring reports. The methodology based on the Checklist has 5 categories:

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

The indicators within each group further encompass questions that need to be fulfilled in order for the indicator to be fully realized. Each operational question is assigned with a score - 1 if the operational question is fulfilled, 0 if not and, in cases where the situation is dubious, 0.5 is given. The indicators' fulfillment gives the percentage of fulfillment - for example if an indicator has 6 operational questions and 3 are achieved, then we can say that the indicator is 50% fulfilled. In addition, the analysis also gives a narrative interpretation and explanation of the results.

Rule of law in Kosovo – data analysis

A. LEGALITY

The principle of Legality⁹, overviews the **Supremacy of the Law, Compliance with the Law, Relationship between International Law and Domestic Law, Law making Powers of the Executive, Law-making Procedures, Exceptions in Emergency Situations, Duty to implement the Law, Private Actors in charge of Public Tasks.**

The **Supremacy of the Law** scored 3.5 points out of a total 8. This subcategory runs through the recognition of the supremacy of the law amongst Constitution, legal framework and its implementation by public institutions. Even though the supremacy of the law is recognized by the Constitution¹⁰, legislation is adopted with delays in various cases (i.e. Law on Salaries and Law on Public Officials). Similarly, secondary legislation is often characterized with major delays in adoption (by-laws of Law on Public Officials, Law on Access to Public Documents).

In 2019, in the municipality of Kamenica, schools were reorganized following a decision of former Mm mayor Qëndron Kastrati, justifying it by the decrease in number of students and the lack of proper infrastructure of educational institutions. In 2021, the Ministry of Education, Science, Technology and Innovation (MESTI) took a decision that enabled the organization of accelerated alternative education for 441 students of the Municipality of Kamenica¹¹. Later, in 2022, the Constitutional Court declared that the MESTI's decision for supplementary education in Kamenica unconstitutional.¹² The judgment¹³ stated that MESTI 'surpassed its competence and violated the municipal responsibilities, respectively, has interfered in the own competencies of the Municipality of Kamenica regarding the provision of public education, contrary to constitutional and legal guarantees', therefore concluding the Ministry's decision as unconstitutional.

In addition to this, there have been many frequent violations of the Law No. 03/L-040 on Local Self Government with regards to municipality competencies on construction permits. Even though municipalities are competent in issuing such permits, the competent institution when it comes to appeals is the Ministry of Environment, Spatial Planning and Infrastructure. The Law No. 03/L-040 on Local Self Government,¹⁴ 17, clearly states that municipalities have full and exclusive powers in urban and rural planning as well as implementation of building regulations and building control standards.¹⁵

9 For the first time, the principle of legality was mentioned in the 2004 verdict of the court on the case of Commission of the European Communities v CAS Succhi di Frutta SpA. This principle demands the standing of a transparent, accountable and democratic process for enacting law, made possible by effectively accountable and transparent institutions and representative decision-making.

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

11 <https://kallxo.com/lajm/merret-vendim-per-kompensimin-e-oreve-te-humbura-ne-kamenice/>

12 <https://kallxo.com/lajm/gjykata-kushtetuese-e-shpall-jo-ligjore-vendimin-e-mashti-per-mesimin-plotesues-ne-kamenice/>

13 <https://gjk-ks.org/decision/vleresim-i-kushtetutshmerise-se-vendimit-te-ministrise-se-arsimit-shkences-teknologjise-dhe-inovacionit-nr-01b-24-te-23-prillit-2021/>

14 Law No. 03/L-040 on Local Self Government, Article 17, Official Gazette of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2530>

15 Law No. 03/L-040 on Local Self Government, Article 17, Official Gazette of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2530>

In this case, the established practice fails to recognize the legal framework, therefore creating a confusion of competencies even though the Law on Self Government gives such competencies to the municipalities.

The **Compliance with the Law** scored 2.5 points out of total 6. This percentage is the same as in the previous period. This subcategory aims to reflect if the powers of the public authorities are defined by law and if the delineation of powers between different institutions is clear. Even though constitutional provisions and legislation provide a clear definition of powers and exercise, Kosovo's public authorities continue to fail with regards to respecting the established laws. Public authorities' actions and scope are regulated by the Constitution and by-laws (regulations). It is worth mentioning that by-laws do not always have a legal basis. On a positive note, this year the Draft Law on Government was approved in the first reading by the Assembly of Kosovo¹⁶. Considering that the work of the Government is regulated only by a secondary act (regulation), it allows for interference in the functioning and responsibilities of Government – as such, the recently-approved draft law would regulate the Government's mandate, competencies and responsibilities.

