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DECRIMINALIZATION OF POLITICS IN KOSOVO



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ABOUT KLI

KLI, Kosovo Law Institute, is a non-governmental and non-profit organization on public policy, think-tank specialised in in the justice sector.

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1. Introduction

Rule of law continues to be the weakest link in the chain of state-building and governance in Kosovo. The relevant institutions, and especially the prosecution and the judiciary, face systematic and repeatable problems, one of which continues to be political interference. Despite all the problems of the justice system, thus taking into account only the few cases that this system treats, it is easy to create the impression that crime and politics coexist in Kosovo. Cases where senior state officials start the day of work in court as defendants before they continue to govern the country are not rare.

One such case is Valdrin Lluka, currently Minister of Economic Development. On 27 October 2016, the Basic Prosecution in Pristina raised an indictment against Valdrin Lluka, suspecting that in the capacity of a senior official at the Ministry of Trade and Industry (MTI), and also Chief of the Investment Promotion Agency, on 23 March 2014, had initiated the procedure for the commitment of 20 thousand Euros for the Non-Governmental Organization (NGO) "Jakov Innovation Center", in which he was the founder of this NGO. Accused according to this indictment was also General Secretary of the MTI Eljana Naka, who on 2 June, 2014, made a decision that funds of 20,000 euros should be allocated as financial support to the NGO "Jakov Inovation Center" , where she had been the director of the board. On 23 July 2018, the Basic Court in Pristina announced innocent Valdrin Lluka, who at this time was only Minister of Economic Development.¹ According to the verdict announced by the presiding judge, Judge Hamdi Ibrahim, it has not been proven that Lluka committed the criminal offense with which he was charged. Meanwhile, former Secretary General of MTI, Eljana Naka, was found guilty and sentenced to 7,000 euros fine.

Since October 2016, when an indictment was raised against him, and until July 2018 when he was found innocent, Valdrin Lluka continued his work. In September 2017, he was appointed Minister while his trial was still continuing. Since then, as a minister, he participated in nine court hearings at the Basic Court in Pristina.² During this time, accused of corruption and conflict of interest, on 20 December, 2017, Valdrin Lluka participated in the signing of the commercial agreement that the Government of Kosovo related with the American company Contour Global for the construction of the New Kosovo Power Plant, a project, which under this agreement, will cost 1.3 billion euros.³

Valdrin Lluka was neither the first minister nor the only one to have dealt with the judiciary while he was in the executive. Ministers, deputy ministers, mayors and deputies of the country continue to carry out state and political powers while remaining investigated or accused of abuse and corruption. On 10 April 2018, the Special Prosecution of the Republic of Kosovo (SPRK) raised an indictment against the former mayor of Gjakova, Pal Lekaj, charging him with two criminal offenses, that of abuse of official duty and acquiring on duty.

¹ "The announcement of the verdict in the case of Minister Valdrin Lluka and Eljana Naka". www.betimiperdrejtesi.com (See link <https://betimiperdrejtesi.com/valdrin-lluka-lirohet-nga-akuza-per-konflikt-interesi/>)

² Reports from monitoring court hearings in Valdrin Lluka case by OathforJustice. www.betimiperdrejtesi.com (See link <https://betimiperdrejtesi.com/?s=valdrin+lluka>)

³ "The agreement for construction of the new power plant" Kosova e Re "is signed. Free Europe. (See the link <https://www.evropaelire.org/a/kontrata-per-ndertimin-e-termocentralit-kosova-e-re-/28928811.html>)

The Basic Court of Gjakova has confirmed the indictment regarding the criminal offense of "abuse of official position or authority", while has dismissed the indictment for the criminal offense of "misappropriation in office". In the ruling which was provided by the "Oath for Justice", it is stated that regarding the criminal offense of abuse of official position, against accused Pal Lekaj, the evidence attached to the indictment by the prosecution's office are acceptable and their sustainability will be verified at the main hearing.

While the judicial process against him continues, Lekaj is exercising the function of the Minister of Infrastructure in the Government of Kosovo, where he manages a budget of more than 65 million euros.⁴ The calls of civil society organizations for his resignation, as usual, were ignored by the government.

These two cases best illustrate the situation of the current political caste in Kosovo, which in one way or another coexist with crime. The level of political and underground interaction is best seen during the publication of interception of political affairs that public knows them by the name "Pronto". In a series of audio-recordings published in the media, senior state officials are heard by 'devising' state affairs, making illegal decisions for appointments to public positions. On 6 April 2018, the SPRK raised an indictment in the case of the "Pronto" affair. Among the 11 accused are former chief of parliamentary group of the KDP, Adem Grabovci, current Minister of Innovation and Entrepreneurship, Besim Beqaj, current KDP deputy, Zenun Pajaziti, former chairman of the Municipal Assembly of Prizren, Nijazi Kryeziu, former Chief of Supply Unit at the Ministry of Health, Arbenita Pajaziti, former Secretary of the Ministry of Internal Affairs, Ilhami Gashi, former Deputy Minister of Labor and Social Welfare, Fatmir Shurdhaj, former political advisor to MIA, Sedat Gashi, etc. These persons are accused of committing the criminal offense "Violating equal status of citizens and residents of the Republic of Kosovo in co-perpetration", from Article 193 paragraph 4 in conjunction with paragraph 1 of the CCRK, in conjunction with Article 31 of the CCRK to which some of the offenses remained attempted.

