

The Bumpy Road of EULEX as an Exporter of Rule of Law in Kosovo

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Abstract

This paper analyses EULEX mission in Kosovo (hereafter EULEX) as an exporter of rule of law. From the deployment of the mission, two mainstream discourses have coined the effectiveness of EULEX establishing the rule of law in Kosovo. From the Brussels point of view, EULEX has marked a lot of progress in promoting the rule of law in Kosovo. On the other hand, based on international indexes and other secondary sources, EULEX has been harshly criticised to deliver its promises in strengthening the rule of law institutions, fighting organised crime, war crimes and reducing corruption. Beyond these discourses, the paper tries to explore whether, how and to what extent, EULEX has promoted rule of law in Kosovo. The paper argues that EULEX has failed to promote rule of law in Kosovo due to 1) the costs of adaptation or compliance as function of the misfit between EULEX institutional approach on rule of law and domestic conditions and 2) incapacity of Kosovo rule of law institutions to interact with EULEX in strengthening the rule of law as a result of political interference on judiciary and police sector.

Keywords: EULEX; Kosovo; rule of law; judiciary; organised crime; corruption.

Introduction

After the fall of communism regime, the promotion of rule of law emerged as an important tool for reconstruction and reconciliation of post conflict societies. Several International Organizations took it for granted the revival of the rule of law in post conflict societies, through offering financial aid to strengthen rule of law or advising on different types of reforms in judiciary system, law revision and government compliance with the laws (Samuels 2006, 5-6). As Carothers remarked in a Foreign Affairs article "One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles." (1998) Among many international and regional organization, EU has increased its presence in Western Balkan countries – especially in Kosovo - as an exporter of rule of law, following two types of policies: enlargement policy and Common Security and Defence Policy (CSDP) mission.

However, these promises have proved difficulties for both EU and Kosovo authorities. In terms of enlargement, non – recognition of Kosovo as an independent state by 5 EU member states has placed Kosovo in stalemate. It is not clear to what extent these countries will affect European integration process. On the other hand, the deployment

of EULEX in Kosovo to strengthen rule of law has been coined by two main discourses. From the Brussels point of view, the mission has marked a progress in the area of rule of law through combining jointly non-executive and executive functions. (EULEX 2015a; EULEX Programme Report 2012). From the other point of view, the situation is quite different. Based on international indexes (Freedom House; Transparency International's Corruption Perception Index and Worldwide Governance Indicators) and other secondary sources (Bajrami 2011; GLPS 2013; Radin 2014; Belloni and Strazzari 2014; Capussela 2015a; 2015b), EULEX has been criticised as ineffective to deliver its promises repressing corruption and organised crime that are omnipresent in Kosovo society.

Beyond these discourses, the paper aims to link existing literature on the EU as an exporter of rule of law (Kmezcic 2014; Ilievski 2014; Magen and Morlino 2009) with factors on which EU's domestic impact hinges. The paper argues that EULEX has failed to promote rule of law in Kosovo due to 1) the costs of adaptation or compliance as function of the misfit between EULEX institutional approach on rule of law and domestic conditions of Kosovo society and 2) incapacity of Kosovo rule of law institutions to interact with EULEX in strengthening the rule of law as a result of political interference on judiciary and police sector. In order to address both these shortfalls, EULEX needs to shift its strategy from institutional approach toward an end – goal pragmatic approach by emphasizing the culture of rule of law. As Stromseth, Wippman and Brooks rightly emphasize “the rule of law can neither be created nor sustained unless most people in a given society recognize its value and have a reasonable amount of faith in its efficacy. The rule of law is as much a culture as a set of institutions, as much a matter of the habits, commitments, and beliefs of ordinary people as of legal codes”. (2006, 310) Moreover, what Kosovo society wants and EULEX has to understand, are not legal package reforms adopted to strengthen rule of law but a state where rule of law counts as a restraint on power of politician that interfere in judiciary and police sector for their own interest.

This paper is structured as follow. First, I set forth the definition of the rule of law in the context of the EU external action, especially through CSDP missions. Second, I provide a background of challenges that United Nation Mission Interim in Kosovo (UNMIK) to establish rule of Law in Kosovo and the transition toward the deployment of EULEX in Kosovo. Third, I analyse the EULEX mandate, goals and implementation. Fourth, I assess to what extent EULEX has delivered its objectives and how domestic factors have mitigated its effectiveness. Finally, the paper provides a conclusion.

