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Legal Transplants and Their Impact on Kosovo's Legal System

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Abstract. Alan Watson once argued that a rule which is transplanted is different in its new home. For a poor village housewife 'bread' does not have the same meaning as for the wealthy Parisian businessman. The housewife has much less choice, is close to the source of supply, and bread plays a very different role in the family diet. Similarly, foreign legal rules transplanted to the legal system of Kosovo may have different results than in their legal system of origin. Kosovo is a country with a unique history of state-building. As a new state, Kosovo had to be built from scratch, which entailed a lengthy process of legal changes. Laws that were in force Kosovo before 1999 could not support the new developments in its economic and social order, especially the transition from a state-controlled economy to an open-market economy, thus Kosovo has relied heavily on foreign experience in drafting its legislation. Since 1999 Kosovo has received millions of Euros in legal aid from international organizations for the purpose of legal reform. However, this assistance may prove to be very costly for Kosovo as it implies importing foreign rules to Kosovo legislation. Therefore, the aim of this paper is to explore the impact of external factors on the development of Kosovar law. The paper will assess whether the transplanted law comports with the culture and tradition of Kosovo and whether the models are likely to fit with the adopting legal system? Is there a timeframe to determine on whether something foreign really "fits in" the local environment? By exploring the above I want to show the impact of legal transplants on the legal order of Kosovo and whether legal solutions that were effective in foreign countries can be effective in Kosovo too.

Keywords: Legal Transplants, Foreign legal assistance, Kosovo Legal System, Criminal Procedure Code

1 Introduction

In Transition countries legal reform is a must and to undertake the legal reform foreign assistance is a precondition. Especially when talking about Kosovo; a country emerging from war and opening to market oriented economy, aspiring membership to international forums and organisations, engaging in international cooperation, and on the other hand lack of in house knowledge and expertise. Laws existing until 1999 did not reflect legal developments in the world hence could not support these processes Kosovo was in.

The amount of donor assistance to Kosovo has so far been enormous, and great part of it went to the legal reform.

Although important, the foreign assistance does not come without a cost. Donor tries to influence the beneficiary by bringing the so called "best practices" from their home countries. At first hand one may think that this is not a negative approach in itself, however, this should be done in a coordinated way by adapting transplanted models through a well-coordinated process of political debate and legal drafting. Sharing knowledge and experience between countries is crucial in developing laws that comply with international and standards however the "cut and paste" practise may be the inappropriate in an environment with weak institutions. The aim of the legal reform is to set standards which can be easily implemented and not otherwise as it is the case with the criminal procedure code and many other laws because this create gaps and possibility for abuse.

On the other hand the agenda of international donors and their urgency to achieve results have put such pressure on the Government of Kosovo that it was unable to treat issues critically and make appropriate policy and strategic choices.

Having this in mind I chosen to write this modest paper in order to tackle a problem that I believe is and should be concerning and that is foreign legal assistance in the legal reform which has been going on since 1999 and consequently legal transplants and their impact in Kosovo legal system.

2 Legislative Process in Kosovo

*"The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."*¹³⁹

Kosovo is a unique country, with a unique history of state building. The state of Kosovo was born on 17 February 2008.¹⁴⁰ As a new state, Kosovo had to be built from scratch, implying also a lengthy process of legal changes. Laws that were in force when Kosovo was part of Federal Republic of Yugoslavia could not support the new developments in its economic and social order, especially transiting from a state-controlled economy to an open-market economy. Moreover aspiration for membership of the European Union (EU), United Nations (UN), North Atlantic Treaty Organisation (NATO), the Council of Europe and other international organizations also require changes in the legal system. To this extent Kosovo does rely heavily on the foreign experience in drafting its legislation.

Since 1999 Kosovo received millions of Euros in legal assistance and thus may be ranked as country that received largest amount of legal assistance from international organisations in the name of legal reform and strengthening the rule of law. Almost every piece of legislation has undergone the process of amendments or was completely redrafted. However, international reports still show that Kosovo faces legal uncertainty. The Kosovo Ombudsperson rightfully described this situation as a "legal chaos".

The laws applicable in Kosovo have been changing continuously from a complex mix of old laws of the province of Kosovo prior to 22 March 1989, United Nations Interim Administration Mission in Kosovo (UNMIK) regulations and international human rights standards, whether universal or European, and finally laws adopted by the Assembly of Kosovo since the declaration of Independence in 2008.

