



Rule of Law. Peculiarities of Kosovo System

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Abstract: Nowadays there is a general call, of every international institution, meaning EU, and other international mechanism requiring and basing their policies on the principle of conditionality (Pippan, 2004) by urging states to undertake steps to fulfill the whole range of political and economic conditions in return for partnership, membership or monetary aid. Conditionality is screened through the new lenses of order and stability based on rule of law, democracy, free market economy, and respect for human rights and minority rights, envisaged as Western values. (Copenhagen Criteria, 1993) To achieve this aim the rule of law is considered as occupying a unique position in a democratic society, therefore it is called upon states to create conditions for reforms on a judiciary as the traditional mechanism to decide on disputes, to protect citizens from the arbitrary political affiliation or private individuals. As such, it fights corruption too. (Un Judge) Simply said it is required from the states to create conditions to achieve the independent judiciary, through which democratic society can be created. As such, these analyses give hints on the issue of rule of law from the transitional phase of UNMIK to Kosovar Institution elucidating the presence of the EU EULEX Mission, too. Therefore, in the case of Kosovo the challenge of the judiciary system was twofold concerning UNMIK and EU Mission and the establishment of the Kosovo Constitution from another side.

Keywords: Rule of Law; UNMIK; judiciary; EULEX; Constitution; Kosovo

1. Introduction

Kosovo was administered territory through international organization UNMIK, (1999-2008) until Kosovo has reached Independence on 2008. In the early phase UNMIK it has de facto recognized politically as a state-like entity. (Brandt, 2005). In such environment the political system in Kosovo has been based on the rule of

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law only to a limited extent. Rule of Law requires that laws are implemented by the executive power, that any executive action is based on the law, it requires the availability of effective remedies against acts of the executive and overall the transparency. (Raz, 1979) To achieve this aim every democratic society is based on the hierarchy of normative acts. Hierarchy implies that a legal act has its basis in the constitution, which provides structure of the government and at the same time limits the government action. Furthermore, Constitutional Courts are typically established outside the framework of the rest of the judicial system. In this early phase the promulgation of the Regulation 2001/9 known as Constitutional Framework for Self Governance of Kosovo (Constitutional Framework) UNMIK has established Kosovar Provisional Institutions for Self Government which is consisted of Assembly, President of Kosovo, Government, Courts, and other bodies of central and local level. Even though the Constitutional Framework sets out broad competences and responsibilities of the PISG still it reserves expressly the UNMIK and SRSG authority through Chapter 8 and 12 under which the SRSG and UNMIK have the authority to override every decision of the Kosovar elected institutions. (Report of the Secretary General, 1999)

In the case of UNMIK, the Resolution 1244 has granted all legislative and executive powers in the SRSG that is heading the interim civil administration, including the administration of the judiciary. (Nilson, 2004) This robust mandate has shown also to lack central features of a democratic system with functioning separation of powers and checks and balances. This mandate did not guarantee also the accountability of administration when alleged human rights violations occur.

On the other hand with the promulgation of the Constitutional Framework it was anticipated that the Provisional Institutions of Self Governance, in their activity must promote and fully respect the rule of law, human rights and freedoms, democratic principles and reconciliation. (Constitutional Framework, ch2b) However the Constitutional Framework did not provide for an individual complains procedure to review legislative acts of the local administration at the Supreme Court as the precondition for the independent judiciary. Therefore, “an individual alleging a human rights violation resulting from a piece of legislation does not have an effective judicial remedy”. (Salamun, 2000) While, the concept of rule of law aims to protect citizens from arbitrary state actions and human rights violations. (Brogan v. UK 1988; Amuur v. France 1996)

Resolution 1244 envisaged the transitional phase and devolution of power to the people of the territory, however there was no clear vision of what will be the

organizational function of the territory, while at the same time the status and the talks were based on the policy of “standards before the status” (UN DOC 2003) This policy was justified as the precondition for a just and fair society, as required for the potential integration of Kosovo into European structures. (Commission Communication, 2014) The rationale behind this policy was to formulate indicators of good governance, to use as tools to measure progress in policies. Make local institutions fulfilling certain steps of progress from the intermediate phase to the discussion of final status. Standards intended to build democratic institutions, protect minority rights and human rights. Indicators of achievement would cover a range of issues in the political and economic sphere, public finance and taxation, human rights, public health, educational advancement, rule of law. (Knoll, 2005) Rule of Law as such was reflected in Standard 2. Due to the linkage of the standards and the status in many respects standards becomes “technical and marginalized” due to undefined status of Kosovo. As such, issue of rule of law has undergone transitional phase from UNMIK to the “Independent Republic of Kosovo” (Declaration of Independence, 2008) with its peculiarities. In this respect, the paper questions the assumption that the rule of law has reached the result based on the European and international law standards enshrined in our Constitution.

