

Establishing Institutions under International Administration: The Case of Kosovo

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<https://doi.org/10.31297/hkju.20.1.1>

UDK 342.5(495.115)
35.07:341.435(495.115)
35.07:341.223(495.115)

Original scientific paper / izvorni znanstveni rad

Received / primljeno: 25. 8. 2019.

Accepted / prihvaćeno: 13. 12. 2019.

The international community, led by the United Nations, created Kosovo's new post-war institutions and continues to influence them, even after Kosovo declared independence in 2008. Yet despite enormous international involvement and the clear intention of the international community to develop institutions that will promote economic development, Kosovo's governance institutions remain weak, especially in the field of public administration and the rule of law. The present paper applies the garbage can model of governance to explain the creation of institutions in Kosovo and identify the design flaws that have led to weak institutions. For its case studies, it focuses on the privatisation of socially owned property and the development of contract law. A complex international environment with different policy preferences and the drive of internation-

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al actors to promote their national solutions to Kosovo's problems in a decontextualised manner have contributed to the creation of weak institutions that continue to influence Kosovo's development to date.

Keywords: organised anarchy, garbage can model, Kosovo, institution-building, rule of law, international administration

1. Introduction

The key question addressed in this paper is why Kosovo's institutional system, and the rule of law in particular, is so weak despite much international expertise, assistance and funding having been provided to Kosovo for almost two decades to support institution-building. Applying the garbage can model approach to decision-making provides an explanation of how institutions are developed and why, despite perhaps the best intentions of those who designed them, they do not produce the desired results and fail to solve underlying policy problems.

After almost two decades of internationally led institution-building, Kosovo is still, measured by European standards, a poor country. With a population of around 1.8 million, Kosovo has a GDP of 7.1 billion US\$, which is one of the lowest in Europe, coupled with a high poverty and unemployment rate. Its economy is characterised by unsustainable finances, a persistent trade deficit, a weak production base, informal economy, reliance on remittances and a high unemployment rate. Public administration and the rule of law are still weak and allegations of corruption, clientelism and nepotism in government institutions are commonplace. This is despite the enormous amount of international assistance which has been provided to Kosovo by the international community since 1999, when the United Nations assumed administrative responsibility for Kosovo. According to Capussela (2015, p. 12), "after the 1999 conflict Kosovo received from the international community 50 times more peacekeeping troops and 25 times more funds than Afghanistan did after the 2001 war". The EU alone has provided more than 4 billion Euro in aid, which is the largest annual per capita contribution ever provided to a third country (Capussela, 2015, p. 12).

The international community, led by the United Nations, also created Kosovo's new post-war institutions and continues to influence them, even after Kosovo declared independence in 2008. One of the very first priorities of the United Nations Interim Administration Mission in Kosovo

(UNMIK) was to establish the rule of law and to develop institutions and legal frameworks for a normally functioning economy (United Nations, 1999, pp. 10-11). This reflects the understanding that the rule of law is a necessary institution for economic development, while lack of it could significantly hinder economic growth (Krever, 2011, p. 305).

There is an overall consensus that institutions, including the rule of law, determine a country's economic success and development (Acemoglu & Robinson, 2012, p. 73). Institutions may be defined as rules, whether formal (constitutions and laws) or informal (customs, traditions, practices), which influence behaviour and social interaction (Groenenwegen, Spithoven & van den Berg, 2010, pp. 24-25). Acemoglu and Robinson (2012, pp. 74-75) claim that for economic development to be successful, the economic institutions of a country must be inclusive, i.e. they must be characterised by secure private property, an unbiased system of law, and the creation of an environment where people can exchange and contract. A country's economic institutions are the result of its political institutions (Acemoglu & Robinson, 2012, pp. 74-75). As Acemoglu and Robinson (2012, p. 75) conclude, "secure property rights, the law, public services, and the freedom to contract and exchange all rely on the state". Whether institutions are inclusive or extractive, i.e. designed to extract incomes and wealth from one group to another (Acemoglu & Robinson, 2012, p. 76), depends on whether political power is distributed broadly in society and subject to constraints, or whether it is in the hands of a narrow elite with few constraints on the exercise of power (Acemoglu & Robinson, 2012, pp. 80-81).

Acemoglu and Robinson's explanation of the relationship between institutions and economic development implies that institutions are the product of rational decision-making. It also assumes that those in power are a homogenous unit which shares the same preferences. The same applies to the World Bank's understanding of the rule of law and the role that the state plays in economic development. According to the World Bank (World Bank, 2017, p. 83), "it has long been established that the rule of law - which at its core requires that government officials and citizens be bound by and act consistently with the law - is the very basis of the good governance needed to realise full social and economic potential". The state sets and enforces rules which underpin private transactions and which encourage and complement the activities of private businesses and individuals (Krever, 2011, p. 305). In doing so, it provides a stable environment for efficient market operations (Krever, 2011, p. 313). This is clearly an instrumental concept where preferences are clear and are pursued by rational actors, i.e. the state. Furthermore, even if interest groups

within the state are important, they are also rational actors and pursue clearly defined preferences. Given the enormous involvement of various international organisations and donors in Kosovo for over two decades, whose clear goal is to develop the rule of law in Kosovo, why is Kosovo's rule of law system and economic development still so weak? The garbage can model approach to decision-making can be applied to provide an explanation as to why the rule of law and economic development have not produced the desired results.

