

The transformative power of EU: an Assessment of EU impact in the judicial system of Kosovo

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Abstract

In the process of EU integration, the aspiring candidate and potential candidate countries have undergone a major process of reforms. The Central European Countries accession process has been analyzed in details, using both rationalist and constructivist models. However, the South European Countries, in general, and Western Balkan countries, in particular, have a lot to be critically analyzed, studied and understood. Nevertheless, the purpose of this paper is not to analyze all Western Balkan countries, but to focus only on Kosovo, namely to study its judicial system. In this regard, to what extent the EU has had transformative power and impacted the internal judicial structures of Kosovo and under which conditions the EU is more effective? This article analyzes the findings of the Progress reports for a ten-year period (2005 - 2015) and the extent of the EU impact. It makes use of the conceptual and rational framework of external incentives model and argues that the EU impact in the judiciary system of Kosovo was crucial and transformative considering the starting low phase of reforms in Kosovo.

Key Words: European Union; Kosovo; Judicial System; Transformative power; impact

www.dx.doi.org/10.21113/iir.v6i1.227

ILIRIA International Review – Vol 6, No 1 (2016)

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1. Introduction

The transformative power of EU integration processes and its impact in the candidate countries and potential candidate countries has been deeply analyzed by the Europeanization literature.¹ The EU incentives formed the basis of a strong conditionality policy which the EU used to press for democratic reforms and to monitor compliance with its core political values.² The literature has attempted to move beyond the rationalist bargaining model, which is referred as the external incentive model, by introducing new variables both at the EU and at the domestic level. Most of the literature I have consulted with has shown a top down approach by introducing variables at the EU level to explain the compliance or non-compliance and the effectiveness of EU conditionality.³

Considering the fact that majority of the Western Balkan countries have been empirically analyzed on the impact of the EU integration/accession processes, the case of Kosovo has been barely addressed. In this regard, with the aim of addressing the impact and the 'transformative power' of the EU integration processes, on the judiciary system in particular, this paper argues that despite the slow reforms that gradually took place and the weak state capacities to absorb the required reforms, the EU as an actor and the EU integration/accession processes, as diffusion of idea⁴, was the most crucial actor/mechanism, respectively, that had a crucial impact on gradual changes in Kosovo in. In conceptualizing the EU impact, this paper will make use of the work of Schimmelfennig and Sedelmeier which provided the theoretical framework of the rational 'external incentives model' which follows the logic of consequences and is driven by the external rewards and sanctions that the EU adds to the cost-benefit calculations of the rule-adopting state'.⁵

Therefore, this article has been designed to illustrate the extent and ways the EU exercises its influence on the accession countries, namely in the

¹ Schimmelfennig, Frank, and Ulrich Sedelmeier (2004).

Grabbe, Heather (2006).

Borzel, Tanja A., and Thomas Risse (2012).

² Grabbe 2006; Schimmelfennig and Sedelmeier 2004; Vachudova 2005.

³ Grabbe 2006; Schimmelfennig and Sedelmeier 2004; Vachudova 2005; Noutcheva and Aydin-Dyzzit 2011).

⁴ Börzel, Tanja A. and Risse T. (2009).

⁵ Schimmelfennig, Frank, and Ulrich Sedelmeier (2004).

judicial system of Kosovo. The extent of the EU impact is limited on the formal structures of judiciary, namely developed legal framework and institutions. However, considering the very low starting point of judiciary in Kosovo, these reforms are tangible which transformed the judiciary system of Kosovo. The effectiveness and transformative impact of EU integration will be proven by studying and analyzing the EU progress reports, its findings, gaps and progresses that cover a period of 10 years (2005 – 2015).

2. Literature Review and Theoretical background: The EU impact through Conditionality

In the most literature review, EU is rightly described as an actor, which seeks to ‘transform the domestic structures of the Western Balkan countries in order to foster peace, stability and prosperity in the region ridden, by war and ethnic conflict’.⁶In this regard, Croatia is seen as the only country of the Western Balkans to have made sufficient progress to successfully conclude the accession negotiations, whereas in the other extreme lies the case of Kosovo and Bosnia Herzegovina, which are considered seriously lagging behind.⁷ The reasons behind the lack of progress remain the limited statehood that ‘has seriously curbed the transformative power of the EU in the Western Balkans - despite their membership perspective.’⁸

The lack of state capacities has also been argued to have an impact on the effectiveness of EU conditionality. Even though features of EU conditionality, in particular its prescriptive essence, are far from being well defined, conditionality is seen as ‘a gate keeping mechanism embodying clearly identifiable and generally understood norms, rules and institutional configurations that are applied consistently and over time to regulate the entry of new members’.⁹ It is argued for its ambivalence and ambiguity because ‘Copenhagen Criteria’ was politicized and operationalized in a selective manner.¹⁰Therefore Hughes *et al*, argues that this ambivalence and vagueness of the *acquis* across policy areas has significantly weakened the impact of conditionality. Nevertheless, we have to be aware of the fact that

⁶ Börzel, Tanja (2011).