Concerning the **Relationship between International Law and Domestic Law**, this subcategory showcased 2 points out of 2 of fulfillment. This score is based on the fact that Kosovo's legal system abides by its binding obligations under international law, by binding decisions of international courts as well as prioritizing international/regional treaties and Human rights covenants applied to domestic law (Article 22 of the Constitution of the Republic of Kosovo).

As for the following sub-category within 'Legality', **Law-making Powers of the Executive**, this subcategory scored 1 points out of 3. The Constitution of the Republic of Kosovo foresees the supremacy of the legislature, the control over the executive branch is not exercised regularly. However, there are general and abstract rules foreseen in the Assembly's regulation regarding supremacy of the legislature. During the last six months, there has been lacking regular parliamentary oversight over the Government's performance, except regarding the energy crisis in Kosovo. As recently as April, the opposition requested an ad-hoc parliamentary committee, seeking to investigate all measures taken during the period of the energy emergency.¹⁷

With regard to **Law-making Procedures**, this subcategory scored 3 out of 6. Though there are clear constitutional provisions on law-making procedures and the Assembly is supreme in deciding content of the law, the accountability, transparency and inclusivity of the enacting law-enacting process is still lacking. Further, while the Assembly debates publicly on the proposed legislation, there are no explanatory reports drafted that are publicly available.

The process of policy making offers the possibility to include all stakeholders and interested parties in all phases, except in early consultations. Early consultations are rarely held with the interested parties because common practice dictates that these types of consultations should be limited at institutional level. Also, public consultation reports do not always provide detailed information nor specify the extent to which third parties recommendations were approved or rejected. In addition to the Constitution and other laws that ensure citizen inclusion in policymaking, the Governmental Regulation that specifies the minimum standards for public consultations¹⁸ has a significant role in this matter. However, on the case of the consultations on the draft law for the State Bureau on Verification and Confiscation of Unjustified Wealth, public consultations were open for only 7 days despite the regulation stipulating a 15-day deadline.

16 Kosovapress, "Miratohet në parim projektligji për qeverinë", March 2022, available at: <https://kosovapress.com/miratohet-ne-parim-projektligji-per-qeverine/>

17 Two ad-hoc parliamentary committees were established on 6th of May by the Assembly of Kosovo. The first committee initiated by Democratic Party of Kosovo (PDK) will investigate all measures taken during the period of the energy emergency, which the Assembly voted to declare last year. On the other hand, the investigative committee of Vetëvendosje Movement (LVV) seeks to investigate the activities in the energy sector in the period 2006-2022. This includes the investigation of capital investments in the Kosovo Energy Corporation after the privatization of distribution in this company.

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

As seen in the previous report, there is still a lack of impact assessments before adopting legislation, and existing analyses are not taken into account when drafting new legislation. There are rare cases in the past where ex-ante analysis or ex-post analysis have been drafted (e.g., Law on Civil Service).

Exceptions in Emergency Situations are clearly outlined in Article 131 of the Constitution, specifying the national provisions applicable to emergency situations, the scope, duration, and limitations. Based on the legal regulation, this subcategory received maximum fulfillment (4 out of 4 points). For instance, in February 2022, the Assembly of Kosovo approved a state of emergency for energy, as a result of the energy crisis deriving from the aggravated situation with electricity supply.

On the other hand, the **Duty to Implement the Law by public authorities** subcategory scored 0 out of 5 points due to lacking measures ensuring public authorities effectively implement the law. There are no effective remedies for poor implementation, for there is no solid system to enforce sanctions against this phenomenon. It should also be noted that the public institutions continue to fail in assessing the impact of the law in particular to the implementation for a particular law.

