



## **RULE OF LAW FINDINGS ON KOSOVO**

Assessment based on the Rule of Law Checklists developed by  
the Council of Europe (The Venice Commission)

## **POLICY BRIEF – RULE OF LAW FINDINGS ON KOSOVO**

Author(s):

Bárbara Matias, Group for Legal and Political Studies

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**Konrad-Adenauer-Stiftung e.V.**

Tiergartenstraße 35

D-10785 Berlin

Germany

Phone: +49 30 269 96 453

Fax: + 49 30 269 96 555

Website: [www.kas.de](http://www.kas.de)

**Rule of Law Programme South East Europe**

**Konrad- Adenauer-Stiftung e.V.**

5 Franzelarilor Street, Sector 2

RO-020785 Bucharest

Romania

Tel.: +40 21 302 02 63

Fax: +40 21 323 31 27

Email: [office.rspsoe@kas.de](mailto:office.rspsoe@kas.de)

Website: [www.kas.de/rspoe](http://www.kas.de/rspoe)

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## ACRONYMS

ECHR – European Convention on Human Rights

ECtHR - European Court of Human Rights

EU – European Union

GLPS – Group for Legal and Political Studies

KDI – Kosova Democratic Institute

KAA – Kosovo Accreditation Agency

KJC – Kosovo Judicial Council

KPC – Kosovo Prosecutorial Council

PM – Prime Minister

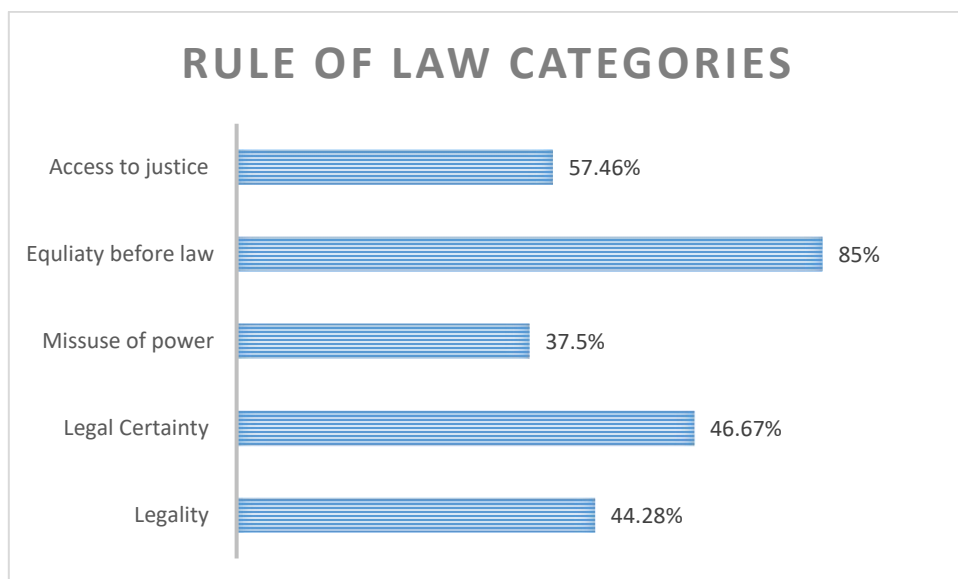
OSCE – Organization for Security and Cooperation in Europe

UNDP – United Nations Development Programme

## EXECUTIVE SUMMARY

This analysis is part of the project **“Developing methodology for assessing the rule of law in Macedonia and Kosovo based on CoE’s Checklist”**. The implementing partners are the Center for Research and Policy Making (Skopje) and the Group for Legal and Political Studies (Prishtina).

The aim of the research is to assess the current state of affairs regarding the Rule of Law in Kosovo, for the purpose of identifying the main issues and challenges in this area and to contribute towards shaping the agenda for tackling the priorities in the reform process. The methodology, as stated, is based on the Rule of Law Checklist, developed and adopted by the Venice Commission which is used as a tool for systematic and comprehensive assessment of the fundamental pillars of the rule of law.



*Figure 1 Rule of Law in Kosovo by categories*

As the chart in Figure 1 shows, the average fulfillment score for the Republic of Kosovo is of 54.2%. This means that it is slightly above the passing grade regarding the Checklist used in our analysis methodology. Out of all categories, the one which presented the best results is Equality Before the Law, mainly residing in the fact that Kosovo is a multi-ethnic

state which assures equal rights to minorities. On the other hand, the Misuse of Power category amounted to the lowest result, showing that in Kosovo the prohibition of arbitrariness as a key principle which sets a standard for fair and equitable conduct is far from ideal. All other categories – Legality, Legal Certainty and Access to Justice - have a medium-optimal score, which we will look into detail throughout this Policy Brief. Overall, in Kosovo a gap remains between the *Rule of Law de jure* and the *Rule of Law in practice*. There is a need to revitalize the confidence and trust in the relationship between citizens and the State in Kosovo.

## INTRODUCTION

As the self-titled ‘newborn’ country in Europe, the Republic of Kosovo continues to face structural challenges that hinder the Rule of Law and the quality of life of citizens since its self-proclamation of independence from Serbia in 2008. The country is still engaged in a complex state and nation-building process, implementing reforms in many fields. This encompasses economic, social and political development, as well as institutions which safeguard human rights and provide for the Rule of Law.

With a total land of 10,887sq km and a total estimate population of 1,895,250 people, Kosovo is a landlocked country in the Balkan Peninsula<sup>1</sup> - one of the majority Albanian ethnicity and Muslim religion. It nevertheless counts several other ethnic minorities which make up the national composition of the country and its institutions. In addition to ethnic tensions and sovereignty disputes, one of the most pressing challenges is a distinctive shortcoming in the Rule of Law and its direct and indirect impact on the quality of life of the citizens nationwide. It is this topic that this project focuses on and aims to qualitatively assess, tackle and improve.