Since the rule of law is a very broad concept, the present analysis focuses on two important aspects of the rule of law: property rights and contract law. These two aspects are particularly relevant from a new institutional economics perspective, which, according to Daniels and Trebilcock (2004, p. 101) "emphasises that the protection of private property rights and the facilitation and enforcement of long-term contracts are essential to raising levels of investment and hence economic growth". The following two case studies, one on property rights and the other on contracts, analyses the development of Kosovo's privatisation policy and its attempt to regulate contract law.

The case studies on privatisation and the civil code are preceded by an outline of the original garbage can model of decision-making. The case studies and the resulting conclusions are presented with this theoretical framework in mind.

2. Garbage Can Model of Decision-Making

Cohen, March and Olsen (1972, p. 1) developed the garbage can model of decision-making in so-called organised anarchies. Organised anarchies are organisations or decision situations which are characterised by problematic preferences, unclear technology and fluid participation. Problematic preferences means that the "organisation operates on the basis of a variety of inconsistent and ill-defined preferences," which are in fact a "loose collection of ideas" (Cohen, March & Olsen, 1972, p. 1). Actors lack clarity about both problems and goals (Lipson, 2007, p. 81) and they discover their preferences through action rather than acting based on preferences (Cohen, March & Olsen, 1972, p. 1). As Peters (2002, p. 9) explains, "individual actors may have consistent preferences, but the policy making system qua-system is assumed to encounter substantial difficulty in reconciling those varied preferences and making them coherent". Unclear technology refers to the rules, structures and processes of the

organisation according to which decisions are made (Lipson, 2007, p. 82). Actors do not understand the organisation's own processes, they proceed on a simple trial-and-error basis, using lessons from past experiences and pragmatic inventions of necessity (Cohen, March & Olsen, 1972, p. 1). Fluid participation emphasises that actors have limited time and attention to devote to the organisation's processes and their involvement varies from time to time (Cohen, March & Olsen, 1972, p. 1), is capricious and therefore not predictable (Peters, 2002, p. 11). Participants change during the decision-making process and with them change the preferences and knowledge of the organisation's processes (Lipson, 2007, p. 82).

In such an organised anarchy, "a decision is an outcome or interpretation" of four independent streams: problems, solutions, participants, and choice opportunities (Cohen, March & Olsen, 1972, pp. 2-3). Problems are defined as concerns which require attention (Cohen, March & Olsen, 1972, p. 3). However, in an organised anarchy the meaning and interpretation of a problem is poorly defined by the different actors (Lipson, 2007, p. 82) and each actor defines the problem from their own viewpoint and interests. Solutions are viewed as products that are looking for a problem (Cohen, March & Olsen, 1972, p. 3). Solutions precede problems because they are already there, and are only later connected to a problem (Aberbach & Christensen, 2001, p. 411). A solution-driven, rather than a problem-driven process is the key feature of a garbage can model of decision-making in organised anarchies (Aberbach & Christensen, 2001, p. 411). Solutions are very often ready-made; initiated by other organisations or countries and decontextualised, i.e. intended to be applicable everywhere irrespective of the local context (Aberbach & Christensen, 2001, p. 411). As Aberbach and Christensen (2001, p. 411) observe, such ready-made solutions can be "irrational in that they do not specifically address current problems in public organisations or are loosely coupled to a national structural or cultural context", and as such they are likely to "produce unexpected and unwanted effects". Different actors interpret problems and solutions differently and try to attach their solution to a problem as they interpret it (March & Olson, 1983, p. 287). The participants are the actors involved in the decision-making process and they come and go depending on the time and the attention they commit to the process (Cohen, March & Olsen, 1972, p. 3). On the one hand, there is usually an attention deficit, especially of major political actors who are critical for a decision (March & Olson, 1983, p. 286). On the other hand, less important actors and otherwise-unoccupied actors may move to the front turning the process into a collection of "solutions looking for prob-

lems, ideologies looking for soapboxes, pet projects looking for supporters, and people looking for jobs, reputations, or entertainment” (March & Olson, 1983, p. 286). Lastly, choice opportunities are occasions when the organisation can make decisions and these are usually determined by the organisation’s processes (Lipson, 2007, p. 82). These choice opportunities are like a garbage can into which participants dump various problems and solutions. Whether a solution attaches to a problem depends more on timing and context, i.e. whether solutions and problems arise at the same time and whether they happen to be present at the time of the choice opportunity, rather than on a rational choice of solutions to problems (Saxonberg & Sirovatka, 2014, pp. 451-452). Aberbach and Christensen (2001, p. 411) conclude that “if actors seek to act rationally in such processes, this is best characterised as local rationality and may lead to problems with organisational rationality because local actors have narrow perspective and a shortage of influence, attention and knowledge, and do not manage to take a broad view of, coordinate or control, the larger decision-making context”.

