09/2024

Instituti i Kosovës për Drejtësi
Kosovo Law Institute
Kosovski Institut Pravde

ACCOUNTABILITY

(Constitutional and Legal Problems of the Current Draft Law)

Pristina, July 2024

Author: Gzim Shala

Editorial Team: Ehat Miftaraj and Betim Musliu

The content of this publication is the sole responsibility of the Kosovo Law Institute (KLI) and it does not reflect the views of the Bureau of International Narcotics and Law Enforcement Affairs (INL) - U.S. Department of State and the National Endowment for Democracy (NED).

Implemented by:

Instituti i Kosovës për Drejtësi
Kosovo Law Institute
Kosovski Institut Pravde

Supported by:

NED NATIONAL ENDOWMENT FOR DEMOCRACY
SUPPORTING FREEDOM AROUND THE WORLD

ABOUT KLI

KLI, the Kosovo Institute of Justice, is a non-governmental and non-profit public policy organization, a think tank specialized in the justice sector.

KLI, Ilaz Agushi Street
Prishtina
E: info@kli-ks.org
www.kli-ks.org

July, 2024
Prishtina, Republic of Kosovo

CONTENTS

ACRONYMS

LDRJP	Law on Disciplinary Responsibility of Judges and Prosecutors
MJ	Ministry of Justice
KLI	Kosovo Law Institute
SC	Supreme Court
IO	Institution of the Ombudsperson
KJC	Kosovo Judicial Council
KPC	Kosovo Prosecutorial Council
TRC	The respective Council

1. Executive Summary

The Ministry of Justice (MJ), the Judicial Council, the Prosecutorial Council, the Supreme Court, and the State Chief Prosecutor signed the Joint Declaration of Commitments on March 14, 2023, aiming to continue the justice reform. However, despite the goal of conducting the justice reform with the MJ alongside the heads of the KJC and KPC, the Ministry of Justice ended up alone in its attempt at justice reform due to disagreements among the institutions. The MJ has published six (6) Draft Laws on the Public Consultation Platform, including the Draft Law on Amending and Supplementing Law No.06/L-057 on the Disciplinary Responsibility of Judges and Prosecutors (Draft Law).

Firstly, it should be noted that the amendment of this Draft Law is a delayed initiative by the Ministry of Justice. The needs for amending this Law were presented as early as 2021, but they were not addressed by the Ministry of Justice, which had only amended one article of this Law.

Furthermore, the provisions of the current draft law are involved in constitutional violations. In this analysis, the KLI found that the MJ referred only to draft amendments that were not approved and, as a result, are not part of the Constitution. These are constitutional amendments that the Constitutional Court had given the green light for approval, but they were never approved.

Another issue with the Draft Law is the mixing of disciplinary responsibility with criminal responsibility. Specifically, the Draft Law lists a criminal offense as a disciplinary violation. Such mixing of these two types of responsibilities is also evident in other articles of the Draft Law. The criminal procedure, both conceptually and procedurally, differs from the disciplinary procedure, and this distinction must be maintained. Mixing these two types of responsibilities contradicts the conceptual differences between them, which have been sufficiently elaborated by the Venice Commission.

The problems of the Draft Law also concern the investigation panels in the KJC and KPC. A system with a permanent panel creates an "institution" for handling disciplinary cases. This also means a concentration of case handling in this investigative panel. The creation of an "institution" for handling disciplinary cases has elements of the past disciplinary system of judges and prosecutors, when the Disciplinary Prosecutor's Office was functioning. The failure of this Office to address the need for accountability within the justice system is almost a notorious fact. Investigation panels, although not the same as this office, should not resemble that system.

On the other hand, the KLI believes that the Draft Law should remove the Institution of the Ombudsperson from the accountability system of judges and prosecutors. Until now, the Institution of the Ombudsperson has refused to exercise its competencies, while the Draft Law addresses the issue of appeals against the decision of the competent authority. Therefore, in this situation, the role of the Institution of the Ombudsperson is irrelevant in the accountability system of judges and prosecutors.