The eighth and final sub-category within the Principle of Legality relates to **Private actors in charge of public tasks**. The legal framework of Kosovo does not regulate or mention explicitly the delegation of public tasks to non-state entities. Nonetheless, the Law on General Administrative Procedure¹⁹ (LGPA) is applied whenever a private person acts in the name of a public institution upon an explicit authorization by a law, or based on a law. To fully comprehend this term one should note that private actors in charge of public tasks means that non-state entities have taken on traditionally-public tasks, therefore having an impact as if actions undertaken by public institutions. For example, a decision undertaken by the Government²⁰ to mitigate the COVID-19 pandemic enabled private economic operators (i.e. restaurants, bars, cinemas) to check the vaccination certificates prior to entering closed spaces and mandated them with the responsibility to accept or reject entry. All considering, this subcategory scored 0.5 out of 1 point, for even though the LGPA applies for such cases where a public task is transferred to non-state entities, these non-state entities are not accountable for the implementation of such tasks.

Overall, compared to the previous assessment (May-October 2021) (44,28%), the Legality category scored 47,14% of fulfillment (16,5 points out of a total of 35) for the period of November 2021 to April 2022. The subcategory on the relationship between domestic legal system and the international laws remains as a best practice, with a full score. On the other hand, one can conclude that Kosovo needs fundamental reforms regarding compliance with the law and supremacy of the law, where the score was lower due the executive branch's actions not being conform with the Constitution and due to the lack of judicial review for decisions of private actors performing public tasks. More solid efforts in the rulemaking procedures and law-making procedures are needed. The need to address the legislative gap on the duty to implement the law also remains pressing .

B. LEGAL CERTAINTY

Legal Certainty is the second category of the Rule of Law Checklist consisting of the following sub-categories: **Accessibility of Legislation, Accessibility of Court Decisions, Foreseeability of the Laws, Stability and Consistency of the Law, Legitimate Expectations, Non-retroactivity, Nullum Crimen Sine Lege, Nulla Poena sine Lege principles and Res Judicata.**

In terms of **Accessibility of Legislation**, the assessment shows that overall no changes were encountered. The sub-category scored 100% (2 out of 2 points) considering that the draft laws are publicly available on the official website of the Office of the Prime Minister. However, there are some minor improvements that are still needed when it comes to line ministries sponsoring a particular draft law and do not publish them in their respective websites. As for the laws, once approved by

19 Law on General Administrative Procedure, Official Gazette of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=12559>

20 Decision on general and specific measures for the control, prevention and control of Pandemic COVID-19, Office of Prime Minister of the Republic of Kosovo, 01 March 2022, available at: <https://kryeministri.rks-gov.net/wp-content/uploads/2022/03/Vendimet-e-mbledhjes-se-66-te-te-Qeverise.pdf>

the Assembly, they are available in the Official Gazette of the Republic of Kosovo²¹. The access to the laws continues to be free of charge and all legislation enforced is accessible in Albanian, English, Serbian, Turkish and Bosnian. As for the **Accessibility of Court Decisions**, this category scored 1.5 out of 2 total points. The Administrative Instruction No.04/2019 on the Publication of Processed Decisions²² demands for all regular courts to publish the decisions within sixty (60) days. The decisions of the Constitutional Court are always published in a timely manner and are easily accessible on the official website. Similarly, most of the decisions of the Basic Courts, the Court of Appeals and the Supreme Court continue to be available in their respective websites. However, exemptions are to this day still not justified towards the public. So far 71,676 judgments of regular courts have been published on the KJC's website. Concerning the sub-category of **Foreseeability of the Laws**, 1 out of 2 points in total were granted. The laws that are, to some extent, available in the Official Gazette are written in an intelligible manner. In addition, even during this six-month period there are no consolidated versions of the amended laws published and they are not offered in other format besides PDF.

With regard to the **Retroactivity of Legislation**, there is no general law that prohibits the retroactivity of the laws, meaning that each law needs to state whether retroactivity applies, given that the Criminal Code²³ explicitly prohibits this. **Nullum Crimen Sine lege and Nulla poena sine lege** are applied as legal principles and are ensured in the Criminal Code as well as the Constitution. On **Res Judicata**, the Criminal Code formally provides this principle in Kosovo.

In conclusion, there are no changes for this category, as most of its subcategories require the insurance of the basic legal principles like nullum crime sine lege, nullum poena sine lege, res judicata, which are already applied in Kosovo. Therefore, the final score of Legal Certainty is 8,5 points out of 15 in total, which provides 56,66% of fulfillment percentage, slightly higher than in the previous assessment (53,33%). Nonetheless, work still needs to be done towards foreseeability of the laws (consolidation of the laws), as well as accessibility of court decisions more precisely providing justification for limitations to court decisions. Moreover, the principle of legitimate expectations, as the general principle of legal certainty should be respected, which signals that public institutions should also abide by their promises and raised expectations, and not only by the law.