⁷ Ibid: p. 5.

⁸ Ibid: p. 5.

⁹ Hughes J., et al. 2005.

¹⁰ Ibid: p. 25.

'EU conditionality does not have a uniform logic, but rather has a waspish nature that shifts and transforms depending on the content of the *acquis*, the policy area, the country concerned and the political context.'¹¹

Another contribution in the literature was given by Heather Grabbe in her book *The EU's transformative power* in 2006, who investigated the mechanisms used instrumentally by the EU to effect change through conditionality and the accession process, grouping them into five categories such as 'Models: provision of legislative and institutional templates, Money: aid and technical assistance, Benchmarking and monitoring, Advice and twinning, and Gate-keeping: access to negotiations and further stages in the accession process'.¹²

A close look at the Central Eastern Europe candidate countries illustrates that potential candidate countries of CEE had to undertake all the EU's existing laws and norms in order to be subject to the same Europeanisation pressures as member-states in policies and institutional templates that they downloaded from EU level.¹³ Furthermore, the legal transposition of the *acquis* and harmonization with EU laws was essential to becoming member state. In the case of CEE, differently from the existing EU Member states, the uploading of preferences into EU level policies was not applicable and possible. As Grabbe (2004) points out this fact that CEE countries were 'consumers not producers of the outcomes of the EU's policy making processes'.¹⁴ This means that even though EU policies might very badly fit with their domestic structures, the CEE candidate countries could not object.

If we were to summarize the effectiveness of the EU's mechanisms to effect change through conditionality and accession process, we could say that it was widely viewed as one of the success stories of European Union foreign policy in the case of CEE countries. EU has had a considerable contribution to political transformation processes by promoting democratic consolidation, rule of law, respect for human rights and the protection of minority rights. In general, the literature acknowledges the fact that conditionality will bring about substantial change if the expected political

¹¹ Ibid: p.26.

¹² Grabbe, H. (2006), p.76.

¹³ Ibid: p.76.

¹⁴ Ibid: p.77.

costs of compliance with EU requirements do not exceed the benefits of a credible membership perspective.¹⁵

In one hand, Othon Anastasakis and Dhimitar Bechev in their paper *EU conditionality in South East Europe: Bringing commitment to the process* (2003)¹⁶, argue that ‘Conditionality is the EU’s most powerful instrument for dealing with the candidate and potential candidate countries in post-communist Europe.’ On the other hand, contrary to the CEE countries, ‘in the Balkans, EU conditionality is a multidimensional and multipurpose instrument, geared towards reconciliation, reconstruction and reform. It is regional, sub regional, bilateral and project specific and relates to economic, political, social and security related criteria.’ EU conditionality is also aimed at integrating the Balkan states into the EU: its intention is to promote reform, to prescribe criteria attached to EU granted benefits, and to differentiate among countries by assessing each on its own merits. However, the application of EU conditionality has met some problems in the Balkans. Othon Anastasakis *et al.*, point three crucial reasons why EU conditionality has met some problems in the Balkans.

- *“It has proved unable to sustain reform and to generate local consensus about the need for reform.*
- *It overlooks the widening discrepancies between the priorities of the EU and the priorities of Balkan governments and populations. The limited input from the region in shaping the priorities inhibits the build-up of reform consensus and prevents local ‘ownership’ of policies.*
- *By emphasizing the heterogeneity of the region, it exacerbates antagonism among the countries. In particular, the blend of bilateral and regional conditionality spawns a climate of suspicion where the stronger feel that they are delayed by the weaker countries and the weaker do not benefit from the progress of the stronger”*(2003)

Even though, Anastasakis O., (2003)¹⁷ gives reasons from both the supply and demand side, it directs attention more to the European Union which lacks a clear strategy and recommends EU to adopt policies in three ways by “making it explicit that accession is the key objective of its conditionality in the Western Balkans; by making the criteria more relevant

¹⁵ Grabbe 2006; Schimmelfenning et al 2006; Vachudova (2005).

¹⁶Anastasakis, O., & Bechev, D. (2003).

¹⁷ Ibid.

to the needs of the citizens in the region; and finely tune the regional and the bilateral dimensions of its policy in order to tackle all negative externalities of the current confusion.”¹⁸

Following the similar line of addressing the problem of the effectiveness of EU conditionality in the Balkans, Gergana Noutcheva (2009)¹⁹ has argued that ‘the EU’s foreign policy in Western Balkans lacks a strong normative justification, which affects the degree of compliance with the EU’s demands in areas related to state sovereignty’. As such, domestic actors have responded by ‘fake compliance, partial compliance and non-compliance with the EU’s condition’.