Over the past year, several breaches to Rule of Law were noticeable. Last October, Prime Minister Ramush Haradinaj suddenly dismissed the board of the Kosovo Accreditation Agency, putting the Agency’s independence into question<sup>2</sup>. He claimed irregularities had been tarnishing the accreditation process in check, yet no further clarification was given on these claims of non-compliance from the Executive. Most recently, weekly protests have been organized in the capital city of Prishtina throughout the months of August and September, with hundreds of citizens marching in a demand for the resignation of Kosovo Chief Prosecutor Aleksander Lumezi, the vetting of the judiciary and a review of the current lists of the Kosovo Liberation Army veterans<sup>3</sup>. This comes in the aftermath of the public resignation of former prosecutor Elez Blakaj on the subject of his investigation on the latter issue and the alleged intimidation threats that ensued.

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<sup>1</sup> <https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html>

<sup>2</sup> <https://prishtinainsight.com/kosovo-accreditation-agency-loses-european-network-membership/>

<sup>3</sup> <https://prishtinainsight.com/gallery-protestors-demand-resignation-of-kosovo-chief-prosecutor-mag/>

The Rule of Law reality in Kosovo is extremely volatile as is. The citizens and civil society organizations alike are demanding more and institutions are not delivering with better performance or transparency. Ultimately, in the Republic of Kosovo the restriction of an arbitrary exercise of power and proper accountability of government is not guaranteed in practice despite legal provisions for that effect. This Rule of Law negligence considerably hinders imperative issues in society, such as corruption, equal access to justice, fair trials and other interconnected human rights principles.

## RULE OF LAW CONCEPT

When assessing the Rule of Law in Kosovo, a distinctive factor must be considered as backdrop to the current standing of the legal system and political developments in the country. Kosovo's legal background and foundation is unique - following the NATO intervention in 1999 which ended the war, international actors attempted to cover legal and political gaps through the mandated mission of the United Nations in Kosovo (United Nations Interim Administration Mission in Kosovo, UNMIK) by order of Security Council Resolution 1244. UNMIK sought to ensure proper institution-building efforts while autonomy and self-government lacked in Kosovo. In parallel, a tied-in OSCE mission led democratization and institution-building efforts more so related to the Rule of Law and the respect for human rights and, also established under the umbrella of UNSC Resolution 1244, the European Union Rule of Law Mission in Kosovo (EULEX) deployed police and civilian resources. These peacekeeping efforts managed legislative, executive and judicial powers in this post-conflict society, the effects of which last until today in terms of governance transition and institutional efficiency. As things currently stand, the Constitution of Kosovo is the primary legal document in the country and national state institutions are complemented by efforts from international missions on the better fulfillment of the rule of law implementation, human rights obligations and government accountability.

In light of the cluttered legal system in place, civil society organizations (CSOs) exercise an important monitoring role over state action and state spending. Nevertheless, this watchdog action is often inadequate seeing as such organizations operate on an *ad hoc* basis and with

limited funding. Funding for projects is usually external, donor-based, which renders this layer of monitoring as underdeveloped in promoting citizens' interest independently from the government. While conducting our research, reports and experts from the following organizations and/or missions were consulted: Kosovo Law Institute, Group for Legal and Political Studies, Kosovo Democratic Institute, UNDP Kosovo, Swiss Cooperation Office Kosovo and OSCE Mission in Kosovo. Generally, civil society action is supported by external donors or initiatives from international missions to cover gaps of poor domestic support or even governmental antagonism. An example of such actions was the Public Integrity Initiative launched by the American Embassy in Kosovo with the aim of enhancing judicial transparency, ethics, and independence in view of improving national conditions and advancing Euro-Atlantic integration prospects<sup>4</sup>.

## METHODOLOGY

Rooted in the recently published Council of Europe's Checklist for evaluating the Rule of Law in single countries, the Group for Legal and Political Studies (GLPS) conducted an assessment and evaluation of the Rule of Law application in Kosovo. The results and tied-in recommendations are presented below, aiming at improving legal and political certainty in a country where citizens' trust in institutions must be restored. In order to assess the Rule of Law principles operating in Kosovo, the Methodology employed was inspired by the Council of Europe's Rule of Law Checklist for assessing the Rule of Law in from the view point of its constitutional provisions, laws, by-laws and rules of procedure to assess the difference between law and implementation. The Checklist contains eight major benchmarks, which in turn encompass several indicators to monitor and evaluate the state of play as it stands in an objective manner. In finding the sources and explanations for the indicators, the Constitution was taken as the highest ranking of source of law, followed by ordinary laws, judicial decisions and relevant NGO monitoring reports. The checklist is comprised of 23 indicators, grouped into 5 categories:

- Legality

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<sup>4</sup> <https://xk.usembassy.gov/launch-of-the-public-integrity-initiative-in-kosovo/>

- Legal certainty
- Prevention of abuse (misuse) of power
- Equality before law and non-discrimination
- 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 score, 1 if the operational question is fulfilled, and 0 if it is not fulfilled. Thus, the indicators' fulfillment gives the percentage of fulfillment - for example if an indicator has 8 operational questions and 6 are achieved, then we can say that the indicator is 75% fulfilled. However, the intention of the analysis is to give also a qualitative interpretation of the results in order to help decision-makers better shape the agenda.

## RULE OF LAW IN KOSOVO – DATA ANALYSIS

### LEGALITY

The principle of legality is explicitly recognized as an aspect of the Rule of Law by the European Court of Justice, as noted in the 2004 judgement of the court on the case of *Commission of the European Communities v CAS Succhi di Frutta SpA*. It states that "the fundamental principle that, in a community governed by the rule of law, adherences to legality must be properly ensured"<sup>5</sup>. The principle of legality entails the standing of a transparent, accountable and democratic process for enacting law, made possible by effectively accountable and transparent institutions and representative decision-making.

