

The Rule of Law in Kosovo Concepts, Challenges and Realities

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In Kosovo, more than anywhere else in Europe, the Rule of Law is in the making. As one of the world's youngest democracies, a Kosovo-specific concept of the Rule of Law is still at the beginning to take shape. Similar to other post-conflict settings, a gap remains between the Rule of Law de jure and the Rule of Law in praxi. The formalistic idea of the Rule of Law on paper is not yet what it is in reality.

Since declaring independence in February 2008, Kosovo has been growing as a state. However, currently only recognized by 71 states (November 2010), the country lingers in a legal and political limbo. Recently in July 2010, the International Court of Justice ruled on the legality of Kosovo's secession. Stabilized by a NATO-led international peacekeeping force (KFOR) and an international EU law mission (EULEX), the republic is struggling with common matters of governance in transition: difficulties to access justice, corruption, parallel legal systems, and a slow judiciary.

This paper aims to capture the evolution of the Rule of Law in Kosovo and to define its current status. Moreover, the objective is to contribute to a better understanding of the "Rule of Law" in general, particularly in regard to specific normative implications in various legal systems; here, the focus is on the Balkans.

The analysis is comprised of four parts: an overview of the historical background (I.), a summary of normative provisions (II.), an assessment of the

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practice of the Rule of Law in Kosovo (III.), as well as a discussion of current and future challenges (IV.).

I. Historical Background

Kosovo's present framework of the Rule of Law results to a great extent from its past. An autonomous province within the Socialist Federal Republic of Yugoslavia, Kosovo already had its own first constitution since 1974. Whether there was rather a Rule *by* Law instead of a Rule of Law in communism and socialism is a question of academic interpretation (Linz/Stepan 1996), however, elements such as the supremacy of the law and accountability in courts existed.

In 1989, Serbian President Slobodan Milosevic brought Kosovo under the direct control of Serbia. Tensions escalated into a humanitarian crisis and a phase of absence of the Rule of Law; this was followed by an intervention of NATO forces that ended the war in 1999. To fill the vacuum of order, the UN Security Council established a civilian interim administration (UNMIK). UNMIK was conceptualized to manage and carry out state functions until a final solution is reached. Simultaneously, the UN peacekeeping mission took over legislative, executive and judicial powers. As part of UNMIK's institution-building pillar, the Organization for Security and Cooperation in Europe (OSCE) was given the lead in ensuring the respect for human rights and the Rule of Law. In July 1999, a Department of Judicial Affairs was established to set up local justice institutions. In February 2000, a group of international judges and prosecutors was created. Its core mandate was to build a multi-ethnic, independent, impartial and competent judiciary (INPROL 2009:1).

After a series of unsuccessful talks between Pristina and Belgrade to settle the status problem, the Kosovo Assembly announced the independence of the Republic of Kosovo on February 17, 2008. A constitution for the country was adopted shortly after. The draft of the constitution was prepared by a working group reflecting the comprehensive representation institutions in Kosovo, such as members of the Government, the Office of the President, international organizations (USAID, ICO, Council of Europe), as well as other local and international legal experts. Several provisions were derived from the "Ahtisaari Plan", a comprehensive peace proposal to settle the Kosovo issue which was formulated by UN Special Envoy Martti Ahtisaari in March 2007. Alongside granting specific rights to non-Albanian minority groups, the plan includes a provision for international support in the area of the Rule of Law *"in accordance with internationally recognized standards and*

European best practices" (see Article 13, United Nations Office of the Special Envoy for Kosovo 2007:8). To oversee the implementation, the International Civilian Representative (ICR) was installed, which acts on the premise that

"Kosovo shall be responsible for managing its own affairs, based upon the democratic principles of the rule of Law, accountability in government, and the protection and promotion of human rights, the rights of members of all Communities, and the general welfare of all its people." (see Article 1, Annex IX, United Nations Office of the Special Envoy for Kosovo 2007:52).

Parallel to the declaration of independence, the European Union Rule deployed its Rule of Law mission EULEX to Kosovo. Among others, the mission also monitors, mentors, and advises the competent Kosovo institution in all areas related to "*the wider rule of law (including a customs service)*" (Article 3, Council of the European Union 2008:2). As such, EULEX defines three areas of the Rule of Law: an independent police, justice, and customs. They are aimed to be kept "*free from political interference*" and, as already configured in the Athissari-Plan, "*adhering to internationally recognized standards and European best practices*" (Article 3, Council of the European Union 2008:2). As an external guarantor and support mechanism for the Rule of Law, EULEX was also equipped with certain executive powers particularly to investigate, prosecute, and adjudicate serious and sensitive crimes in cooperation with Kosovo authorities.

II. Constitutional provisions, interpretations, and specifics

Kosovo's constitution enshrines the concept of the Rule of Law through numerous normative provisions: As an overall guiding basis, Article 3, para. 1 expresses that

"the Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive, and judicial institutions."