Unpacking the Principle of Rule of Law for EU External Action

Defining as to what mean the rule of law is no easy task. This principle is characterised by an extensive debate as what it means at different times and in different context, its elements and the benefits of the rule of law. (Tamanaha 2004) A first complication derives

from the interweaving with other domains – conceptual, historical, philosophical, law and morality. (Morlino and Palombella 2010; Sellers and Tomaszewski 2010; Kryger 2009) Secondly, the variability in terminology and different understanding in various legal systems has elicited confusion. (Parliamentary Assembly 2007) The French expression *Etat de droit* and the German expression *Rechtsstaat* have been used but do not always reflect the English language notion of “rule of law”.

Since there is no internationally accepted definition, both academician and International Organization have attempted to define or at least unpack rule of law based in accordance with their understanding and aim. Synthetizing literature, the definition of the rule of law falls in two categories: 1) end-goals programmatic approach and 2) institutional approach.

The end-goal programmatic approach emphasises the importance of the goods that rule of law brings to society as a final end. UN Secretary General in its Report “*The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*” defines the rule of laws as a system of governance in which all persons, public and private institutions are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, adherence to the “principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”. (UNSC 2004) Whereas Rachel Kleinfeld Belton (2005, 3) breaks the concept of rule of law into five socially desirable goods for: (1) a government bound by law, (2) equality before the law, (3) law and order, (4) predictable and efficient rulings, and (5) human rights.

On the other hand, after the fall of communism regime, the institutional approach definition of rule of law has got much attention. International Organizations - UN, CoE, OSCE and EU – and practitioners have increasingly recognised the importance of rule of law, as a way to move post conflict countries toward deeper level of reforms. According to institutional approach, the rule of law focuses on: “reforming institutions” (judicial police and prison reform), “rewriting laws” (modernizing laws) and “upgrading the legal profession” through support for stronger bar associations and law schools, and “increasing legal access and advocacy” through the support of legal advocacy NGOs, law school clinics. (Carothers 1999, 165 – 169; Belton 2005, 16)

In the EU context, the principle of rule of law has undergone a profound gradual affirmation, becoming among other fundamental principles such as liberty, democracy, respects of human rights and four freedoms. Neither Treaty of Rome or Single European Act or Treaty of Maastricht referred to the concept of the rule of law as fundamental principles of the Union. With the Treaty of Amsterdam, entered into force in 1 May 1999, the principle of rule of law was recognised as among the founding principles of

the Union which are common to the Member States and as a guiding objective of the foreign policy. (article 6 and 11/1) The Lisbon Treaty, entered into force in 1 December 2009, reaffirmed the principle of rule of law in internal and external dimension. Internally, the rule of law has been listed among the founding principle of the Union; (TEU 2010, article 2) whereas externally, the promotion of the rule of law, especially in post conflict societies, has become one of the four priorities of civilian operation – police missions, civil administration, and civil protection - agreed in the Santa Maria da Feira Summit (2000). In this summit, European Council laid down its approach on promoting the rule of law in third countries by considering the following measures: 1) deploying at short notice to peace support operations judges, prosecutors, penal experts and other relevant categories within the judicial and penal system; 2) promoting guidelines for the selection and training of international judges and penal experts in liaison with the UN and regional organisations (particularly the CoE and the OSCE); and 3) supporting the establishment/renovation of infrastructures of local courts and prisons as well as recruitment of local court personnel and prison officers. (European Council 2000)

In the case of Kosovo, the promotion of rule of law has been principal work of EULEX rather than through enlargement policy. The deployment of EULEX, under the auspices of the CSDP, aims to export rule of law by emphasizing the importance of security with the rule of law in post conflict stabilisation. As Hurwitz and Studdard have pointed out, ‘rule of law institutions are indispensable for internal security and law enforcement purposes, and to ensure the transparency, accountability and control of security forces such as the police and the military’. (2005, 1) In conclusion, the promotion of rule of law by the EULEX relies more on the institutional approach, focusing on judicial authorities and law enforcement agencies rather than in an end – goals programmatic approach.

