



GROUP FOR LEGAL
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STUDIES

Opinion³

Opinion Against the Ministry of Justice's Proposed Amendment to the Criminal Code Regarding Declaration of Assets

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OPINION AGAINST THE MINISTRY OF JUSTICE'S PROPOSED AMENDMENT TO THE CRIMINAL CODE REGARDING DECLARATION OF ASSETS

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ABOUT GLPS

Group for Legal and Political Studies is an independent, non-partisan and non-profit public policy organization based in Prishtina, Kosovo. Our mission is to conduct credible policy research in the fields of politics, law and economics and to push forward policy solutions that address the failures and/or tackle the problems in the said policy fields.

1 Asset declaration by government and public officials is the cornerstone of any anti-corruption framework. It is crucial that Kosovo sustain the progress made in its legislation and hold top officials accountable for declaring their assets. Asset declaration is important for transparent governance and for ensuring citizen's democratic right to hold government and public representatives accountable. Targeting the flow of illicit wealth is at the core of the fight against political corruption. The European Commission (EC) Progress Report on Kosovo 2014 calls upon the Kosovo government to increase the political will to fight corruption and to implement the existing legislative framework, as an important facet of European Union (EU) integration¹. Under the current framework, the Criminal Code provides a criminal penalty for officials who fail to provide full and complete information regarding their assets to the proper authorities. The Criminal Code focuses on objective measures for determining whether a public or government official has complied with the law on the declaration of assets, and the failure to do so can result in a

criminal sentence between six(6) months and five (5) years in jail².

2. The The Ministry of Justice has proposed an amendment to the articles of the Criminal Code that address the declaration of assets, particularly Article 437. The amendment includes subjective measures to determine whether an official has committed a criminal offence as a result of neglecting to fully or accurately declare their assets. The Ministry of Justice's proposed amendment requires that an official had the intent to conceal the disclosure and origin of assets as an element of the criminal offence. Such an amendment would greatly weaken the efficacy of the criminal provisions concerning the declaration of assets, as it would be nearly impossible to prove intent given the complexity of declaration of assets cases. In addition, the Anti-Corruption Agency, which is tasked with referring such cases for prosecution, lacks both the resources and capacity to prove intent in potential asset declaration cases. If the proposed draft amendment on asset declaration were to pass into law, this would signal to both public and international stakeholders that the Kosovo government is not serious about fighting corruption, and would likely provide to

¹ *Kosovo* Progress Report*. European Commission, October 2014, available at http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-kosovo-progress-report_en.pdf.

² Gazeta Express, "MD: Nuk penalizohet mosdeklarimi i pa qëllimshëm i pasurisë." 16 March 2015, available at <http://www.gazetaexpress.com/lajme/md-nuk-penalizohet-mosdeklarimi-i-paqellimshem-i-pasurise-87229/>

officials with protection and impunity from criminal laws that compel the declaration of assets.

3. Asset declaration is an essential tool for the fight against corruption, and signals to Kosovar citizens and the international community that addressing corruption is a key priority of the Kosovo government. Disclosure of a government or public official's assets provides a comprehensive picture of the officials' finances, including assets and all sources of income. Such disclosure provides the relevant entities, including the Anti-Corruption Agency, with the information needed to detect the likely theft of public assets. Not only does the declaration of assets aid in the fight against corruption, but asset declaration also helps to increase local and international confidence in the integrity of the Kosovo government³. Asset declaration ensures that citizens and watch-dog organizations are able to hold officials accountable.

³ Albana Rexha, "Is the Assets Declaration System in Kosovo helping the fight against Corruption and Preventing the Abuse of Power?" Policy Report 08/2014, June 2014, available at <http://legalpoliticalstudies.org/wp-content/uploads/2014/11/Policy-Report-08-2014-Asset-Declarations-ENG-1.pdf>.

This is crucial at the local level and has the additional benefits of increasing international confidence in Kosovo. Improving Kosovo's image and demonstrating that the government takes a serious stance on combatting corruption is essential for EU integration.

4. The EU has made it clear that fighting political corruption must be a priority for the Kosovo government in progressing on the path to EU integration. Combatting illicit wealth is the main tool for addressing corruption among top officials. The EC Progress Report 2014 recognizes that while Kosovo is in the early stages of the fight against corruption, there has been only limited progress thus far. Importantly, the 2014 Report states with regard to corruption that, "The judiciary needs to be enabled to fight this phenomenon effectively⁴." Although Kosovo's anti-corruption framework is largely in accordance with EU standards, implementation and enforcement is a major issue. Contrary to the recommendations of the EC Report, the proposed amendment aims to severely restrict the efficacy of the current framework on asset declaration, and if approved, would render the current law on declaration of assets largely ineffective.