2. Delay in Initiative

The MJ had initiated amendments to the Law on Disciplinary Responsibility of Judges and Prosecutors (LDRJP). This Draft Law was published on October 26, 2020, on the Public Consultation Platform. According to this Draft Law, only one article of the LDRJP was to be amended. Welcoming the proposed amendment by the MJ, the KLI submitted 12 pages of comments on the needs to amend/supplement the LDRJP. These comments came after the KLI had identified practical challenges in the implementation of the LDRJP through close monitoring of this Draft Law by submitting disciplinary complaints. These comments addressed several issues of the LDRJP, such as disciplinary violations, definitions, complaints against judges and prosecutors, investigative procedures, disciplinary procedures, and appeals against disciplinary decisions. Furthermore, these comments also reflected practical viewpoints in terms of the Supreme Court's decision, as cited in the previous chapter.

At the time when the public consultation document regarding the LDRJP was published, the MJ was headed by Mr. Selim Selimi, who was succeeded by the Minister of Justice, Ms. Albulena Haxhiu, on March 22, 2021. These needs for advancing the LDRJP were ignored by the MJ, both during Mr. Selimi's mandate and Ms. Haxhiu's mandate. The latter sent the Draft Law to the Government for approval with only one amendment, ignoring all the concerns raised by the KLI. The Draft Law with only one amendment was approved by the Government on April 21, 2021, and the same was approved by the Assembly and entered into force on November 5, 2021.

Thus, the needs for reforming the accountability system of judges and prosecutors through the amendment and supplementation of the LDRJP were evident even at that time. However, the MJ ignored all these needs, fulfilling only the Legislative Agenda formally but not addressing the real problems of the Law on Disciplinary Responsibility of Judges and Prosecutors.

Thus, since the approval of the Law on Amending and Supplementing the LDRJP until today, nearly three (3) years have passed, and the said Law has not been reformed. Throughout this time, the disciplinary system of judges and prosecutors has been lacking due to the non-reformation of this Law. For example, during all this time, there has been no mechanism for appealing against the decisions of competent authorities.

At that time, the MJ emphasized that a complete review of this law would be done after the completion of several processes within the MJ, such as the Functional Review of the Rule of Law Sector, Vetting, etc.[1] However, while this Law is being reviewed, not only has the vetting not been completed, but it has not even started.

---

[1] Shala G; "Accountability without Progress"; p. 20; November 2021; (See link: IKD_Llogaridhenia-2021_Final.pdf), (Last accessed on June 30, 2024).

3. Reference to Draft Amendments

In the Basic Law on Disciplinary Responsibility of Judges and Prosecutors, legal violations are listed as disciplinary violations for judges and prosecutors [Article 5.1.1.2. and Article 6.1.1.2.]. The Draft Law replaces this violation with the requirement that the judge or prosecutor has unjustified wealth. Article 2 of the Draft Law emphasizes that "In Article 5, paragraph 1, sub-paragraph 1.2. of the basic law, it is amended as follows: 'it is proven that there is unjustified wealth by a final decision of the court or'", while Article 4 of this Draft Law emphasizes that "In Article 6, paragraph 1, sub-paragraph 1.2. of the basic law, it is amended as follows: '1.2. it is proven that there is unjustified wealth by a final decision of the court or'."

This provision is in contradiction with the Constitution of the Republic of Kosovo, as unjustified wealth does not fall within either of the two categories where the dismissal of judges or prosecutors is determined. Article 104.4. of the Constitution of the Republic of Kosovo specifies that "Judges may be dismissed from office due to conviction for a serious criminal offense or serious breach of duties," while Article 109.6. of the Constitution specifies that "Prosecutors may be dismissed from office due to conviction for a serious criminal offense or serious breach of duties." Thus, according to the Constitution, the basis for the dismissal of a judge and prosecutor is conviction for a criminal offense or serious breach of duties.

Therefore, Articles 2 and 4 of the Draft Law are in contradiction with the Constitution of the Republic of Kosovo.