Challenges to establish rule of Law: From UN(MIK) to EU(LEX)

After NATO intervention, the UN became an important actor in exporting the rule of law in Kosovo. Pursuant to the aims laid down in the Resolution 1244 adopted by the United Nation Security Council (UNSC 1999a, para 3), the UN decided to establish a new structure – UNMIK - for the peacekeeping missions where “four international organizations and agencies will be working together in one operation under one leadership of UN”. (UNSC 1999b, para 43) UNMIK structure was composed in four pillars corresponding with the mission objectives because “setting up an interim administration, providing humanitarian relief, building democratic institutions and restoring an entire economy would go beyond the competence and capabilities of just one organization”. (paras 43 and 118)

Considering the post conflict situation of Kosovo, International Community contributed in ensuring the security of the population, building a neutral and efficient judiciary system, promoting economic development and building a democratic system of

governance. Being responsible for rule of law institutions, UNMIK started from *tabula rasa* to establish rule of law through 1) filling legal vacuum 2) recruiting and training judges and prosecutors and 3) building judicial infrastructure. First, UNMIK ensured a regulation on the applicable law. On July 1999, UNMIK enacted the first Regulation “*On the Authority of the Interim Administration in Kosovo*”. (UNMIK Regulation 1999a) According to section 3 of this regulation, the applicable law in the territory of Kosovo would be the law prior to 24 March 1999 (NATO intervention), insofar as the applicable law do not conflict with internationally recognized standards referred to in section 2, mandate of UNMIK and other regulation issued by UNMIK. (UNMIK Regulation 1999a, section 3) Such clause caused problems among newly appointed Albanian judges and prosecutors because they had to apply Serbian criminal law. They proclaimed resignation *en masse*, in the case that Regulation will not be amended. In order to avoid the shutdown of Kosovo judicial system that would had effects on the credibility of UNMIK work, on December 1999, UNMIK enacted another Regulation 1999/24 “*On the Applicable Law in Kosovo*” by stipulating that the applicable law in Kosovo will be a) the regulation promulgated by the Special Representative of the Secretary-General and b) the law in force in Kosovo prior to 1989. (UNMIK Regulation 1999b, article 2) Subsequently, UNMIK Regulation No. 1999/25 repealed the first regulation concerning the applicable law in Kosovo prior to NATO intervention. Secondly, in order to build neutral and efficient judicial system, UNMIK created an Advisory Judicial Commission with primary task of recommending suitable candidates as judges and prosecutors. (UNMIK Regulation 1999c) Pursuant to this procedure, on 29 December 1999, UNMIK appointed 301 judges and prosecutors and 238 lay judges. (UNSC 2000, para 107) It should be noted that in the beginning judges were selected generally from Albanian nationality. This preferential appointment occurred due to the dismissal of Albanian judges during Milosevic period. (Cady 2012, 27) Third, UNMIK assisted Kosovo to build judicial infrastructure and improving the correction system. Assistance targeted courts building; attorney general’s offices; offices for justice personnel and detention facilities, prisons and corrections personnel. Through UNMIK assistance, Kosovo Correctional Service complied with European standards. (Cady 2012, 29)

Despite UNMIK efforts to establish rule of law, the mission achieved partially its objectives mainly for two reasons. First reason is related with the mission itself as an unprecedented mission with extensive power. According to the UNMIK Regulation No 1999/1 ‘all legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary - General’. (section 1.1) As can be seen, no separation of power principle was foreseen. All powers were concentrated in the hand of Special Representative of the Secretary – General, including the appointment or dismissal in the judiciary. Such discretion weakened the independence of judiciary and consolidated the role of the leadership of the mission to control the work of prosecutors and

investigators. According to King and Mason, UNMIK decline to administer justice in sensitive cases because “many cases were blocked by officials in KFOR and UNMIK” (2006, 59-60) who did not desire the prosecution of high profiles figures and prominent guerrillas. During its mandate (1999 – 2008), UNMIK’s judges prosecuted only three important war crimes cases; in five cases, involving the enforced disappearances of 27 ethnic Albanians, no-one was brought to justice and in 10 cases, involving the abduction of 13 Serbs and Roma, only one perpetrator was brought to justice, but by the Serbian authorities. (AI 2013, 22) Furthermore, for seven years, UNMIK did not review 2.000 -3.000 reports of war crimes alleged committed in 1998 – 1999 against Kosovo Serbs. (King and Mason 254) In 2008, 1. 187 files were transferred to EULEX and many of files contained only the reports or the evidence brought by relatives without even been interviewed. (AI 2013, 22) Recognized by UNMIK Human Rights Advisory Panel “The apparent lack of any adequate reaction from UNMIK Police [...] towards the gravest crimes in any society, and especially in post-conflict circumstances, inevitably creates a culture of impunity among the criminals and can only lead to a worsening of the situation.” (AI 2013, 1)

Secondly, the UNMIK ‘s mandate was to contribute in state-building of Kosovo as a democratic polity, not to solve the issue of statehood. Such issue was left open by the UNSC Resolution 1244. As the International Crises Group (ICG) observes “The lack of progress over final status and the absence of any indication how much longer UNMIK’s mandate would last were sources of frustration”. (2004, 2) Riots in March 2004 ushered the development of post-war Kosovo into new phase. The rampage left at least 19 people died, 900 injured, over 700 Serb, Ashkali and Roma homes, 10 public buildings, 30 Serbian churches and two monasteries damaged or destroyed and roughly 4.500 people displaced. (ICG 2004, 1) In these circumstances, considering the lack of an exit strategy for independence raised the assumption that postponing the status might serve to start inter-ethnic war between Kosovo people and Serbs.