All in all, the literature so far has shown and proven that the EU has had a transformative impact on Central European Countries through its conditionality. This success story, however, has not yet proven to be in the case of Western Balkan countries, rightly referred as “the EU’s unfinished business”. Nevertheless, what is important for this paper is to analyze the extent of the slow but tangible impact of EU in the case of Kosovo, as the most lagging behind country in the Western Balkans.

3. Historical Background of the case of Kosovo

The European Union has been and remains an integral part of international efforts to build a new future for Kosovo since 1999.²⁰ The European Union, especially the European Commission, plays an important role in the reconstruction and Kosovo's development. In this regard, the assistance of the EU is also shown by the financial assistance where it can be said that the EU is one of the largest donors in providing assistance to Kosovo (over 2 billion euros by 1999).

In order to study and analyze the case of Kosovo, namely judicial system, it is important to explicate the following crucial events: the Zagreb Summit, the Thessaloniki Summit, First Communication of the European Commission for a European future for Kosovo, the appointment of the Special Envoy for the future status process of Kosovo, the establishment of the Rule of Law Mission in Kosovo (EULEX), initiation and launching of the visa liberalization process, the end of supervised independence from western powers, the feasibility study and the signing of the SAA.

¹⁸ Ibid: 1-22.

¹⁹ Noutcheva, G. (2009).

²⁰ European Neighborhood Policy and Enlargement Negotiations, 2015.

Zagreb Summit launched the first Stabilization and Association Process (SAP) for five countries of southeastern Europe. The Stabilization and Association Process (SAP) is the EU policy towards the Western Balkans (WB), established for the purpose of eventual accession of these countries to the EU. Western Balkan countries are involved in a progressive partnership with the aim of stabilizing the region and establishing a free trade area. SAP sets out common political goals and economic, though the assessment of progress is based on countries own merits. This Summit was one of the first that paved the way for the integration of the Western Balkans to the European Union. However, in this summit Kosovo was not invited and thus was not admitted in the final declaration of the summit".²¹

The European Council reiterated its determination to support fully and effectively the European perspective of the Western Balkan countries, which will become an integral part of the EU after specified criteria, are met²². This is reinforced by EU leaders, who have established the European Union's policy towards the Western Balkans, in their meeting at the Thessaloniki Summit in 2003. Unlike the Zagreb Summit, at the Thessaloniki Summit political leaders of Kosovo were present. This summit was attended by former UNMIK chief Michael Steiner, President of Kosovo, Ibrahim Rugova and Prime Minister Bajram Rexhepi. However it should be noted that their names were not listed as participants in the summit's final declaration. However, it was the first summit in which they emphasized "European perspective" for Kosovo.²³

Further, the European Commission, on 20 April 2005²⁴, adopted the *Communication on a European Future for Kosovo*, emphasizing its contribution to making Kosovo's European perspective a reality. It was stressed that Kosovo will be high on the agenda in the months to come. This press release stated that "the next review in 2005 of the UN Standards, including democratization, the rule of law and minority protection, could be followed by discussions on Kosovo's future status. Regardless of the outcome of these future talks, Kosovo needs to be firmly anchored in the progress of the Western Balkans in the Stabilisation and Association Process."²⁵

²¹ Final Declaration of Zagreb Summit, 24 November, 2000.

²² MEMO/07/169, Regional cooperation in Southeast Europe, Brussels, 8 May 2007.

²³ The Thessaloniki Agenda for the Western Balkans - the move towards European integration, p. 10.

²⁴ IP/05/450, A European Future for Kosovo, 20 April 2015.

²⁵ Ibid: p. 1.

Welcoming the Commission's contribution, Olli Rehn, Commissioner for Enlargement said:

*"Kosovo's economic problems cannot wait until the resolution of the status question. The economic development of the province needs to be fostered to guarantee a better future for all people in Kosovo. Our aim is to build a truly multiethnic Kosovo in which all citizens feel secure and equally treated. Our contribution today sets out the Commission's approach to Kosovo's long-term development. We are ready to continue helping Kosovo to make progress towards its European aspirations, provided political leaders demonstrate a clear commitment to democratic principles, human rights, protection of minorities, rule of law, market economic reform and the values on which the European Union is based. Ultimately, Kosovo's future is in the hands of its people."*²⁶