For these provisions, the Ministry of Justice (MJ) has only referred to draft amendments, which have not been approved and therefore are not part of the Constitution. On March 2, 2023, the Speaker of the Assembly referred to the Constitutional Court proposals for amendments that pave the way for the development of vetting in the justice system. Part of these proposed amendments are also amendments 27 and 28 of the Constitution, according to which serious breach of duties under Article 104.4 and Article 109.6 include, among others, verification of unjustified wealth by judges or prosecutors. In this regard, the Constitutional Court of the Republic of Kosovo, through this ruling, opened the possibility for the approval of these constitutional amendments, considering that these amendments do not violate the rights established under Chapter II of the Constitution.[2]

However, after the decision of the Constitutional Court, the Assembly never approved the constitutional amendments that the Constitutional Court paved the way for. The decision of the Constitutional Court in this case is part of the constitutional procedure for amending the Constitution.[3]

---

[2] Constitutional Court Judgment in case no. KO55/23, "Assessment of proposed constitutional amendments referred by the Speaker of the Assembly of the Republic of Kosovo on March 2, 2023, through letter no. 08/3509/Do/1493/1"; (See link: KO55/23 Judgment), (Last accessed on June 30, 2024).
[3] Article 113.9 and 144.3; Constitution of the Republic of Kosovo, K-09042008; Official Gazette of the Republic of Kosovo; Pristina, 2008.

This decision implies that the Court allowed the Assembly, according to the constitutional procedure, to approve these constitutional amendments. However, this never happened, as the Assembly did not approve these constitutional amendments.

Therefore, in this situation, these provisions are merely draft constitutional amendments and are not part of the Constitution. Reference to them can only be made once these draft amendments are approved by the Assembly. If unjustified wealth were implied to be part of "serious breach of duties," then there would be no reason to propose amending the Constitution for this issue, as has occurred in the specific case. Thus, through this course of action, the Ministry of Justice referred to draft constitutional amendments, thereby violating the Constitution.

For these reasons, KLI recommends that Articles 2 and 4 of the Draft Law be removed.

4. Mixing Disciplinary Responsibility with Criminal Responsibility

The Draft Law [Articles 3 and 5] also lists the situation where a judge or prosecutor "abuses authority for financial or personal gain" as a disciplinary offense. This provision represents a mixing of two separate and distinct responsibilities, namely disciplinary and criminal responsibility.

The misuse of authority for financial or personal gain is a criminal offense. Article 414 of the Penal Code No. 06/L-074 of the Republic of Kosovo criminalizes the abuse of position or official authority. Chapter XXXIII of this Code also criminalizes many other acts of official corruption and offenses against official duty. Therefore, if a judge or prosecutor abuses authority for financial or personal gain, they have committed a criminal offense under the Penal Code of the Republic of Kosovo, and this does not count as a disciplinary violation. Therefore, if the commission of this criminal offense is proven, the court judgment that establishes this is sufficient basis for the dismissal of the judge or prosecutor, due to the commission of the criminal offense.

What the draft law does in this situation is list a criminal offense as a disciplinary violation. This distinction is made clear in the opinions of the Venice Commission. According to this Commission, judges are subject to two types of responsibilities: disciplinary and criminal. Disciplinary responsibility is different from criminal responsibility. This responsibility involves different elements from criminal responsibility and applies a different standard of proof.h[4] In a joint opinion with ODIHR/OSCE, assessing the Draft Law of the Republic of Moldova on Disciplinary Responsibility of Judges, the Venice Commission highlighted that one proposed article was unclear as it seemed to introduce criminal elements into the disciplinary procedure.

---

[4] Opinion No. 880/2017, "Republic of Moldova - Amicus Curiae Brief for the Constitutional Court on the Criminal liability of judges"; Venice Commission; Strasbourg, 13 Mars 2017; (Link: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)002-e), (Last accessed on June 30 2024)

In this joint opinion, the Venice Commission emphasized that the disciplinary procedure should not be mixed with the criminal one. On the contrary, it should be kept separate.[5]

The intermingling between disciplinary and criminal responsibility is also encountered in Article 7.7 of the Draft Law. According to this provision, "...Records of investigations or disciplinary sanctions shall be expunged after a period of five (5) years, except for disciplinary sanctions imposed for deliberate violations of the law or for disciplinary violations resulting in criminal conviction for a serious criminal offense." In this case, the scope of this Law does not include "convictions for serious criminal offenses." If a judge commits a serious criminal offense, this forms the basis for their dismissal due to committing a criminal offense. However, records related to criminal convictions, from criminal records, do not belong in records related to disciplinary sanctions. Unfortunately, this intertwining of these two types of responsibilities is also present in the basic Law [Article 7.5].

