

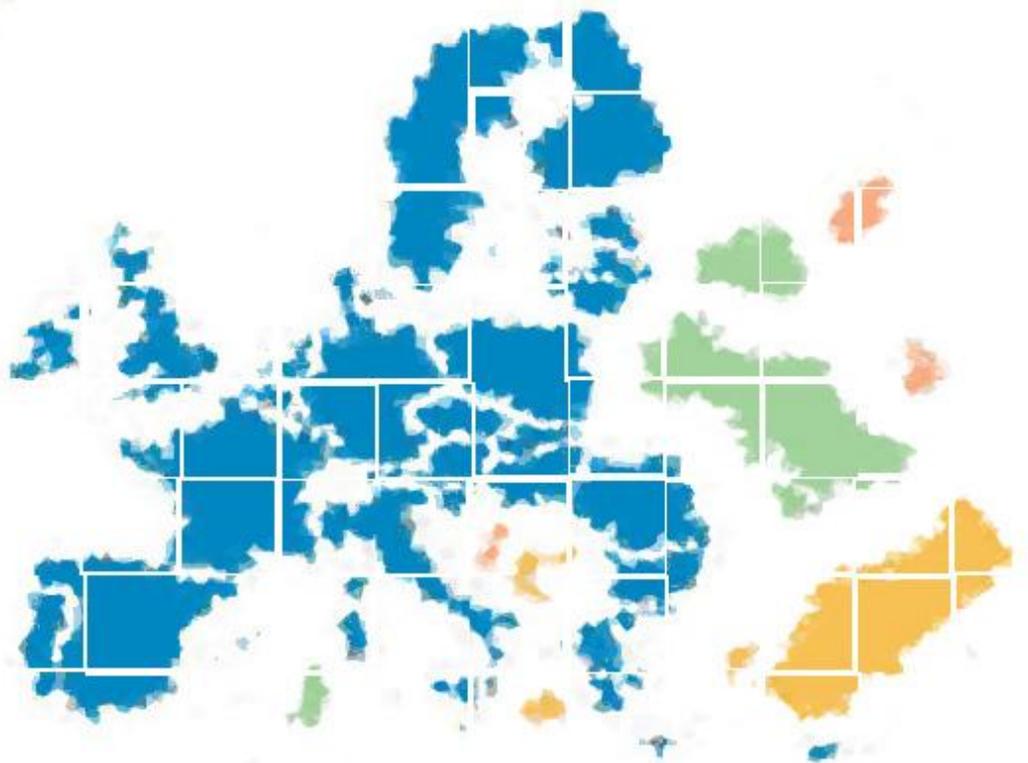
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Student Paper Series

Establishing the Rule of Law in Kosovo

The Local Ownership and International Control

Bojan Elek



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Establishing the Rule of Law in Kosovo

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Introduction

In February 2008, Kosovo's Parliament unilaterally declared independence from Serbia, a political act which was endorsed and later recognized by most of the European Union countries and the US. This declaration of independence came after a lengthy eight-year period, ever since Serbian authorities left Kosovo in accordance with the United Nation's Security Council resolution 1244, during which the UN administration¹ had been effectively running the province. In February 2008, the EU's Rule of Law Mission in Kosovo (EULEX) was launched, the largest EU mission ever under the European Common Security and Defense Policy (CSDP).² With the authorization to "assist and support the rule of law institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability,"³ its mandate has been extended to 2014. Apart from EULEX, the EU is present in Kosovo through the EU Office in Kosovo, which is merged with the EU Special Representative for Kosovo. This double-hatted institution acts as a key factor in the process of Kosovo's political and technical negotiations with Brussels, with aim of approximating Kosovo's legal and institutional order with that of the EU. In addition to this, the EU is also present through the International Civilian Office Kosovo (ICO), which was established on the request of Kosovo's Parliament in order to supervise implementation of The Comprehensive Proposal for a Status Settlement for Kosovo.⁴

This brief overview of international institutions and missions operating in Kosovo, as presented above, serves to illustrate the efforts and involvement of the international community in restoring and developing the post-conflict society of Kosovo. Taking into account the recent Feasibility Study for a Stabilization and Association Agreement which has confirmed Kosovo's future within the EU,⁵ the efforts of the international community—

¹ United Nation Mission in Kosovo (UNMIK) was established by the "United Nation Security Council Resolution 1244 (1999)," May 10, 1999, as a provisional administration, alongside with the NATO peacekeeping Kosovo Force (KFOR).

