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Operationalizing and Measuring Rule of Law in an Internationalized Transitional Context: The Virtue of Venice Commission's Rule of Law Checklist

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Abstract: This article will seek to operationalize and measure rule of law primarily relying on the "Rule of Law Checklist," developed by the Venice Commission, composed of the following five elements: (1) Legality; (2) Legal certainty; (3) Prevention of abuse or misuse of powers; (4) Equality before the law and non-discrimination; and (5) Access to Justice. Each of these elements will be operationalized in the context of Kosovo – the leading case study – with an ultimate aim of obtaining an enhanced understanding of the Rule of Law framework and its measurement in transitional contexts more generally. The underlying circumstances of the selected case are defined by an almost unparalleled involvement of the international community, in particular the UN and the EU, which forms a relatively significant part of the observable context.

Keywords: rule of law, rule of law reform, Venice Commission, democracies in transition, European Union

1 Introduction

It is not uncommon to be challenged by the task of defining the often used terms such as in the present case "rule of law". What is taken for granted is not necessarily easy to define and conceive of in conceptual and operational terms. It has been precisely this difficult task that led to an earlier international report describing it as "a phrase of uncertain meaning."[1] Indeed, when it comes to the rule of law, it may be practically necessary to look at this notion from both a conceptual perspective and a constitutional viewpoint. Beyond the considerations

1 International Commission of Jurists, *The Rule of Law in a Free Society: A Report on the International Congress of Jurists* (Geneva, Switzerland: International Commission of Jurists, 1960), V.

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of understanding, the principal ambition of this article is to translate that conceptual understanding into an operational arena that seeks to enlighten the persistent rule of law challenges in a transitional context; more precisely, a transitional context defined by heavy international involvement and influence. This is the experience of Kosovo, which will provide the almost exclusive case study. Given its emergence from a state of war and the ensuing transitional state of development, the establishment of new structures of government, including in the arena of rule of law, has presented unique realities for experimenting with policy choices and legal and institutional arrangements under specific conditions of an international presence. This set of factors provide for a uniquely posited terrain of investigation of the rule of law foundations, their practical operation and specific challenges faced in the pursuit of the rule of law ideals.

A conceptual definition of each element of the adopted Rule of Law approach will precede their application against the identified challenges. Some other variations of the rule of law measurement will also be explored. The article ends with a specific section on the EU's role in the rule of law promotion in Kosovo through its policy of conditionality. This policy, same as the involvement and role of other international actors, will be critically appraised, so as to obtain a vision of the shortcomings of such policy. In this way, the article observes how the rule of law has evolved since after the United Nations deployment in Kosovo in 1999 and tests, in the light of this operational framework, the results of the international interference by the UN, the EU, and other relevant international actors.

1.1 Terminology

Whatever one's definition about the rule of law is, it is certain that it operates in concert with other phenomena. In particular, it is linked with the distinct, yet highly interrelated notions of democracy and respect for human rights. As it is for example proclaimed in the iconic phrasing of the Universal Declaration of Human Rights, "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."[2] The three notions, namely rule of law, democracy and human rights, are intrinsically intertwined and interdependent. They also overlap, at least partially, as it is the case with the principles of equality, non-discrimination, or the freedoms of expression, assembly, or association. These principles constitute,

2 Universal Declaration of Human Rights, *adopted* December 10, 1948, G.A. Res. 217A, U.N. Doc. A/810 (III) (1948), pmbl.

simultaneously, fundamental pillars of democracy, rule of law, and respect for human rights.

Rule of law could be conceived in terms of both an end in itself and a means to an end. In relation to its function as a means toward other socially desirable goals, one can particularly acknowledge the overarching role in economic development. A critical correlation between the rule of law and economic development has been witnessed by scholarly literature and empirical surveys. Most prominently perhaps, Hernando de Soto, through his *The Other Path: The Invisible Revolution in the Third World* reminded the international community that smoothly functioning legal institutions promoted economic efficiency and, more specifically, formal property rights made a difference.[3] An empirically rich and authoritative World Bank Report on Governance and the Law has established that the rule of law is strongly correlated with high income.[4]

The prime importance of the rule of law is recognized in most discussions regarding developing countries in general and post-conflict societies in particular.[5] As once stated by Lord Ashdown, the former High Representative for Bosnia and Herzegovina:

> In hindsight, we should have put the establishment of the rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, public confidence in the police and the courts.[6]

In this sense, rule of law is quintessentially represented as a political ideal that serves particular societal functions.[7] This view has been widely shared, including by the United Nations, NGOs, and the academic community. As stated by the UN Secretary-General,

> the rule of law is a concept at the heart of the [UN] Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally

3 Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (New York: Harper & Row, 1989).