C. PREVENTION OF ABUSE (MISUSE) OF POWERS

Prevention of Abuse (Misuse) of Powers encompasses only one sub-category which is **the existence of legal safeguards against arbitrariness and abuse of power by public authorities**. This category assesses if the exercise of powers violates the rule of law. In Kosovo, there are clear legal restrictions to discretionary power, but there is no adequate enforcement or functioning of mechanisms to prevent, correct and even sanction these arbitrary actions. Moreover, there have been cases where public institutions failed to provide valid justification for their actions. Indeed many cases of abuse of power have been documented, from the President to the Prime Minister and other officials. Even though some of their decisions have been abrogated, sanctions against abuse of power remain scarce. Based on the 7th edition of Rule of Law Performance Index in Kosovo (RoLPIK)²⁴, 60% of citizens answered affirmatively to the question "Do you think that people with political influence are less likely to be punished by law?". The justice sector is perceived as among the highest politically-influenced sectors in Kosovo. In February 2022, an indictment was filed against former Minister Pal Lekaj and others for abusing their official duty and authority, having exceeded their powers in order to cause harm to the budget of Kosovo, to the benefit of other entities.

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

22 Administrative Instruction No.04/2019 on the Publication of Processed Decisions, Kosovo Judicial Council, available at: https://www.gjyqesori-rks.org/wp-content/uploads/lgs/79875_Udhezim_Administrativ_Nr_04_2019_per_Publikimin_Aktgjykimeve_te_Perpunuara_dhe_Manual_per_Publikimin_dhe_Perpunimin_Aktgjykimeve.pdf

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

24 Rule of Law Performance Index in Kosovo, 7th edition, Group for Legal and Political Studies, available at: https://www.rolpik.org/wp-content/uploads/2021/12/RoLPIK_botimi7_draft3_en.pdf

In the January to March 2022 period there were three police operations (“Pika”, “Subvencionet”, “Brezovica”) which uncovered that state officials and police officers were involved, suspected of various criminal offenses of corruption. These cases must be handled with maximum professionalism and high efficiency by the justice institutions, so that at each stage of the criminal proceedings the legislation in force is respected, all relevant evidence is collected and a fair trial is conducted.

On the other hand, on January 2022, the Supreme Court of Kosovo acquitted the suspects of the Pronto Case – the Pronto Case being one of the cases with the greatest influence on the public ended. In it ending with no convictions, it shows the failure of the prosecution and the court in handling this case with the right priority.

Given the above, overall score for this category is 1.5 points out of 4 total points (37,5% of fulfillment).

D. EQUALITY BEFORE THE LAW AND NON-DISCRIMINATION

This category looks **into the principle of non-discrimination** and the legislative framework that regulates the area of **equality in law** and **equality before the law**. The Constitution of Kosovo ensures equality before the law and non-discrimination (Articles 21 to 62 which are dedicated exclusively to human rights). However, the marginalized groups still face systemic discrimination in many aspects of society. In March 2022, the Civil Code containing 1630 articles was not approved by the Assembly – of note is that one of the articles of the Civil Code allows registered civil unions between persons of the same sex. This was accompanied by discriminatory and offensive language by the members of the Assembly against LGBTQ + persons. In addition to this regulation, it is important to note that the Civil Code provides for equal treatment of spouses in terms of personal and property. In case of divorce, the court will have to divide joint property equally among both spouses, even in cases where one is unemployed.

Social inequality between women and men in Kosovo is also visible when it comes to maternity leave. According to the Law on Gender Equality, each new policy must include a gender perspective, be based on gender analysis, and ensure that it targets the specific needs of both women and men. That being the case, there is an urgent need to review the laws in force based on this provision and ensure future laws have a gender perspective.

As for **Equality in Law** and **Equality before the Law**, Kosovo continues to stand well, despite an existent gap on the full integration of minority groups. Even though the Constitution ensures all minorities have reserved seats in the Assembly and public institutions , for a genuine well-being and social integration.