On 24 October 2005, the Security Council authorized the beginning of the Kosovo status process. On the other side, from the Kosovo leadership was asked to increase their efforts to ensure the implementation of standards.²⁷ Council supported the Secretary-General's intention to start a political process to determine Kosovo's future status, as foreseen in Security Council resolution 1244 (1999). Reaffirming the framework of the resolution, the Council welcomed the appointment of the Special Envoy to lead the process. The Council also encouraged Contracted Group, comprising France, Germany, Italy, Russian Federation, United Kingdom and the United States to remain closely engaged in the political process that will be led by the United Nations. In agreement with the Council, the Secretary General appointed Martti Ahtisaar, former President of Finland, to help negotiate the end of the air campaign of NATO against Yugoslavia, as his special envoy for the status process of Kosovo's future.²⁸

Another important date in the wake of the events that have shaped further EU-Kosovo relations is 4 February 2008 where the Council adopted Joint Action 2008/124 / CFSP on the establishment of the Rule of Law

²⁶ Ibid: p. 2.

²⁷ Speech of the President of the Security Council, Doc. OKB/PRST/2005/51, 24 October 2005.

²⁸ Letter dated 31 October from the Secretary General addressed to the Security Council, Doc. OKB. S/2005/708, 10 November 2005; and Letter dated 10 November from the President of the Security Council to the Secretary-General, Doc. UN S/2005/709, 10 November 2005.

Mission in Kosovo (EULEX).²⁹ In this regard, February 16, a day before the declaration of independence, the Council decided to launch the EULEX mission in a broader field of rule of law. Meanwhile Peter Feith was appointed as EU Special Representative in Kosovo. As foreseen in the Ahtisaari's package, the mandate of EULEX mission was to assist the Kosovo authorities in the judiciary and to assist these institutions according to European best practices.³⁰ The mission of the European Union Rule of Law Mission in Kosovo (EULEX) became the largest civilian mission so far under the European Security and Defense. The main goal was and remains to assist and support the Kosovo authorities in the rule of law, especially in the police, judiciary and customs. EULEX is a technical mission which consists of mentors, monitors and advises keeping a number of limited executive powers.

In the decision of the Council for the appointment of Pieter Feith as EU Special Representative in Kosovo, Javier Solana, High Representative of the EU for Foreign Policy and Common Security Policy (CFSP) stated the following:

*"I am very pleased that the Council has decided on the basis of my recommendation to appoint Pieter Feith as EU Special Representative in Kosovo and Yves de Kermabon as Head of Mission for the rule of law mission in Kosovo, EULEX KOSOVO. These appointments further illustrate the EU's enhanced engagement in the Western Balkans. Pieter Feith will in particular offer the EU's advice and support in the political process and promote overall EU coordination in Kosovo. I have known him for a long time and we have always worked very well together. I wish him all the luck in his new position. He has my full trust and support and I look forward to working with him. Both have an in-depth knowledge of the region and of EU policies there."*³¹

After the declaration of independence on 17 February 2008, the Council of the European Union, at their meeting led by President Mr. Dimitrij Rupel (Minister of Foreign Affairs of Slovenia), dated 18 February 2008, he discussed the unilateral declaration of independence of Kosovo. The Council discussed developments in Kosovo and adopted the following conclusions:

²⁹ EU Official Gazette, L 174/42h.

³⁰ Council of the European Union, S060/08, 16 Feb 2008.

³¹ Ibid. p. 1.

"The Council welcomes the continued presence of the international community based on UN Security Council resolution 1244. The Council notes that Member States will decide, in accordance with national practice and international law, on their relations with Kosovo. The Council recalls the European Union's longstanding commitment to the stability of the Western Balkans region. The Council reiterates the European Union's readiness to play a leading role in strengthening stability in the region, and recalls the European Union's commitments contained in the conclusions of the European Council of 14 December 2007, as well as the agreement to Joint Actions establishing an ESDP Police and Rule of Law mission and appointing an EU Special Representative in Kosovo."³²

Although the goal of this paper is not to study and analyze the approach of the EU and its institutions in terms of the debate of 'security vs. democracy', it should be noted that in these findings it is clear that the approach of the European Union in general, and the Council the European Union, in particular, is more focused on the reign of stability in the Western Balkan countries than in the commitment of all forces for democratization of society and institutions. This does not mean that the influence of the EU is small, but it means that the direction of the impact turns out to be more security issues as democratization, which is analyzed and criticized in many other academic works.³³ However, what remains most important in this is that the Council accepts the proclamation of Kosovo's independence, and underlines the EU's conviction that Kosovo is a *sui generis* case.