Thus, conceptually and procedurally, the criminal procedure differs from the disciplinary one and this difference must be maintained. Mixing these two types of responsibilities contradicts the conceptual distinctions between them, distinctions that have been adequately elaborated by the Venice Commission. Moreover, mixing these two procedural types undermines the clarity of reasons for imposing disciplinary measures. The clarity of reasons for imposing these disciplinary measures is one of the indicators of assessment of the independence and impartiality of the judiciary [6].

For these reasons, KLI recommends that Articles 3 and 5 of the Draft Law be removed.

5. Relation to Criminal Procedure

In delineating the distinction between criminal and disciplinary procedures, the Venice Commission emphasized that these two types of responsibilities differ significantly in terms of evidentiary standards but do not preclude each other. Disciplinary measures can still be applicable even if it is found in criminal proceedings that a judge or prosecutor did not commit a criminal offense. According to the Commission, the fact that a criminal procedure has not commenced does not mean that no disciplinary violation has occurred. The Venice Commission added that criminal procedures do not take into account the specific disciplinary aspect of inappropriate behaviour but rather focus on criminal guilt [7].

Article 11.3 of the Basic Law stipulates that "Referral of the case to the State Prosecutor interrupts the preliminary investigation and suspends the disciplinary procedure." This provision of the Basic Law conflicts with the distinctions between disciplinary and criminal procedures.

---

[5] Opinion no. 755/2014, Paragrafi 27, "JOINT OPINION ON THE DRAFT LAW ON DISCIPLINARY LIABILITY OF JUDGES OF THE REPUBLIC OF MOLDOVA"; Strasbourg / Warsaw, 24 March 2014; (Link: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)006-e), (Last accessed on June 30 2024).

[6] Venice Commission; "The Rule of Law Checklist"; May, 2016; (See the link: Rule of Law Checklist, (Valid until June 30, 2024).

[7] Opinion No. 880/2017, "Republic of Moldova - Amicus Curiae Brief for the Constitutional Court on the Criminal liability of judges"; p.6; Strasbourg, March 13, 2017; (See the link: Opinion No. 880/2017, (Valid until June 30, 2024).

As mentioned, disciplinary responsibility is a distinct form of accountability that applies different criteria and standards of evidence compared to criminal procedure.

Due to these differences, situations may arise where a person is acquitted of criminal liability, but they should still be held accountable for disciplinary violations. The development of disciplinary proceedings in this scenario, according to the Basic Law [Article 9.4], only recognizes this after the conclusion of the criminal procedure.

This problematic aspect of the Basic Law is not addressed in the Draft Law. In light of the given elaborations, KLI recommends that MJ amend Article 11 of the Basic Law in the Draft Law, specifying that the criminal procedure does not affect the disciplinary procedure, and that both procedures can be conducted concurrently.

6. Investigative Panels

Article 8 of the Draft Law stipulates that "Within the framework of the Judicial Council, an Investigative Panel shall be established comprising five (5) judges and two (2) reserve judges, and within the framework of the Prosecutorial Council, an Investigative Panel shall be established comprising five (5) prosecutors and two (2) reserve prosecutors. The mandate of the members of the investigative panels is five (5) years, without the possibility of re-election." Thus, unlike the Basic Law where a investigative panel is established for each disciplinary case, the Draft Law establishes only one investigative panel within the respective Council. The competencies of the investigative panel, under the Draft Law, will include investigating disciplinary cases and reviewing appeals against decisions of competent authorities.

Regarding the investigation of disciplinary cases, it should be emphasized that so far, there have been no issues encountered in practice regarding the manner of appointing investigation panels for the investigation of disciplinary cases. These panels are created for each specific case and have not created any significant administrative burden. For this reason, there is no need to transition to a different system with a permanent panel.