In November 2021, the case of the murder of a minor from Fushe Kosova was discussed by a number of experts and representatives of the relevant institutions²⁵. The Ombudsperson alerted that the state failed to act to fulfill the positive obligation for the protection of life, did not react in a timely manner, and did not respect the legal duties in the criminal procedure. . The victim's ethnicity was also mentioned as one of the reasons for the negligence in this case.

The Equality before the Law and Non-Discrimination reached the score of 8 out of 10 points (80%). This category scored lower than in the previous assessment (85%) for no positive measures have since been provided for the benefit of particular groups in order to address the existing inequalities.

²⁵ Telegrafi, “Avokatja e Kujtim Veselit: Rasti i tij është neglizhuar për shkak të përkatësisë etnike”, November 2021, available at: <https://telegrafi.com/avokatja-e-kujtim-veselit-rasti-tij-eshte-neglizhuar-per-shkak-te-perkatesise-etnike/>

E. ACCESS TO JUSTICE

Access to justice consists of: **Independence and Impartiality, Fair Trial and Constitutional Justice**. This category is considered as one of the most complex and detailed categories of the checklist.

The first sub-category is the **independence and impartiality of the judiciary**. The Constitution of Kosovo (Chapter VII) ensures the basic principles of judicial independence including procedures and criteria for judicial appointments. As for the tenure, discipline and removes, these principles are enshrined in the Law No. 06/L-057 on Disciplinary Liability of Judges and Prosecutors²⁶. Complementary to the Constitution is present in the Law No. 06/L-054 on Courts²⁷, which lists the qualifications, rights and duties of judges. Since July 2021, all KJC meetings are broadcast online, thus continuing the good practice.²⁸ The score gathered in this subcategory is 8,5 points out of 14 total. The score is lower than in the previous assessment report (64, 28%). The score derives from different factors, starting with the fact that the deadline for the announcement of the judgment has been completely exceeded in most cases. Based on the 7th edition of ROLPIK²⁹, the survey shows that about 60 % of citizens answered in positively to the question "Do you think that people with political influence are less likely to be punished by law?". 32.9% of the respondents, think that courts are the most politically- influence institutions, followed by the Prosecution with 31.3%, and then the Kosovo Police with 19.7%

Furthermore, in the case of the former judge Driton Muharremaj and the former prosecutor Shemsije Asllani, despite the publication of the wiretaps, the undertaking of disciplinary measures and their resignation, no indictments have been filed against them.

Regarding **sufficient constitutional and legal guarantees for the independence of individual judges**, the judicial activities are subject to the supervision of the KJC. This subcategory scored 2 out of 4 points. The Law on Courts³⁰ states that each court has their court President and Vice-presidents, with Article 13 of this law clearly determining the competencies of each regular court and setting rules to avoid competence/jurisdiction conflicts. Regarding competence, Article 13 on the Law on Courts³¹ determines the conflict of jurisdiction between courts. Considering that KJC is the competent institution for the disciplinary proceedings and performance evaluation of the judges, a report published by the Justice Today states that: "the KJC in its disciplinary decisions should take into account the frequent repetition of disciplinary violations by judges who are subject to disciplinary proceedings, in the case of imposing a disciplinary sanction. This report does not include data on disciplinary decisions in which the KJC has issued "non-public written reprimands", as such decisions, according to applicable law, are not published on the web portal". According to Justice Today, the KJC has adopted the following regulations: Regulation 01/2021 on the evaluation of judges' performance; Regulation 02/2021 on amending and supplementing; Regulation 01/2021 on the evaluation of judges' performance. The RoLPIK data shows that 34.5% of citizens considers that judges are influenced by pressure, corruption and private interest during the decision-making process. Whereas 29.1% of the respondents think that judges base their decision-making under the influence of pressure exerted by senior officials or persons with political influence.