On May 2005, UN Secretary General Kofi A. Annan appointed Kai Eide from Norway as a Special Envoy to undertake a comprehensive review whether Kosovo had fulfilled the conditions to enter into political process designed to determine the future of Kosovo in accordance with the UNSC Resolution 1244 or not. In his Fact Finding Report, Kai Eide suggested the presence of international police with executive powers in sensitive areas and the reconsideration of reduction of international judges and prosecutors. (UNSC 2005) Pursuant to this Report, UNSC appointed the former President of Finland, Marti Ahtisaari, as an UN Special Envoy for the “*Future Status Process for Kosovo*”.

After one year of status talks between Serbia and Kosovo, on 26 March 2007, the UN Special Envoy Ahtisaari presented his final report called “Comprehensive Proposal for Kosovo Status Settlement” (hereafter Ahtisaari Proposal) to the UN Secretary Council, which opened the green light for Kosovo independence. (UNSC2007) The Ahtisaari Proposal

foresaw the possibility of the deployment of an ESDP/CSDP mission in the field of the rule of law including in particular, in the judiciary, police, border controls, customs and correctional services. (Annex IX, article 2) According to this proposal, the ESDP/CSDP mission shall have the authority to investigate and prosecute independently sensitive crimes, such as organized crime, inter-ethnic crime, financial crime, and war crimes and monitoring, mentoring and advising Kosovo authorities on all areas related to the rule of law. (article 2)

After the rejection of Ahtisaari Plan in UNSC by Russia and China to deploy an ESDP/CSDP mission, it became clear that the best solution for the future of Kosovo was to declare independence unilaterally and to implement the Ahtisaari Proposal including the deployment of ESDP/CSDP mission in the field of rule of law. (Džihic and Kramer 2009, 3-4; Grevi 2009, 357) On 17 February 2008, the Assembly of Kosovo declared Kosovo “to be an independent and sovereign state” that “reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Marti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement” (2008, para 1) and welcomed the deployment of the EU civilian presence to supervise the implementation of the Ahtisaari Proposal. (para 5) In the same vein, Kosovo Constitution adopted on 15 June 2008, incorporated the Ahtisaari Comprehensive Proposal as an integral part of Kosovo domestic legal system, requiring by “all authorities in the Republic of Kosovo (to) shall abide by all of the Republic of Kosovo’s obligations under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007” and “take all necessary actions for their implementation”. (article 143/1) Despite its contested status, Kosovo has been recognized by 111 out of 193 UN member states. (MFA 2016)

Europeanization by Rule of Law mission: EULEX Mandate, Goals and Implementation

It is agreed in academia that Europeanization denotes a top – down process through construction, diffusion and institutionalization of rules, procedures and policy in the domestic polity, policy and/or politics of member states (Radaelli 2003, 30) and potential candidate countries. (Sedelmeier 2011; Kmezic 2014; Ilievski 2014) Through EULEX, EU aims to Europeanize rule of law institutions in Kosovo. EULEX operates under the authority of the UNSC Resolution 1244 and maintains a neutral status. (UNSC 2009, para 6) Article 2 of the Council Joint Action 2008/124/CFSP, which provides the legal bases of the mission, outlines the objective and methodology of the mission. The first paragraph states that:

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 recognised standards* and *European best practices* (emphasize added).

The 6 key concepts emphasized in the mission statement – sustainability; accountability; multi-ethnicity of the police, justice and customs; free from political interference; recognized standards and European best practices – show the strong ambition of the EU as an exporter of rule of law. Additionally, it is worth mentioning that these concepts indicate the challenges that Kosovo authorities face in the rule of law such as: the lack of accountability; the lack of multi-ethnicity and political interference. The second paragraph of article 2 points out the methodology to be used for the implementation of the objectives in the previous paragraph. Accordingly, EULEX has different type of tools in its disposal to assist Kosovo authorities toward progress in strengthening the rule of law: monitoring, mentoring, advising and retaining executive functions.