In an organised anarchy, decisions are usually made by flight and oversight, which means that problems are not really resolved (Cohen, March & Olsen, 1972, p. 9). A decision by flight means that there is no decision because, according to Fioretti and Lomi (2009, p. 4), actors “shy away from a difficult problem by removing the most difficult problem from the agenda of the current choice opportunity to attach it to another choice opportunity, one that will be due at a later time”. Decisions are either postponed or buck-passed to some other actor (Fioretti & Lomi, 2009, p. 10). Decision by oversight means that a problem is not solved at all (Fioretti & Lomi, 2009, p. 4). Overall, in an organised anarchy “problems are less likely to be solved, decision makers are likely to shift from one problem to another more frequently, choices are likely to take longer to make and are less likely to resolve problems” (Cohen, March & Olsen, 1972, p. 9). As a result, “although decision making is thought of as a process for solving problems, that is often not what happens” (Cohen, March & Olsen, 1972, p. 16).

The garbage can model provides an alternative to the rational choice model of decision-making which assumes a linear process where first objectives are determined, then decision alternatives are identified and their consequences evaluated, and then a decision is made among the alternatives which best suits the objectives to be achieved (Cohen, March & Olsen, 1972, p. 2). One of the most prominent variations of the original garbage can model is Kingdon’s multiple streams framework. Kingdon’s primary concern is to explain how certain issues get on the political agenda. His view is that an issue

manages to get on the agenda when three independent streams; problems, policies and politics are coupled in a policy window. The coupling does not happen by chance, as in the original garbage can model, but because of the efforts of policy entrepreneurs to make use of such policy windows “to push their pet solutions or to push attention to their special problems” (Kingdon, 1972, p. 203). According to Kingdon, “policy entrepreneurs are people willing to invest their resources in return for future policies they favour. They are driven by their straightforward concern about certain problems, their pursuit of such self-serving benefits as protecting or expanding their bureaucracy’s budget or claiming credit for accomplishment, their promotion of their policy values, and their simple pleasure in participation” (Kingdon, 1972, p. 204). Policy entrepreneurs play a critical role in the process, especially since “problems get attention based on how they are framed or defined by participants who compete for attention in the policy game” (Saurugger & Terpan, 2016, p. 37). Since Kingdon’s model is focused on agenda-setting it is difficult to apply it to other stages of the policy process or in general to decision-making in organisations (Howlett, McConnell & Perl, 2015, p. 422). However, it makes sense to include policy entrepreneurs in the original garbage can model to provide a better explanation of how solutions are attached to problems, depending on how they define the problem and the solution which they favour.

This is the theoretical background against which the two major reform efforts to strengthen the rule of law in Kosovo for facilitating economic development, i.e. the privatisation of socially owned property and the effort to draft a comprehensive civil code, are illustrated. The main argument is that institution-building in Kosovo, even under international administration, reflects organised anarchy, where certain policy entrepreneurs promote specific solutions and define problems in such a way as to fit the solution without assessing if the real problem is indeed addressed and if the promoted solution indeed solves the problem.

3. Case studies: Privatisation and Civil Code Reforms

3.1. Privatisation Reform

The privatisation of Kosovo’s socially owned enterprises (SOE) is perhaps one of the most complex undertakings of the United Nations (UN) in the context of a peacekeeping operation. From 1999 to 2008, the UN, acting through the United Nations Interim Administration Mission in Kosovo

(UNMIK), designed and implemented the privatisation process. It is the only privatisation process which was initiated and implemented by the UN under Chapter VII of the UN Charter. In 1999, SOEs were the main commercial organisations in Kosovo covering almost all of its mining, industry and agricultural business (Knudsen, 2013, p. 292). These enterprises were all socially owned, which is a former Yugoslav-socialist property concept, fundamentally different from a Western-liberal understanding of property rights (Knudsen, 2013, p. 292).

The legal nature of socially owned property was a matter of controversy even in Yugoslavia. Some viewed socially owned property as a form of ownership (Coronna, 1985, p. 230), owned by society in general, but there was disagreement as to who was entitled to use it. Opinions ranged from the state to every self-management entity, as being the representative of society, including the opinion that the state, the republic, the local community and labour organisations held divided ownership (Coronna, 1985, pp. 230-232). It was also suggested that socially owned property was in fact state property which was given to workers in perpetuity for utilisation and management (Peselj, 1963, p. 698). There were others who viewed socially owned property as an entitlement under public law rather than a property right (Coronna, 1985, p. 234). The legal complexity surrounding socially owned property was further complicated by the fact that in 1988 Yugoslavia initiated a program for the privatisation of SOEs allowing them to be transformed into joint stock companies (Medjad, 2004, p. 304). As Serbia suspended Kosovo's autonomy in 1989, followed by the exclusion of most Kosovo Albanians from participation in political processes, Kosovo considered the privatisation to be illegitimate.