Another matter within Access to Justice is the **autonomy and control of the prosecution service**, which again gathered 5 out of 12 points. The latest edition of RoLPIK states that the public perception towards the prosecution is more positive than in previous periods, but still far behind from a good perception. According to RoLPIK, only 15,9% of the respondents think the prosecution is able to perform duties/responsibilities independently. Regarding disciplinary mechanisms, a Justice Today report states that, in 2021, the KPC received 95 complaints against prosecutors, of which 41 were

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

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

28 Drejtesia Sot/ Justice Today, " Monitoring of the Judicial and Prosecutorial System in Kosovo for the period January-December 2021", page 8, available at: <https://www.rolpik.org/wp-content/uploads/2022/04/Monitoring-Report-January-December-2021-eng.pdf>

29 Rule of Law Performance Index in Kosovo, 7th edition, Group for Legal and Political Studies, available at: https://www.rolpik.org/wp-content/uploads/2021/12/RoLPIK_botimi7_draft3_en.pdf

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

31 Ibid, article 13

rejected and another 40 dismissed, while only a 14 requests for initiating disciplinary proceedings against state prosecutors were conceded. With the entry into force of the Law on the Disciplinary Liability of Judges and Prosecutors, the legislative framework regarding the control of the prosecution has improved, yet the score shows many legal provisions are missing for proper control of the Public Prosecutor's Office.

The subcategory on **impartiality and independence of the Bar** scored 4.5 out of 5 total points, as there is a legal basis for functioning of the Bar, based on the principles required by the Rule of Law Checklist including independence (Article 111 of the Constitution), confidentiality and professional ethics. The Law No. 04/L-193 on Bar serves³² as the legal basis for the functioning of this independent legal profession. It is important to note that this category did not score the maximum points due to lack of data on public perception about the Bar's independence, as one of the benchmarks of RoL checklist. For 9 months, in the case of Agonis Tetaj³³, the Kosovo Chamber of Advocates rejected the trial panel's request to appoint a lawyer for the accused for Tetaj's murder.³⁴ However, in April 2022, the Chamber abrogated its decision.³⁵

The next sub category, **Fair Trials**, is the broadest one under the Access to Justice category. The existing legal framework ensures that every individual has the right to challenge a public or private act that violates their rights. However, the access to justice is not easy considering the excessive backlog of cases and the prolongation of judicial processes. As for formal requirements, time limits and court fees, they are reasonable taking into account that filing a suit has a cost of 50 euros. Regarding the existence and effectiveness of legal assistance, free legal representation is only offered if the sanction to the indictment is more than 10 years. As for the legal sources of this fundamental right, Article 53 of Code No. 04/L-123 on the Criminal Procedure³⁶ and Article 29 of the Constitution guarantee the right to defense, as well as Law No. 04/L-017 On Free Legal Aid.³⁷ As for **the Presumption of Innocence**, as a prerequisite to ensure right to a fair trial, Article 3 of the Criminal No. 04/L-123 on the Procedure Code guarantees this right. **Other aspects of the right to a fair trial** including equality of arms, right to be heard, appeals procedure which are assured in the Code of Criminal Procedure. At the same time, the practice established by courts on not offering enough arguments or not contesting their decisions continues. Moreover, on March 2022 The Supreme Court of Kosovo found violations by the Basic Court of Peja and the Court of Appeals, in handling the case against two KEDS officials accused of taking bribes, reports Justice Today. Among other things, the reasoning of this judgment states that the Supreme Court finds that both the courts of first instance and that of the second instance have failed to provide legal reasoning for some certain aspects.³⁸ In addition, we still face situations in which court hearings are not held because court summonses are not delivered to the parties involved in time. As for the effectiveness of judicial decisions, in many cases during 2021, the deadline for the judgment announcement was exceeded. These delays have been accompanied by prolonged execution of judgments in both criminal and civil proceedings. The positive side of civil proceedings is that the individuals can start executing the proceedings on their own.

The last subcategory in this indicator is the **Constitutional Justice**. Based on the constitutional framework, individuals have effective access to constitutional justice only in terms of violation of their fundamental rights (not general acts), once they have used all the other legal remedies – the Supreme Court being the last instance. The Parliament and the Executive are obliged to take into account the arguments used by the Constitutional Court and to fill legislative/regulatory gaps identified by the Constitutional Court. However, there are some cases that do not take these into account, e.g Law on Public Officials. This subcategory scored 4 out of 7 points in total.