5. The proposed amendment would erode the force and efficacy of criminal sanctions where financial information is omitted from an official's declaration of assets. If the current criminal sanctions are considered extreme, it should be noted that sufficient safeguards are already in place, and allow officials to remedy any mistakes or omissions in their asset declaration. Currently, under Law No. 04/L-129 on Amending and Supplementing the Criminal Code of the Republic of Kosovo No. 04/L-082, Article 437(2), "Any person, obligated by law to file a declaration of property, income, gifts, other material benefits or financial obligations, who falsifies or omits

⁴ *Kosovo Progress Report*. European Commission.

data or required information on the required declaration shall be punished by a fine and imprisonment of six (6) months to five (5) years⁵." Where the official has been notified that their declaration of assets is incorrect or incomplete, the Law on Declaration of assets allows for the official to provide an explanation of their asset declaration within fifteen (15) days. This provision of the law allows for a safeguard if an official has made a mistake in their declaration of assets, and provides the official with ample time to remedy their error(s). This administrative procedure allows for additional or different information to be provided by the public or government official before proceeding to a court of law. The proposed amendment goes far beyond providing a safeguard for honest mistakes in an official's declaration of assets. The criminal sanctions currently in place are proportional to the failure to fully or accurately declare assets, while allowing the existing laws to maintain their efficacy. The draft amendment, if approved, would diminish the usefulness of the law on confiscation of official's assets.

6. The Ministry of Justice's proposed amendment requires that a senior public official had the intent to conceal the disclosure and origin of assets as an element of the criminal offence. The proposed amendment would complicate the prosecution of such cases, and would have to include proof of subjective intent in order to show that a violation of the law on asset declaration occurred. The Anti-Corruption Agency is tasked with referring cases that relate to declaration of assets for prosecution. The proposed amendment would make it nearly impossible for the Agency to submit such cases for prosecution, given the Agency's lack of resources and limited investigate capacity to prove the accused's intent to conceal

⁵ Criminal Code Republic of Kosovo. Law No. 04/L-082 Law on Amending and Supplementing the Laws Related to the Criminal Code of the Republic of Kosovo, 9 November 2012.

information regarding their assets. In addition, the ability of the prosecution and court to handle such cases would be severely hampered by the proposed amendment.

7 It is the responsibility of the Kosovo government and the Ministry of Justice to support legislation that encourages and enables prosecutors to initiate cases against high public and government officials for corruption and the confiscation of illicit assets. Adding the burden on prosecutors to prove that an official intended to conceal information would make it nearly impossible for prosecutors to attain a guilty verdict, but it would also dramatically lengthen the timeframe of such cases. In addition, the court system would not have the necessary tools to sustain a finding of guilt for concealing assets as it is unable to seek information by other means, such as wiretapping, as the maximum sentence for a violation of Article 437 is five (5) years. The increased burden posed by the potential amendment to Article 437 would add to the already high number of cases in the judicial system, and would make it nearly impossible for prosecutors to hold officials accountable. Given the administrative procedure for tracking official and public assets, the ability of prosecutors and