On 14 October 2009, the European Commission proposes to mark a new stage of relations between the EU and Kosovo. In the communication "Kosovo - Fulfilling its European Perspective", the Commission proposed to start a process that should lead to visa-free travel for Kosovo citizens and to begin preparations for a comprehensive trade agreement once Kosovo meets the requirements. EU Enlargement Commissioner Olli Rehn said: "Today's decision marks a new stage. We propose a series of practical measures to help improve the lives of all Kosovo citizens. These measures will show Kosovo that EU approximation is not something abstract, but that it has to do with real benefits tangible to all. We now urge member states of the EU to agree to our proposals and to ensure Kosovo keeps pace with developments in the rest of Western Balkans"³⁴

³² EU Council meeting 2851, 6946/08 Press 41.

³³ Borzel Tanja A, 2010; Amichai Magen, 2005; Richard Youngs, 2009.

³⁴ IP/09/1516, Kosovo - Fulfilling its European Perspective, Brussels 14 October 2009.

Although this EU step is promising on two levels, first giving the opportunity to the citizens of the Republic of Kosovo to gain access to countries of the EU without visas, and second to include the state of Kosovo among other states of Western Balkans which enjoy visa liberalization, it should be noted that this process in the case of Kosovo has had a lot of criticism regarding the criteria involved in this process (that differ from those of other WB countries) and unclear assessments by the EU.³⁵

Among the most important events of the relationship between Kosovo and the EU, remains the date of 10 September 2012, when the Western powers that supervised Kosovo for 13 years, announced the end of their supervision. In this case, the Dutch diplomat Pieter Feith, the highest international representative in Kosovo, said at the press conference that "The supervision of Kosovo is finished. The International Steering Group has decided to end the period of supervised independence of Kosovo."³⁶ Since EULEX judges still continue to work in the judiciary system of Kosovo, peacekeeping mission KFOR is still there, and the influence of foreign embassies (especially that of US), international oversight continues to be part of the operating system in Kosovo. However, the fact that the supervision of Kosovo's independence was officially announced as something completed should still be recognized as an achievement.

Furthermore, the two most important events that led to the establishment of contractual relations between Kosovo and the EU were the issuance of the feasibility study for the Stabilisation and Association Agreement between the EU and Kosovo (October 10, 2012), then the beginning (25 July 2014) of the Stabilisation and Association Agreement (SAA) and the signing of the SAA between the EU and Kosovo (27 October 2015).³⁷ On the day of signing the agreement in Brussels by representatives of the EU and Kosovo, such as High Representative for Foreign Affairs and Security Policy Federica Mogherini, Commissioner for European Neighbourhood Policy and Enlargement Negotiations, Johannes Hahn, Prime Minister Mustafa and Minister of European Integration / chief Negotiator, Bekim Çollaku, Federica Mogherini stated: *'This agreement has opened a new phase in EU-Kosovo relations. This represents an important*

³⁵ The EU visa liberalisation process in Western Balkans: a comparative assessment, September 2013.

³⁶ BBC News.

³⁷ Ibid.

*contribution to stability and prosperity in Kosovo and in the region.*³⁸In this document it is stated that after the entry into force, the SAA will establish a contractual relationship involving reciprocal rights and obligations, and covers a wide variety of sectors. The SAA focuses on respect for key democratic principles and core elements that are at the heart of the EU market. This agreement will also help to implement reforms to achieve the adoption of European standards by Kosovo. Other provisions cover political dialogue, cooperation in a variety of sectors ranging from education and employment to energy, environment, justice and home affairs.

These events shaped the Kosovo society and institutions and paved the way for the EU integration. Without the EU commitment, Kosovo would have been the only country in the Western Balkans/South East Europe without EU perspective, thus creating gaps in almost every sector of society, political and economic development. Following similar line of thoughts and argumentation of Schimmelfenning and Sedelmeier (20014) that the 'effectiveness of rule transfer varies with the credibility of EU conditionality and the domestic costs of rule adoption.' This will be observed by studying and comparing of EU progress reports in Kosovo for a period of 10 years.

4. Analyzing EU Progress Reports on judiciary system (2005 - 2015)

This section will provide detailed information on gaps and progresses identified by European Commission Progress Reports from 2005 - 2015 of the judiciary system. It will illustrate that EU had a transformative power and an important impact on the formal structures of judiciary system, namely motivating and forcing the Kosovo institutions to build the legal framework and establish institutions, competences and their mandate. Even though the impact of EU as actor and EU integration processes, as diffusion of ideas, was very limited to the establishment of formal structures of judiciary, it should be acknowledged the fact that the starting point of Kosovo was from scratch. Therefore, the impact is considered to be a transformative one, differently from other WB countries. Furthermore, with the visa liberalization process and the Stabilization Association Agreement (SAA), as a first contractual agreement between Kosovo and

³⁸ Ibid.

EU, it is proven that the external incentive model proved to be applied in the case of Kosovo as well, meaning that when the external incentive/reward is strong enough, the rule adopting country is more willing to pay the costs and comply with the conditions.