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

33 Telegrafi.com, March 2021, available at:

<https://telegrafi.com/reagime-te-shumta-pas-publikimit-te-videos-se-vrasjes-se-agonis-tetaj-video-kujdes-pamje-te-renda/>

34 Kallxo.com, April 2022, available at: <https://kallxo.com/ligji/vrasja-e-agonis-tetajt-gjykatesja-do-ti-therrasim-te-gjithe-avokatet-ne-kosove-deri-sa-te-plotesohen-kushtet-ligjore/>

35 Kallxo.com, April 2022, available at:

<https://kallxo.com/lajm/terhiqet-oda-e-avokateve-pas-9-muajve-zhbllkohet-rasti-i-vrasjes-se-agonis-tetajt/>

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

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

38 Justice Today/ Drejtësia Sot, March 2022, available at: <https://www.rolpik.org/gjykata-supreme-konstaton-shkelje-ne-aktgjykimet-me-te-cilat-u-shpallen-te-pafajshem-dy-te-pandehurit-per-marrje-ryshfeti/>

Access to Justice, as the broadest category of the C checklist, scored 58,95% (39,5 points out of a total of 67 points). A slight decrease from the last assessment report (59.70%) is reflected considering that access to justice in Kosovo should not only be text-book. In addition, access to justice should ensure independence and impartiality of the judiciary and the prosecution, therefore enabling the changing of public perception about political influence on their decisions and work. In addition, the institutions must ensure effective access to courts as well as a non-discriminatory approach for legal assistance, which is fundamental and still a setback in Kosovo

Concluding remarks

The Rule of Law sector in Kosovo continues to have a disparity between the de jure and the de facto reality. Although these two terms are overused with the same comparison, a more realistic description of the factual situation could not be better summarized: out of the 5 categories of the Venice Commission's Rule of Law C checklist, only one of them showed moderate improvement, while the others scored slightly lower percentages compared to the last assessment. Breaking down the categories, a handful of sub-categories scored a null fulfillment. The subcategories that scored the highest points mostly relied on the legal framework rather than the implementation of the provisions in practice. Kosovo's Government should uphold their initiatives, such as the vetting reform and the confiscation of unjustified assets, in addition to the proposed changes on the Law on Kosovo Prosecutorial Council. At the same time, as a step to increase citizen trust in the rule of law institutions, more efforts should be put forward in ensuring transparency, accountability, and impartiality of the justice sector. In addition, the justice sector and the institutional level should further commit to embracing international standards such as those of the Venice Commission's checklist in order to further align with the intended EU integration process, so that EU rule of law benchmarks are met.

The following section offers a number of recommendations based on the challenges, gaps and problems identified during this assessment period.

Recommendations

- The Government should always ensure conformity between the Constitution and primary legislation. Moreover, the competencies of public institutions should be adhered to by law with special emphasis on the government-municipality relation
- Public authorities should always respect the constitutional provisions and legislation providing definition between powers and exercise, meaning appropriate implementation of the tripartite division of powers – focus on Kosovo as a parliamentary state, in which the Assembly should step up by upholding their given competences and take a proactive role in the oversight of the work of the Government;
- When required by the Constitutional Court, the public authorities must always ensure the adoption of legislation without delay;
- It is an emergent need that amended laws be fully incorporated in a consolidated version of the law. In addition, the laws should be available in open data format.
- It is crucial that the Parliamentary Committee on Legislation improve its oversight role as mandated by law ;
- Public institutions should facilitate the access to justice for vulnerable groups and ensure that the law of non-discrimination is implemented. In addition, they should provide positive measures for the benefit of particular groups in order to address existing inequalities;
- Legal assistance should be available for every individual, along with pro-bono legal aid for those who struggle financially. Furthermore, citizen-friendly and easy-accessible information on how to bring a case to court should be offered to the public;
- The Kosovo Judicial Council (KJC) and Kosovo Prosecutorial Council (KPC) should push for extended transparency and accountability;
- The Kosovo Judicial Council (KJC) and Kosovo Prosecutorial Council (KPC) should ensure that the objective procedures and criteria for appointments of judges and prosecutors are respected, as stated in the legislation;
- Autonomy of the prosecution should not only be protected from political influence, but also be ensured inside the prosecutorial institutions;
- It remains very important for the responsible public institutions to become familiar with the Venice Commission's Checklist and to make a rule of law assessment based on this document.

Annex 1

RULE OF LAW INDICATORS BY CATEGORY

A. *Legality*

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

B. *Legal certainty*

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

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

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

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

E. *Access to justice*

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



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