2. Judiciary Reform under UNMIK

Judiciary reform is considered as key element to combat crime and political violence, while weak justice system undermines the effort to establish stable governing institutions. (Cerone & Baldwin, 2004) Having in mind this circle, International Community has increasingly recognized the importance of judiciary reform programs in post conflict reconstruction in Balkans. Judiciary reform became priority even to UNMIK administration. (Betts, 2001; Stahn, 2007) From June 1999 UNMIK’s primary task was revival of the Kosovo judiciary.

At the time of UNMIK deployment, the judicial system was literally non-existent, carried out within a relatively short time, has certainly represented one of the most remarkable achievements of UNMIK. Courts of all instances were restored in all centers of Kosovo. Subsequently, courts of minor offences were established in the municipal level including the High Minor Offences Courts as an appellate court for minor offences cases. Commercial Court, competent to adjudicate disputes involving business enterprises, also became functional. (Stahn, 2008) Reform programs were concentrated mostly as to identify and address weaknesses of

justice institutions through training and technical assistance, and international judge and prosecutors are brought when local judges or prosecutors are unable or unwilling to handle sensitive cases. (Carolan, 2008) As of October 2004, the judiciary employed 313 judges, including 14 judges serving on the Supreme Court.

To ensure independent judiciary UNMIK has promulgated Regulation 1999/7 based on this Regulation it was established the Advisory Judicial Commission (AJC). This body was competent to recommend candidates for judicial and prosecutorial appointment. The SRSG (Special Representative to the Secretary General) did not renew the AJC mandate due to the incapacity of this Commission to explicitly deprive judges and prosecutors to disband membership and political activities, and to initiate and disciplinary investigations during 1999 and 2000. (Inglis & Marshall, 2003)

In April 2001 it was promulgated Regulation 2001/8 establishing the Kosovo Judicial and Prosecutorial Council, (UNMIK Regulation 2001/8, 2001) composed of nine members, the majority of whom were internationals. The KJPC thus envisaged a clear policy of International control over the judiciary.

In securing the judicial independence UNMIK has appointed local and prosecutors with the three months contract, which gave to UNMIK a degree of control over them and possibility to intervene when independence could be at stake. To this effect, UNMIK has appointed international judges to district courts throughout Kosovo and to the Supreme Court, to handle sensitive cases as war crimes or inter-ethnic or political violence. While on the other hand there was no appeal mechanism in place to complain against international judge's professional or ethical misconduct. (OSCE reports; Lawyers Committee for HR, 1999)

Although UNMIK has been able to intervene and protect judicial independence to a certain limits from the politics, judicial independence remained under the absolute control of UNMIK without a possibility to be challenged by the local ownership. The UNMIK achievements were not sufficient to assert conclusively that Kosovo judiciary has become "independent, impartial, multi-ethnic and competent", due to the nature of UNMIK itself.

3. EU Standards and the Rule of Law

Membership in European Union is a clear aspiration of leaders across SEE Central and Eastern Europe, and consequently for Kosovo too. As envisaged, EU has set up

the principle of conditionality for accession in EU, known as: “Copenhagen Criteria” of 1993. One of the main criteria’s for EU accession is the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. (Hillgruber, 1998)

In the accession process of the Western Balkans countries strengthening the rule of law has proved to be an uneasy task and “identified as continuing major challenge and a crucial condition”. (Enlargement Strategy 2011-2012) The Commission notes in the EU’s Enlargement Strategy that the accession process depends on demonstrating results in the application of the rule of law and at the same time it was agreed that “strengthening the rule of law and democratic governance is central to the enlargement process”. (Baun, 2000)