UNMIK's mandate under UN Security Council resolution 1244 (adopted in 1999) added to the complexity. Following an armed conflict with Serbia, the Security Council adopted Resolution 1244 under Chapter VII of the UN Charter and authorised the Secretary-General to establish an international civil presence in Kosovo, known as UNMIK. UNMIK's mandate was to provide an interim administration for Kosovo, including economic reconstruction. However, Resolution 1244 was not clear as to the legal status of Kosovo under the UN's interim administration. On the one hand, Resolution 1244 reaffirmed the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, while on the other hand it was ambiguous as to the question of whether Kosovo should become an independent state or remain an autonomous entity within Yugoslavia (Knoll, 2005, p. 638). Although all legislative and executive authority with respect to Kosovo was vested in the Special Representative of the Secre-

tary-General (SRSG), the ambiguity inherent in Resolution 1244 caused major controversies as to UNMIK's authority to privatise socially owned property (Everly, 2007, p. 22).

Despite its deployment in 1999, UNMIK was not able to assume full authority over Kosovo until early 2000. During this time, various warlords and persons connected to these structures seized control of SOEs and used them for personal enrichment through asset stripping and exorbitant leases (UNMIK, 2002, pp. 9-11). UNMIK (2002, p. 6) described SOEs as “quasi-feudal estates, where a privileged few wielded control over assets belonging to society as a whole and diverted the revenues for their own profit”.

Uncertainty as to the meaning of socially owned property, legal ambiguity concerning the scope of UNMIK's mandate, Serbia's insistence on respecting its sovereignty over Kosovo, and *de facto* control of SOEs by different Kosovo Albanian political factions characterised the political and legal environment in which the United Nations embarked on the privatisation process. UNMIK's organisational structure added to the complexity. It was organised in four pillars, which were under the authority of the SRSG. The pillars reported to the SRSG, who took most of the decisions only after clearance by the UNMIK Legal Office. Political decisions had to be coordinated and were subject to approval by the Department of Peacekeeping Operations (DPKO) and the UN Legal Office at the UN headquarters in New York. Pillar IV, which was administered and staffed by the EU, was responsible for economic reconstruction, including privatisation (Knudsen, 2013, p. 291). Although under EU authority, the legal department of Pillar IV was staffed by USAID, which promoted a neoliberal approach to economic development, emphasising privatisation as a key instrument to economic reform. As Knudsen (2013, p. 290) observed, in addition to different actors involved in the process, UNMIK's set-up was not favourable to long-term policy planning. Its mandate lasted one year and was subject to extension on an annual basis, and UNMIK personnel worked primarily on short-term contracts and consisted of international bureaucrats with little sense of ownership or responsibility for UNMIK's mandate (Knudsen, 2013, p. 290). Most of Pillar IV's budget was spent on salaries for international staff (Knudsen, 2013, p. 299).

The establishment of the Kosovo Trust Agency was initially opposed by the UN because of liability concerns (UNMIK, 2002, p. 18). The UN believed that the permanent change of property rights, which would be the result of privatisation, went beyond the interim administration mandate established in Resolution 1244 (Zaum, 2007, p. 156). The UN was also

concerned about possible liability claims against them that could arise from lawsuits by owners or creditors of socially owned enterprises that had been privatised in the 1990's (Zaum, 2007, p. 159). The UN also believed that the Kosovo Trust Agency would be a subsidiary organ of the Security Council and that the UN would therefore be responsible under international law for the Agency's actions.

Despite the UN's concerns, both the US and the EU representations within UNMIK pushed for privatisation. The term Kosovo Trust Agency is an almost literal adaptation of the German *Treuhandanstalt*, which was responsible for privatising Germany's social enterprises following Germany's unification. The German deputy director of Pillar IV used the *Treuhandanstalt* as a model for Kosovo's privatisation, including the name. As a result of negotiations between the UN, EU and US components of UNMIK, the UN endorsed privatisation under the condition that (i) the Kosovo Trust Agency would be established as an entity separate from UNMIK in order to limit UNMIK's and UN's exposure to liability, (ii) the role of the SRSG in the operations of the Kosovo Trust Agency was to be reduced as much as possible in order to distance UNMIK and the UN from possible liability claims, (iii) the proceeds of privatisation would be held in trust by the Kosovo Trust Agency to satisfy claims made by owners and creditors of SOEs, and (iv) a judicial review mechanism would be established to adjudicate property and other privatisation related claims made by possible owners and creditors. As Kosovo's judicial system was in a poor state, the UN required that privatisation related decisions be reviewed by a court composed of international judges, who would guarantee independence and impartiality, and whose procedures would ensure that all who claimed ownership interests were able to make submissions and appear before the court.

The legislation which established the Kosovo Trust Agency shows that the UN's primary concern was to shield itself and its international officials from liability (Knudsen, 2013, p. 293). Knudsen (2013, p. 293) concludes that "fear of exposing international officials or institutions to legal liability if directly selling the SOEs in Kosovo was to be the single most dominating concern shaping Pillar IV's operations".