According to the indictment, the defendants abused their official positions by cooperating with each other for the granting of privileges and unlawful advantages to persons who have competed in important functions such as: Director for Central Public Enterprises, Chief Executive Officer of the Registration Agency in The Ministry of Internal Affairs, the Head of the Agency for Medicinal Products and the Coordinator of the Civil Registration Center in the Municipality of Klina, denying and limiting the freedoms and rights of other candidates guaranteed by law.⁵

The initial review in the Pronto case, scheduled on 1 October, 2018, was postponed because former chief of parliamentary group of the KDP Adem Grabovci, the current Minister of Entrepreneurship and Innovation, Besim Beqaj, former chief of parliamentary group of the KDP, Zenun Pajaziti, did not appear at the Basic Court in Prishtina, when the trial against them was scheduled to start.

⁴ Law on the Budget of the Republic of Kosovo for 2018. (See link <https://mf.rks-gov.net/desk/inc/media/668E7D87-490C-4229-881B-E66CE614F4C1.pdf>)

⁵ "Pronto" affair, Special Prosecution raises indictment against Adem Grabovci, Zenun Pajaziti, Besim Beqaj and others. www.betimiperdrejtesi.com (See link <https://betimiperdrejtesi.com/afera-pronto-prokuroria-speciale-ngrite-aktakuze-ndaj-adem-grabovcit-zenun-pajazitit-besim-beqajt-dhe-te-tjereve/>)

Other four defendants were not present in the court, Arbenita Pajaziti, Ilhami Gashi, Nijazi Kryeziu and Fatmir Shurdhaj. Presiding Judge Shashivar Hoti said that the lawyer of the accused Beqaj, lawyer Besnik Berisha, had previously requested postponement of the hearing on the grounds that his client had previously obligations scheduled for his agenda.⁶

Based on such cases, the prestigious organization Freedom House in its annual report Nations in Transit noted that the political power in Kosovo remains informal, that decisions are taken at cafe bars by powerful political party circles and that state institutions are there to legitimize the decisions they make (Gashi, 2016). According to the same report, the informality of political power remains one of Kosovo's key problems in consolidating a democratic system. The Kosovo Law Institute during the process of monitoring judicial hearings in criminal cases in all Kosovo courts has identified a large number of cases when accused for corruption offenses or other criminal offenses are deputies of the Kosovo Assembly, ministers, mayors, members of municipal assemblies, and other appointed political persons or elected by the people's vote. Characteristic of these cases is the fact that a large number of these senior public officials, spend a part of their day in courtrooms as suspects of various criminal offenses where corruption offenses dominate, while the rest of the time exercise their public competences and responsibilities.

The criminalization of the political scene in Kosovo has become a matter of concern in Kosovo, especially since Kosovo's declaration of independence, being transformed into a 'standard' of governance. The highest institutions of the state, such as the Assembly and Government, but also the local power in the municipalities, are rarely notled by persons with criminal record or that have problems with the law. Government members and governance by persons with criminal record or that have problems with the law undoubtedly reduce credibility and legitimacy in relation to citizens and seriously affect the values and principles which are promoted by the Constitution of Kosovo.

It is expected that deputies of the Kosovo Assembly and the government cabinet represent the interests and aspirations of Kosovo's citizens. In a democratic society where minimum principles of democracy and good governance are applied, these representatives should be honest, accountable and convey confidence and security to the public. Starting from this principle, KLI in this study addresses the problem of criminalization of politics. The purpose of the study is to highlight the depth and complexity of the problem by framing some concrete recommendations. The main data for this study were collected from the daily activities of the KLI including monitoring of rule of law institutions, investigative reporting, and legal and public policy research. In addition, we have also conducted ten quality interviews with field experts and representatives of political parties. On the other hand, we have taken into account the previous findings and recommendations from studies by other civil society organizations' as well as their activities. We have interpreted this data with a pragmatic approach through abductive logic, trying to build a framework that draws a complicated view of crime interconnectedness with politics and leaves space for concrete recommendations.

⁶ "Absent Adem Grabovci, Besim Beqaj and five other, the initial review is postponed in the" Pronto "case. www.betimiperdrejttesi.com (See the link <https://betimiperdrejttesi.com/mungojne-shtate-te-akuzuar-shtyhet-shqyrtimi-fillestar-ne-rastin-pronto/>)

2. Everything starts with finance

The main source in coexistence of politics with crime, not just in Kosovo, but around the world, remains the funding of political parties. Powerful groups of interests, often related to crime, use the election campaign framework to support political candidates, in order for the same to "turn the favors" once they receive power. Even the most developed societies, such as The United States, continuously discuss for preventive measures of crime interaction with politics.