4 World Bank, *2017 World Development Report: Governance and the Law* (Washington, DC: International Bank for Reconstruction and Development / The World Bank, 2017), at 95–96.

5 See, e. g. David Tolbert with Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 Harvard Human Rights Journal (2006), 29–62.

6 Paddy Ashdown, 'What I Learned in Bosnia,' *New York Times*, October 28, 2002, at A2.

7 Simon Chesterman, *An International Rule of Law?*, 56 American Journal of Comparative Law, no. 2 (2008), 331–361.

> enforced and independently adjudicated, and which are consistent with international human rights norms and standards.[8]

In the Secretary-General's conception, rule of law

> requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[9]

Another principal UN organ, the General Assembly has also recognized the imperative "of upholding and promoting the rule of law at the international level,"[10] encouraging the Secretary-General and the wider United Nations system "to accord high priority to rule of law activities."[11]

1.2 Venice Commission Conception

The European Commission for Democracy through Law, known as and hereinafter referred to as the Venice Commission,[12] has adopted a "Rule of Law

8 The Secretary-General, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, para. 5, U.N. Doc. S/2004/616 (August 23, 2004).
9 *Ibid*.
10 United Nations General Assembly resolution 70/118, *The rule of law at the national and international levels*, para. 6, U.N. Doc. A/Res/70/118 (December 14, 2015).
11 *Ibid*., para. 4.
12 The Venice Commission is as an independent consultative body which co-operates with the member states of the Council of Europe (CoE), as well as with interested non-member states and international bodies and organizations. Its key role is to provide legal advice to its member states with a view of helping them to bring their legal and institutional structures into line with European standards and international best practices in the spheres of democracy, rule of law, and human rights. Opinions from the Commission can be also requested by the Council of Europe bodies and international organizations such as the European Union, OSCE/ODIHR, as well as other international organizations involved in the Commission's work. The Venice Commission's expertise can, in addition, be engaged by a State that is not a member of the Commission by making a request to the Committee of Ministers. In addition to the standard opinions, at the request of a constitutional court or the ECtHRs, the Venice Commission can also provide *amicus curiae* opinions on comparative constitutional and international law issues. The Venice Commission presently has 61 member states, of which 47 are member states of the Council of Europe (the other fourteen members include Algeria, Brazil, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia, and the United States). The Commission—as it was originally conceived and once functioned—was an exclusive club for the CoE Member States. However, with the 2002 revised Statute, membership is expanded; states that were not party to the CoE were allowed to become members of the

Checklist." Its content is instructive for what could be the content of an institutionally or conceptually defined notion of the rule of law. It is composed of five core elements, which will be elaborated in further detail below: (1) Legality; (2) Legal certainty; (3) Prevention of abuse or misuse of powers; (4) Equality before the law and non-discrimination; and (5) Access to Justice.[13] The Commission itself is a body whose existence drew motivation from the iconic fall of the Berlin Wall and of the communist regimes in Central and Eastern Europe. It has now become a catalyst or a "laboratory" for constitutional engineering and constitutional change across different jurisdictions on a trans-European – and increasingly global – scale, aiming to generate the convergence of national constitutional approaches and designs with the cardinal values of the rule of law, human rights, and democracy that it personifies and promotes.

Notwithstanding nuances developed in various legal regimes and traditions (e. g. *Rule of Law, Etat de droit, Rechtsstat, Stato di Diritto, Estado de Derecho*), these five elements identified and advanced by the Venice Commission reflect the common core contained in the concept of rule of law. Its wide-ranging content also allows for flexibility that is conducive for operational exploration, perhaps the most formidable of all challenges surrounding the very concept of the rule of law.

As it is elaborated in further detail in the forthcoming section, the choice of the Venice Commission's conception is dictated by both practical and substantive considerations. Practically, it is only natural for a country that wishes to align its human rights and democracy standards to those of the Council of Europe to rely on the guidelines and policies of this organization and its relevant bodies. Substantively, the broad and inclusive character of the Venice Commission's concept permits the accommodation of existing conceptual variations of the kind of "thick" and "thin" versions of the rule of law.