With a score of 4 points in 8, the **Supremacy of the Law** as a chief democratic principle that requires both citizens and government to be subject to standing laws of a country, shows a 50% fulfillment in Kosovo. The same percentage applies to the indicator on **Compliance with the Law** (3 points out of a total 6). There is a clear definition of powers of public authorities and exercise of judicial review by law and statutes. Our research lists this indicator as a best practice, for the powers of the public authorities are properly defined by the law that defines the competencies of the public authorities, such as the regulations and administrative instructions for each Ministry. Additionally, the division of power among the three main branches of government (executive, legislative, judicial) is well-defined in Chapters IV to VII of the Constitution. Yet there lacks an unconditional respect of legal norms by all state bodies, official authorities, organizations and citizens. The 2008 Constitution in place is relatively complete, seeing as it was drafted by local and international legal experts with the intent for peace and stability in Kosovo as a multi-ethnic country. Nevertheless, in practice public authorities often operate with delays, without a legal basis and in infringement of their legal obligation to uphold human rights.

Such disregard for the supremacy and compliance with the law is tied to an overall prevalence of corruption in the country. For instance, all acts of government must be consistent with law for, if not, cases go to the Constitutional Court where a decision is

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<sup>5</sup> ECJ, C-496/99 P, *Commission v. CAS Succhi di Frutta*, 29 April 2004, § 63

reached on their compliance or violation – however, there have been cases when the Constitutional Court reaches a favorable verdict for reasons of political influence<sup>6</sup>. Furthermore, the recent Law on Conflict of Interest (LAW NO. 06/L-011) that has just come into force, stipulates that high officials cannot hold two salaries/positions at the same time, yet currently the Chief Prosecutor has around seven positions, as do other high officials in government who also follow this practice.

In Kosovo, the domestic legal system ensures and privileges an **alignment with the rules of international law**. Principally, in search of an uncontested recognized standing as an equal member of the international community and also rooted in the drafting process having been carried out in large part with international supervision. This sub-category's score is 100%, rendering it a best practice sub-category in this research. Regarding the interdependence and hierarchical relationship between international law and domestic law, abiding by both international customary law and obligations derived from international treaties have priority over the Constitution, even if Kosovo is not a state party to many international and/or regional treaties and human rights covenants. In case of legal vacuums, international laws take precedence over the Constitution, as determined in Article 22 of the Constitution – "Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, and are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions". In a similar manner, the Ahtisaari Plan, also known as the Comprehensive Proposal for the Kosovo Status Settlement which pertains several issues on the Kosovo's international status, also has priority over the Constitution even though the legal document is based upon it. Moreover, Article 53 of the Constitution determines that human rights provisions must be consistent with court decisions of the European Court of Human Rights, which renders decisions and case law derived from the ECtHR as binding interpretative guidelines.

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<sup>6</sup> <http://zeri.info/aktuale/85950/vendimet-kunderthenese-te-kushtetueses/>

The following sub-category within the broader ‘Legality’ category is **Law-making Powers of the Executive**, which showcases a fulfillment score of 0%. Despite a tripartite division of powers being enshrined in the Constitution and Kosovo being a parliamentary state, the supremacy of the legislature is not ensured. Control of the executive branch (i.e. the government) is rarely exercised. The executive has overhauled competencies of the Assembly, an example being the decision on salaries. It clearly falls on the scope of the Assembly but the government has since taken charge. An analysis of the legal order in place showed that, moreover, there is no effective remedy against such abuse. Regarding **Law-making Procedures**, the transparency, accountability and inclusivity of the process for enacting law scored a 2.5 in 6 fulfillment points. While there are clear constitutional rules on the legislative procedure, proposed legislation often is not debated or adequately justified - for instance laws proposed by the executive branch are sent directly to the Assembly without garnering an open discussion that takes into consideration the recommendations from CSOs. There are no official or regular channels that bridge citizens and public debate, making citizens' participation in public affairs and legislation quite limited and mainly consisting of the election cycle every 4 years. Besides this inclusivity gap, when it comes to accountability, the budgetary impact of legislation is never assessed. Especially in cases of fulfilling human rights standards, usually a budget is defined but never sent to implement the law.

The following sub-category, **Exceptions in Emergency Situations**, carries a full contentment of 100%. Constitutional Article 131-2 clearly defines the national provisions applicable to emergency situations within the nation-state and, most importantly, the duration, the scope and the limitations to such abnormal circumstances. Namely it delineates the possible derogation of rights under such emergency circumstances, with the full respect of fundamental freedoms being inalienable.

Unlike the precedent sub-category, the **Duty to Implement the Law by public authorities** scored a null fulfillment. A main problem pertains the conduction of a thorough analysis before and after the adoption of laws. As a new nation-state and a civil law country, the 2008 Constitution of Kosovo was directly inspired by constitutions of influential States,

however, no process was conducted to see how domestic implementation of such laws and values applies to the Kosovar reality. On the ground, for instance, some laws are not in tune with the particular sociopolitical circumstances of Kosovo, such as the anti-discrimination laws and the fact that, in reality, minorities remain socially and economically excluded. Tied to this, remedies against non-implementation of legislation have also proved to be inefficient in that there are no clear sanctions but rather scattered attempts to make up for the implementation gaps. An example to consider is the Law on Health Insurance which is not fully realized due to the lack of human resources and capacities. With regards to an effective implementation of the law, sanctions are not applied and violations are not identified which necessarily obstructs a fully democratic execution of the law.

Within the first analysis category – Legality - the final sub-category relates to **Private actors in charge of public tasks**. In Kosovo, the law does not hold non-State entities taking on traditionally public tasks with citizen impact accountable to Rule of Law requirements as public authorities holding similar tasks are. In fact, there is no mention of delegating public tasks to non-state entities in the Constitution. In the official CoE checklist document itself, the Commission highlighted how individual rights must be considered as being affected not only by State authorities but also by private actors and international organizations performing traditionally-state tasks and, for this reason, the Rule of Law principles should be applied in these cases as well.

Overall, the Legality category-benchmark marked a fulfillment score of 44.28% (15.5 points out of a total of 35 points). This means that Kosovo legislation framework needs improvement in terms of implementation and effectiveness of the responsible institutions, such as the Constitutional Court, which are lagging behind with delays in terms of providing support and review. Although a definite best practice is the way the domestic legal system ensures and privileges an alignment with the rules of international law, the country shows to still be in an initial phase of capacity and will to comply with the law and have a robust legal system, in view of the shortcomings identified throughout this analysis (i.e. lack of political will, lack of implementation, effects of political influence).