In Kosovo, civil society organizations have continuously emphasized the problems with the transparency about the funding of political parties, where criticism has been made on deficient legislation, inadequate law enforcement, lack of sanctioning measures against parties, etc. In previous studies, the KLI has emphasized that funding of political parties and expenditure of finances, especially for election campaigns, has always been problematic in Kosovo, because there is lack of transparency in funding and reporting of their finances.⁷ The same view is shared by other civil society organizations, research institutes and advocacy centers.⁸

According to the Kosovo Democratic Institute (KDI), political parties continue to not implement the law when it comes to declare their finances because they have never shown willingness to publicize their financial reports, including income, contributions, sources of funding, assets, liabilities, equity and expenses fairly.⁹ COHU organization has found that "the two main sources of political party finance come from the public budget and from external donors or in the form of cash or in the contributions to goods and services." According to the findings, "about 220 million euros have benefited political party funders from public tenders over a time period from August 2007 - May 2014".¹⁰

Further, based on the interviews, COHU has found that some companies that directly dealt with campaigning have emerged that in a triangle political-business marketing companies that compete in public tenders a strategy has been built to hide campaign funding but also to its own political parties.¹¹ Common findings from NGOs in Kosovo show that the responsibility for implementing the legal framework should be extended to all levels - with relevant oversight bodies, legislative bodies, political parties and potential election candidates.

⁷ "To investigate Political Parties"; www.kli-ks.org; August 16, 2013. (See the <https://kli-ks.org/te-hetohen-financat-e-partive>)

⁸ COHU, Kosovo Democratic Institute (KDI), Initiative for Progress (INPO), Institute for Development Policies (INDEP), KIPRED Institute, D4D, Levizja FOL, Democracy Plus, etc.

⁹ "There is No Political Will for Transparency in Political Party Financing" - (See Link <http://kdi-kosova.org/aktivitetet/nuk-ka-vullnet-politik-per-transparence-ne-financimin-e-partive-politike-2/>)

¹⁰ "Money Policy" - (See link <http://preportr.cohu.org/sq/hulumtime/Politika-e-parase-71>)

¹¹ "Non-declaration of finance results with clientele policy". (See the link <http://preportr.cohu.org/sq/hulumtime/Mosdeklarimi-i-financave-rezulton-me-politike-klienteliste-144>)

Common recommendations by common findings are as follows:

- Legislative review with special emphasis on the full definition of an institutional mechanism that would deal with oversight of its implementation¹²;
- The oversight institutions should take the necessary measures to impose sanctions for violating those rules regarding the reporting and publishing of political parties' finances;
- Private donations for parties should be allowed conditionally to not have any conflict of interest and to be limited¹³;
- In addition to punitive provisions foreseen by law, parties that do not implement the law should be taken the right to run in elections;
- Political parties to make public the businesses that they finance;
- Individual spending reports during the campaign¹⁴;
- Monitoring of donations of political parties in order to verify whether different donors have committed violations such as: having contractual relations with government and public institutions at the time when they donated or within the time that the law foresees as a violation¹⁵;
- Fundings of the Political Parties should be published on the web;
- Internal control of fundings within the party and detailed reporting to members.¹⁶

Funding political parties is the base issue, with full priority when it comes to criminalization of politics. Permanent and continuous empowerment of the legal framework that regulates this field is a full priority of the most developed societies and should be the absolute priority of developing societies. Hence, the issue of political parties' finances in Kosovo should be considered as a formal part of the problem, a part which is well identified. As we will elaborate on the following chapters, informal parts show the deeper nature of the stem of the problem with criminalization of politics.

¹² "Failed Meditation: Funding Political Parties in Kosovo". (See link http://cohu.org/repository/docs/Persiatja_e_Deshtuar_ALB-FINAL-Print-Bleed-v1_175837.pdf, December 2016)

¹³ "There is No Political Will for Transparency in Political Party Financing" - (See Link <http://kdi-kosova.org/aktivitetet/nuk-ka-vullnet-politik-per-transparence-ne-financimin-e-partive-politike-2/>)

¹⁴ In the same place. 5.

¹⁵ In the same place. 5

¹⁶ "Funding political parties" - -- (Shih linkun <http://inpo-ks.org/finacimi-i-partive-politike/>)

3. Non differentiation of Crime by Politics

Studies in social science show that crime and politics do not only interfere to the finances of political parties; interconnectivity of politics with crime is multifaceted, multidimensional and more radical than it is usually perceived. Sociologist Stanley Cohen highlights the risk of non differentiation of political violence from the criminal one, concluding that for many countries, especially those in transition, all prospects for consolidating democracy depend precisely on the societies' ability to differentiate crime by politics.¹⁷ Subsequent studies point out that while in developed countries the mix of crime with politics can determine the nuances of democracy, in transition countries such a interfere also determines the existence of democracy itself.

As a transition country, Kosovo faces a series of continuous problems that complicate the context of crime operation with politics. Here, first enters inheritance from the historical and social past, from the period of Yugoslavia, from repression and armed war, whether post-war and international administration.¹⁸ Taking into account the institutional theory according to which the behavior of a society's institutions depends on the behavior trajectory in the past, the problem of demarcation of politics from crime in Kosovo becomes more evident.¹⁹ Along the repressive powers in Kosovo, and even during the time of resolving Kosovo's status under international administration, being political in many aspects meant being unlawful. Hence, the difference between political power and criminal power becomes difficult. When in this social context it happens that politicians start the day as accused in court and continue to govern the country, the problem of criminalization of politics becomes dominant.