In principle, justice system so far, with the integration processes in the EU did not resulted with the creation of a uniformity, by creating a united model of a justice system for every EU member, therefore national justice system remained with the specific features of organization. (Toggenburg & Grimheden, 2016) EU members accepted that each state has the right to organize its own judicial system in the manner it consider most appropriate. The aim behind this policy of EU is to protect rights granted to individuals and legal persons (and rights recognized by the EU law) in practical and effective manner despite the forms of how justice system is organized. (Rollo & Mayhew 2006). At the same time, the ongoing reforms of the Western Balkans countries in the area of rule of law and judiciary reform have been primarily driven by EU assistance. (Larsen, 2014) For a decade now, the EU through the assistance provided by the Community Assistance for Reconstruction, Development and stability programme-CARDS and as of 2007 through the Instrument for Pre-Accession Assistance (IPA) supports the rule of law and judiciary reform. In particular, as mentioned by the Commission, the current IPA regulation has proved to be efficient and effective and the proposal for the new financial instrument will draw from this experience. (Enlargement Strategy, 2011-12) As a result of EU assistance and as noted through the Country Progress Reports, there is a general perception that (with noted exceptions) the legal and institutional framework in the judiciary is mainly in place. Enlargement process in Kosovo were initiated with UNMIK and continued with the government of Kosovo after gaining the Independence. The biggest achievement is the signing of the SAA (Stabilization and Association Agreement between the European Union and Kosovo on 22 October 2015).

4. Status of Kosovo - Independence

Independence of Kosovo is achieved on 17 February 2008 after more than six years of international administration by UNMIK in Kosovo, the international community agreed to open the issue of the future political status of Kosovo. In essence, the Contact Group, an informal grouping of six countries (USA, Russia, United Kingdom, Germany, France and Italy) in the second part of 2005, agreed to open the issue of the future political status of Kosovo.

On 14 of November 2005 the UN Secretary General appointed Marti Ahtisari as the Special Envoy of the Secretary General of the United Nations for the process regarding Kosovo's future status (UNOSEK, 2007a), Status talks began in Vienna on 20.02.2006 between the PISG and Serb authorities. Despite several rounds of talks and conciliatory efforts made by Ahtisari, Prishtina and Belgrade were not able to reach an agreement on Kosovo's political status. In view of this deadlock, on 26.03.2007, Ahtisari submitted the "Comprehensive Proposal for the Kosovo Status Settlement", which proposed internationally supervised independence for Kosovo with extensive protection mechanisms primarily for Kosovo Serb Community. Efforts to have the proposal endorsed by the UN Security Council failed in July 2007 as a result of indications that Russia and China would veto the proposal if voted upon in the Security Council. While the proposal was accepted by Prishtina it was declined by Belgrade. A last effort to reach a consensual solution was made with the appointment of a Troika consisting of representatives of the United States (US), the European Union (EU) and Russia, which, however, on 10.12.2007 reported that their efforts had ended in failure. Finally, on 17.2.2008, supported by the US and most EU states, Kosovo declared independence with the Constitution of the Republic of Kosovo entering into force on 15.6.2008. As of mid-January 2010, 65 states have recognized the Republic of Kosovo and it has become a member of the International Monetary Fund and the World Bank Group. However up today five European countries Cyprus, Spain, Romania and Slovakia and Greece did not recognize Kosovo Independence yet. (Weller, 2008)

5. EULEX Mission and the Rule of Law

Additionally, Ahtisari's proposal covered the structure of the future international presence in Kosovo, including here the ESDP mission (EULEX) in the field of the rule of law. European Council of Foreign Ministers rushed through the joint action establishing EULEX before Kosovo's declaration of independence, thus at time when at least no EU member would object to the establishment of EULEX. (Dzihic & Kramer, 2009) A legalization of EULEX Mission occurred with the acceptance of Russia and Serbia for the price of the EU Member States accepting EULEX participating as part of the UN presence in Kosovo. However from a Kosovo perspective EULEX operates lawfully only if it is based on any of the documents listed by Kosovo as being legally constitutive for EULEX's mandate. The Joint Action establishing EULEX makes no reference to the Ahtisaari Plan, the Constitution of the Republic of Kosovo, the Declaration of Independence or an invitation by Kosovo authorities.

Its mission statement was as follows:

EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognized standards and European best practices (Council of the EU, 2008b)

EULEX is also responsible to monitor, mentor and advise Kosovo institutions in all areas to rule of law and to investigate, prosecute, adjudicate and enforce certain categories of serious crimes. (Council Joint Action 2008). At the same time EULEX is also responsible for ensuring the maintenance and promotion of the rule of law, public order and security, which could include the reversion of annulment of operational decisions taken by Kosovo authorities. (Council Joint Action, note 55).