Commission. Conceptually, the Statute, by allowing for membership of the non-European states—subsequently followed by a marked increase of the Commission's activities in the other regions of the world—makes it a unique international institutional structure, which aspires a universal dimension to its goals and activities. It therefore transforms the Commission from a regional body that sought to bring the post-communist Central and Eastern European bloc into the liberal democratic club to a global institution with universal ideals. For more on the Venice Commission and its role and contribution, see Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, 2 UC Irvine Journal of International, Transnational, and Comparative Law (2017), 57–85; Wolfgang Hoffmann-Riem, *The Venice Commission of the Council of Europe – Standards and Impact*, 25 European Journal of International Law (2014), 579–597.

13 European Commission for Democracy through Law (Venice Commission), *Rule of Law Checklist*, available at: <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e>, accessed December 10, 2018.

1.3 Constitutional Conception and Constitutionalism for Rule of Law

It is certainly plausible to discern a certain meaning or even a variety of meanings of the "rule of law" from a country's foundational document, namely the Constitution. It is, as well, an inescapable part of the constitutional discourse and decision-making.[14]

Respect for the rule of law is one of the fundamental values enshrined in Kosovo's Constitution, as it is the case with all other regional countries that emerged from the dissolution of former Yugoslavia, and certainly beyond.

A closer look at Kosovo's Constitution leads to a conclusion that, although it contains a literal translation of the English phrase "the rule of law" (in Albanian: *sundimi i ligjit*), its substance would also be concordant to the French and German variations of *Etat de droit* and *Rechtsstaat*.

The French and German variations of the rule of law are quintessentially equal to the principle of constitutional supremacy and of the protection of fundamental rights from any public authority.[15] A reflection of this understanding can be found in Article 3 of Kosovo's Constitution, which reads:

> The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of, and participation by, all Communities and their members.[16]

This provision is reinforced by an equally important statement on the underlying values of Kosovo's constitutional order, namely its foundations "on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy."[17]

The rule of law is thus considered to be among the foundational values of the constitutional order of Kosovo.[18] Its inclusion, along with the other constitutional order values enshrined in the Constitution, is a reflective by-product of the

14 Richard H. Fallon, Jr., *'The Rule of Law' as a Concept in Constitutional Discourse*, 97 Columbia Law Review (1997), 1–56.

15 See Laurent Pech, "Rule of Law in France," in R.P. Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (London and New York: Routledge, 2004).

16 Constitution of Kosovo, art. 3(2).

17 *Ibid*., art. 7(1).

18 *Ibid*.

historical and political context preceding the adoption of the Constitution, a manifest "response" to political and legal problems of the past.[19] The core values, listed in a rather exhaustive fashion, exhibit a deep sense of understanding for what has been absent in the preceding order. Indeed, the content of these values and the broader contours of Kosovo's Constitution were most naturally shaped by a brutal and violent past, which resulted in conflict and further non-consensual bloody dissolution of the remainder of the former Yugoslavia, superseded provisionally by an UN-led territorial administration.

Beyond the more limited function of spelling out the constitutional meaning of the rule of law, Constitutions can also be uniquely posited institutional devices for furthering the ideal of rule of law or, indeed, making that ideal sufficiently meaningful so as to not only deserve attention, but produce social values and outcome that gratify desire. This instrumentality of constitutionalism lies in that Constitutions not only articulate the appropriate procedures of governance,[20] but also the substratum of legal principles from which government action and the lines between public authority and private liberty are drawn.[21]

In practice, there is often a variance between the establishment of a scheme of constitutionalism in a country that supposedly aims to establish rule of law and the maintenance and performance of that constitution in the real world of law and politics. All in all, the nexus between constitutionalism and rule of law is dependent upon the formal and political expressions of rule of law components or values in the constitution, in the document itself, and in the way in which it is interpreted in real life.[22] Therefore, constitutionalism has a contingent, rather than intrinsic, relationship with rule of law.[23]

19 Joseph Marko, *The New Kosovo Constitution in a Regional Comparative Perspective*, 33 Review of Central and East European Law (2008), 437–450, at 438 (comparatively, for example, as the author notes, "it is not accidental that the German Basic Law of 1948, by signaling the absolute importance of 'human dignity' as the basic value for state and society in its Article 1, is a response to all of the atrocities that had been committed by the Nazi regime.").