The law making process very often was a process to suit individual interests. The Government of Kosovo has weighed its success by the number of laws adopted during its mandate, whereby it was many times criticised for choosing quantity over quality.¹⁴¹ On the other hands laws are drafted under influence of foreign donors through the legal assistance and their implementing partners. But most of the time donors are focused on the production of laws in order to show quick measurable results thus putting emphasis on delivering a piece of legislation without a proper follow up of its implementation. It is even assumed that their assistance is not always bona fide in the search for new projects and donations.

Another problem which follows the legal assistance is that of legal transplants and their impact on the legal certainty in Kosovo's legal order. Currently, there is scarce information and understanding amongst the lawmakers in Kosovo about the meaning of legal transplants, or their impact on the legal system. Aspiring integration in EU, UN and other international bodies Kosovo is primarily obliged to show that the rule of law is up to desired standards. Especially with the new relationship between Kosovo and EU, Kosovo has to ensure full respect for the rule of law as one of the so-called 'Copenhagen Criteria'. And the legal certainty is at the core of the rule of law expressly recognised by the European Court of Justice as part of the general principles of EC law.¹⁴²

¹³⁹ Wendell Holmes, Oliver. *THE COMMON LAW*. 1881 ed. Vol. 41.

¹⁴⁰ Kosovo announced its independence in 2008 after being ten years under UN Administration, thus becoming being the newest country in Europe.

¹⁴¹ Conclusions of EU – Kosovo Stabilization Association Process Dialogue (SAPD) sectorial meeting held in Pristina, 20-21 February, 2014 available at http://eeas.europa.eu/delegations/kosovo/documents/eu_kosovo/20140520_conclusions_sapd-inno_2014_final.pdf

¹⁴² C-323/88 Sermes (1990) ECR I-3027, esp.p.I-3050

It is generally accepted that law is the instrument through which goals are promoted, implemented, and reviewed; the kinds of laws that are written and the way they are interpreted by the judiciary will determine the type of reconstruction and development that takes place in a post conflict society.¹⁴³ But is this what is really happened? Inclusion of legal transplants in the Kosovo legal system has caused shift from the civil law tradition¹⁴⁴ that previously existed towards the common law tradition¹⁴⁵ which also implies change in working culture and methods. The most important sample is the Criminal Code and Criminal Procedure which have been drafted to resemble to a large extent American law. The shift to adversarial system and the direct effect of international human rights instruments in the legislation whereas only few judges speak English and are thus unable to understand and interpret for example the European Court of Human Rights cases, could be detrimental to the effective rule of law.

Internationally there might exist a discourse of discussion and voluminous literature on this topic, however this does not seem to be the case in Kosovo. The lack of clarity and any research on the legal and social culture of Kosovo could make the legal assistance for the beneficent institutions inappropriate.

There are many questions related to this topic that require extensive legal attention, however this paper will focus only on few of them with a strong belief that it will initiate further discussions on this topic.

3 Legal Transplants

Although this paper builds upon the theory of Watson that transplantation is the most fertile source of legal development and thus it is possible, this paper will strive to answer as to what it means for Kosovo and what impact they have in undermining the principle of legal certainty.

As mentioned above the legislative process in Kosovo has at large been led by international experts and therefore laws are to a large extent inspired by foreign policies and experience thus giving less attention to the needs of Kosovo and its social and legal culture. Very often this process has imposed the laws of other countries as a 'one size fits all' model. There were also cases where a law of another country was completely copied and only name of the country was changed creating sometimes also funny situations when occasionally the name of the country that law came from was mistakenly left in. This has happened with many laws, i.e Law on electronic monitoring of persons whose movement is limited by decision of the court or the conditional release panel which was copy pasted from law of Albania and in one place the name Albania was there. Copying is not the answer. The legislative process must take into consideration the country's unique reality in order to draft better laws. There must be involvement of local legal practitioners who know and have first-hand knowledge of their local realities.

The changes to legal system in Kosovo have also caused shift from civil law towards common law system. This means that also legal practitioners should be able to apply law as in common law system. Consequently this means that Kosovo judges must be able to work based on case law.¹⁴⁶ Finally this means that also the legal education must change so that to produce lawyers that are able to work based on the new legal system. So, it is clear that this is a complex multi-layered undertaking here which

¹⁴³ Muna Ndulo: *Rule of Law Programs; Judicial reform, Development and Post Conflict Societies*; ANLEP Working Paper No. 2; available at: <http://www.sum.uio.no/english/research/networks/anlep/publications/anlep-working-paper-2.pdf>

¹⁴⁴ The *Private Law Dictionary*, *supra* note 14 at 62 defines "civil law" as follows: "Law whose origin and inspiration are largely drawn from Roman law."