Democracy as a system of values and political organization does not depend on the principle of the rule of the majority, namely free elections, and the separation of powers, namely the rule of law, as is commonly perceived. The public sphere, through which citizens are directly involved in political life, is just as important in the functioning of democracy. especially since through the public sphere are discussed and defined values of a society, including its code of conduct.

In consolidated democracies, the public sphere serves as the main means of society to difference crime from politics. In each democratic society, senior state officials, politicians, and all those who hold public responsibility are subject to ethical norms set by society. Thus, each official investigated for crimes, the public automatically demands resignation from public responsibilities. The code of conduct, always under the observation of the public, works so well that rarely happens that the resignation is required; officials who are under investigation usually resign immediately, after being made public the suspicious about their relations with the crime. Although the code of conduct in this case does not guarantee an absolute explicate of politics from crime, at least it creates the impression of the functioning of the political and social system.

In Kosovo, as we described in the introduction of this study, ministers, deputies and mayors continue to govern even when investigations against them were completed. The governance of

¹⁷ Cohen, S. (1996) *Crime and Politics: Spot the Difference*, The British Journal of Sociology, Vol. 47, No.1, pp.1-23.

¹⁸ Linz, J. dhe Stepan, A. (1996) *Problems of Democratic Transition and Consolidation*. Baltimore: John Hopkins University Press.

¹⁹ Peters, G. (1999) *Institutional Theory in Political Science: The New Institutionalism*. London: Pinter.

people who have to share their work schedule to take part in court proceedings against them does not only leave a black spot in the ethical sense of the word, but takes incredibly practical proportions.

The lack of a functional code of conduct, transition societies like Kosovo, try to separate crime from politics through regulatory processes, either through preventive legislation or through institutional punishment measures.

In a recent study by the Westminster Foundation for Democracy, three means have been elaborated which various countries around the world use to maintain the border between crime and politics. In it, three types of actions are categorized that companies can undertake:

- 1) preventing liaison of politics with crime through laws,
- 2) exclusion of crime from politics through the regulations of public institutions and
- 3) preserving politics from crime through regulations of political parties, whether it be preventive or exclusive.²⁰

When drafting a legal framework, states may limit the right of citizens to compete for a public position. Thus, for example, different societies do not allow competition in the election of persons who have a criminal record. The problem of prevention through laws as a solution, however, lies in the fact that the main principle of lawmaking should be non-discrimination.²¹

Thus, at least two aspects should be considered here, that of international conventions that Kosovo applies directly, which give the rights to citizens, and the presumption of innocence, where the suspected persons or involved in a crime against whom there are no judicial decisions, can not be discriminated by being disqualified from the political competition.

States such as Britain, Spain and Australia, at different levels determine the manner and timing of such disqualifications, whereas the criminal offenses for which disqualifications usually occur are crimes related to elections, related to ethics (such as fraud, sexual criminal offenses, etc.) crimes against the state (treachery, terrorist acts, etc.) as well as premeditated criminal offenses.

But preventions through laws, in another way as states regulate the demarcation of crime from politics is through institutional rules. Political institutions, such as governments or assemblies, foresee detailed code of conduct for their officials, ensuring that in cases of mixing in criminal affairs, the same to exclude them.²² A third step identified in the same study, is that of regulating the problem through political parties. In fact, in most cases, political parties are making sure that their members respect codes of conduct, rather than legal ones, thus ensuring to separate crime from politics. From countries in transition, eg, the Union of Democratic Forces in Bulgaria, through the statute, excludes the possibility of membership of citizens who have committed any criminal or political act against the people or the Bulgarian state. In Ghana, the New Patriotic Party, according to its founding act, foresees a verifying commission for all candidates that run for public positions.²³ Political parties in other countries, especially those newly created, increasingly are trying to have such preventive provisions in strategic documents.

²⁰ Westminster Foundation for Democracy (2018) Transformation of Political Governance in Kosovo: Decriminalization of Political Governance. Pristina, 2018.

²¹ In the same place.

²² In the same place.

²³ In the same place.

4. Crime and Politics in Kosovo

The Constitution of Kosovo stipulates that any citizen of the Republic who has reached the age of eighteen, even on Election Day, has the right to elect and be elected, except when this right is limited by a court decision.

Exceptionally, Article 29 of the Law on General Elections has defined the categories of persons, who are ineligible to be certified as candidates for general or local election. Among other things, this law prevents the categories of these persons from running in general or local elections:

- a) Persons who are serving the sentence imposed by the International Criminal Tribunal for the former Yugoslavia;
- b) Persons charged by the Tribunal and have failed to comply with the order to appear before the Tribunal;
- c) Persons whose right is limited by a court decision, including the decision of the ECAC, has been deprived of the right to be a candidate;
- d) Persons to whom this right has been deprived, the right to be a candidate by a court decision; and
- e) Persons who have been found guilty for a criminal offense with a final court decision in the last three (3) years.