The concern with legal liability was manifested most obviously in what became known as the status determination problem. In order to privatise a SOE, the Kosovo Trust Agency Board had to determine whether an entity was a SOE and thus eligible for privatisation. Serbia threatened the mostly international Board members that it would sue them if they made such decisions, claiming they would violate Serbia's property rights. The

EU, which had seconded the international Board members, asked the UN to accord those Board members immunities and privileges, which the UN denied. As a result, the international Board members refused to make decisions, halting the privatisation process for almost two years. Following the March 2004 riots, which were also seen as an expression of revolt against economic and political stagnation (Knudsen, 2013, p. 298), UNMIK amended the legislation allowing the Kosovo Trust Agency to assume that an entity was a SOE without having to make an explicit status determination beforehand. This overcame the impasse and privatisation resumed, but it also showed that “international officials used legal regulations primarily as a means to ensure implementation of neoliberal reform in a manner shielding them from being sued” (Knudsen, 2013, p. 300).

In the years after 2008, when Kosovo declared independence and UNMIK ceased to privatise SOEs, privatisation was generally perceived as a failure. Around 40 per cent of Kosovars were still living in poverty, almost the same number as when the UN started to administer Kosovo (Knudsen, 2013, p. 299). Privatisation was widely perceived as a corrupt and mismanaged process, which had destroyed Kosovo’s economic basis and which had left more than 70.000 former SOE workers unemployed (Knudsen, 2013, p. 300).

Nonetheless, Kosovo continued with the privatisation process which was designed by international actors to suit primarily their interests and concerns, which is a clear example of institutional path dependency. After independence, Kosovo did not make any effort to evaluate the privatisation process so far, nor review the fundamental decision to privatise SOEs. Instead, it followed through with the privatisation process uncritically and with very few minor legal modifications. In 2017, the Government officially acknowledged that most of the privatised SOEs were not functional and were not achieving their performance targets, confirming claims made by civil society and experts that privatisation has failed to facilitate economic reconstruction and development.

3.2. Civil Code Reform

Kosovo’s attempt to draft a civil code, which would codify in a systematic and comprehensive manner all contract, property, family and inheritance law, dates back to 2003. The idea of having a civil code is embedded in 19th century Continental European legal thinking, which assumed that law could be collected and ordered comprehensively in a logical and system-

atic structure. In 2003, an EU funded project assisted the Office of the Prime Minister in preparing such a civil code. Despite some first drafts, and several rounds of discussions and consultations with stakeholders, the Office of the Prime Minister did not follow through and the idea of a civil code was abandoned (Susino & Moreno, 2016, p. 4). Instead, the Government decided to regulate civil law through separate pieces of legislation. In 2005, the Kosovo Assembly adopted a law on inheritance, while family law was regulated separately in 2006. In 2009, a law on property rights was passed and in 2012 a law on obligations, which, with its more than 1.000 articles, regulates contracts and torts in a comprehensive manner. All laws were prepared with the support of international donor organisations, which provided financing and technical assistance. However, each of the international donors tried to implant their own legal tradition into Kosovo's legal system, especially in the field of property rights, which was already complicated because of the socialist elements which were carried over from Kosovo's Yugoslav past. According to Roccia (2015, p. 567), the involvement of various international donors in drafting Kosovo's property law created legal confusion and contradictory legislation. Conflicts between common law and continental civil law elements, which were introduced depending on who the donor was and for which law they were providing assistance, were the most prominent (Roccia, 2015, p. 578).

Although the contract and property related legislation was relatively new and legal practice based on these laws was still in an early phase of development, the Kosovo Ministry of Justice re-launched the idea of drafting a civil code in 2013. In its Rule of Law Assistance Strategy, the Ministry stated that the rule of law would require a civil code in order to improve the performance of the judicial system (Ministry of Justice, 2014, p. 17). The Ministry of Justice (2014, p. 18) argued that since the end of the war there had never been adequate policies for property rights, which would hinder the resolution of property rights related issues. An underdeveloped civil justice system would undermine commercial and property rights, which would create obstacles for the social and economic development of Kosovo (Ministry of Justice, 2014, p. 17). A civil code would therefore be essential for rule of law and economic development in Kosovo. However, the Ministry of Justice never explained why the relatively new contract and property legislation was inadequate and why Kosovo really needed a civil code. There are other countries in the EU which don't have a civil code, such as Croatia, and still have an effective rule of law system and a much firmer economic standing than Kosovo. Inconsistencies in the laws could have been addressed by making sure that individual laws were

amended and brought in line with each other. This option however was never considered as a possible solution. The civil code project became a pet project of the Ministry of Justice and was dominated by legal academics who claimed that Kosovo needed a civil code as a matter of prestige and as a symbol of its independent statehood.