A system with a permanent panel creates an "institution" for handling disciplinary cases. This implies a concentration of case handling within this investigative panel. Therefore, as long as in each case the investigative panels consist of judges or prosecutors who meet the established criteria, it is more appropriate to have a separate panel for each case rather than a single panel for all cases. The potential for influence is lower when each case has a separate panel, as opposed to a single panel with a 5-year mandate.

The establishment of an "institution" for handling disciplinary cases has elements reminiscent of the former disciplinary system for judges and prosecutors, when the Disciplinary Prosecutor's Office operated. The failure of this Office to address the need for accountability within the judicial system is almost a well-known fact. Although disciplinary investigative panels are not identical to this office, they should not resemble that system.

Meanwhile, permanent investigative panels composed of judges or prosecutors with specific mandates are necessary regarding their second competence, which is deciding on appeals against decisions of competent authorities. Thus, the Draft Law should specify the creation of permanent panels solely for handling these appeals and not for investigating disciplinary cases. KLI recommends that panels for the investigation of disciplinary cases continue to be appointed as they have been until now, with a separate investigation panel designated for each individual case.

However, in terms of competence regarding appeals against decisions of the competent authorities, the establishment of a single investigative panel to review these cases is insufficient. Due to the large number of disciplinary complaints, there is a high potential for the number of appeals against decisions of the competent authorities to also be high. This is considering the fact that the majority of disciplinary complaints are dismissed or rejected by the competent authorities.

For these reasons, the IKD recommends revising Article 8 of the Draft Law in such a way that the appointment of panels for investigating disciplinary cases continues to function according to the basic Law, while for reviewing appeals against the decisions of the competent authorities, the creation of at least three investigative panels is determined. For the latter, provisions that clarify the relations of these investigative panels with the relevant Council should also be established.

7. Appeals against the Council's decision

Article 8 of the Draft Law specifies that "In case of rejection or dismissal of a disciplinary appeal, the appellants have the right to submit an appeal to the Investigative Panel which decides on the appeal within thirty (30) days." This provision is one of the most positive aspects of the Draft Law. Through this provision, the effectiveness of disciplinary procedures under this Law is enhanced. This is because the competent authority, in case of rejection or dismissal of a disciplinary appeal, will not be the final authority in deciding on a disciplinary appeal. Therefore, the appellant of the disciplinary appeal will have the right to appeal to the Investigative Panel.

However, the Draft Law regresses in terms of accountability regarding decisions issued by the respective Council. While according to the Basic Law, "parties" have the right to appeal against the decision of the respective Council, this right under the Draft Law is limited to the "subject of the investigation." Thus, apart from the subject of the investigation, namely the judge or prosecutor, neither the parties to the procedure nor the appellant of the disciplinary appeal have the right to appeal against the Council's decision. This means that in cases where the respective Council releases the subject of the disciplinary investigation from disciplinary responsibility, practically, that decision is non-appealable.

For this reason, KLI recommends that Article 12 of the Draft Law be reviewed so that the right to appeal against the Council's decision is also granted to the parties in the procedure and the appellant of the disciplinary appeal. The fact that the appellant of the disciplinary appeal already has the right to appeal against the decision of the competent authority necessitates recognition of the right to appeal against the Council's decision as well, requiring a redefinition of the term "parties to the procedure" to include the appellant of the disciplinary appeal.

Disciplining judges and prosecutors are a matter of public interest. This is evidenced by the fact that initiating a disciplinary procedure is also an official duty. For this reason, the legal interest of the appellant in criminal cases is not relevant in these cases. Establishing distinct procedural stages ensures sufficient security for judges and prosecutors regarding disciplinary appeals against them. Thus, incorporating the appellant of the disciplinary appeal within the parties to the procedure framework enhances the effectiveness of disciplinary procedures.

For these reasons, KLI recommends that the definition of parties to the procedure include the appellant of the disciplinary appeal.