In wide plan, the debate is among the fundamental human rights that also guarantee the persons in the court procedure to choose and to be chosen, on the one side, and the values of society to be governed by persons with clean hands on the other side . In Kosovo, mainly based on the first part of the argument, we have continuously licensed election candidates, who did not necessarily have clean hands.

For example, last year, in 2017, local and mayors elections were held in Kosovo. During this election process, the CEC has continued to certify candidates who had proven criminal background. On 10 September 2017, the KLI reacted to the CEC regarding the certification of candidates with criminal offenses record, respectively with final court sentences, which run for assemblies and mayors in the local elections of 22 October 2017. In our response, we estimated that the CEC decision to certify candidates with criminal offenses record in the last three years, contrary to the Law on Local Elections in Kosovo, presents a scandal, inviting the State Prosecutor to investigate the CEC decision-making.

The basis for the investigation is underlined by the fact that despite the official data by the KJC for candidates with criminal offenses record, the CEC had made their certification or did not take any action in accordance with the law to clear lists of candidates for assembly or mayor of the municipalities. According to the same legal basis, according to the law of the country in Kosovo, these candidates should be denied the right to run in municipal elections scheduled on 22 October, 2017.

This CEC decision had witnessed the lack of political will of political parties, which through their representatives constitute the CEC body to respect legal criteria, aiming to introduce candidates with criminal record in violation of the law.

The political composition of the CEC would not pose any problems in democratic societies. The representation of political forces based on a template that reflects their political power is a formula that should produce a political balance. In Kosovo, however, the work of CEC often becomes a slave of this political balance, where political parties find consensus to make decisions that benefit them, and not necessarily the system and the society. The political composition of the CEC, therefore, makes the absence of the political code that would regulate the separation of crime and politics, to be reflected in this institution as well. Thus, the key state institution that regulates the work of political parties and elections, faces the same inability to regulate the separation of politics from crime.

Based on the official data that the KLI provided, of over 7000 candidates for whom the CEC requested data on their criminal record in Basic Courts of the Republic of Kosovo, over 600 candidates had final judgements of conviction, or were found in criminal proceedings. KLI had requested from the CEC, in accordance with the positive legislation, the removal of all candidates for assembly and candidates for Mayor of Municipality, with final judgements of conviction for criminal offenses.

In this regard, KLI has received complaints from candidates, who contested the accuracy of KJC data, and therefore requested the KJC to verify the data of final judicial decisions from the Basic Courts, in order to be accurate and to limit the rights of the candidates with final judgements, in accordance with the Law on Local Elections in the Republic of Kosovo.

On September 12, 2017, the CEC based in article 29 of the Law on General Elections, decided to decertify all candidates who were running for Mayors of Municipalities and Municipal Assemblies for the Local Elections of October 22, 2017, who had a final judgement from Courts of the Republic of Kosovo. Among those who were denied this right to compete for Mayor, was the Member of the Parliament from “Nisma”, Zafir Berisha, who had been running for Mayor of Prizren.

Against the CEC decision, the decertified candidates had filed an appeal to the Supreme Court of the Republic of Kosovo, including the candidate Zafir Berisha. The Supreme Court had approved the appeal of Zafir Berisha, candidate from the political entity “Nisma”, running for Mayor of Prizren, filed against the decision of Election Complaint and Appeal Panel. Consequently, the Supreme Court had obliged the CEC to certify the aforementioned candidate, for the Local Elections of October 22.

According to the Judgement AA.-Uzh.nr. 16/2017, of the Supreme Court, of September 19, 2007, no one can be denied the right to run in elections, if such right has not been removed by a judicial decision, which means that the candidate must be found guilty by a final court decision and the court must have imposed the accessory punishment “deprivation of the right to be elected”. The judgement of the Supreme Court also found that the Law on General Elections contradicts article 45 of the Constitution, where, according to the interpretation of this Court, on one hand, we have the constitutional norm, that stipulates that the right to run in elections may be

limited only by a judicial decision, and on the other hand, article 29 of the Law on General Elections provides the possibility of limiting this right without a judicial decision. In this case, the Constitution, as the supreme legal act, prevails.

Regarding the decision of the Supreme Court, also the US Embassy in Kosovo reacted. According to the Embassy, this CEC decision enforces Supreme Court orders to recertify the previous disqualified candidates, based on the Law on Elections. “We understand the decision of the CEC to return the 89 disqualified candidates, in response to the Court decision. However, we regret that the outcome of this decision undermines the excellent work of the CEC and the Election Complaint and Appeal Panel (ECAP) to enforce the prohibition provided by the Law on Elections, to disallow candidacy of candidates convicted of a criminal offense”, reads the letter from the US Embassy.

“We continue to support the spirit and purpose of that provision of the Law on Elections. We invite the relevant state institutions to correct any legal uncertainty regarding this provision, before the next electoral cycle in Kosovo. We believe that the voters look for uninhibited crime candidates”.

As a result of Supreme Court’s interpretation and legal uncertainty, respectively the Constitution of the Republic of Kosovo and the Law on General Elections, only in local elections held on October 22, 2017, have been certified and have run for Mayor or Municipal Assembly, over 600 persons with criminal record.²⁴

The Ministry of Justice during 2017 and 2018 has worked on re – viewing the Criminal Code of Kosovo, that was approved by the Government of Kosovo on April 13, 2018²⁵, and it is still on the Assembly of the Republic of Kosovo, for sub – measure procedures.