## B. LEGAL CERTAINTY

The Legal Certainty category, another central requirement for the Rule of Law, relates to the law providing those subject to it with the ability to regulate their conduct.

For this to be achieved, access to laws and court decisions that are comprehensible is the key. Regarding the **Accessibility of Legislation**, draft laws are made available to the public through the official webpage of the Assembly of the Republic of Kosovo and laws are also available, in Albanian/English/Serbian/Turkish/Bosnian, in the webpage of the Official Gazette of the Republic of Kosovo. This represents an easily and free way for citizens to consult all legislation, for which we deem this practice to fall under the ‘Best Practice’ category of our research. For the **Accessibility of Court Decisions**, decisions of the Constitutional Court, the Supreme Court, the Appeals Court and the Basic Court of each Municipality are made available in the Judicial Institutions webpage of the Official Gazette of the Republic of Kosovo, yet only some recent public judgements from last year but still not from all Kosovo courts. Exemptions are never justified to the public, which renders this particular sub-category’s score as 0.5 in 2 points, lower than the former.

On the topic of the **Foreseeability of the Laws**, the online law-listing platform in the Official Gazette of Kosovo is quite exemplary in this presentation of all legal acts and decisions. Also listed as a best practice is the fact that the laws are available and written in an intelligible manner in several languages in order to cover all minority groups (Albanian/English/Serbian/Turkish/Bosnian). The aforementioned official online platform also makes note of the laws affected and/or abolished for each new law published. However, this does not necessarily imply that **laws are stable and consistent**. In fact, in Kosovo laws are amended and changed very often for they end up serving the political interests of the parties in power at the time. An example is the Law NO.03/L –223 on the Kosovo Judicial Council, which has been amended three times in the last six years<sup>7</sup>. Also the sub-category of the respect for the **principle of legitimate expectations** is not ensured, in view of the fact that the principle pertains not only that public authorities must abide by

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<sup>7</sup> <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2713>

the law, but also by their promises and raised expectations - Kosovo's political standing as a hopeful candidate of international organizations renders it difficult to meet public expectations on top-bottom requirements.

Still within the scope of Legal Certainty, the topic of **retroactivity of legislation** is tackled. Articles 2 and 3 of the Criminal Code, on the Principle of Legality and the Application of the most favorable law, prohibit the retroactivity of criminal legislation, yet there is no general provision which prohibits the retroactivity of laws. This means each law needs to stipulate if a protection against retroactive application of the law applies. Other legal principles, such as the *nullum crimen sine lege* and *nulla poena sine lege*, are similarly listed as part of the Rule of Law checklist. In this case, the Criminal Code and the Constitution do indeed set forth principles in order for a person to face criminal punishment for an act that was criminalized by law before he/she performed the act - an example is the Resolution of Inadmissibility in Case No.KI88/17 of the Constitutional Court of the Republic of Kosovo, which cites Article 7 of the ECHR on the right to No Punishment without Law as a basis for the principle that only the law can define a crime and prescribe a penalty. Eventually, in reviewing if the **respect of *res judicata*** is ensured in Kosovo, the score is one of partial fulfillment. The Criminal Code formally provides *res judicata* but in practice there are exceptional cases due to a lack of coordination among the courts and prosecutors.

Overall, the final category score on matters of Legal Certainty in Kosovo was of 7 points in a possible total of 15, which rendered the fulfillment percentage as 46.67%. This therein renders the legal system of Kosovo as not fully predictable and transparent, rather potentially prone to arbitrariness. Wholesome legal certainty in the Rule of Law would signify that the citizens and various recipients directly affected by legislation feel certain and secure about the framework in place. However, in a system lacking stability and consistency, with gaps in accessibility and meeting of expectations, Kosovar citizens are more prone to feel their rights and interests are not being properly respected. Such a society is inevitably prone to higher crime and lower quality of life.

Every year laws are amended too often and, frequently, relay a superficial change rather than a substantial change of content. In fact, a law is usually amended to fulfill requests by the EU, it just being a matter of tick a box – for instance, the anti-corruption legislation has been amended several times, but has not shown substantial results that corruption is being fought yet.

### C. PREVENTION OF ABUSE (MISUSE) OF POWERS

The importance of the Protection against arbitrariness of power has already been mentioned by the European Court of Human Rights in a number of cases. Prohibition of arbitrariness is another key principle in any democratic state with standing Rule of Law in that it prevents violations of law and sets a standard for fair and equitable conduct.

This category only holds one sub-category, pertaining to **the existence of legal safeguards against arbitrariness and abuse of power by public authorities**. The overall score of fulfillment is 1.5 points out of 4 total points. This 37.5% percentage of fulfillment means that, albeit the existence of laws in formality, the laws and mechanisms often fail in practice and their implementation.

Legislation and provisions exist on this category but there is a clear lack of action in practice when it comes to mechanisms to prevent, correct and sanction abuse of discretionary power. For instance, in 2018, the case of the increase of high officials' salaries by the Prime Minister and the Government interfered with the division of powers set in Chapters IV to VII of the Constitution. This executive decision directly affects the Law on the Budget, which needs to be approved by the Assembly yet went forth without the mandated consent. Such an example of interference on the legislative competences is not exceptional. Many cases of abuse of power have been recorded by the President, the Prime Minister and other high rank officials. In matters of President, former Kosovar President Behgjet Paçolli left his position after a month in office following a ruling from the Constitutional Court that his election had been irregular. Also former President Fatmir

Sejdiu resigned from office following raised constitutional concerns. Most recently the Ministry of Justice resigned claiming political influence.