20 See Russell Hardin, "Constitutionalism," in Donald A. Wittman and Barry R. Weingast (eds.), *The Oxford Handbook of Political Economy* (Oxford: Oxford University Press, 2008).

21 See Keith Whittington, "Constitutionalism," in Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2010).

22 Mathew D. McCubbins, Daniel B. Rodriguez & Barry R. Weingast, *The Rule of Law Unplugged*, 59 Emory Law Journal, (2010), 1455–1494, at 1492.

23 *Ibid*.

2 Exploring the Wider Conceptual Framework of the Rule of Law and Its Measurement

The rule of law is a much celebrated historic ideal, which is in constant search of its precise meaning and content. Some have traced this ideal to Aristotle, who equated the rule of law with the rule of reason,[24] or as his statement reads "the law is reason unaffected by desire,"[25] others have associated the rule of law with rights-based liberalism and judicial review of governmental action,[26] yet others have argued based on more procedural formal grounds that it requires publicly promulgated rules, laid down in advance, and adherence to at least some natural-law values.[27] By contrast, positivists have insisted that the rule of law represents one thing, its moral virtue or abomination something else.[28]

A more contemporaneous and comprehensive conception of the rule of law was provided in 1959 by the International Commission of Jurists. It conceived of the notion as

> *the principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men.*[29]

Indeed, two ideals are said to be underlying this conception of the rule of law. First, it is based on the fundamental premise that all power in the State should be derived from, and exercised in accordance with, the law. Second, it implies that the law itself is based on respect for the supreme value of human

24 See Judith N. Shklar, "Political Theory and the Rule of Law," in Allan C. Hutchinson and Patrick Monahan (eds.), *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987); Lawrence B. Solum, "Equity and the Rule of Law," in Ian Shapiro (ed.), *The Rule of Law: Nomos XXXVI* (New York: NYU Press, 1994).

25 Aristotle, *The Politics*, Book III, Ch. Xvi, 1287a.

26 See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (2d ed., London: Macmillan; New York: St Martin's Press, 1959), pp. 181–205.

27 See Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), pp. 42–44.

28 See, e. g. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), p. 224 (distinguishing between formal and substantive theories of the rule of law); Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 Ratio Juris (1993), 127–142, at 139–141 (answering in the negative the question whether there is at least some moral value in every legal system). See also Jeremy Waldron, *Kant's Legal Positivism*, 109 Harvard Law Review (1996), 1535–1566, at 1536–38.

29 International Commission of Jurists, *supra* note 1, 197.

personality.[30] The two exclusive elements characterizing the notion are thus prevention of arbitrariness and a general notion of dignity of person.

This definition cannot be particularly praised for providing sufficient practical guidance or relevance. Indeed, it exhibits the inherent difficulties present in defining any complex and variable social phenomena, such as in this case rule of law.

An evolved and more articulate vision is reflected in the already presented Venice Commission's Rule of Law Checklist (namely legality; legal certainty; prevention of abuse or misuse of powers; equality before the law and non-discrimination; and access to justice).

It should also be noted that a series of indexes to measure the rule of law have been developed. Among the representative indexes are those produced or generated by the Freedom House, the World Bank Worldwide Governance Indicators (WGI), the Bertelsmann Transformation Index, the Democracy Barometer, and the World Justice Project (WJP) Rule of Law Index.

The majority have rule of law only as a component or sub-component of a wider arena that they seek to measure, such as freedom, good governance, or democracy. Thus, their major weakness or shortcoming as far as the rule of law is concerned is its marginal treatment or its consideration as part of a whole set of indices used to define and measure either democracy or good governance. For example, the Democracy Barometer includes rule of law as one of the nine core functions of democracy, which is conceived in terms of two main pillars: (1) equality before the law, and (2) quality of the legal system. The WGI further measures the rule of law as one of the six components of good governance. It defines rule of law as "the extent to which agents have confidence in and abide by the rules of society, including the quality of contract enforcement and property rights, the police, and the courts, as well as the likelihood of crime and violence."[31]

Overall, it can be observed that a thin rule of law concept is reflected in most indexes, in particular the Freedom House Index, the WGI, and the Democracy Barometer. The WJP Rule of Law is, on the other hand, more general. It is based on four principles, which are conceived in the following terms: (1) The government and its officials and agents are accountable under the law; (2) The laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property; (3) The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient;

30 *Ibid*., 196.