² "EULEX Fact Sheet," *EULEX*, accessed December 18, 2012, <http://www.eulex-kosovo.eu/docs/info/basic/Basic-ENG.jpg>, EULEX website presentation.

³ *Ibid.*

⁴ This Proposal—often referred to as Ahtisaari's plan, after President Marti Ahtisaari, the UN Secretary-General's Special Envoy for Kosovo who drafted it—contains a set of provisions for establishing sustainable, stable and multi-ethnic Kosovo. The ICO supervised implementation of this plan until 10th of September, 2012. In its meeting in January 2012, The International Steering Group concluded that "Kosovo now was in the final stages of implementing the Comprehensive Status Proposal, allowing for preparing for an organized end to supervised independence and the closure of the ICO by the end of 2012". ("End of Supervised Independence", ICO Website, 10 September, 2012).

⁵ First at the Feira (June 2000) and Zagreb (November 2010) European Council meetings, as a part of the Western Balkans; then, in Thessaloniki agenda from June, 2003; finally, "the December 2011 Council

and especially the EU—for promoting development are only a logical step for bringing Kosovo closer to Europe. However, this vast myriad of institutions working towards the same goals creates confusion at the same time,⁶ due to overlapping competences, lack of visibility and so far limited success in creating sustainable positive change. In the latest report from the European Court of Auditors, the EU's assistance in the field of rule of law has been characterized from "not being sufficiently effective" to having "only modest success."⁷ Although there is a civilian staff of approximately 1700 internationals, and the EU's financial assistance amounted to more than EUR 1.2 billion over the last four year period,⁸ the efforts have so far had a limited success in tackling corruption and establishing the rule of law. If we take into consideration that the people of Kosovo are strongly in favor of joining the EU,⁹ together with promised membership prospects and strong determination of the international community to help development efforts in Kosovo, then establishing the rule of law—as one of the first and foremost of the Copenhagen criteria—becomes crucial and urgent.

Identifying the Problem

In October 2012, the European Commission has published Feasibility Study for a Stabilisation and Association Agreement between the European Union and Kosovo, where Kosovo has been evaluated in terms of current compliance with the EU regulation as being "largely ready"¹⁰ to conclude the agreement. It has been found that Kosovo has no legal obstacles to conclude a Stabilisation and Association Agreement (SAA) with the EU,¹¹ once the short-term criteria are met. The first short-term priority identified was establishing and strengthening the rule of law, especially with regards to the judicial system and fight against the corruption.¹² However, the European

recalls the EU's willingness to assist the economic and political development of Kosovo through a clear European perspective, in line with the European perspective of the region"("Feasibility Study for a Stabilisation and Association Agreement Between the European Union and Kosovo," October 10, 2012)

⁶For a detailed explication of the problem see Brosig (2011), who argues that "the smallness of the region and the engagement of major international players create a situation of high actor density in which multiple interaction points between international institutions arise."(Malte Brosig, "The Interplay of International Institutions in Kosovo Between Convergence, Confusion and Niche Capabilities," *European Security* 20, no. 2 (2011): 186)

⁷ "Rule of Law Assistance to Kosovo Not Sufficiently Effective" (European Court of Auditors, Press release ECA/12/41, October 30, 2012), http://eeas.europa.eu/delegations/kosovo/press_corner/all_news/news/2012/30102012_en.htm., European Court of Auditors report, ECA/12/41

⁸ Kosovo is the world's largest recipient of EU financial aid in per capita terms (Ibid.)

⁹An astonishing 89.6% of Kosovo's population sees membership in the EU as a good thing, the largest percentage in the Balkans ("EU Membership Good/Bad | Survey Data | Gallup Balkan Monitor," accessed December 19, 2012, <http://www.balkan-monitor.eu/index.php/dashboard>).

¹⁰"Feasibility Study for a Stabilisation and Association Agreement Between the European Union and Kosovo." October 10, 2012

¹¹ Notwithstanding the current dispute over Kosovo status by the five member states that do not recognize Kosovo's independence, the SAA is seen as status neutral.