Another case which further showcases the disparity between written law and implementation of the law is the dismissal of the Kosovo Accreditation Agency (KAA) board by the Prime Minister without any prior or official communication. What's more, the judicial review undertaken by the Constitutional Court, following the mechanisms found in the Constitution and the Law on the Constitutional Court, determined that the dismissal of the KAA board was not a misuse of powers. This decision was tied to political interference in this decision-making.

Here no best practices were listed for it was found that this particular category is lacking in deliverance of proper results in practice. The correct way to combat potential misuse of powers is to ensure that laws passed in that regard are fulfilled and therefore lead to improvements. A welcomed step is the recently-passed Law No. 06/L-011 on Prevention of Conflict of Interest in Discharge of a Public Function, in April 2018. Still, the lasting and practical effects of this law being passed have yet to be seen, overtime, on the combat against arbitrariness and abuse of power.

#### D. EQUALITY BEFORE THE LAW AND NON-DISCRIMINATION

The Rule of Law and Human Rights are interdependent and interlinked. A strong Rule of Law regime would not be effective or conducive to a sustainable democracy if it did not cart a protection and promotion of human rights. Moreover, the Rule of Law itself encompasses various inalienable human rights, such as the right to equal treatment before the law and the right to a fair trial. Both the ECHR and the European Court of Human Rights (ECtHR) have defined standards on not only primary concepts such as equality and non-discrimination, but similarly on pre-trial detention and the presumption of innocence.

According to the Kosovo Constitution, the courts are obliged to follow the European Convention on Human Rights (ECHR) yet in practice this rarely occurs. For instance, in recent amendments to the Criminal Procedure Code recently, EULEX officers stated that

abiding by EU standards is more important than following the ECHR, despite the Constitution affirming adherence to the latter in Article 22.

Starting from the basic principles in the topic of equality, the Constitution enshrines the **principle of equal treatment** and state commitment to promote the right of individuals to be free from discrimination. This is defined in Article 24 of the Constitution of Kosovo - "Everyone enjoys the right to equal legal protection without discrimination" - and further consolidated in Article 7 on the **principle of non-discrimination** and in the Law No. 05/L-021 on the Protection from Discrimination which prohibits both direct and indirect discrimination. This focus on the prohibition of discrimination is listed as a best practice, yet still suffers from the fact that this anti-discrimination law is often not used in practice given that the prosecution shows many shortcomings in its application. Moreover, in parallel to the Rule of Law and existing equality before the law safeguard, the LGBT community still faces prevalent discrimination in society and everyday life despite the Constitutional guarantee in Article 24 that "No one shall be discriminated against on grounds of (...) sexual orientation (...)". On this issue, the second LGBT+ parade took place in Kosovo in October 2018, in demand of better visibility and appealing to institutions to recognize the discriminatory issues this community faces.

In matters of **Equality in Law** and **Equality before the Law**, Kosovo is an interesting legal country case to examine given its status as a multi-ethnic state with six major ethnic groups, as represented in the national flag: Albanians, Serbs, Turks, Gorani, Roma and Bosniaks. Delineated as a Constitutional Basic Provisions, Article 3 and 7, enshrine equality before the law. Article 58-7 of the Constitution stipulates that "The Republic of Kosovo ensures, on a non-discriminatory basis, that all communities and their members may exercise their rights specified in this Constitution". However, in practice, some gaps still need to be covered. Regarding if that legislation violating the principle of equality can be challenged by, in Kosovo the Ombudsperson has three months to provide to the Constitutional Court the review of the discrimination in question, yet going through all legislation to assure conformity is rare, given a lack of resources.

With a final score of 8.5 out of 10, the Equality before the Law category showcases the highest fulfillment score of all (85%). Since one of the main goals of the Kosovar government is integration into the European Union, the United Nations and other international organizations, the domestic institutions have paid a clear attention to the respect of such rights.

The Constitution of the Republic of Kosovo promotes a human rights regime in almost every Chapter, however dedicates Articles 21 to 62 exclusively to the matter. In this section, the official document safeguards two types of human rights. Individual rights regardless of ethnic background (i.e. right to life, human dignity, right to a fair trial) are put forth in Chapter II, and collective rights (i.e. representative rights, rights to use their language in official documents) which seek to protect communities holding ethnic minority status are put forth in Chapter III. The **collective rights for ethnic minorities** assured in the Constitution complement the individual equal rights also assured. In this way, principles of equal treatment and non-discrimination are upheld, especially noting Kosovo's multi-ethnic composition. Non-majority communities, namely Kosovo Serbs, are granted certain privileges in order to assure proper representation. In fact, Article 24 allows differentiations in that "Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled". This ideal, considered as a best practice in our research, is further materialized in Article 64 of the Constitution regarding the Structure of the Assembly, Article 67 on the election of Deputy Presidents and Article 97 on Ministers and Representation of Communities. On this note, Article 58-2 of the Constitution mentions the Council of Europe in stating that "The Republic of Kosovo shall promote a spirit of tolerance, dialogue, and shall support reconciliation among communities and respect the standards set forth in the Council of Europe Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages".

Looking at the practical side, the search to uphold equality and non-discrimination standards is met. The mandated quotas are respected and there is consultation between the different minority groups – for instance no Constitutional amendment can be done without the approval of all minorities since all amendments require a double majority to pass.

Regardless, inter-ethnic tensions are still very present in practice in Kosovo's daily life. A recent example is the tension which arose for the occasion of Serbian President Vucic's visit to the Gazivoda Lake dam in early September 2018, the control has long been a source of contention between Belgrade and Pristina<sup>8</sup>.

## E. ACCESS TO JUSTICE

Access to justice is a basic principle of the Rule of Law. In the absence of it, citizens are unable to have their voices heard, exercise their rights or hold decision-makers as well as formal and informal institutions accountable.