Progress Report of 2005 - First Progress Report on Kosovo was published in 2005, which estimates the progress for the period during March 2004 and September 2005. The approach of this report was to be seen whether the planned reforms in the 2004³⁹ annual report have been achieved and examines the overall level of implementation.⁴⁰ The political context in this period insisted that institutions established Kosovo governed by Resolution of the Security Council 1244 for the establishment of an interim administration International Civilian Mission of the United Nations in Kosovo (UNMIK) with the Special Representative Secretary General (SRSG). In this context, the Constitutional Framework for Provisional Self Government of Kosovo divided responsibilities between UNMIK and the Provisional Institutions of Self-Government (PISG) for the purpose of developing a meaningful government in Kosovo.⁴¹

In this report, the judicial system and judicial institutions are regarded as weak and unable to provide a proper service, be that in the civil sector as well as in penal, which need to be improved. The basic difficulty in this assessment was legal uncertainty about the legislation that was currently in force. The key problem in this respect is the applicability of laws in Kosovo, which is divided between UNMIK regulations and some Yugoslav laws in force since 22 March 1989. More specifically, it was not clear which laws were effective and which were not, thus contributing to the destruction of rule of law and creating legal uncertainty.⁴²

On the other hand, "the efficiency of the judicial system was also very low⁴³, thus contributing to the length of proceedings and backlog of cases. Also, another problem was the level of education and professionalism of judges and prosecutors. Judges and prosecutors, were educated during the Yugoslavian system, thus were not able to properly implement quite

³⁹ The Stabilisation and Association process for South East Europe, March 2004.

⁴⁰ Progress Report 2005, Kosovo (under UNSCR 1244).

⁴¹ Ibid: p. 5.

⁴² Ibid: p. 15.

⁴³ Ibid: p. 15.

extensive legal and practical changes of the new interim criminal and criminal procedure codes, which came into force in April 2004.

In this regard, in the progress report of 2005, 'deep structural reforms that are necessary for a professional justice system' were required.⁴⁴

Progress report of 2006 -The 2006 report also analyzes the political situation in Kosovo in terms of democracy, rule of law, human rights, protection of minorities and regional issues. In assessing the judiciary, achievements that were highlighted were: the appointment of ministers after the Ministry of Internal Affairs and Ministry of Justice were established in December 2005; establishment of the Kosovo Judicial Council (KJC); approval of the nominations and the appointment by the Assembly of the Judicial Council members; selection of ten judges and two prosecutors from the communities underrepresented in Kosovo; and promulgation of the law on the Kosovo Judicial Institute to establish the Institute as an independent body to coordinate the training of judges and prosecutors and candidates for judges and prosecutors, in this case the responsibility was transferred from the Ministry of Public Services to the Kosovo Judicial Institute (KJI).⁴⁵

Nevertheless, legislation and efficiency of the judicial system still remained the challenge of this assessment. Legislation was still divided between UNMIK regulations, laws passed by the Assembly and Yugoslav laws, which have continued to be in force. For these reasons, the legal basis was not clear in the delivery of justice in the decisions of judges. In terms of legal gaps, the deficiencies of the draft laws on courts and prosecution offices and the creation of objective procedures and merit-based recruitment of judges and prosecutors still remained. This in turn had an impact on the lack of an independent judiciary system. Regarding efficiency, judicial institutions were criticized for low efficiency, small progress in providing an effective service, overload cases, poor management of cases and lack of enforcement and implementation of judges' decisions.⁴⁶

⁴⁴ Ibid: fq. 14.

⁴⁵ Commission staff working document, Kosovo (under UNSCR 1244) Progress Report 2006.

⁴⁶ Ibid: pg. 10.

*Progress Report of 2007*⁴⁷ - This year report assessment was short and concise without not much elaboration or concrete recommendation. For example, the overall judicial institutions have been assessed to have still made little progress during the 2007 reporting period and the judicial system remained weak. During this time, the absence of a constitutional court created legal uncertainty in the interpretation of the law. This issue was one of the highest to be emphasized which paved the way for other problems such as 'Parallel courts applying Serbian law continued to operate in areas with the majority of Serb population in Kosovo.' Furthermore, despite the legal problems, the administrative capacity of Ministry of Justice was also mentioned to remain weak and its structure was not finalized, yet.

*Progress Report of 2008*⁴⁸ -During 2008, the gaps identified above, regarding the lack of a certain legal framework, started slowly to change. For example, during 2008, Progress report identified as a progress the fact that the Assembly approved the following laws: the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo; the Law on Special Prosecution of Kosovo; the Law Supplementing and Amending the Provisional Criminal Code of Kosovo; the Law Amending and Supplementing the Law on Execution of Penal Sanctions; the Law Amending and Supplementing the Kosovo Provisional Code of Criminal Procedure and the Law on the Out Contentious Procedure.