¹²"Feasibility Study for a Stabilisation and Association Agreement Between the European Union and Kosovo."

Commission's Report largely insists on placing the blame on local authorities for failing to cooperate with the EULEX officials, seeing this lack of cooperation as the reason for unsatisfactory performance in these areas. The Report states that "on Rule of Law EU needs to see from Kosovo continuous good cooperation with EULEX" as well as that "the implementation of the mandate of EULEX needs to be actively supported"¹³ by the government of Kosovo. Although this is true to a great extent, the Commission's Report largely fails to notice that the international community's omnipresence in every facet of Kosovo's social and political life might actually be detrimental, because of its primary focus on problem management instead of fostering development. This trend can be observed in areas as different as local administration, security sector or the reform of judiciary system.¹⁴ As noticed by the policy analysts from the Center for Strategic and International Studies, the EU extensive supervision might actually "be holding back the country from achieving its potential...limit[ing] political competition and democratic transparency as the government feels more accountable to outside powers than its own citizens."¹⁵

The criticism of EULEX and its performance of establishing the rule of law in Kosovo mostly goes along the same lines as stated above—blaming either one or the other side. However, there are more balanced approaches in criticizing the process of reforms, the ones that place the blame on all the parties involved. In a recently published Balkan Policy Institute's research (2010), the issues in the field of judiciary reform has been seen as not taken seriously by either side of the actors involved. Some of the identified issues include lack of the political will to undertake the necessary reforms; need for new legislation on courts and judicial matters; the courts in the northern Kosovo that are largely unfunctional; understaffed EULEX mission, especially when compared to the number of police officers.¹⁶ Another line of criticism of the rule of law reform implementation in Kosovo is directed towards lack of clear ownership structure of the reform. As presented in a recent field research on Kosovo, the EULEX mission is characterized as a "disjuncture of expectations."¹⁷ This disjuncture of expectations is due to: Kosovo's government expectations that EULEX should use its executive powers to assert Pristina's control over northern part of Kosovo, while at the same time expecting that EULEX should only use its 'soft', advisory power, when it comes to problems within the rest of Kosovo's territory; EULEX expectations that the government in Pristina should have a decisive role in tackling corruption and organized crime, and that the EU's civilian mission

¹³Ibid.

¹⁴"North Kosovo: Dual Sovereignty in Practice - International Crisis Group," 2–4, accessed April 15, 2013, <http://www.crisisgroup.org/en/regions/europe/balkans/kosovo/211-north-kosovo-dual-sovereignty-in-practice.aspx>.

¹⁵Janusz Bugajski and Heather A. Conley, "A New Transatlantic Approach for the Western Balkans" (Center for Strategic and International Studies, November 2012), 13, <http://csis.org/> (accessed 15 December, 2012)

¹⁶"EULEX: Still in Search of an Identity" (Balkan Policy Institute, April 9, 2010), 2, <http://policyinstitute.eu> (accessed 16 December, 2012).

¹⁷Mary Martin and Stefanie Moser, *Exiting Conflict, Owning the Peace*, Eds. (Friedrich Ebert Stiftung), accessed December 19, 2012, <http://www.owning-the-peace.eu/>.

should only have a supportive role; lastly, the civil sector expects to see EULEX using more of its executive powers in fighting the corruption and crime.¹⁸ It is obvious that the expectations of neither side will be met in the foreseeable future, unless a clearer and more effective institutional arrangement replaces the current one.

Another example of a failed application of the local ownership principle can be observed in the field of electoral reform. As early as in 2002, after a short period of institution-building in local municipalities, the Electoral Division of the Organization for Security and Co-operation in Europe (OSCE) started transferring responsibilities to the local Kosovar authorities who have undergone extensive capacity-building trainings.¹⁹ The OSCE's plan was to gradually transfer powers to local institutions and make them functionally independent by 2004, with only limited advisory and assistance role provided by OSCE. However, this goal has only been achieved partially by the suggested deadline, and "in 2007 the OSCE even took some of the transferred tasks back because it felt that the Secretariat was incapable of organizing the elections and that there was a serious risk of complete failure."²⁰ This experience suggests that, without proper control mechanisms over the transfer of powers, the local ownership remains an unattainable goal.