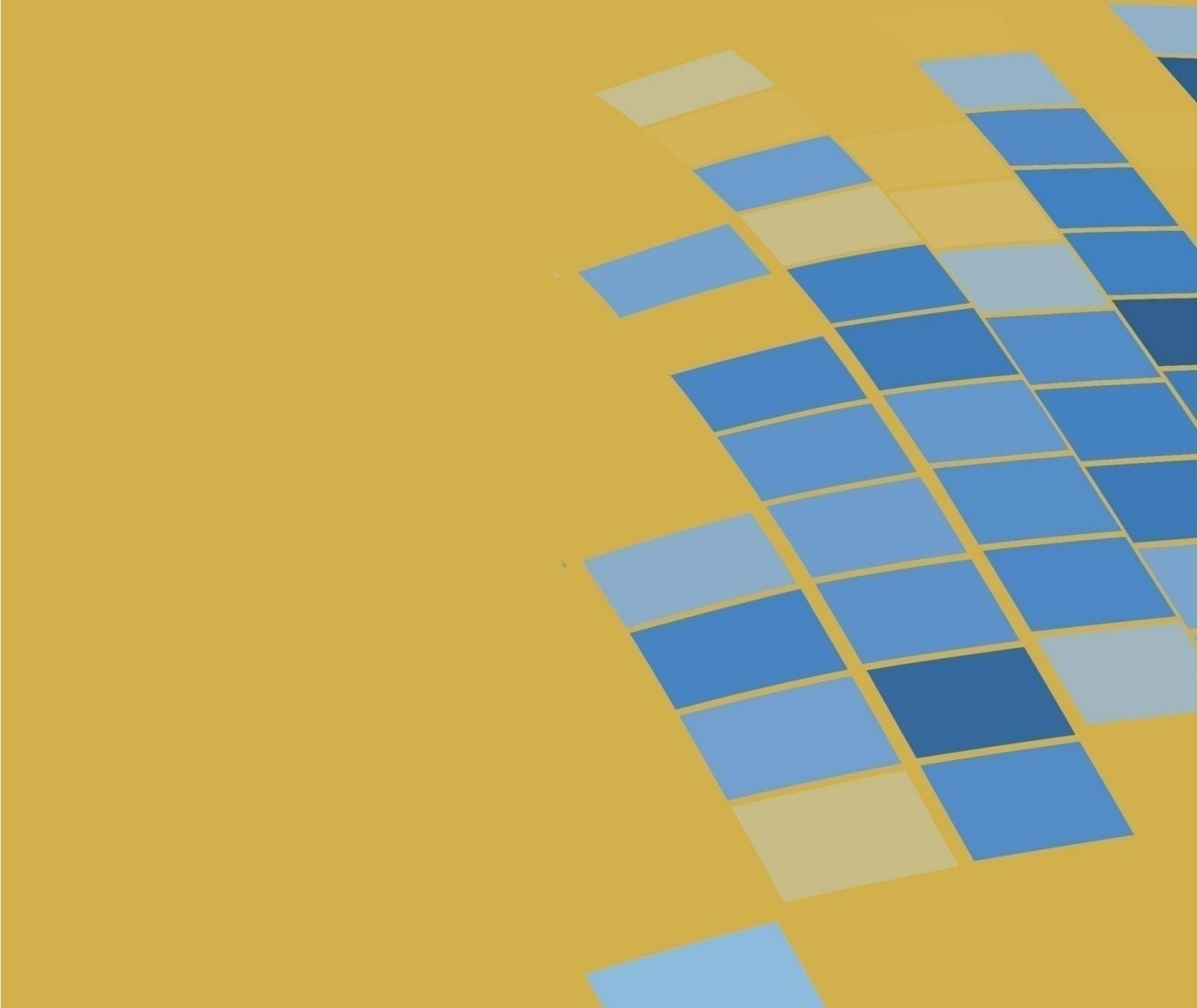
investigators to fight corruption would be greatly diminished. The law currently allows prosecutors to supply objective evidence to prove that an official violated the law on declaration of assets. To add the element of intent would allow for the consideration of subjective factors, which would enable officials to more easily defend their actions. Officials already have a full fifteen (15) days to correct any oversights or errors in their declaration of assets under the current legal framework. To allow officials the additional protection resulting from the added element of intent would provide an unfair barrier to prosecution and would effectively grant officials impunity from the law on declaration of assets.

8. The framework on combatting corruption should not be damaged by the passage of the proposed amendment to the Criminal Code's provisions that address the declaration of assets. The Kosovo government should demonstrate its seriousness on this issue to the EU, the international community, and Kosovar citizens. Weakening the effectiveness of the law on declaration of assets would hinder Kosovo's progress on the path to EU integration. Public and government officials should be subject to criminal prosecution where they have concealed information, regardless of intent, in order to maintain the efficacy of the law concerning asset declaration and its central role in the fight against illicit wealth. Safeguards in the current law are already in place to allow for officials to correct any errors in declaring their assets. To allow officials any additional protections beyond those already foreseen in the Criminal Code would only serve to protect illicit wealth and corruption among top officials. The Kosovo government must demonstrate its commitment to fighting corruption. There would be serious damage to the current legal framework on declaration of assets if the draft amendment were adopted. The proposed amendment should thus be rejected immediately. Therefore, Group for Legal and Political Studies requires that the Kosovo Parliament and Government prevent the amendment to

the Criminal Code from being passed into law.

OPINION PUBLICATIONS

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