The EU allocated 2 million Euro for a two-year project to support the Ministry of Justice in drafting a civil code and a property rights strategy (Susino & Moreno, 2016, p. 3). It is interesting to note that the EU project designated to assist the Ministry in this effort also included a component on donor coordination (Susino & Moreno, 2016, p. 3), as other international donors were also involved in this field. These other donors were: USAID, which provided assistance in the area of property rights and which overlapped in large parts with the EU assistance; the World Bank, with a project on property rights cadaster; OSCE, which was active in housing rights; the German GIZ, which also provided assistance on property rights registration and cadaster; the Swiss Agency for Development and Cooperation; the Norwegian Cooperation Development Agency; and the Swedish Development Cooperation Agency, all of whom were involved in providing some form of assistance to the government on property rights related issues (Susino & Moreno, 2016, p. 6). All these donors had to be included in the process as they had all allocated significant resources in an area, which the Ministry of Justice, with EU support, now wanted to regulate through a comprehensive civil code. Due to large overlaps in project scope, coordination with USAID was very important and it very soon crystallised that the EU's assistance would be limited to the civil code, while USAID would take the lead on drafting a property rights strategy (Susino & Moreno, 2016, p. 17).

Although the Ministry of Justice had initiated the drafting of the civil code and had requested EU assistance for this purpose, it showed little leadership and ownership of the process. Working groups, which were essential due to the complexity of the project and were requested by the EU project, were never established (Susino & Moreno, 2016, p. 11). Shortly after the launch of the project, in 2015, the Government established a State Commission to draft the civil code (Susino & Moreno, 2016, p. 11). The role of the Ministry of Justice was reduced to providing secretarial services. The State Commission was led by the Minister of Justice and was composed of 25 members, most of them academics (Susino & Moreno, 2016, p. 11). As the EU noted in a subsequent evaluation of the project, the members of the State Commission had extensive knowledge of former Yugoslav law but limited experience with modern EU contract law

(Susino & Moreno, 2016, p. 12). Practitioners, such as judges, attorneys and notaries, as well as members of civil society, were significantly under-represented (Susino & Moreno, 2016, p. 12). The State Commission and the EU project worked in parallel, but with little interaction with each other and the State Commission did not even invite the EU project to attend its sessions (Susino & Moreno, 2016, p. 11). As the EU noted in its evaluation, the State Commission was “running its own show slowly and with very little advancements”. There was no political leadership in the Government or the Ministry of Justice to ensure cooperation and coordination between the Commission and the EU project (Susino & Moreno, 2016, p. 12). The Minister of Justice gradually assumed a passive role, despite his personal interest in a civil code, and the Ministry of Justice officials were formally excluded by the State Commission, while the State Commission itself was paralysed by internal problems. According to the EU, most members of the Commission did not receive any remuneration for their work, which limited their commitment to the work of the Commission (Susino & Moreno, 2016, p. 12). Personal dissatisfaction and jealousies also plagued the State Commission as some of the members were hired by the EU project as consultants, while others did not have that privilege (Susino & Moreno, 2016, p. 11). The EU project also had its problems. International experts who were brought into the process worked separately and, as the EU noted, often did not know each other, which prevented interconnection and the exchange of information (Susino & Moreno, 2016, p. 13). Anecdotal evidence suggests that the EU project was internally divided as to which European law should be taken as a model for Kosovo’s civil code. Very often the national background and expertise of the consultant determined which national model would serve as a template for certain parts of the civil code.

In view of the rather passive role of the State Commission, the EU project filled the gap by drafting and submitting to the State Commission a first draft civil code in 2016. As the EU noted in its evaluation, the State Commission and the Ministry of Justice remained mere spectators, receiving the assessments and proposals of the EU project without demonstrating effective commitment to the creative process (Susino & Moreno, 2016, pp. 21-22). By the end of 2016 the Government dissolved the State Commission and re-mandated the Ministry of Justice to lead the drafting of the civil code. After having spent 2 million Euro for two years, the EU rolled out a new project worth 2.3 million Euro to again assist the Ministry of Justice in drafting a civil code for three more years. The process continues to this day and Kosovo still has no civil code.

4. Analysis

The case study on privatisation shows that the decision to privatise socially owned enterprises in Kosovo was taken without assessing other options. As Knudsen (2013, p. 291) explains, none of the various international actors indicated that they had “considered other economic approaches than pushing for neoliberal reform”. According to Knudsen (2013, p. 291), “debates among international officials concentrated on how to privatise, not whether to privatise”. The Kosovo side, which by 2001 had a provisional government that acted under the authority of UNMIK, followed the economic reform program promoted by the UN, the EU and the US without much discussion and substantial input. Their main concern seems to have been to secure a stake in the privatisation process by making sure that each of the rival Albanian political factions appointed one Deputy Director to the Kosovo Trust Agency, which had been established by UNMIK to administer the privatisation process.

The complexity surrounding the idea of socially owned enterprises and their role in economic development, as well as the complexity related to UNMIK’s mandate reflects problematic preferences as one of the constitutive elements of organised anarchies. There were multiple actors, both international and local, and each of them had different preferences throughout the process. The original idea to privatise SOEs to stimulate economic development was superseded during the process by the preference to limit the UN’s exposure to potential liability. Rules were evidently not designed to have the best possible economic outcome for Kosovo, but primarily to shield international officials and organisations from liability. In this context, the preferences of the UN, UNMIK, EU and the US, as the key actors, were not uniform and not aligned towards the same preferences. While the EU and the US were pushing for fast privatisation, the UN was concerned with limiting its legal exposure. The Kosovo side had its own preferences, which, unable to control the entire process, satisfied itself by trying to establish as much political leverage over the process as possible to serve the preferences of certain interest groups.