As can be seen from the arguments presented above, most of the analysts agree that the results of the reform processes so far are not satisfactory. However, they fail to agree on who is to blame. What seems to be an underlying issue in this dispute is a fundamental disagreement over who should be the main owner of the reforms. Should EULEX be more assertive and impose more control over Kosovo's government, or is it exactly the government that needs to start dealing with the most pressing problems on its own initiative? The answer to this question, as this analysis suggests, is that a delicate balance needs to be established during this period of transition of powers. An effective arrangement needs to balance between the strict international control imposed by EULEX over the direction and pace of reforms, on one side, and the respect for the local ownership principle by gradually extending powers of the local authorities after certain standards are reached, on the other.

The Local Ownership vs. International Involvement

In the vocabulary of activists and theoreticians dealing with peace building processes in post-conflict societies, the term *local ownership* has become crucial.²¹ It is used to indicate "the degree of control that domestic actors wield over domestic political processes; in post-conflict contexts, the notion conveys the commonsense wisdom that any peace process not

¹⁸Ibid., 18.

¹⁹Tobias Pietz and Leopold von Carlowitz, *Ownership in Practice: Lessons from Liberia and Kosovo* (DSF, 2011), 40.

²⁰Ibid.

²¹Timothy Donais, *Peacebuilding and Local Ownership: Post-Conflict Consensus-Building*, Studies in Conflict (Oxon: UK: Routledge, 2012), 12

embraced by those who have to live with it is likely to fail.”²² The local ownership principle serves to bridge the gap between the international assistance’s lack of legitimacy to influence domestic policies, on one side, and the necessity of local governments to implement institutional and procedural changes for which they lack expertise or resources, on the other. Therefore, the international actors provide the necessary resources and expertise to the local governments, while in turn obtain the legitimacy for the actions undertaken by promising democratic participation, local institution building and, eventually, transfer of powers.²³ In the case of Kosovo, the international community is obliged under the UN Resolution 1244 to respect the principle of local ownership during the peace building process, and this is ensured through the following three provisions: guaranteeing to the citizens of Kosovo participation in the democratic elections; establishing self-governing local institutions and providing help in capacity building; finally, transferring interim administrative authority to the local institutions after establishing them.²⁴

However, although it seems that the local ownership principle solves many legitimacy and sustainability issues, the matter of fact is that there are problems with the speed and directions of reforms. Luckily for the EU, there have already been experiences with civilian missions before Kosovo, so there are valuable empirics to look at when making policy decisions. As a starting point, the experience of High Representative for Bosnia and Herzegovina and lessons learned there could serve the purpose of informing policy makers about the importance of the local ownership principle and its relation with a more strict international control. The international community’s High Representative in BiH from 1999 to 2002, Wolfgang Petritsch, was supportive of “the idea that if peace was to take hold in Bosnia, then Bosnians in general—and their elected officials in particular—had to be front and center in the peace process.”²⁵ However, while his rhetoric was in favor of promoting the local ownership, the actions of his administration were not. Having at his disposal extensive Bonn Powers granted to the High Representative position after the initial slow implementation of Dayton Peace Accords, Petritsch imposed several pieces of legislation in an authoritative manner, which prompted some authors to name this period of post-war peace-building as “protectorate democracy in Bosnia.”²⁶ However, this was the first time that some actual progress had been made in post-war Bosnia. As this process had almost complete lack of local ownership, in addition to lacking legitimacy among the local population, it had to be abandoned. Later officials at this post made a shift towards more locally owned approach to reforms, although this transfer of powers to local actors resulted in losing the momentum and

²² Ibid.

²³Jens Narten, “Post-Conflict Peacebuilding and Local Ownership: Dynamics of External–Local Interaction in Kosovo Under United Nations Administration,” *Journal of Intervention and Statebuilding* 2, no. 3 (2008): 369–390. 373

²⁴UN Security Council 1999, Paras. 11c and d, taken from Narten, “Post-Conflict Peacebuilding and Local Ownership”, 377.

²⁵Donais, *Peacebuilding and Local Ownership*, 12.

²⁶Michael Pugh, *Protectorate Democracy in South-East Europe* (Copenhagen Peace Research Institute, 2000) taken from Donais, *Peacebuilding and Local Ownership*. 12

the peace building dynamics.²⁷ As noted by Donais, this was due to the fact that “local ownership is inherently problematic in cases where key local actors are less than fully committed to building peace.”²⁸ Since the cases of Bosnia and Kosovo are similar in many aspects, especially in regard to still ongoing ethnic tensions and bloody past, this experience can be used to create better institutional arrangements and policies in Kosovo.