Provisions of the Draft – Criminal Code regarding the limitation of the right to be elected, are almost the same provisions of the currently applicable Criminal Code in Kosovo. Both the Criminal Code and the Draft – Criminal Code provide three types of punishments against perpetrators of criminal offenses: principal punishments, alternative punishments, and accessory punishments. Accessory punishments may be imposed together with a principal or alternative punishment.

In context of accessory punishments, it is provided the deprivation of the right to be elected. The Court deprives the perpetrator of the criminal offense the right to be elected from one (1), to four

²⁴ “KLI responds to the violation of the law by the CEC, requires the removal of certified candidates with final judgements of conviction and invites the State Prosecutor to investigate the CEC decision – making”. Kosovo Law Institute. September 10, 2017.

(Follow link <http://kli-ks.org/ikd-reagon-ndaj-shkeljes-se-ligjit-nga-kqz-kerkon-largimin-e-kandidateve-te-certifikuar-qe-kane-aktgjykime-denuese-perfundimtare-dhe-fton-prokurorin-e-shtetit-te-hetoje-vendimmarrjen-e-kqz-se/>)

²⁵ Draft – Criminal Code of the Republic of Kosovo, approved by the Government of Kosovo on April 13, 2018. (Follow link <http://kryeministri-ks.net/ep-content/uploads/2018/04/PROJEKTKODI-PENAL-I-REPUBLIK%C3%8BS-S%C3%8B-KOSOV%C3%8BS.pdf>)

(4) years, if that person, in order to be elected, commits any of the criminal offenses against the right to vote or any other criminal offense that is punishable by at least two (2) years of imprisonment. Whereas, according to the Criminal Code, the execution of the accessory punishments shall commence with the execution of a principal or alternative punishment. The execution of the accessory punishment regarding the deprivation of the right to be elected shall commence after the term of imprisonment has been executed, and while serving the punishment of imprisonment, the convicted person may not enjoy the rights limited by the accessory punishments.

6. Comparative analysis of the legislation on decriminalization

KLI research regarding the legislation of various countries in terms of decriminalization shows that practices are different, by imposing restrictions by specific laws and court decisions.

Practices of imposing restrictions by law or by court decision

Country	By Court decision to restrict the right to be elected	Because of the punishment imposed by the Court
Germany	When the Court issues a decision to deprive a person of the right to run for parliament or for public office.	Persons who lose the right to vote due to the criminal punishment. Those who lose the right to vote are automatically considered disqualified to run for parliament.
Great Britain	The House of Representatives has the authority to exclude members of the House who do not comply with the Chamber's rules, but this has been a rare occurrence lately.	A person who is found guilty of a criminal offense and is sentenced (or ordered to be imprisoned) for more than a year, is disqualified from the possibility of election to the House of Representatives.
USA	There is no constitutional or legislative ban for convicted persons to compete in Congress elections.	Article 1, Section 5 of the United States Constitution, "each House may set work rules, punish its members for irregular behavior and, with the consent of two thirds, exclude any member", giving the institution the right to impose sanctions up to the maximum sanction, that of exemption.
Estonia		Individuals lose the right to vote and run if punished by imprisonment of a particular crime.
Armenia		Individuals lose the right to vote and run if punished by imprisonment of a particular crime.
Turkey		A convicted person for more than a year and for serious offenses has no right to run.
Macedonia		Persons convicted over 6 months or serving a sentence for serious crimes have no right to run in elections.

Institutional exclusion practices:

Country	
USA	Article 1, Section 5 of the Constitution of the United States of America has stipulated that “each House may set work rules, punish its members for irregular behavior and, with the consent of two thirds, exclude any member”, giving the institution the right to impose sanctions up to the maximum sanction, that of exemption.
Bulgaria	The Union of Democratic Forces (Bulgaria) - The party's statute blocks the membership, in parties, of citizens involved in any criminal or political act against the people or the state of Bulgaria, either personally or as a member of a totalitarian party.
Great Britain	The main political parties in Great Britain have rules and policies for membership and candidacy. For example, the Labor Party's statute gives power to the National Executive Commission to act when a member is convicted of a crime, ranging from suspension to party exemption.
Germany	According to the Law on Political Parties, persons who have been deprived of the right to be elected or to elect by a judicial decision, are not allowed to be members of a political party. Therefore, they lose the right to be party candidates.
Kenia	Under the 2011 Political Party Act, the rules and regulations of each political party must be in accordance with the Constitution, and their failure to act is the basis for the de-registration of the party. The party must also sign a Code of Conduct, which inter alia forbids the party to take bribes, affect frauds and other forms of corruption.

6. Parties declaring “pro” decriminalization, but against the “practical” removal of the accused

Political liaisons with the crime and the experiences of the government officials who are adjudicated for corruption offenses in the morning, while in the afternoon participate in the meetings of the Government, Assembly of Kosovo, Municipalities, independent institutions and agencies, to govern in respect of the wellbeing of the citizens.