8. Ombudsman

The Basic Law provides for the possibility of lodging a disciplinary appeal with the Ombudsman. Article 12.3 of the Basic Law specifies that "The Ombudsman may request the Council to initiate disciplinary proceedings against a Chief Judge or Chief Prosecutor if there are reasons to believe that he/she has committed a disciplinary violation under Article 9, paragraph 7 of this Law. In case of acceptance of the appeal, the Ombudsman may also request the Council to initiate disciplinary proceedings against a judge or prosecutor if it is considered that the Competent Authority has decided to dismiss the appeal against that judge or prosecutor in contravention of Article 9, paragraph 5, in which case he/she must provide reasons why the appeal should not have been dismissed."

However, in practice, the Ombudsman has not exercised the competences it has had, except in cases where the competent authorities have not issued a decision within the statutory 30-day period. The Ombudsman has taken the position that this institution has the competence to consider only cases where the competent authorities do not issue a decision within the legally defined period, but not in cases where this institution finds reasons why the disciplinary appeal should not have been dismissed by the competent authority. KLI has consistently opposed this approach of the Ombudsman, until in a case initiated by KLI, the Supreme Court confirmed KLI's positions rather than those of the Ombudsman. However, even after this situation, the Ombudsman continued not to exercise these competences, now adequately clarified by the Supreme Court[8].

In the case of the Basic Law, this lack of exercise of competences by the Ombudsman creates a very pronounced problem: the lack of control over the decision-making of competent authorities. This is because, according to the Basic Law, this competence is left to the Ombudsman, and the appellant of the disciplinary appeal does not have an address for an appeal. However, this problem is addressed by the Draft Law [Article 8], which emphasizes that "In case of rejection or dismissal of a disciplinary appeal, the appellants have the right to submit an appeal to the Investigative Panel which decides on the appeal within thirty (30) days."

---

[8] Shala G; "Accountability without progress"'; p. 16 and 19; November, 2021; (https://kli-ks.org/wp-content/uploads/2021/11/IKD_Llogaridhenia-2021_Final.pdf) (Last accessed on June 30, 2024)

In this situation, now that appellants of the appeal have the right to appeal against decisions of competent authorities, the Ombudsman loses its relevance in the system of accountability for judges and prosecutors. This is because these same competences are now held by the appellant of the disciplinary appeal. However, these competences have never been fully exercised by the Ombudsman.

For this reason, KLI recommends that the Ombudsman be completely removed from the system of disciplining judges and prosecutors.

9. Publication of Decisions

Article 7.4 of the Basic Law stipulates that "With the exception of non-public complaints, all final decisions on disciplinary sanctions shall be published promptly, but no later than fifteen (15) days by the respective councils on their official page." Meanwhile, Article 7.6 of the Draft Law reformulates this provision as: "All final decisions on disciplinary sanctions shall be published promptly, but no later than fifteen (15) days by the respective councils on their official page."

Thus, in both situations, both the Basic Law and the Draft Law obligate the publication of decisions "on disciplinary sanctions". Fortunately, so far, the KJC and KPC have interpreted this provision adequately by publishing all Council decisions on their official pages. However, from the wording of this text, it only concerns situations where there are "final decisions on disciplinary sanctions", which do not include decisions where it has been found that the appointed judge or prosecutor is not responsible for disciplinary violation. The publication of all decisions, as in cases where the subject of disciplinary investigation is found to have committed a disciplinary violation and in cases where it is found that no disciplinary violation has occurred, is of particular importance. Through these decisions, the public can monitor the decision-making process of the respective Council in disciplinary cases. Moreover, for the dismissal of subjects of disciplinary investigation from disciplinary responsibility, the respective Council must provide reasoning and accountability to the public. Furthermore, through these decisions, the interpretation of the respective Council concerning different situations is also understood.

For this reason, in order to avoid problems in the future regarding the interpretation of this provision, KLI recommends that Article 7.6 of the Draft Law be amended as follows: "All final disciplinary decisions shall be published promptly, but no later than fifteen (15) days by the respective councils on their official page."

Positive practice is evident in Article 9.8 of the Draft Law, where the positive standard set by the KJC for the obligation of competent authorities to publish decisions in disciplinary cases is now defined as a legal norm in the Draft Law.

However, the institution that publishes decisions according to Article 9.8 of the Draft Law should be the Court, respectively, the Prosecutor's Office and not the respective Council. This is because the decisions of the competent authority are decisions issued by the chief judge or chief prosecutor, institutions that are separate from the HJC and SPC, although they are under their umbrella.