In this category, the first checklist sub-category pertains **the independence and impartiality of the judiciary**. It is crucial in a democratic society that the judiciary is impartial and independent of any organ and all external pressures in order for the wider public to have confidence that cases will be decided fairly and in proper accordance with the law. The score gathered here was of 50% (7 points out of 14). The Constitution (Chapter VII) assures basic principles of judicial independence and impartiality, yet this often does not translate in practice. In matters of appointment and removal of judges, Article 104 of the Constitution defines the Appointment and Removal of Judges, stating the grounds for removal are limited to serious matters. Article 150 of the Constitution further details such appointments, stating them to be until retirement age. Further definitions on grounds for removal and follow-up sanctions are not provided and, with regards to immunity, judges are not immune to even a small violation of an international law according to Article 107 of the Constitution. At present (July 2018), a Law on Disciplinary Prosecutor is in the early stages of being amended to reform the disciplinary proceedings to be applied. The Kosovo Judicial Council is the independent body in charge of disciplinary measures. It is composed of judges and deputies and is responsible for transfer and disciplinary proceedings of judges, as per Article 108-3 of the Constitution. The Office of Disciplinary Counsel is a separate body that serves the Kosovo Judicial Council and the

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<sup>8</sup> <https://www.reuters.com/article/us-kosovo-serbia/serbias-vucic-says-long-road-ahead-in-talks-with-kosovo-idUSKCN1LO0OV>

Kosovo Prosecutorial Council – however, the judiciary is often influenced by political powers or the executive, which harms its ultimate autonomy and transparency. Kosova Democratic Institute's (KDI)s 2017 report on Kosovo Justice Sector Integrity Scan notes that "The selection of court presidents, financing decisions on the judiciary as well as public statements in the media related to cases are seen as the most common situation where external interventions occur." For all the findings mentioned above which amount to the 50% fulfillment score, there is a generalized negative public perception about the judiciary.

Overall, standards are not met on the **sufficient constitutional and legal guarantees for the independence of individual judges** (1.5 points out of 4). In Kosovo, there is no hierarchy in legal terms regarding judges or prosecutors - the only way to monitor their actions is through appeal. With the KPC and the KJC they can use disciplinary proceedings and the evaluation of performance, both tools which were introduced in 2011. Yet these mechanisms are not applied or effective - for instance, not even 1/3 of judges and prosecutors have been evaluated despite the law stipulating this should be done regularly. The same lack of standards applies for **specific constitutional and legal rules providing for the impartiality of the judiciary** (0 points out of 2). In line with this, there is a widespread perception of corruption and lack of trust in the judiciary and its institutions. KDI's Judicial Integrity Initiative Survey Report of November 2017 accounts that the two most common corruption-inclined groups of citizens are perceived to be wealthy citizens and current politicians and government officials<sup>9</sup>. Specific measures against corruption in the judiciary are also lacking - there is a Law on Declaration of Assets for high state officials, but not for judges and prosecutors. Furthermore, there is no vetting procedure for such positions, which is why civil society is demanding a bill on the vetting process<sup>10</sup>.

Another topic is the **autonomy of the prosecution service** within the State structure. In Kosovo, both the judiciary and prosecutor system are highly influenced by the legislative and the executive. Additionally, KDI's Judicial Integrity Initiative Survey Report puts forth that Prosecutors (44.4% of respondents) are seen at greater risk of coming directly in

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<sup>9</sup> <http://kdi-kosova.org/wp-content/uploads/2018/01/154-judicial-integrity-initiative-survey-repor-eng-final-1.pdf> (page 21).

<sup>10</sup> <https://balkaneu.com/a-vetting-process-may-be-conducted-in-kosovo/>

contact with stakeholders outside the justice system (political actors and organized crime)<sup>11</sup>. This particular sub-category's score of 5 out of 12 points showcases that there are many legal provisions missing in order for sufficient control of the office of the public prosecution to be ensured. Article 109-6 of the Constitution determines that prosecutors may be dismissed given a serious criminal offense or for serious neglect of duties, and no further legislation exists on the matter. Recent months have witnessed many mass public protests against political impact on the work of the State Prosecutor, regarding the case of Special Prosecutor Elez Blakaj's resignation on account of being threatened during his work<sup>12</sup>.

The **impartiality and independence of the Bar** as the legal profession is sufficiently assured in Kosovo (score 4.5 out of 5). LAW No. 04/L-193 On The Bar defines the profession's conditions and lawyers' rights and obligations.

The next sub-category within the broader category of Access to Justice is **Fair Trials**, if an individual has an easily accessible and effective opportunity to challenge acts in court. Access to justice is troublesome in Kosovo due to an insufficiently resourced legal aid system, lack of coordination among institutions to ensure optimum use of existing resources for access to justice and an excessive backlog of cases. Several campaigns have been launched to better inform the public about their rights before the courts and available resources to exercise them. The Law on the Administrative Procedure (Law No. 02/L-28, Article 99) asserts that an individual act of breach of rights can be taken to the court and dutifully contested by individuals, and Article 53 of Criminal No. 04/L-123 on the Procedure Code and Article 29-3 of the Constitution guarantee the right to defense and the right to legal aid in LAW NO. 04/L-017 On Free Legal Aid (2012). In practice, in terms of free trial, if the indictment is up to more than 8 years the citizen is guaranteed the right to legal representation; if the indictment is less, then this right is more limited, which constitutes a human rights violation by the state.

**Other aspects of the right to a fair trial** are similarly sufficiently assured in the Rule of Law. Article 29-2 of the Constitution pertains the limitations of the deprivation of liberty,

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<sup>11</sup> <http://kdi-kosova.org/wp-content/uploads/2018/01/154-judicial-integrity-initiative-survey-repor-eng-final-1.pdf> (page 21).

<sup>12</sup> <http://www.balkaninsight.com/en/article/citizens-opposition-protest-seek-kosovo-chief-prosecutor-dismissal-08-22-2018>

and Article 30 regards the Right to Fair and Impartial trial, which the US Department of State's 2016 Human Rights report on Kosovo stated the judiciary generally upheld. Article 97-4 of the Criminal No. 04/L-123 on the Procedure Code asserts standards on the admissibility of evidence. Furthermore, the right to be heard, assured in the Code of Criminal Procedure, an appeals procedure is safeguarded in the Criminal Code of Kosovo, and all hearings and judgments are public.