Nevertheless, it should be noted that the legal framework still remained incomplete in 2008. For example there are no laws in the following areas: notaries, executive procedure, prosecution, courts, constitutional court and Kosovo Prosecutorial Council. The findings of the 2008 Progress report show that 'The absence of a constitutional court and inconsistent availability of the Official Gazette across the judicial system continue to hamper legal certainty in Kosovo. This problem is exacerbated by the continuing existence of three parallel sources of legislation (former Yugoslav Law, UNMIK regulations and Kosovo law adopted following the declaration of independence).'⁴⁹

⁴⁷ Commission staff working document, Kosovo (under UNSCR 1244) Progress Report 2007.

⁴⁸ Commission staff working document, Kosovo (under UNSCR 1244) Progress Report 2008.

⁴⁹ Ibid: p. 14.

The efficiency of judicial system still faces crucial problems due to the backlog of cases, especially in civil proceedings. Furthermore, there was confusion between backlog and pending cases. At the beginning of October, the total of unsolved civil cases pending before the municipal courts of Kosovo stood at 160,477. There is no operational system for the execution of civil judgments. Furthermore, over 36,000 criminal cases are pending. Alternative dispute resolution, such as mediation, has not yet been implemented. Municipal courts, along with the police, lack the capacity to address, prevent and sanction illegal occupation, use and construction of property in an impartial manner.⁵⁰

*Progress report of 2009*⁵¹ -The progress report of 2009 continues to identify progress only limited to the legal framework. As such, the following laws were adopted during this reporting period: Law on the Constitutional Court, the Law on Notaries, the Law on Contested Procedure (Civil Procedure Law), the Law on the Bar, the Law on Mediation, the Law on Supplementing and Amending the Kosovo Criminal Code, and the Law on Supplementing and Amending the Kosovo Code of Criminal Procedure. However, Kosovo had still to adopt a package of four reform laws: on Courts, on Kosovo Judicial Council, on Prosecution and on Prosecutorial Council.

On the other hand, gaps in the judiciary system remained regarding 'allegations of corruption and misconduct which were not adequately investigated'⁵² and there has been no significant improvement in reducing the backlog of civil and criminal cases, including by the Supreme Court.

*2010 Progress Report*⁵³ - The overall assessment for the year 2010 was relatively positive due to the fact that 'Major reform process of judiciary was launched by the adoption of the law on courts, which should also improve the situation of judges and vetting process had been largely completed. However, Kosovo is still at an early stage of addressing priorities in the area of justice. Political and other interference is an issue of serious concern. The large backlog of court cases and the lack of effectiveness of the judicial system continue to impede rule of law in

⁵⁰ Ibid: p. 15.

⁵¹ Commission staff working document, Kosovo (under UNSCR 1244) Progress Report 2009.

⁵² Ibid: p. 9.

⁵³ Commission staff working document, Kosovo 2010 Progress Report.

Kosovo.’⁵⁴During this year assessment was also shifted from merely completing the legal framework to the increasing of efficiency of the system.

*2011 Progress Report*⁵⁵ - The assessment for 2011 continues to be positive due to the little progress in this area. In this regard ‘the Constitutional Court had made a number of key judgments; The Judicial Council had started addressing key priorities and the Prosecutorial Council had started operating. The successful completion of the reappointment process had increased self-confidence among the local judiciary.’⁵⁶However, the weakness of judicial system still persisted due to the ‘Interference in the workings of justice, endangering its independence and impartiality and improvements are needed in the efficiency of court proceedings and enforcement of decisions.’⁵⁷

*Progress Report of 2012*⁵⁸ - Differently from other progress reports, which focused more on the legal framework, the Progress report of 2012 assessed the progress of judiciary system regarding the independence, accountability, impartiality and efficiency. The overall assessment included challenges of the preparations for the transition of responsibilities from EULEX to Kosovo, the integration of the judicial system in the north into the Kosovo institutional structures, as well as the need for specialisation and improved quality of performance. In this regard it was suggested that ‘the Kosovo judiciary needs to address the backlog, and, irrespective of public or political opinion, file indictments based on gathered admissible evidence and deliver well-reasoned judgments in a timely manner; Transparent and merit-based recruitment and evaluation of judges and prosecutors, as well as a properly functioning disciplinary mechanism, are important steps towards improving the functioning of the judiciary’.⁵⁹ Furthermore, in 2012 the Commission launched the visa dialogue with

Kosovo, thus requesting first to adopt or amend in line with the EU *acquis* the legislation set out in this roadmap and then to fully implement

⁵⁴ Ibid p. 10.