Systematically interlinked with the right of equality before the law (Article 3, para. 2), the Rule of Law is envisaged as a key instrument to prevent tensions within Kosovo's diverse communities.

Embraced as a fundamental value in Article 7, para. 1, the respect for the Rule of Law is once more well placed between the principles of peace, equality, and non-discrimination:

“The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.”

The separation and limitation of state powers is preserved in Article 4, para. 1:

“Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them as provided in this Constitution.”

Generally, laws are solely enacted by the Assembly (Art. 80), the President can only issue executive regulations as decrees in particular situations (Art. 84, para. 4), such as to declare the State of Emergency setting forth the nature of the threat and any limitations on rights and freedoms (Article 131, para. 3) or to dissolve the Assembly if two thirds of all deputies vote in favor of dissolution (Art. 82, para. 1). Other hybrid legislative-executive powers of the President, like the “Ukas” of the Russian President, do not exist. Non-parliamentary regulations only fall in the competency of the Government if they involve decisions-making, issuing legal acts, or regulations “necessary for the implementation of laws” (Art. 93, para. 4).

The right to review and the assurance of consistent interpretation by an independent judiciary is declared in Article 4, para. 5:

“The judicial power is unique and independent and is exercised by courts.”

Article 102, para. 1-4 about the General Principles of the Judicial System states:

“1. Judicial power in the Republic of Kosovo is exercised by the courts.2. The judicial power is unique, independent, fair, apolitical and impartial, and ensures equal access to the courts.3. Courts shall adjudicate based on the Constitution and the law.4. Judges shall be independent and impartial in exercising their functions.”

Article 54 elaborates on the judicial protection of rights:

“Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.”

Art. 102, para. 5 completes:

“The right to appeal a judicial decision is guaranteed unless otherwise provided by law. The right to extraordinary legal remedies is regulated by law. The law may allow the right to refer a case directly to the Supreme Court, in which case there would be no right of appeal.”

As an underlying principle, the constitution is supreme (Art. 16, para. 1-3):

“The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution. The power to govern stems from the Constitution.”

Similar to other post-communism/socialism countries in Europe, constitutional rights are safeguarded by a strong Constitutional Court, which is established as the state’s highest legal authority (Art. 4, para. 6):

“The Constitutional Court is an independent organ in protecting the constitutionality and is the final interpreter of the Constitution.”

Issues of jurisdiction by the Constitutional Court are wide: the Court can be approached by the Government, a municipality, the Assembly as well as individuals after the exhaustion of remedies (Art. 113). Temporarily, until the end of the international supervision of the implementation of the comprehensive proposal for Kosovo status settlement, the Constitutional Court is composed also of three international judges (currently from USA, Bulgaria, Portugal), which have been appointed by the ICR (Art. 152).

Constitutionally installed and protected is also the role of the Kosovo Judicial Council (Art. 108), which shall ensure the independence and impartiality of the judicial system. The Kosovo Judicial Council is responsible for recruiting and proposing candidates for appointment and reappointment to judicial office, in particular to fully reflect the multi-ethnic nature of Kosovo. Moreover, the Kosovo Judicial Council oversees the transfer and disciplinary proceedings of judges. At least once a year, the chair of the Kosovo Judicial Council addresses the Assembly

regarding the Judicial System. As at the Constitutional Court, some of the members of the Judicial Council are temporarily seconded as international practitioners (Art. 151).

Different to most other constitutions in Europe, the institution of the State Prosecutor (Art. 109), the Kosovo Prosecutorial Council (Art. 110), and an independent advocacy (Art. 111) are upheld in Kosovo's constitution. In connection with the Kosovo Prosecutorial Council, it is emphasized that all persons shall "have equal access to justice" (Art. 110, para. 1). Additionally, the Council ensures that the State Prosecutor is "independent, professional and impartially reflects the multiethnic nature of Kosovo and the principles of gender equality" (Art. 110, para. 1).

III. Judicial Review

The stock of reviewed legal findings is still thin. Since October 2009, the Constitutional Court issued five judgments, 16 decisions, and 19 resolutions (November 2010, <http://www.gjk-ks.org/>).

The first decision of the Constitutional Court already attracted attention: The case *Tomë Krasniqi vs. RTK et Al* (Decision, Interim Measure, Case KI 11-09, October 16, 2009) brought down the collection of public broadcasting fees. The applicant, Tomë Krasniqi, a pensioner, petitioned for provisional measures to suspend the charging of Euro 3,5 for the public radio and television broadcaster RTK. Krasniqi stated that the fee represents 10% of his 40 euro retirement payment per month. Though no signal can be received in his area, the amount was directly deducted from his electricity bill. The Constitutional Court found this procedure unconstitutional. The Court ruled the collection system to be discriminatory for taking electricity counters as a reference point and not households. The practice was leading to absurd constellation, where citizens had to pay telecommunication fees for their elevator, as it had its own electricity counter. RTK is currently funded by the ordinary Kosovo budget until an alternative source of financing is found.