While dozens of senior state officials, such as Deputy Prime Ministers, Ministers, Members of the Parliament, as well as other officials, are investigated, accused and adjudicated for corruption offenses, KLI has encountered difficulties in providing many interviews with representatives of the political parties, to discuss the decriminalization of politics in Kosovo. Nevertheless, KLI has interviewed representatives of all parliamentary political parties, who declared pro decriminalization of politics, but in fact, most of them, for the time being, have representatives accused of various criminal offenses of corruption, excluding the representatives of “Vetëvendosje”, who are accused of non-corruptive offenses, but related to their actions of criminal sphere, within their political activity.

Political party representatives basically agree that the decriminalization of politics in Kosovo should take place, but they have different opinions on how to approach this problem. For the

current situation, where there are a large number of senior state officials with indictments and sentences, they have different assessments.

PDK²⁶, NISMA²⁷ and AAK²⁸ in principle, estimate that without final judicial decisions, no one should be prejudiced and incurred due to the filing of an indictment, or the prosecution of a case. They state that the accused should be taken care of, and by no means should be considered guilty and be punished. In this regard, AAK stresses that there are political implications in the justice system, where prosecutors have filed unfounded indictments against various officials, that have been rejected by the Court. LDK²⁹ states that there is no readiness to deal with governing officials, as they call them criminalized, because of the indictments that were filed against them for corruption. VV³⁰ estimates that the governance in Kosovo has built governing standard through people accused of corruption. Given the fact a number of MPs of this party have indictments for non – corruptive offenses, representatives of VV point out that the decriminalization idea should be taken care of, making a big difference between the idea of moving away from the scene the accused and convicted of corruptive and non – corruptive offenses. PSD³¹ considers that in order of having changes regarding decriminalization in Kosovo, there should be another government, that would take all – inclusive measures in all institutions regarding an inclusion on a vetting process. This, according to them, is the only solution for decriminalization.

Representatives of all these political parties emphasize that within their parties have discussed the idea of regulating the area of decriminalization, for which it is stated that all the entities agree. PDK states that this is an idea of their leader, while VV warns regarding the way how decriminalization is tried to be regulated, underlining, according to them, the persecution of this party's activists regarding pure political activities, while at the same time, the captured, according to them, judicial system, from the current government, amnesties the corrupt activities of the rulers.

The representative of PDK states that this party thinks that all party members who are being adjudicated and those who are convicted by final decisions, shall not be part of the institutions. However, such thing is not being respected, because in the Government and in the Assembly, there are MPs of the PDK, who are being adjudicated for criminal offenses, and they are not being removed. LDK insists that during the Mustafa rule, this party, had built a standard that people with indictments shall not be part of the governing institutions. However, there have been MPs of LDK accused of corruption, such as the case of Naser Osmani, who has not been withdrawn, and the party did not remove him. While AAK states that there have been cases when the officials, against whom were filed indictments, were removed, the representative of NISMA

²⁶ KLI interview with Mr. Elmi Reçica from Democratic Party of Kosovo. September 2018.

²⁷ KLI interview with Mr. Etem Arifi from Social Democratic Initiative of Kosovo. September 2018.

²⁸ KLI interview with Mr. Ahmet Isufi from Alliance for the Future of Kosovo. September 2018.

²⁹ KLI interview with Mr. Imet Rrahmani from Democratic League of Kosovo. September 2018.

³⁰ KLI interview with Mrs. Albulena Haxhiu from “Vetëvendosje” Movement. September 2018.

³¹ KLI interview with Mr. Frashër Krasniqi from Social Democratic Party of Kosovo. September 2018.

states that they will take a stand as a party, on how to act regarding such cases. VV and PSD seek clarification when it comes to accused persons, stating that for corruptive acts they should be removed, while for political offenses this criterion should not be applied.

When it comes to acting regarding the removal of persons with controversial integrity due to indictments or convictions, PDK states that the party and the government are the ones to decide. LDK estimates that political parties, in the current circumstances, are unable to remove individuals who are facing indictments, therefore considers that such thing can be regulated only by law. PSD, AAK and NSIMA state that the party should decide regarding the removal of such persons and that a discussion regarding this subject has taken place within the parties. VV states that they will not remove their representatives against whom have been filed indictments, as long as these indictments, according to them, are political persecution and the criminal offenses are related to their political activity.

KLI interviewed representatives of political parties and asked what policy should be used, based on the opinion of their party, to decriminalize politics, and can this be regulated by a Code of Conduct, that should serve all political parties to prevent persons who are facing problems with the law be part of the electoral lists, or even when they are serving as part of the executive, the moment they face official criminal charges filed by the prosecution, to leave temporarily from the government. In this regard, PDK estimates that there should be a common coordination and attitude of all political parties, and according to PDK this can be possible after all the parties publicly state that they are interested to regulate the issue of decriminalization. The representative of LDK, does not think that a Code of Conduct can be a solution regarding the decriminalization of politics. One of the reasons why such a Code cannot be a solution, relies on the fact that some parties that enter a government coalition, find it difficult to engage with powerful individuals of those parties, who remain untouchable. On the same line stands PSD, whose representatives state that problems of criminal nature can be regulated only by law, and not by a Code of Conduct, even though in principle, they would prefer a regulation by Code. For AAK and NISMA, political parties, based on their statutes could regulate the issue of decriminalization, while a common Code would be a solution to the entire spectrum of political parties. VV insists that without the clearance of the justice system, there cannot be a functional solution to decriminalize politics.