⁵⁵ Commission staff working document, Kosovo 2011 Progress Report.

⁵⁶ Ibid: p. 10.

⁵⁷ Ibid: p. 10.

⁵⁸ Commission staff working document, Kosovo 2012 Progress Report.

⁵⁹ Ibid: p. 12.

this legislation and all other measures specified in the visa liberalization roadmap.⁶⁰

*Progress Report of 2013*⁶¹ - In the previous reports, the legal framework was important to create a legal certainty. In this progress report, the focus starts to shift to the secondary legislation, which 'needs to pay particular attention to the harmonisation of primary and the current implementing legislation.' Overall, it was assessed that Kosovo needs to address priorities of the feasibility study, one of which is also rule of law. It was required to 'demonstrate a clear commitment to deliver results in the fight against organised crime and corruption, including launching investigations and ensuring continuous good cooperation with EULEX; Support the work of the Special Investigative Task Force; While implementing the new structure of courts, ensure that the Special Prosecution responsible for cases of organised crime, war crimes and corruption maintains its competencies; Adopt the legislation on confiscation of assets and revise the law on prevention of money laundering and financing of terrorism. Adopt a new anti-corruption strategy.'⁶²

*Progress Report of 2014*⁶³ - After the structural and comprehensive judicial reforms, which were adopted in 2013, with the request of the visa liberalisation roadmap, the judicial authorities were assessed to cope well with the new changes. This demonstrates again that when the potential incentive is real and good enough, the accession country complies. Therefore, in the progress report of 2014, the assessment was positive, stating that 'Overall, there has been some progress in the judiciary.'⁶⁴ Nevertheless, there are issues, which continued to challenge the functioning of the judiciary system such as 'Transparent and merit-based recruitment and evaluation of judges and prosecutors, as well as a properly functioning disciplinary mechanism'.⁶⁵

⁶⁰ Visa Liberalization with Kosovo, Roadmap; p. 3 h.

⁶¹ Commission staff working document, Kosovo 2013 Progress Report.

⁶² Kosovo's* progress in addressing issues set out in the Council Conclusions of December 2012 in view of a possible decision on the opening of negotiations on the Stabilization and Association Agreement.

⁶³ Commission staff working document, Kosovo 2014 Progress Report.

⁶⁴ Ibid: p. 12.

⁶⁵ Ibid: p. 12.

2015 Country Report⁶⁶ was characterized by number of events. First of all, on 27 October 2015, the EU signed a Stabilization and Association Agreement (SAA) with Kosovo, which is 'a milestone on Kosovo's path towards a European future.'⁶⁷ The SAA constitutes the first contractual relationship between the EU and Kosovo and provides a comprehensive framework for closer political dialogue and economic relations between Kosovo and the EU, including opening EU markets to Kosovo products. Second, Commission services presented their assessment differently, thus changing the name of the Progress reports to the Country Reports, and showing the achievements of each candidate and potential candidate over the last year, and set out guidelines on reform priorities. The structure of the report was different and the approach was tougher. In this regard, judiciary system was criticized and considered being at 'an early stage of developing a well-functioning justice system.'⁶⁸

The only progress identified was the adoption of the package of four core judicial laws such as Law on Kosovo Judicial Council, Law Kosovo Prosecutorial Council, Law on Courts, and Law on State Prosecutor. 'In addressing the shortcomings outlined below, Kosovo was suggested to 'implement the justice package, including timely adoption of any secondary legislation; Step up financial and human resources to the judicial sector to ensure the proper functioning of the judicial system; Ensure lawful and timely appointments in critical institutions, such as the Kosovo Judicial Council and the Kosovo Prosecutorial Council; and Further reduce the backlog of cases'.⁶⁹

5. Conclusions

As argued herein, the EU as an actor, and the EU integration processes, as diffusion of ideas plays a crucial role and impacts domestic structures of candidate and potential candidate countries. In this regard, the EU integration processes such as visa liberalization process and the conclusion of Stabilization of Association Agreement has also impacted the judicial system of Kosovo. These two processes, under the framework of EU

⁶⁶ Commission staff working document, Kosovo 2015 Country Report.

⁶⁷ Ibid: p. 4.

⁶⁸ Ibid: p. 12.

⁶⁹ Ibid: p. 12.

integration, were considered as the EU rewards, which will be given to the Kosovo, in case it complies with the requested changes.

Considering the fact that Kosovo started from a very low stage of state building, the EU therefore had a transformative power in contributing to the establishment of the legal framework and judicial institutions. However, it should be noted that the extent of the effectiveness of the EU impact was only limited to the establishment of merely structural reforms, leaving behind the functionality of the overall judicial system.

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