Article 3 of the Council Joint Action 2008/124/CFSP actions enumerates 9 tasks of the EULEX. These tasks can be divided in two groups. The first group reflects those tasks dealing with monitoring, mentoring and advising functions, pointed out as follow:

- (a) monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law (including a customs service), whilst retaining certain executive responsibilities;
- (c) help to ensure that all Kosovo rule of law services, including a customs service, are free from political interference;
- (e) contribute to strengthening cooperation and coordination throughout the whole judicial process, particularly in the area of organised crime;
- (f) contribute to the fight against corruption, fraud and financial crime;
- (g) contribute to the implementation of the Kosovo Anti-Corruption Strategy and Anti-Corruption Action Plan;

and

- (i) ensure that all its activities respect international standards concerning human rights and gender mainstreaming.

Whereas the other three tasks refer to executive responsibility of EULEX, stipulated as follow:

- (b) ensure the maintenance and promotion of the rule of law, public order and security including, as necessary, in consultation with the relevant international civilian authorities in Kosovo, *through reversing or annulling operational decisions taken by the competent Kosovo authorities;*
- (d) ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, *including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo*

investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities;

and

(h) assume other responsibilities, independently or in support of the competent Kosovo authorities, to ensure the maintenance and promotion of the rule of law, public order and security, in consultation with the relevant Council agencies.(emphases added)

From a literal interpretation, the last paragraph of Mission Statement provides a clause on the possibility of the combination of both executive and non-executive tasks. Such vagueness combination has been asserted for two purposes. Firstly, to provide to EULEX appropriate tools for establishing rule of law that are specifically addressed for the post conflict societies. Secondly, to avoid any unpredictable difficulties in the ground that the mission might occur with Kosovo authorities especially in corruption investigation.

Articles from 6 to 13 of the Council Joint Action 2008/124/CFSP laid down the command and organizational structure of the mission. Based on article 6 of the Council Joint Action 2008/124/CFSP, the EULEX can be divided into: Brussels support (strategic) part and Pristina operational part. The Director of Civilian Planning and Conduct Capability, which is part of Brussels strategic part, is the Civilian Operation Commander of EULEX. His task is to exercise command and control of EULEX at the strategic level, in accordance with ‘the political and strategic direction of the Political and Security Committee (PSC) and overall authority of the High Representative of the Union for Foreign Affairs and Security Policy (HR)’. (Council Decision 2010, article 1)

From the moment of the full deployment in April 2009, EULEX has been implemented in two different ways. In the first phase of the deployment (2008 – 2012), EULEX was structured to be implemented through three components namely police, justice and customs. (Council Joint Action 2008, article 6/3) Following 2012 Strategic Review conducted by the EEAS, EULEX has been reconfigured without affecting the mission statement. (Council Decision 2012) Recognised by European Court of Auditors as ineffective due to lack of clearly defined objectives and insufficient coordination between EU and Kosovo institutions (ECA 2012), reconfiguration aimed “at better completing other EU instruments for Kosovo, maximizing resources, avoiding overlapping and ensuring a consistent and coherent approach to the EU perspectives for Kosovo”. (EULEX Programme Report 2012, 43) The three components – police, justice and customs – have been transformed into a new two-pillar structure consisting of an Executive and a Strengthening Division.

EULEX Objectives to deliver its Promises

Promoting the rule of law in Kosovo has been an expensive enterprise for the EU in 3 aspects. Firstly, during the EUPT preparatory work, was foreseen to deploy around 3, 000 international and local staff. The largest staff was deployed during the period January - April 2011, where EULEX comprised a total staff of 2,858, at its peak (1,670 international and 1,188 local staff). (UNSC 2011, 13) After the decision to restructure the mission, EULEX staff was downsized. Currently, EULEX has around 1,600 international and local total staff (EULEX 2015) and comprises representatives from all EU member states - including 5 EU member states that have not recognised Kosovo - and other third countries, including USA presence. Secondly, EU has spent a huge of money in exporting rule of law in Kosovo. Through Instrument of Pre Accession I and financial arrangement of EULEX, EU has provided in total about € 1,386.61 million financial assistances in Kosovo. As table 1 shows, more than a half of budget € 897.39 million out of € 1386.61 million has been spent on strengthening the rule of law. Whereas, the financial aid provided by EULEX for the period 2008 – 2014 is € 757.8 million. Thirdly, EULEX is the first fully integrated rule-of-law mission across the fields of (civil and criminal) justice, police and customs and its mandate is very comprehensive and unprecedented by having in its disposal both non-executive (monitoring, mentoring, advising functions) and executive function to investigate and prosecute serious cases of organised crime, corruption and war crimes. Considering that EULEX has been an expensive and abitious mission to export rule of law in Kosovo, the following sections analyse whether, how and to what extent, EULEX has promoted rule of law in Kosovo based on implementation methodology.