The privatisation process also confirms the existence of unclear rules and processes of the privatisation program, which were not known to the actors, and were only discovered during the process. The complexity of the communication process between the UN (DPKO), UNMIK, Pillar IV, USAID and the Kosovo government was hardly known to all those involved. The other aspect of organised anarchy, i.e. fluid participation, is also present. Not only did international policy-makers and officials in

UNMIK change frequently over time, but the technical side especially saw major fluctuations of experts and consultants who were brought into the country to design and implement the privatisation process. The Kosovo government's attention to the process was intense until it secured a say in the functioning of the Kosovo Trust Agency, and then it faded away.

The privatisation process clearly shows that the policy process was a solution-driven process. Privatisation as a solution was already there, with the (German) model which was readily available and preferred. It just required a few policy entrepreneurs inside UNMIK to create an advocacy coalition and push the idea of privatisation forward. There was no thorough analysis if this would indeed be the solution to Kosovo's economic problems and if it would indeed facilitate economic growth.

The privatisation process provides evidence of decision-making by oversight. Once the decision was made to privatise Kosovo's SOEs, nobody cared further if that would indeed solve Kosovo's economic problem, let alone if there was even a causal relationship between SOE performance and economic growth. The decision did not solve Kosovo's problem as Kosovo's SOEs were privatised, and Kosovo still remained economically weak and without a production base.

The civil code drafting process also confirms the existence of an organised anarchy. There were multiple international and local actors who wanted to play a role in drafting a civil code for Kosovo, but none of them had a clear idea about what this civil code should be and what problem it should really address. Each of the actors had their own preferences as to the content and structure of the civil code, but there was no overall agreement on these issues. The participants had limited attention in the process, especially the State Commission. The Minister of Justice was initially very active but then lost interest (Susino & Moreno, 2016, p. 11). The individual members of the State Commission also showed that they had different preferences, not necessarily to fully engage in drafting a civil code for Kosovo (Susino & Moreno, 2016, p. 11). International experts came in and out to provide limited input, primarily from each expert's own viewpoint of what the problem and the solution should be (Susino & Moreno, 2016, p. 11). It seems that experts came with ready-made solutions from their national legal systems, which they tried to insert into Kosovo's civil code (Roccia, 2015, p. 578). Furthermore, the solution, i.e. a civil code, was already available before the process had started, but there was no thorough analysis of the underlying problem and if a civil would indeed be the right policy choice.

While a civil code might have worked in other countries, it is not necessarily the case that it would also work in Kosovo. The whole process is a good

example of a decontextualised solution-driven process where numerous participants interpret the problem and the solution differently and from their perspective, and where actor participation is very fluid. The civil code process confirms that in such an organised anarchy, problems are not solved and decisions are taken by flight or oversight. During the two year process, two million Euros were spent and no decision was made on either to adopt a civil code or to abandon the idea. Instead, it was decided to continue with the process and to take that decision at a later stage; a typical decision by flight.

Both case studies show that organised anarchy dominated the policy-making structure, although both processes developed in different political contexts and in different periods of Kosovo's state-building process. The privatisation process was initiated at a time when Kosovo was not an independent state but under full international administration, while the civil code process was initiated following Kosovo's declaration of independence. Despite the different political contexts, local actors were very passive, while the solution-driven processes remained dominated by various international actors. Kosovo, assuming the attributes of a sovereign state did not affect the organised anarchy, and it did not lead to a locally led problem-based policy process.

5. Conclusion

One has to be careful not to draw generalisations from two case studies, but they at least indicate that internationally driven institution-building in Kosovo, and especially the development of the rule of law, fits the description of organised anarchy. Internationally driven development of the rule of law implies the involvement of many different international and local actors. Given the different meanings of the rule of law, it is not surprising that each actor interprets this idea from a different perspective. In order to reduce complexity, it is also understandable if the different international actors, who spend only a limited period of time in the country which is going through a process of state-building, promote their national legal models as ready-made solutions for local problems. For Kosovo, adopting the best international and European standards almost always meant adopting a decontextualised solution promoted by an international actor. It did not really matter if that solution indeed solved the problem. In most cases, the problem remained, and perhaps new problems were created because of the inadequacy of the imported ready-made solution. Con-

sequently this only triggered international actors to design new projects, provide additional funding and come up with new ready-made solutions, which again did not address the real issues. Competition between international actors only exacerbated the drive to sell ready-made solutions to Kosovars, who in most cases turned into mere spectators of power games between international actors. The Kosovars themselves did not show much enthusiasm to lead and own the policy processes, partially because of a sense of helplessness in view of the enormous international presence and its capacity to sell solutions to Kosovars, and partially because of the opportunity to free ride and extract individual and personal benefits from various international actors who sought to prevail in the competition for selling their solutions. Instead of Kosovars building their own state and rule of law system, which fits their context and needs, international actors built what they believed should be the state of Kosovo based on their preferences, modelled after their legal models, and in most cases without substantial input by the Kosovars.