6. EULEX and the Judiciary

On 13.03.2008 the Assembly of Kosovo adopted the Law on the Jurisdiction, Case Selection and case Allocation of EULEX Judges and Prosecutors in Kosovo. The purpose of this Law is to regulate the integration and jurisdiction of EULEX Judges exercise certain judicial functions including the investigation, prosecution

and adjudication of criminal and civil cases listed in the law. (Law no. 03/L-053) EULEX judges exercise their jurisdiction either alone or in panels composed of EULEX and Kosovo judges and they operate within the structures of Kosovo courts. (Law no. 03/L-053.)

Looking at the success of the EULEX Mission, according to the public perceptions it seems that it has failed. EU has published an independent report on its rule of law mission in Kosovo, EULEX. It concerns a scandal which erupted last year, when an official of the mission publicly accused it of having covered up a case of judicial corruption within its ranks. EULEX's poor performance and grave mistakes, in particular, confirmed the untouchable status of the criminal segments of Kosovo's elite, and, thereby, indirectly assisted them in strengthening their control over the country. (EU observer) On the other hand in the "Freedom House Report" Kosovo earned the rating "Semi Consolidated Authoritarian Regime", while Gabriele Meucci, EULEX Head of Mission reacted on the ranking considering that "Kosovo Deserves Better" (www.eulex-kosovo.eu)

There are also other scholars that considers that corruption remains "omnipresent" in Kosovo, adding that, while Eulex could not have been expected to root it out completely "it should, nevertheless, have been possible to lay the foundations of a system capable of fighting corruption". (EU Observer; Jacque, 2015)

7. Kosovo Constitution and the Rule of Law

Besides the International presence Kosovo has promulgated its Constitution. The constitution was ratified on 9 April and came to effect on 15 June 2008. The Constitution was drafted through cooperation of USA-AID (as the main donor), Venice Commission, and a group of national experts. As such this Constitution became a model for attaining the highest standards of human rights.

The Constitution provides that the courts must adjudicate based on the Constitution and the Law. (Const. of the Republic of Kosovo) The Constitution therefore does not allow for a EULEX judge, who is supposed to be integrated in the judicial system of the Republic of Kosovo, to decline the application of a law adopted by the Assembly of the republic of Kosovo or to seek legal clarification from a body

other than the Kosovo Constitutional Court. (ibid, Art. 102.3). Also, the Constitution of Kosovo makes clear division between the regular courts and the Constitutional Court envisaging that the Constitutional Court is not part of the judiciary, but entirely separate from it and from any other power. As such, the Constitutional Court as an independent organ of the Constitution, has the duty to protect constitutionality and make final interpretations of the Constitution. (ibid, Art. 102-107)

8. Human Rights as a Prerequisite for Enforcement of the Rule of Law

One of the novelties of the Kosovo Constitution is Art.53 which stipulates that “[h]uman rights and fundamental freedoms guaranteed [...] shall be interpreted in consistence with the decisions of the European Court of Human Rights”. (ibid, Art. 53). This Provision created the possibility for Kosovo citizens to address issues of human rights on the Constitutional Court and also through this provision European Convention of Human Rights directly become part of the national law of Kosovo. Therefore, decisions which derive from the ECtHR are binding interpretative guidelines, not only for all courts in Kosovo, but also other state organs, and assist them as to how fundamental rights and freedoms must be interpreted and applied in Kosovo.

9. Conclusion

Building the Statehood of Kosovo was rather peculiar and with it rule of law had the same destiny. In its inception UNMIK played the important role on reviving the judiciary, albeit with lots of critics on the concentration of power in the hands of SRSG. On the other hand the European Rule of Law (EULEX) mission is meant to serve a noble and important purpose, i.e. to assist Kosovo’s authorities in establishing and developing rule of law. However, it is impossible for EULEX to accomplish its mandate under circumstance in which it was established, under the status neutral framework of the Resolution 1244 while at the same time co-operating de facto in justice and other legal matters with the authorities of the Republic of Kosovo. On the other hand, the establishment and performance of the constitutional courts certainly contributed to building the Rule of Law

through judicial review within the political system. The justices and their rulings, in former communist countries and in Kosovo too, promoted the institutionalization of a political pattern, which relies on a constitutionally resolved conflicts. Therefore, one can conclude that from the very beginning the Constitutional Court has demonstrated that the bases of the decision are based on the jurisprudence of the European Court of Human Rights with the desire to improve the bases of the Rule of Law as a determinant for developing democracy.

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