Indicative Financial Allocation per Sector	
IPA 2007 - 2013	(€ million)
Sector 1: Justice and Home Affairs	139.59
Sector 2: Private Sector Development	290.68
Sector 3: Public Administration Reform	126.57
Sector 4: Other	71.97
IPA TOTAL	628.81
EULEX 2008 - 2014	757.8
Total EU assistance to Kosovo	1,386.61
Total EU assistance to the wider rule of law	897.39

*Table 1: EU assistance to the Rule of Law in Kosovo
Sources: Author's Compilation (COM 2011; Council Decision 2014)*

Monitoring, Mentoring and Advising (MMA) function

After the reconfiguration of EULEX in 2012, the Strengthening Division is responsible for implementing MMA objectives. The Strengthening Division has a consultative role and works closely with the Ministry for Internal Affairs, Kosovo Police, Kosovo Customs, Ministry of Justice, Kosovo Judicial Council, Kosovo Prosecutorial Council as well as Kosovo Correctional Service in strengthening the rule of law. (EULEX 2015c)

Through MMA functions, EULEX has provided a significant contribution in the implementation of rule of law. According to the EULEX Programme Report, the police sector has marked significant progress comparing to justice and customs sector. (2012, 7) For the period September 2009 – June 2012, 18 out of 31 MMA projects in Police Sector were completed; 7 MMA projects had achieved some key outputs; 5 MMA projects were closed due to the lack of suitable resources and 1 MMA were removed. (EULEX Programme Report 2012, 10) Through EULEX assistance, the police sector has marked progress in talking crime effectively; providing secure borders; ensuring public order and providing sustainable organization.

The deployment of EULEX was a challenging task for the EU with regard to establishing a multi-ethnic judiciary and customs, free from political interference. This is evident as well from EULEX Programme Report 2012 which provides an overview of the progress of Kosovo institution's in the rule of law. Both justice and customs sector have hampered the success of the EULEX. In judiciary, EULEX supported Kosovo Judicial Council and Kosovo Prosecutor Council in building a neutral, independent, professional and accountable judicial and prosecutorial system that is capable in fighting organised crime, corruption and implementing judicial reforms in accordance the European standards.

Recognised by almost all EC Progress Reports, the interference of executive and legislative in the judiciary appointment constitutes one of the main obstacles that EULEX faces in establishing a functional multi-ethnic justice system in accordance with European standards. Despite constitutional requirement that '[A]t least fifteen percent (15%) of the judges from any other court established with appeal jurisdiction' (article 103/6) shall be from the minorities, the reality is quite the opposite. According to 2011 Kosovo Judicial Council Report, only 5.66% represent minority communities, respectively 2.43% are from Serb community; 2.43% are from Bosniak community; 0.40% are from Turk community and 0.40% are from other minorities communities. (KJC 2011, 25) On the other hand, Constitutional Court and Kosovo Judicial Council have not been working as the Constitution provisions requires due to the lack of the Assembly to fill the vacant positions. According to 2015 EC Progress Reports, the Constitutional Court has worked with a quorum of seven judges; with two appointments being pending. The Constitutional Court became fully operational only in the end of 2015 with the appointment of the last judge. Whereas, the Kosovo

Judicial Council is composed by 13 members; five out of 13 members are elected by the members of Kosovo's judiciary and eight members are appointed by the Kosovo Assembly. Currently, Kosovo Judicial Council is working with 12 members. The way of appointment to fill the vacant position has led toward "strong political interference and jeopardises the independence of the judiciary" (COM 2015, 13). As a result, referring to the Freedom House report "Nation in Transit", Kosovo judicial framework and independence was rated 5.75 out of 7 in 2008 – the year of EULEX deployment - and 2016 report rates 5.75 out of 7. (Gashi 2016) Overall, 6 years of EULEX presence, Kosovo has improved only 0.25 rates during 2012- 2014.