For this reason, KLI recommends that Article 9.8 of the Draft Law be reformulated as follows: "All decisions of the Competent Authority must be in writing and must contain reasons for the decision and legal advice which are published promptly, but no later than fifteen (15) days by the respective Court or Prosecutor's Office on their official page."

10. Compensation of the Investigative Panel members

Article 12.3 of the Draft Law stipulates that "... the Council ensures that members of the Investigative Panel will receive compensation for their work on the Investigative Panel and a proportional reduction in their caseload as judges or prosecutors, and provides administrative and professional assistance to the Investigation Panel." Thus, according to this provision of the Draft Law, members of the investigation panels receive compensation for their work on the panel, as well as a proportional reduction in their caseload.

In this situation, members of the investigation panel benefit twofold for their work. While they continue to receive their full salary as judges or prosecutors, they do not perform their duties like all other judges and prosecutors due to their involvement in the Investigative Panel, resulting in a proportional reduction in their caseload. Moreover, they also receive compensation for their work on the investigative panel, despite being proportionally relieved of their caseload duties.

On the other hand, this provision of the Draft Law is not in harmony with Law No. 08/L-196 on Salaries in the Public Sector, which specifies in Article 13 that "The salary of civil servant consists of base pay, allowances, and compensations, where applicable under this law," and in Article 2.2 that "The rules and conditions for determining the salary of employees in the public sector are exclusively regulated by this law and may be regulated by other subordinate acts only when explicitly provided by this law." Chapter V of the aforementioned law defines allowances and compensations. Therefore, in each case, the respective Council may decide whether any of these allowances are applicable to members of the investigation panel, depending on specific circumstances. However, the a priori determination that members of the panel will receive compensation for their work on investigation panels is not in accordance with Law No. 08/L-196 on Salaries in the Public Sector as the basic law in this field.

In order to avoid dual benefits and to harmonize the Draft Law with Law No. 08/L-196 on Salaries in the Public Sector as the fundamental law, KLI recommends that the provision in question be reformulated so that members of investigation panels only receive a reduction in caseload, and only proportionally according to the workload they have had with these cases, without additional compensation for their work on panels.

11. Impact of Legal Remedies on Disciplinary Responbility

Articles 5 and 6 of the basic law list the disciplinary violations for judges and prosecutors. IKD considers these two (2) provisions to be understandable and sufficiently clear.

However, in practice, IKD has found that in handling disciplinary complaints, the competent authorities, investigative panels, and the Councils themselves have amnestied numerous disciplinary violations, whether by judges or prosecutors, justifying it by stating that the party has the right to apply legal remedies against certain decisions. Nonetheless, in some situations, the application of legal remedies, regardless of the decision of the other instance, would not rectify the damages caused.

In this context, the actors involved in disciplinary procedures have conflated disciplinary procedures with judicial procedures, which can belong to different fields. The provisions of the LPDGjP do not state that if the party has the right to apply legal remedies, disciplinary responsibility is excluded. Such a situation would entirely exclude accountability, as legal remedies, according to the Constitution and the law, must be available for every decision.

However, due to situations that have arisen in practice, IKD recommends adding an additional paragraph to both articles. Specifically, a new paragraph should be added to Article 5 with the following wording: "The right to apply legal remedies against the action of a judge does not exclude the disciplinary responsibility of the judge," while a new paragraph should be added to Article 6 with the following wording: "The right to apply legal remedies against the action of a prosecutor does not exclude the disciplinary responsibility of the prosecutor."

The report "Challenges of Reform in Justice", (Analysis of four Draft Laws deriving from the "Joint Declaration of Commitments"), was carried out by the Kosovo Law Institute with the support of the Bureau for International Narcotics and Rule of Law (INL) - US Department of State and National Endowment for Democracy (NED).

Instituti i Kosovës për Drejtësi
Kosovo Law Institute
Kosovski Institut Pravde

NATIONAL ENDOWMENT FOR DEMOCRACY
SUPPORTING FREEDOM AROUND THE WORLD