¹⁴⁵ The *Private Law Dictionary*, *supra* note 14, 72 defines "common law" as follows: "Legal system of England and of those countries which have received English law, as opposed to other legal systems, especially those evolved from Roman law."

¹⁴⁶ Whilst it is recognised that French civil law is based on the Montesquieu's theory of separation of powers, whereby the function of the legislator is to legislate, and the function of the courts is to apply the law. Common law, on the other hand, finds in judge-made precedent the core of its law

should not have started at the top. The approach must have been bottom- up and well-structured in order to produce results.

On the other hand there is no policy decision on the direction legal system should take. It has rather been a spontaneous undertaking based on the donor driven legal assistance coming from either from United States (US)¹⁴⁷ or based on the standards set by EU¹⁴⁸ as the main donors. Although both US and EU consider rule of law “a prerequisite for good governance, a functioning public administration and socio-economic development”¹⁴⁹ the coordination and cooperation amongst them was not always smooth. Disagreements were at times apparent when it comes to the question of which legal system should be introduced in Kosovo – the (Anglo-Saxon) common law or the (continental European) civil law.¹⁵⁰

The US, for example, has had significant influence in the drafting of Criminal Code and Criminal Procedure Code whereby it can be easily stated that these two codes resemble very much Anglo-Saxon (adversarial) system. Many concepts that have been introduced in the codes are new for legal practitioners in Kosovo. For example plea bargaining has been introduced into Kosovo criminal Code by US experts.¹⁵¹ The idea was to reduce the backlog of cases in the judiciary which according to European Commission Progress Report for Kosovo at the end of 2012 counted over 218,740 cases pending before the Kosovo basic courts was increasing to over 235,000 cases in 2013.¹⁵² However the immediate result showed that there are potential incompatibilities between the institution of plea bargain as used in adversarial system and the inquisitorial tradition that is followed in Kosovo.¹⁵³ On the other hand the vast majority of judges and prosecutors in Kosovo still remain employed from the previous system and therefore are not very open to such changes and still show considerable resistance to applying them.¹⁵⁴ A survey that was conducted with prosecutors in 2013 with regard to their understanding of the new Criminal Procedure Code that entered into force in January 2013 shows that the average understanding of the new Criminal Procedure Code is about 48.9%. Prosecutors still do not

¹⁴⁷ The Sofia Echo, “First Agreement on US Assistance for Kosovo Signed in Pristina”, 15/09/2009, available at: http://sofiaecho.com/2009/09/15/784938_first-agreement-on-us-assistance-for-kosovo-signed-in-pristina

¹⁴⁸ The EU only through IPA projects contribution in RoL is 7.15 million Euros. See European Commission, “IPA 2013 Annual Programme: Support to the Rule of Law: 02 – 2013 / 02”, available at: http://ec.europa.eu/enlargement/pdf/kosovo/ipa/2013/ipa_2013_pf2_support_to_the_rule_of_law.pdf

¹⁴⁹ European Commission, 2010. *Instrument for Pre-Accession Assistance (IPA): Multi-annual Indicative Planning Document (MIPD) 2011-2013 – Kosovo*, p. 12; Embassy of the United States Prishtina, 2011. “Rule of Law in Kosovo, One Year Later”, Speech by Ambassador Christopher Dell”, 17/01/2011, available at:

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¹⁵⁰ The Rule of Law in Independent Kosovo: See International Crisis Group report, N°204, 19 May 2010, pp. 1/22.

¹⁵¹ Plea bargaining was officially incorporated into the Criminal Code and the Code of Criminal Procedure of the Republic of Kosovo in 2008.

¹⁵² *Commission Progress Report for Kosovo 2013* available at:

http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ks_rapport_2013.pdf

¹⁵³ Kushtrim Tolaj, *The Institutionalization of Plea Bargaining in Kosovo*, JURIST - Dateline, Apr. 15, 2012, <http://jurist.org/datetime/2012/04/kushtrim-tolaj-kosovo-plea-bargaining.php>.