Additionally, the boycott of the Serb minority to be involved in Kosovo institutional framework and establishing rule of law in Northern part of Kosovo has been challenging. Since 1999, Serbian government has spent around 6 billion EUR in the North of Kosovo (COSN 2011, 58-63) by creating a parallel structure on the following institutions: education; health; judiciary; culture and sport; post and energy; local government; safety; financial and transport. (ibid, 11-76) In order to overcome these problems and to re-establish rule of law, EULEX has been focused on a) training and facilitating the integration of 287 Kosovo Serb Police into the Kosovo Police Command North; b) building a multi-ethnic special unit to provide protection for religious and cultural heritage; c) providing assistance and material support in the north crossing points and d) facilitating the implementation of the free movement of Kosovo resident to travel freely through Serbia with ID cards. (EULEX 2015a)

Executive function

Based on article 3/d of the Council Joint Action 2008/124/CFSP, the Executive Division, which comprises EULEX judges, prosecutors and police, shall be responsible for implementing executive function of the mission such as: investigating, prosecuting and adjudicating cases relating to war crimes, terrorism, organised crime and high level of corruption, property and privatisation cases and other serious cases. (EULEX 2015d)

From the EULEX reports, the mission has proved to be effective in the executive functions. Through its executive functions, EULEX has dealt with Kosovo's most challenging cases in corruption, organised crime, money laundering and war crimes. Since 2008, more than 566 verdicts - including 423 verdicts on corruption, criminal cases and war crimes have been delivered by EULEX judges. (EULEX 2015d) These verdicts included former judges, police officers, assembly members, prosecutors and other high level officials. EULEX prosecutors have been involved in 256 cases – 130 war crimes, 15 financial crimes, 32 anti-corruption crimes, 69 organized crimes, and 10 counter terrorism. Between 2009 and 2014, the Special Chamber of the Supreme Court finalised 10.658 cases which includes 8 international judges. In addition, EULEX judges, through Kosovo Property Claims Commission, have adjudicated over 40.000 conflict related with property cases. (EULEX 2015d)

Despite statistical data reported as a success, the situation is quite different when dealing with corruption cases. The situation remains deeply worrying due to the presence of corruption and organised crime. Corruption is omnipresent among Kosovo society. Based on international indexes, even with the deployment of EULEX, the situation has not changed. (see table 2)

Nations in Transit Ratings and Averaged Scores ¹							
	2008	2009	2010	2011	2012	2013	2014
Judicial Framework and Independence	5.75	5.75	5.75	5.75	5.5	5.5	5.5
Corruption	5.75	5.75	5.75	5.75	5.75	6.00	6.00
Transparency International's Corruption Perception Index ²							
Corruption Perception in Kosovo	-	-	28	29	34	33	33
The Worldwide Governance Indicators (WGI) project: Rule of Law ³							
Rule of law in Kosovo	34.13	32.23	31.28	34.74	35.07	36.02	37.02
WGI project: Control of Corruption							
Control of Corruption	32.52	33.01	31.90	31.28	29.67	29.19	39.42

Table 2: International Indexes on rule of law and corruption in Kosovo 2008 – 2014

Sources: Author's Compilation (Nations in Transit 2008 - 2014; CIP 2010 – 2014; WGI 2008 - 2014)

According to the 2014 Anti-Corruption Statistics Platform, 736 people were implicated in the corruption offences – bribe taking, bribe making and abuse with power – and only 23 people were convicted. (FM 2014) More specifically, for the offence of bribe taking, 79 persons were implicated and only 4 were convicted, whereas cases involving the remaining 75 people remained unsolved at the end of this period. For the offence of bribe giving, 52 persons were implicated and only 4 were convicted, whereas cases involving the other persons remained unresolved. For the corruption offense regarding abuse of authority, 605 people were implicated and only 15 people were convicted. Whereas cases involving the remaining 590 people remained unsolved at the end of this period (see table 3).

	implicating persons	convicted	unresolved cases for the year
bribe taking	79	4	75
bribe giving	52	4	48
abuse with authority	605	15	590

Table 3: The level of unresolved cases for three offences

Source: FM 2014

¹ Nations in Transitions ratings are based on a scale of 1 to 7, with 1 representing the highest level of democratic progress and 7 the lowest.

² The Corruption Perceptions Index ranks countries and territories based on how corrupt their public sector is perceived to be. Percentile rank among all countries (ranges from 0 (highly corrupted) to 100 (very clean) rank)

³ Percentile rank among all countries (ranges from 0 (lowest) to 100 (highest) rank).

Additionally, EULEX judges and prosecutors have been reluctant to investigate high profile politicians for corruption and fighting organised crime. As Capussela argues “the mission is set to leave Kosovo in marginally worse conditions than it found it” (2015a). On the basis of empirical analysis, Capussela assessed the performance of executive judicial functions of the EULEX in 22 prominent cases selected according to two criteria namely: the importance of the case if they involve high officials or members of Kosovo’s political and economic elite and whether the case is properly ascribable to EULEX. (2015b, 4) According to him, EULEX’s judges and prosecutors have committed grave errors in favour of political elite or either EULEX itself. Several higher figures were implicated in corruption and organised crime, but none of them was indicted. For instance, in the Bllaca case, none of the higher figures named by Nazim Bllaca - who claimed that was member of PDK’s intelligence – was indicted. The similar situation occurred in Medicus and ‘Marty report’ cases relating with human trafficking during the conflict. Furthermore - despite the fact whether is true or not - Maria Bamieh scandal revealed the rumours that exist on the implication EULEX judges and prosecutors on corruption cases.