Regulation by law, according to PDK, remains the best option, and regarding this matter they state that the leader of this party has publicly disclosed the idea of decriminalization by law. They state that they are still working on how to regulate decriminalization by law, without violating human rights and freedoms. LDK also considers the law as the only solution, but sees no solution to this problem, without amending the Law on Elections, and concurrently without launching a deep electoral reform in Kosovo. NISMA states that supports legal regulation of decriminalization. AAK requires for the legal reform to be accurate and not ambiguous. VV and PSD state that the draft – law on decriminalization should be well analyzed as to what it is intended to regulate and what extent it will have.

One of the main problems in Kosovo, that we have dealt with in this paper, remains the suspicious funding of political parties. In this regard, PDK states that there must be cautiousness on how the political parties are funded, by investigating the source of funding, so that there is no criminal link. LDK states that the transparency of the funding of political parties remains a major problem in all states. According to LDK, suspicious funding from companies with high financial potential, has created monopolies and led to criminalization of politics, because funders always seek return services. VV states that this entity continues to be the most transparent one regarding the financial expenditures and all other revenues. VV calls for strict legal regulation on funding issue and the expenditures of political parties. AAK and NISMA state that there should be law enforcement and audits on political parties and independent candidates. PSD stress that this issue is regulated by law, but only the law enforcement is needed.

Political parties within themselves face numerous problems of democracy, where many of their members remain unseen, especially because of their leaders. The power to change within parties, they all claim to have within their bodies, but in practice there is a lot of criticism on the effectiveness of these bodies.

7. Towards problem solving

The need for decriminalization of the political scene is often highlighted by political and institutional leaders, representatives of civil society, the international community and others. Moreover, this problem constantly re – emerges in public some time before the general or local elections.³²

Since the declaration of independence in 2008, Kosovo has faced a government, either at the central, local or state administration level, with individuals who have faced problems with the law, affecting the lack of trust, credibility and integrity, regarding the citizens, and also the international factor.

Governance in a democratic state should guarantee and secure public trust in the functioning of the elected bodies, independent institutions, state administration, and those established by law, by preventing the election or appointment of persons who have been convicted or face problems with the law, in such institutions, or even by institutional exclusion or by removing from public function of such persons.

KLI based in the legal framework of Kosovo, the precedent set by the Supreme Court regarding the deprivation of the right to be elected, the practices and experiences of various states, and with particular emphasis, based on the situation created on the political scene and state and public

³² *Transforming Political Governance in Kosovo, Decriminalization of the Political Governance*, Comparative Report, Westminster Foundation for Democracy, February 2018.

administration, proposes several models on how the Republic of Kosovo can approach the decriminalization of the political scene in Kosovo.

a) Limitation by legislation

Kosovo Constitution in Article 45 stipulates that every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.

The decision of the Supreme Court, AA – Uhz.nr. 16/2017, of September 19, 2007, has reinforced this constitutional guarantee, by strengthening the right to be elected and by limiting this right only in cases when the candidate is convicted by a final court decision and when the court imposes accessory punishment “deprivation of the right to be elected”

The judgement of the Supreme Court also found that the Law on General Elections contradicts article 45 of the Constitution, where, according to the interpretation of this Court, on one hand, we have the constitutional norm, that stipulates that the right to run in elections may be limited only by a judicial decision, and on the other hand, article 29 of the Law on General Elections provides the possibility of limiting this right without a judicial decision. In this case, the Constitution, as the supreme legal act, prevails.

In this regard, the judicial precedent set by the Supreme Court, considers the legal provisions regarding the legislative prohibition defined by the Law on General Elections, but also by the Criminal Code of the Republic of Kosovo, unconstitutional and not applicable.

In addition, the Code of Good Practice in Electoral Matters of Venice Commission defines cumulative criteria on the deprivation of the right to be elected, which criteria include the obligation to be defined by the law, the principle of proportionality must be respected, it should be based on a serious criminal offense and it should be imposed by the court.³³

Under these circumstances, KLI considers that the legislative prohibition of the deprivation of the right to be elected, can only be regulated by constitutional changes and by considering the criteria and good practice regarding election issues and good governance.

³³ In the same place.

b) Institutional exclusion

Institutional exclusion either by the limitation of competing or by removing from the positions where they have been appointed in elected institutions, can be done by internal rules on inadequacy. Political parties by using internal rules to approve Codes of Conduct, would limit the right of citizens with criminal records or who are inadequate to join political parties. The Code of Conduct could set precedents through which the political parties can not propose inappropriate persons and who have contested integrity, to run for leadership positions, or other political positions.

The approval of the Codes of Conduct would be mandatory, self – regulating and exclusive to individuals who are facing problems with the law. Codes of Conduct can be based and can incorporate principles built by the Venice Commission and other countries with long experience of parliamentary democracies.

The advantages of such institutional exclusion, in practice, require political will of the political parties, and do not present a request for constitutional and legal amendments.



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