31 World Bank, *Worldwide Governance Indicators: Links to the Individual WGI Sources*, available at: <http://info.worldbank.org/governance/wgi/sources.htm>, accessed December 10, 2018.

(4) Access to justice is provided by competent, independent, and ethical adjudicators, attorneys, or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.[32] This index, compared to the others just observed, is based on a thick concept of the rule of law, yet not maximalist, and it also contains procedural elements.[33]

All in all, while the principles and factors associated with the WJP Index may be interpreted as capturing the rule of law in some comprehensive fashion, the overall concept is characterized by the absence of an elaborated theoretical thesis.[34] Comparatively speaking, it is more procedural or less substantive than the rule of law concept advanced by the Venice Commission, which also for practical reasons may be more convenient for a country that intends to align its rule of law policies to those of the Council of Europe, and certainly those of the EU. The broader and inclusive confines of the Venice Commission also accommodate the fundamental principles of content of what sometimes are known as the "thin" and "thick" conceptions of the rule of law. The thinner conception of the rule of law emphasizes the properties of what could be called as the "formal legality," meaning that the laws are clear, public, prospective, certain, and stable. These requirements have been elsewhere referred to as the "internal morality of law."[35] The thicker or substantive version of understanding the rule of law professes the inclusion of wider considerations that encompass equality before the law and individual rights, or even human rights in general,[36] including the separation of powers.[37]

The content of each element of the rule of law conception advanced by the Venice Commission will be offered in the following section and then discussed against the challenges present or persisting in Kosovo's context. The first

32 See World Justice Project, *What is the Rule of Law?*, available at: <http://worldjusticeproject.org/what-rule-law>, accessed December 10, 2018. For more on the methodology used to build the WJP Rule of Law Index, see Juan Carlos Botero and Alejandro Ponce, "Measuring the Rule of Law," *The World Justice Project Working Paper Series*, WPS no. 1 (2010).

33 Wolfgang Merkel, "Measuring the Quality of Rule of Law: Virtues, Perlis, Results," in Michael Zürn, André Nollkaemper and Randall Peerenboom (ed.), *Rule of Law Dynamics in an Era of International and Transnational Governance* (Cambridge: Cambridge University Press, 2012), p. 44.

34 *Ibid*., 46.

35 See Lon L. Fuller, *supra* note 27.

36 For a detailed discussion, see Jørgen Møller and Svend-Erik Skaaning, *Systematizing Thin and Thick Conceptions of the Rule of Law*, 33 Justice System Journal (2012), 136–153.

37 The Secretary-General, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* note 7, para. 5. See also Joseph Marko, *The New Kosovo Constitution in a Regional Comparative Perspective*, *supra* note 17, at 441.

element concerns legality. An attempt at defining its key conceptual parameters will be made first. Challenges or ways of its implementation in the selected context will be offered next to it, an approach that will applied also in relation to other composite elements of the Rule of Law, as articulated in the Venice Commission's conception.

2.1 Legality

2.1.1 Content

The principle of legality forms the basis of the rule of law. It also furnishes the foundations of a well-functioning democracy. It essentially entails the supremacy of the law, and the fact that all State actions are based on, or are in accordance with, or otherwise authorized by, the law. Any exceptions or derogations ought to also be prescribed by the law. Its foundational ideal is the presence of effective legal constraints against the exercise of arbitrary executive or administrative power.[38]

The principle of legality is sanctioned in Kosovo's Constitution of 2008. The constitutional definition of this principle is much narrower, as it relates to the legality and proportionality in criminal cases. However, the broader set of principles codified in the text of the Constitution offer a sound formal testimony to the existence of the fundamental premise of the supremacy of the law.

2.1.2 Challenges Concerning the Legality

The challenges concerning this principle were obviously and probably understandably more present in the immediate post-conflict period in 1999 than they are now. The United Nations mandate to serve as an interim government in Kosovo, superseding the former FRY authority, was unprecedented. The UN was empowered to exercise all legislative and executive authority in Kosovo, and to take full responsibility for the administration of justice. This essentially meant the complete recreation of the rule of law system.