Institutions certainly matter for economic development, but these institutions must be contextualised. This is a problem in internationally led institution-building when the international community consists of different actors with different preferences and who promote their solutions in a decontextualised manner. In terms of international assistance, less seems sometimes to be more. In the absence of so much international financial and technical assistance, Kosovars would have been required to assume more ownership and leadership for solving their problems. Less international assistance would also have meant less competition between international actors, and less pressure to adopt ready-made decontextualised solutions, which do not necessarily solve problems but may actually have triggered new problems. It is therefore not a surprise that after almost two decades of international administration and assistance, Kosovo's rule of law system is still defunct and economic growth is not taking off. Any internationally led process of institution-building should take into consideration that solution-driven policy processes, which are not contextualised, will do more harm than good.

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ESTABLISHING INSTITUTIONS UNDER INTERNATIONAL ADMINISTRATION: THE CASE OF KOSOVO

Summary

The international community, led by the United Nations, created Kosovo's new post-war institutions and continues to influence them, even after Kosovo declared independence in 2008. One of the very first priorities of the United Nations Interim Administration Mission in Kosovo (UNMIK) was to establish the rule of law and to develop institutions and legal frameworks for a normally functioning economy. However, after almost two decades of internationally led institution-building, Kosovo is still, measured by European standards, a poor country with weak institutions. This paper shows that the creation of institutions does not follow a rational decision-making model, even when, like in Kosovo, institutions are created under direct international involvement and with the intention to develop the rule of law and facilitate economic development. The garbage can model approach to governance and decision-making provides a better explanation of the formation of governance institutions and why institutions, despite perhaps the best intentions, do not produce the desired results; failing to solve the underlying policy problems. The case studies on the privatisation of socially owned property and the development of contract law show that, in the case of Kosovo, adopting the best international and European standards almost always meant adopting a decontextualised solution promoted by an international actor. It did not really matter if that solution indeed solved the problem. In fact, in most cases the problem remained, with new problems being created because of the inadequacy of the imported ready-made solution. The conclusion is that sometimes less international assistance is more. In the absence of so much international financial and technical assistance, Kosovar leadership would have been required to assume more ownership of the policy-making for solving their problems. Less international assistance would also have meant less competition between international actors and less pressure to adopt ready-made decontextualised solutions.

Keywords: organised anarchy, garbage can model, Kosovo, institution-building, rule of law, international administration

IZGRADNJA INSTITUCIJA POD MEĐUNARODNOM UPRAVOM: SLUČAJ KOSOVA

Sažetak

Međunarodna zajednica, predvođena Ujedinjenim narodima, koja je izgradila kosovske nove poslijeratne institucije, i dalje ima znatan utjecaj na njih nakon proglašenja samostalnosti Kosova 2008. Među prioritetima Privremene misije Ujedinjenih naroda na Kosovu (United Nations Interim Administration Mission in Kosovo – UNMIK) bila je uspostava vladavine prava te izgradnja institucija i zakonskog okvira za normalno funkcioniranje gospodarstva. Nakon gotovo dva desetljeća tijekom kojih su se institucije gradile pod direktivom međunarodne zajednice, Kosovo je i dalje prema europskim standardima siromašna zemlja sa slabim institucijama. Uzimajući kao primjer slučaj Kosova, želi se pokazati da izgradnja institucija ne slijedi model racionalnih odluka, pa čak i kada se institucije kreiraju uz međunarodnu pomoć zato da se uspostavi vladavina prava i omogući gospodarski razvitak. Model donošenja odluka „kante za smeće“ bolje opisuje način na koji se grade vladine institucije i zašto, unatoč najboljim namjerama, takve institucije ne daju željene rezultate i ne uspijevaju riješiti postojeće političke probleme. Proučavajući privatizaciju društvenih poduzeća i nastajanje ugovornog prava na primjeru Kosova, pokazalo se da prihvaćanje najboljih međunarodnih i europskih standarda znači prihvaćanje dekontekstualiziranih rješenja koja promoviraju međunarodni akteri, unatoč tomu što ta rješenja nisu riješila probleme. Dapače, u većini slučajeva problemi su ostali prisutni, a novi su se stvorili jer su nametnuta neprikladna gotova rješenja. Analiza dovodi do zaključka da je moguće postići više uz manje međunarodne potpore jer bi u nedostatku međunarodne financijske i tehničke potpore kosovsko vodstvo bilo prisiljeno preuzeti odgovornost pri donošenju odluka za rješavanje svojih problema. Manje međunarodne pomoći značilo bi manje konkurencije među međunarodnim akterima i manji pritisak da se prihvate gotova dekontekstualizirana rješenja.

Ključne riječi: organizirana anarhija, model „kante za smeće“, Kosovo, izgradnja institucija, vladavina prava, međunarodna uprava