Moving on to the **Presumption of Innocence** item on the checklist, Article 3 of the Criminal No. 04/L-123 on the Procedure Code assures the presumption of innocence of defendants charged with a criminal offence and Article 20 of Law No. 05/L-021 On The Protection from Discrimination defines the scope of the burden of proof for respondents.

Finally, the last indicator in the Fair Trials sub-category regards the **effectiveness of judicial decisions**. There is a big backlog of cases and a big problem with the execution of judgments and decisions, especially on criminal matters. Consequently, the effectiveness of judicial decisions as perceived by the public is low<sup>13</sup>. This lack of trust of citizens in the system is tied to a lack of objectivity of judges and prosecutors during verdict-reaching.

The last sub-category relates to **Constitutional Justice**. The access to justice is a fundamental right and obliged in the case law of the Constitutional Court. In practice, again we have problems because the appeals that courts and supreme courts establish the practice, but often do it differently and without a follow-up system. Individual persons have effective access to constitutional justice against individual acts which affect them - as was seen in the recent case of Blert Morina, a transgender man looking to officially change his first name in his ID documents from female to male, citing Article 22 of the Kosovo Constitution. Moreover, a citizen can take a case to the Constitutional Court if he or she finds the decision reached by the Supreme Court to be unacceptable.

With regards to harmony between three branches of government and the respective division of power, the government has not maintained effective relations with the Assembly on many issues. The Assembly has showcased several instances of difficulty and delays in decision-making procedures amid tense plenary sessions. Kosovo Democratic Institute's 2015 report on the assessment of Kosovo's national integrity system accounts the case

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<sup>13</sup> USAID and UNDP Kosovo's Action Paper on "Improving the public satisfaction with the work of the judiciary" (September 2011)

when, in the June 2014 general elections, the Democratic Party of Kosovo did not get the majority of the votes needed to form a government, which prompted a political deadlock until a coalition government was formed in December 2014.<sup>14</sup>

The access to justice is more than improving an individual's access to courts or guaranteeing legal representation – it relates accessing to justice before independent and impartial courts, including judicial review of administrative acts. In Kosovo, the judicial system presents itself as inapt in exercising its powers to fight corruption or assure transparency, given that both parliamentary and governmental influence interferes with the work of the judges. This not only accounts for a lack of high-level arrests, but also makes the public distrust the system. For instance, prosecutions are known to only be brought against officials who are not politically connected, therein fighting lesser corruption cases rather than organized crime. In parallel, the staff and the relevant personnel often lacks human or material resources to properly tackle cases and indict the suspected individuals<sup>15</sup>. In the fifth category, Access to Justice, the final score is of 57.46% (38.5 points out of a total of 67 points). This category is the broadest of all, encompassing 67 points to score, whereas in other categories such as “Legality” there are only 15 points in total to score. For a complete fulfillment to be reached, the Rule of Law of the country must provide access to justice for all as well as build effective, accountable and inclusive institutions at all levels. Certain promising, best practice measures have recently been taken by institutions and agencies combatting corruption, such as the draft law currently in place which asks all parties to disclose funds used in political campaigns, the Draft Law on Amending and Supplementing the Law No. 03/L-174 on the Financing of Political Entities.

## F. EXAMPLES OF PARTICULAR CHALLENGES TO THE RULE OF LAW

In the sixth and final category of the research, two-subcategories regard Corruption and Conflict of Interest and Collection of Data and Surveillance.

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<sup>14</sup> [http://kdi-kosova.org/wp-content/uploads/publikime/72-kdi-nis-eng\\_all\\_single\\_final.pdf](http://kdi-kosova.org/wp-content/uploads/publikime/72-kdi-nis-eng_all_single_final.pdf)  
pg.24

<sup>15</sup> <http://kdi-kosova.org/wp-content/uploads/2018/01/154-judicial-integrity-initiative-survey-repor-eng-final-1.pdf>

The fight against the phenomenon of corruption involves preventive measures and criminal law measures. Preventive **measures or specific rules of conduct applicable to public officials** against abusive exercise of public duties, include the recently-passed Law No. 04/L-050 on Declaration, Origin and Control of Property of Senior Public Officials and on Declaration, Origin and Control of Gifts of All Public Officials. Also a Law on Conflict of Interest exists, which seeks to prevent corruption, yet there is a problem with implementation - more than 2000 high official hold a conflict of interest, the Kosovo Law Institute has found in their research, and no proceedings are started because the prosecutor is similarly involved. In Kosovo, all categories of public officials (civil servants, elected or appointed senior officials at State and local levels, judges and other holders of judicial functions, prosecutors) are covered by the measures mentioned above. Recently, a promising and best practice measure was that the recently-passed LAW NO. 06/L-011 on Prevention of Conflict of Interest in Discharge of a Public Function, in April 2018. The score on preventive measures is quite promising, being 4 out of 5 total points.

Regarding the **criminal law measures taken against corruption** the score is of 3.5 out of 4 points, a particular matter to address is bribery. Article 428 of the Criminal Code of the Republic of Kosovo crimes accepting bribes and the Criminal Code prohibits all major forms of corruption, including active and passive bribery, extortion, attempted corruption, money laundering and abuse of office. The Code also prohibits bribery of foreign public officials and extortion. The criminal penalty for bribery ranges from one to ten years' imprisonment. The private sector bribery is also criminalized. Corruption and the fight against this phenomenon is further defined in Chapter XXXIV on Official Corruption and Criminal Offenses Against Official DUTY of the Criminal Code of the Republic of Kosovo, which defines the abuse of official positions, misuse of official information, trading in influence and other breaches of office.

All corruption-related offenses are punishable by imprisonment and/or fines. The delineation of offenses may be clearly addressed in law and anti-corruption laws may be strong, yet the judicial system is inefficient which renders, for example, the practice of offering gifts and bribery common in Kosovo. For this reason, the indicator on **Effective**

**compliance and implementation of preventive and repressive measures** is far lower – 2.5 points out of 6. Enforcement of such laws remains weak. In fact, as a side-note, one of the EU requirements for visa liberalization negotiations to be opened for Kosovo was the country showing clear efforts of fighting mass corruption. Despite many legislative attempts to halt corruption as advised by international monitoring missions, the State has experienced slowness and difficulties in enforcing anti-corruption measures.