Noticeably, the Constitutional Court flags decisions of the European Court of Human Rights besides referring to domestic law. The Court highlights Article 53 of the Kosovo Constitution for the interpretation of human rights provisions, which says that human rights and fundamental freedoms "shall be interpreted consistent[ly] with the court decisions of the European Court of Human Rights." Though the Republic of Kosovo is not an official signatory member state to the European Convention on Human Rights, it constitutionally committed to it. Thus, the Court explicitly states that case law by the European Court on Human Rights serves

“as our very basis while interpreting all our decisions” (Tomë Krasniqi vs. RTK et Al, Decision - Interim Measure - IM - Case KI 11-09, pp. 3-4), which illustrates firmly what the Athissari-Plan meant with *“adhering to internationally recognized standards and European best practices”*. A good indicator for the independence of the Constitutional judges and the dynamics between them is the existence of dissenting opinions. A local judge (Judge Gjyljeta Mushkolaj) and an international judge (Judge Almiro Rodrigues) opposed the majority vote.

Another major case is a judgment of the Constitutional Court in September 2010 regarding Fatmir Sejdiu, the first president of the Republic of Kosovo (Judgment, Case No. KI 47/10, September 29, 2010). The Constitutional Court ruled that Sejdiu had violated the constitution by concurrently holding two positions: one as president of the country and the other as leader of the Democratic League of Kosovo (LDK) party. Sejdiu argues that he had “frozen” his function as chairman of LDK after he was elected President of Kosovo. The constitution, however, does not support such an option. The Court analyses that:

“One of the fundamental ways of winning the hearts and minds of the citizens who will vote in elections is the ability of a political party to be able to assert who is supportive of and will endorse the parties' positions and candidates. If a political party has the endorsement of the President of the Republic, it has a substantial political asset to further its political agenda and the election of its candidates for public office.” (para. 66)

Given this ambiguity, the Court underlines the integrative role of the President within the system of separation of powers:

“Bearing in mind the considerable powers granted to the President under the Constitution is it reasonable for the public to assume that their President, “representing the unity of the people” and not a sectional or party political interest, will represent them all. Every citizen of the Republic is entitled to be assured of the impartiality, integrity and independence of their President. This is particularly so when he exercises political choices such as choosing competing candidates from possible coalitions to become Prime Minister.” (para. 69)

The Court concluded that Sejdiu had committed a violation of the Constitution under Article 88, para. 2, by remaining the recorded party leader of one of the most prominent political parties while being the President of the country.

The Sejdiu case is truly an important sign in the short history of the Republic of Kosovo. It sets the Rule of Law on a strong base for future

developments. The judgment breaks through the long predominant notion that politicians are sacrosanct, a prominent idea of the communism era. The canon of the supremacy of the Constitution is impressively put in action. The words of the Court about political parties, the role of elections, and the function of the President all exemplify genuine care for democracy. They demonstrate that the Constitutional Court is not an alibi institution but a vital device for further legal challenges of the Rule of Law in Kosovo.

IV. Challenges

Though Kosovo has made steps since its independence passing legislation and adjusting institutions, quite a few obstacles need to be overcome. Ambassador Christopher Dell commented at the Rule of Law Day in Kosovo in January 2010:

“Rule of law is not only what happens in the courtrooms, it is what happens in the streets. But too often it remains elusive. Corruption, violence, and abuse go without redress. The vulnerable lack effective recourse, while the powerful manipulate laws and people to retain power and accumulate wealth.” (U.S. Embassy Pristina 2010)

The rapporteur for Kosovo of the Council of Europe Parliamentary Assembly, Björn von Sydow, noted in March 2010:

“At present, the poor record in the respect for the rule of law is the main problem in Kosovo. It affects ordinary individuals in their everyday life, irrespective of the community they belong to. It also affects governance, the functioning of the political system and the administration, people’s trust in the institutions, and the private sector. It is a hindrance to economic development, as foreign and local investors are reluctant to commit resources in these circumstances.” (Council of Europe 2010:2)

The latest EU progress report expressed in November 2010 “serious concern”:

“Along challenges such as corruption and nepotism, the continued political interference at different levels and indifferent forms in a number of cases, including in the work of the Kosovo Judicial Council, is of serious concern.” (European Commission 2010:10)

The EU report stresses that more needs to be done concerning witness-protection, organized crime and free media rights.