Corruption is closely linked with organised crime and has negative impact on economic development and investment. European Court of Auditor points out that ‘the situation regarding organised crime in Kosovo has not changed considerably since the arrival of the international community in the summer of 1999’. (2012, 17) According to unofficial EU reports, around 40% of narcotics entering in Europe are controlled by organised group based in Kosovo. These groups handle a business with an annual turnover of €3 billion Euros. (Strazzari and Coticchia 2012, 13) Official data from Directorate of Organised Crime estimates a daily turnover of organised crime in Kosovo around €1.5 million, corresponding to an annual turnover of €550 million. (Džihić and Kramer 2009, 13) Such lack of EULEX to prosecute key figures accused of organised crime and corruption was associated with the assumption from the Brussels that ‘putting too much pressure on Pristina could spark inter-ethnic violence’. (Bajrami 2011)

Failure of EULEX to handle promises, especially in the targeting corruption and organised crime cases, has led to the widespread perception of corruption in Kosovo and decrease of the public support toward the EULEX. In 2010, Kosovo was ranked in 110th of 175 countries in the Transparency International’s Corruption Perception Index. In 2012, Kosovo improved its position ranking on 105th of 175 countries. Whereas, in 2014, Kosovo was ranked again in 110th of 175 countries. Limited contribution has decreased the support of the mission. In the beginning, EULEX enjoyed a wide public support by reaching the highest level of trust about 55%. (EWR 2009a) The turning point was the conclusion by the EULEX of the Protocol for Police Cooperation with Serbia without the approval of Kosovo institutions. After this momentum, the level of satisfaction decreased to 40% in September 2009. (EWR 2009b) According to *Kosovo*

Security Barometer, the public support on the EULEX remains low with 49.1 % of the respondent stating that they do not trust this mission. (KCSS 2014, 11) In 2015, EULEX was included among justice institutions since majority of competences of the mission are concentrated in the justice sector. Accordingly, the survey shows that 54 percent of the respondents do not trust EULEX. (KCSS 2015, 11 – 12)

Conclusion

Since 1999, UNMIK and then EULEX have been promoting rule of law in Kosovo through an institutional approach; filling legal vacuum and new legislation; recruitment and training judges and prosecutors and building judicial infrastructure. The paper argues that EULEX has provided a limited contribution in promoting the rule of law in Kosovo for two main reasons.

Firstly, institutional approach adopted by EULEX does not reflect what the Kosovo society needs: *culture of rule of law*. Since its deployment, EULEX has been focused on institutional adaptation, neglecting “that promoting the rule of law is an issue of norm creation and cultural change as much as an issue of creating new institutions and legal codes”. (Stromseth, Wippman and Brooks 2006, 75) The culture of impunity among the Kosovo people – especially among politicians and criminals - is widespread. In order to increase the effectiveness of promoting rule of law, EULEX needs to shift its strategy from institutional approach toward an end – goal pragmatic approach: establishing the culture of lawfulness.

Secondly, incapacity of Kosovo rule of law institutions to interact with EULEX in strengthening the rule of law as a result of political interference on judiciary and police sector. It exists a misfit of interest on fighting organised crime and reducing the level of corruption between EULEX and Kosovo political elite. Publicly, both EULEX and Kosovo politician recognize the importance of rule of law. However, EULEX judges and investigators have failed to catch up ‘big fishes’ or pursue sensitive cases, which have coincided with the interference of political elite. The paper showed that none of the high level of politician faced with the offence of corruption, organised crime or war crimes has been convicted.

In conclusion, EULEX has proved to be very weak as a result of institutional approach adopted on promotion of rule of law, dealing more with itself (in search of identity to export rule of law), consistently transforming itself, rather than pursuing its tasks in preventing and fighting organised crime and repressing corruption. On the other hand, the misfit of interest between Kosovo rule of law institutions and EULEX objectives shows that Europeanization by rule of law hinges on domestic factors – political interference on judiciary; culture of impunity; level of corruption, organised crime – and affects the effectiveness of EULEX on promoting rule of law in Kosovo.

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