Inevitably, it is presented that the public perception on corruption and anti-corruption is very low - UNDP Kosovo's Action Paper on Judiciary in Kosovo stated that "As for the perceptions of the presence of corruption in judiciary, 76.5% of the respondents believe that corruption is present on a large scale. However, when asked how they formed this opinion, only 15.5% base this statement on their personal experience whereas 52.3 % of the respondents base this perception on the information received through the media".

The sub-category of Collection of Data and Surveillance encompasses personal data protection, targeted surveillance, strategic surveillance and video surveillance. Law No. 05/L -030 on Interception of Electronic Communications and Law No.03/L – 172 On The Protection of Personal Data make sure **personal data** is processed lawfully, fairly and in a transparent manner. Relevant agencies include the National Agency for Protection of Personal Data (NAPPD), whose competency is defined in the latter law. It therefore assures the fulfillment score of 4 out of 4 points. The **targeted surveillance** indicator is also very accomplished (3.5 points out of 4), also following the aforementioned law's definition of the competences of the Commissioner for Oversight of Interception Process. However, it is worth noting that the Kosovo Law Institute has identified many cases in which the targeted surveillance has been abused by officials - for instance, surveillance is asked for 48 hours yet it carries on besides the strict limit imposed and is still accepted in court. The existing legal framework and safeguards for the collection of personal data and for targeted surveillance seem to be the same ones which apply to **strategic surveillance**. No further or specific laws are exerted, rather based on Law No. 05/L -030 and the Criminal Code of the Republic of Kosovo. Finally, with regards to the guarantees against abuse of **video surveillance**, subchapter J of No.03/L – 172 on The Protection of Personal Data defines the general provisions on this system. The main concern with this surveillance practice is its

presence in public places - Article 24 of Law No. 03/L-035 on POLICE authorizes preventive video surveillance of a public space while laying out the standards for retaining the data and informing the individuals.

The category touching upon particular challenges to the Rule of Law, namely corruption and surveillance, renders a final fulfillment score of 70%. The fight against corruption has been set as a priority for the Republic of Kosovo, also motivated by external recommendations from the EU. The collection of data has also been an issue dutifully targeted, both in the Criminal Procedure Code and in the Criminal Code of the Republic of Kosovo, as well as in laws directly monitoring this issue.

## CONCLUSION

There is a need to revitalize the confidence and trust in the relationship between citizens and the State in Kosovo. As our research shows throughout this Policy Brief, there is a pressing gap between the written legal framework and the reality in practice. Ultimately, the 2008 Constitution of Kosovo is not an *in practice* Constitution - much like other post-conflict societies, a gap remains between the *Rule of Law de jure* and the *Rule of Law in practice*.

In Europe, the unique standing of Kosovo in the regional and international scene renders its Rule of Law as one that is still in the making. In fact, while overseeing the drafting of the Constitution, the United Nations envoy reiterated, that “Kosovo shall be responsible for managing its own affairs, based upon the democratic principles of the Rule of Law, accountability in government, and the protection and promotion of human rights, the rights of members of all Communities, and the general welfare of all its people”<sup>16</sup>. As one of the world’s youngest democracies, a Kosovo-specific concept of the Rule of Law is still taking shape outside formalistic ideas. The Constitution drafted after the declaration of independence in 2008 is highly inspired by the Constitutions of mature, developed countries and not by those in post-conflict transition period. Consequently, in practice many of the Rule of Law provisions are not guaranteed, respected or even dutifully monitored.

For this reason, our research showed several sub-categories with a fulfillment score of 0 points. Ultimately, the formal provisions determined by law often depend on the affiliation and government influence tied to judges and prosecutors, which can lead to manipulation of legal proceedings as noted in examples cited in the analysis. The citizens - in other words the direct users of courts and other legal mechanisms - have shown by means of several surveys that they are eager for improvements and better implementation of the law. Yet the institutions themselves seem more averse to enhance transparency and efficiency. While the quantitative point assessment need not be 100% for the final assessment on compliance with the Rule of Law to be positive, the cumulative points definitely demonstrate where the main difficulties lie, which are the best practice and what lessons can be learned.

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<sup>16</sup> Article 1, Annex IX, United Nations Office of the Special Envoy for Kosovo 2007:52).

Ensuring transparency, accountability and responsiveness through the principles of the Rule of Law is pivotal and will contribute towards stability and security in the region. This can be achieved through a more fitting implementation of the existing legislation. As things stand, the laws are constantly changing in order to better reform and increase effectiveness of the system – but such frequent amendments have not guaranteed stronger compliance, implementation and enforcement. In this way, the Rule of Law focus should be on fortifying the system rather than expanding it or clogging it with too-frequent amendments. From these concluding remarks, the next section proposes some general recommendations for improvement of the implementation of the Rule of Law based on the shortcomings and challenges identified from the list of indicators. Full achievement of the Rule of Law is an ongoing task that must be kept under constant review, even in the well-established democracies.

## **Recommendations**

- Proper 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 (i.e. starting from the Prime Minister to the lowest category of public officials);
- The Committee on Legislation should improve their monitoring processes of the laws (i.e. check for violations, needs for amendments, or cases of interference);
- Establish a vetting process for the entire Judicial System of the Republic of Kosovo;
- Establish a system of checks and balances to prevent individual judges from pursuing a personal agenda or being prone to external influence;
- Provide an oversight of judges and prosecutors (i.e. improved ability to remove judges);
- Ensure protection of the judiciary and prosecutors from political manipulation – in order to allow these public officials to prosecute more cases of high level crime and corruption;

- Push for more and better transparency of both the Kosovo Judicial Council (KJC) and the Kosovo Prosecutorial Council (KPC);
- Facilitate the access to justice of women, minority communities, elderly, children and the poor.

**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 25
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