Low salaries for civil servants are putting the practice of the Rule of Law in danger. Police officers, fire fighters, and prisoner guards took to the streets in protest earlier 2010 for working conditions and wage increases. A judge in a local court earns about €300-€400 per month, which is above the average income of €160, but little compared to rising prices and the far higher wages earned in international organizations. The recent adoption of the Law on Courts introduced a new salary system which slightly improved the situation of the courts. However, many qualified local lawyers would rather work for the OSCE, UNMIK, and embassies, or simply go abroad. The brain drain since the war is taking its toll, and a renewal of national legal experts is slow (Council of Europe 2010:3).

A study by the Kosovo Democratic Institute demonstrated that the judiciary is the most corrupt sector (KDI 2009:6). According to interlocutors of the Council of Europe, up to 80% of cases are directed through benefits (Council of Europe 2010:3). The Parliament passed a reform of the country's anti-corruption agency law in January 2010; nevertheless, bribing legal officials is a common ruse to speed up procedures in public administrations and motivate closures of criminal investigations. There is also a symptomatic reluctance to indict high profile criminal cases. State tenders are frequently said to be predetermined because of nepotism, frustrating foreign investors. Property claims remain another serious concern, and the cadastral register system requires a major organizational overhaul as does the process of document verification.

More importantly, the population lacks confidence in the judicial system due to overdue adjudications. Courts and prosecution offices suffer from insufficient staff numbers. Though the national vetting process for public law clerks is about to be complete, only one-third of serving judges have passed the ethic vetting procedure, which has caused additional under-staffing of some courts (Council of Europe 2010:3).

Finally, parallel courts continue to function in regions with a majority of Kosovo Serb inhabitants, particularly in the North of Kosovo. Following the country's declaration of independence, many Kosovo Serb administration staff refused to resume work under the new authorities. Until today, Serb dominated municipalities are run through funding from Belgrade. The Serbian government pays for schools, hospitals, the police force, firefighters, and judges. The split of the Rule of Law in the North is one of the most critical items on the agenda for the political talks between Pristina and Belgrade.

V. Conclusion

To sum up, what are the characteristics of the Rule of Law in Kosovo?

First, though there has been a long standing Islamic tradition dating back to the Ottoman conquest of the Balkans and over 90% of Kosovo's population today is Muslim, the country's legal system is fully secular. No religious norms are supported by law. Social norms like custom or conventions only exist, if at all, in the traditional rural Kosovo-Albanian regions. The "Kanun", for instance, is a set of habitual Albanian laws estimated to date back to the Bronze Age (Elsie 2001:4). The Arabic word for law, the Kanun sets forth statutes both for civil and criminal questions. As the most prominent customary obligations, the Kanun regulates the restoration of "personal honor", the use of "blood revenge" if a family member is a victim of assault, gives married women very little rights, determines the "Councils of Elders" as quasi-courts, but also explains habits of hospitality and the role of mediators ("reasonable people"). Nevertheless, the application of the Kanun in the Kosovars' daily lives is rather rare and actual cases are seldom very little reported.

Second, defining the contemporary status of the Rule of Law in Kosovo's four main attributes are distinctive: a severe external top-down influence to introduce or restore the Rule of Law in the structure of State institutions, strong safeguards to keep the independence of the Rule of Law functioning, a weak yet growing judiciary on a local level, and an emancipated Constitutional Court to ensure the Rule of Law as a key value.

Critics disqualify Kosovo as an experiment, an artificial state which could not survive without foreign contributions; the "Rule of Law" has only been an empty formula to please donors' hope for peace and stability. And indeed, a decline of international support will be a decisive factor, a test for the strength or weakness of the Rule of Law in the country. Exhausting external support by international organizations risks to substitute statehood, which in the case of Kosovo before its independence was deliberately intended but is now aimed to be dissolved.

Whether the Rule of Law rises to be a "European" one "in accordance with internationally recognized standards and European best practices", needs to be seen. Though propagated, what is understood under these terms dogmatically is not always transparent. Factually, the EU launched so called "twinning projects" in the Rule of Law field, which comprise direct peer-to-peer assistance by EU member states counter-parts with the goal to implement EU *acquis communautaire* and legislation. On the

long-term, twinnings and other programs will gradually guide Kosovo closer to legal standards of the European Union.

The pitfalls of a lack of the Rule of Law have been, are, and will be real for the citizen of Kosovo, as elsewhere – reminiscent of the saying of former U.S. President Eisenhower that “the clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law”.

Delayed court judgments and randomness of administrative decisions lead to business planning insecurity, which have a clear impact on slowing down the economical progress of the country. Predictability and access to legal recourse will be essential to create trust, which might be the most crucial cornerstone for the Rule of Law. However, demands have to be realistic: Kosovo is internally coping with political balances, essential issues of reconstruction, state building (e.g. infrastructure, unemployment), and finally a transition of its legal elite, all of which will also effect the conceptual understanding of the Rule of Law.

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