Policy Implications

With the careful consideration of the local ownership principle and the need for strict international control over the peace building processes, certain policy proposals seem to result from the analysis presented above. They are as follows:

Stricter supervision of the transition of powers from EULEX to local judiciary and administrative authorities – Ever since EULEX took over the task of establishing the rule of law in Kosovo from UNMIK, there has been a continuation of gradual transition of powers to the local authorities in judicial matters, which is largely deemed as a positive thing. The level of local ownership has increased, but problems still persist. This process could be taken to the next level, with employing the local ownership principle to a greater extent, while strengthening the supervisory role of EULEX. There were the cases when EULEX failed to perform its control function, especially when it comes to the fight against the corruption, the reappointment of judges and pressuring the government to implement reforms in judicial areas.²⁹ This control is necessary during the transitional period, and can be loosened or even eliminated after certain standards are met.

Closer cooperation with local authorities on issues of organized crime and corruption – Kosovo continues to be presented as a country with high levels of corruption in international reports,³⁰ and little effort has been made to systematically combat this problem. The EULEX representatives have made statements that high-level government officials will be investigated and that there will be arrests, but there has been little progress so far³¹. This failure to act on promises has led to falling popular support for EULEX and general disappointment with the efforts to combat corruption. With this in mind, it is important to strengthen the cooperation between EULEX and the government, especially by showing more support for the Kosovo Special Prosecutor office.

Strengthening professional support and training– One of the main tasks of the European Rule of Law Mission in Kosovo is to provide professional support and training to the local authorities, so as to facilitate the process of judicial reform and its compliance with the EU standards. There has been serious criticism directed at the member states, on the

²⁷Donais, *Peacebuilding and Local Ownership*, 13.

²⁸*Ibid.*

²⁹“EULEX: Still in Search of an Identity,” 7.

³⁰“EULEX: Still in Search of an Identity,” 2, Balkan Policy Institute

³¹*Ibid.*

account of their seconded staff to EULEX being unqualified and insufficient in numbers, as well as being delegated for too short periods of time.³² This issue has to be addressed by better selection of the EULEX officials and their longer mandate.

Serbian minority must be included in the decision-making, legal and political processes –For any change to be locally owned it must be inclusive. This relates specifically to the northern Kosovo, since the Serbian minority living there largely refuses to participate within Kosovo's judicial and administrative institutional framework. The courts in the northern part of Kosovo are not functional, and without legal protection it is impossible to establish the effective rule of law. Recently opened Kosovo's government administrative office in northern part of Kosovska Mitrovica,³³ although sparking some discontent among the local population, is seen as a positive step towards a more inclusive political arrangement. Another way for bringing about the change in this area could be a closer cooperation between EULEX and the Serbian authorities on the cases of human organ trafficking in Kosovo, which continues to be seen as a major issue among Serbian population in Kosovo, since little has been done so far to investigate this case.³⁴

Conclusion

Taking into consideration the arguments presented in this analysis, it is clear that the current state of affairs in the peace building process in Kosovo is not satisfactory. Besides the slow pace of the reforms undertaken and lack of political will in the Kosovo's government to proceed with further actions to establish the rule of law, the EU's civilian mission is also to be blamed for failing to impose stricter control over the crucial areas of judicial and administrative reform. By proposing a more nuanced approach to this problem, an approach of balancing the local ownership principle and international control over the most important areas of reforms, this analysis offered a set of practical policy proposals that could be implemented in order to overcome current problems. Although Kosovo has been promised a European future, there are still important internal problems that need to be urgently addressed if the positive momentum is to be preserved and the European future is to be materialized. A set of policy proposals presented in this paper, although admittedly limited in scope, is only one, albeit important, step towards reaching this goal.

³²“Rule of Law Assistance to Kosovo Not Sufficiently Effective.”

³³“Kosovo Office in Northern Mitrovica Causes Controversy,” accessed December 20, 2012

³⁴“Prosecutor: EULEX Team Should Investigate Crime - B92 English,” *B92*, accessed December 19, 2012, <http://www.b92.net/>

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