¹⁵⁴ *Legal profession Index for Kosovo Volume III* (prepared by American bar Association) available at:

http://apps.americanbar.org/rol/publications/kosovo_lpri_vol_iii_05_09_en.pdf

understand for example international evidence, the new relationship between police and prosecutor in early stages of investigations. They misapprehend the meaning of the 'notice of corroboration' in the new Criminal Procedure Code, many have a poor understanding of the concept of corroboration and some confuse corroboration with repetition, and are unlikely to seek corroborative evidence. Prosecutors still see the judge as the central figure who should investigate and question the witnesses a concept remaining from the previous system.

All these issues have led to a situation where laws keep being amended very often thereby increasing difficulties in understanding and implementing the legal framework which remains a serious challenge to rule of law in Kosovo¹⁵⁵

4 Conclusion

After 1999 legal reform in Kosovo was unavoidably needed. Independence from Serbia, aspiration for membership to EU and other international organisations could not be realized with the legal framework existing at that time. Especially the need to include international standards on human rights and freedoms cannot and should not be argued at all.

However, what remains an issue is the imposition of various solutions by international actors without a transition in a narrow sense of the word. The main challenge is not only to adopt legal texts but adapting institutional mechanisms and its society to make the legislation work. The legislation must be a tool for effective rule of law. As stated in Organisation for Economic Cooperation and Development report: "the concept first and foremost seeks to emphasize the necessity of establishing a rule-based society in the interest of legal certainty and predictability."¹⁵⁶

Furthermore, as mentioned earlier, the reform was started as a top-down process, and not bottom-up process. There was no assessment of existing capacity for implementing sophisticated laws and systems which in general created a problem of implementation of legislation. The lack of qualified staff, information campaigns and training, as well as weak capacity of institutions for monitoring and co-ordination apparently were blindly bypassed. One must take into consideration on the differences that civil law and common law traditions have in terms of style, functions and interpretation.¹⁵⁷ Here I believe a more aggressive approach should have been taken as it was taken for example in Asia, Africa and Latin America where young lawyers and scholars were sent to reform legal education and to align the laws of the host countries with those of the United States¹⁵⁸ Robust education and raising awareness amongst judges, prosecutors, lawyers and legislators is key to survival of legal transplants.

Consequently, it is of paramount importance to adapt rules to the current legal conditions and values in order to make it successful. According to a study by Berkowitz, Pistor and Richard countries that consciously and carefully adapted the transplant to local conditions and/or had a local population that already was familiar with the legal tradition behind the export had more effective legal institutions than 'transplant effect' countries that received the foreign law without conscious adaptation or prior

¹⁵⁵ European Commission, 2012. *Communication from the Commission to the European Parliament and the Council on a Feasibility Study for a Stabilisation and Association Agreement between the European Union and Kosovo*, Doc. COM(2012) 602 final, 10/10/2012, p. 8.

¹⁵⁶ OECD Development Assistance Committee, Issues Brief: *Equal Access to Justice and the Rule of Law*

2 (2005), <http://www.oecd.org/dataoecd/26/51/35785471.pdf>.

Enumerations of the requirements of the rule of law typically include legal certainty.

¹⁵⁷ William Tetley, *Mixed jurisdictions : common law vs civil law (codified and uncodified)* available at: <http://www.cisg.law.pace.edu/cisg/biblio/tetley.html#22>

¹⁵⁸ Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470, 473 (1995) (reviewing LAW AND DEVELOPMENT (Anthony Carty ed., 1992) and LAW AND CRISIS IN THE THIRD WORLD (Sammy Adelman & Abdul Paliwala eds., 1993)). Trubek

familiarity.¹⁵⁹When discussing the issue of *Plea Bargaining Across Borders* Jenia I. Turner rightfully notes that “difficulties may arise, however, when a country chooses a model because of foreign political influence and without due regard to the models likely to fit with the adopting legal system.”¹⁶⁰

Although the situation in Kosovo requires change in legislation due to international pressure, competent authorities and lawmakers in Kosovo must understand that the legislative process must be a coordinated well thought exercise, with effective participation of all relevant stakeholders, with clear understanding of new concepts and possibilities of adapting them to its culture, otherwise it will end up changing laws every year risking as such their implementation and the whole rule of law. As for the current legal transplants more time is needed to be able to determine if they fit or not. Last but not least, even though at this stage it is difficult to show concretely the results of new legislation this paper is meant to initiate a discussion among Kosovar lawyers on this topic. Only when we start discussing the issue at stake I believe we will be able to deal with it in adequate manner.

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