Consistent with traditional UN missions, priority was given to peace-building efforts, aiming to maintain peace and stability. One key lesson to be learned is the need for such missions to function within a framework of law and order, which

38 Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2000), pp. 15–16.

should be enabled, from the earliest stages, to carry out minimal judicial and prosecutorial functions, including arrests, detention, investigation, and fair trials. The effective reconstruction of the justice system further requires a coherent framework of intervention that includes all its pertinent elements: police, prosecution, judiciary, and the correctional service.[39]

One particular contentious element has been the use by the UN's Special Representative of the Secretary-General (SRSG) of Executive Orders for prolonged detention of suspected perpetrators of criminal offences.[40]

The SRSG's use of executive orders was a demonstration of the problems that arise from a virtually unchecked centralized authority. In the *case of Afrim Zeqiri*, arrested by the UN police and suspected for murder and attempted murder, a series of executive orders were issued, extending his detention to nearly 2 years. He was subsequently released from detention because of the lack of evidence against him.[41] Another notable case was the detention of three Albanian men arrested in connection with the bombing of the "Niš-ekspres", a shuttle service for Kosovar Serbs. Although a panel of international judges found no grounds for the detention, the men remained in UNMIK custody because of successive Executive Orders for their detention.[42]

Existing regulations permitted up to 6 months of detention, which arguably violated international human rights norms as embodied in the ECHR, the ICCPR and the UDHR. Since instruments like the ECHR emphasize the need for judicial authorization in detentions, the extra-judicial authorization of prolonged detentions runs contrary to the right to a fair trial. The result is the need for such missions to prioritize the reestablishment of judicial functions and involve the judiciary as a legally indispensable instrument to ensure an independent check on the UN interim administration or whatever governmental authority.

As far as the present situation is concerned, no clearly discernible pattern of behavior that undermines the fulfillment of the legality ideal could be identified. However, the past challenges are not only instrumental for the institutionalized

39 See Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 American Journal of International Law (2001), 47.
40 See Elizabeth Abraham, *The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo*, 52 American University Law Review (2001–2002), 1291–1337; David Marshall and Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Missions in Kosovo*, 16 Harvard Human Rights Journal (2003), 95–146; Rebecca Everly, *Reviewing Governmental Acts of the United Nations in Kosovo*, 8 German Law Journal (2007), 21–37.
41 See BBC Monitoring International Reports, *Court Releases Kosovo Albanian for Lack of Evidence after Two-Year Detention*, June 17, 2002.
42 See Elizabeth Abraham, *supra* note 40, 1330.

memory that calls for non-repetition, but also a testament to the improvements made precisely because of the advancements in, and application of, the Council of Europe (e. g. ECHR) and other European and international standards.

2.2 Legal Certainty

2.2.1 Content

Legal certainty is mainly formed of the requirements that a law is sufficiently precise, foreseeable, accessible, and understandable. It concerns the stability of legal situations and also relationships addressed and resolved by judicial decision. It is pronounced by the European Court of Human Rights (ECtHR) as constituting one of the basic elements of the rule of law, "a principle which is implicit in all the Articles of the [European] Convention [on Human Rights]."[43] In the view of German legal philosopher, legal certainty was one of the three fundamental pillars of the very idea of law, alongside with justice and policy.[44] It constitutes a "general principle of EC law".[45] Indeed, it is one of the few concepts so vigorously recognized by the European Court of Justice (ECJ) and ECtHR,[46] as it is also a fundamental principle of the national legal systems in Europe:[47] expressed in the diverse set of European languages, the principle is found under the name of *Rechtssicherheit* in Germany, *sécurité juridique* in France, *la seguridad jurídica* in Spain, *certezza del diritto* in Italy, *rechtszekerheid* in the Dutch-speaking countries, *rättssäkerhet* in Sweden, *do obowiazujacego prawa* in Poland, or *oikeusvarmuuden periaate* in Finland.

43 ECHR, *Beian v. Romania* (no. 1), § 39 (2007).

44 Heather Leawoods, *Gustav Radbruch: An Extraordinary Legal Philosopher*, 2 Washington University Journal of Law and Policy (2000), 489–515.

45 Juha Raitio, *The Principle of Legal Certainty in EC Law* (Uitgever: Springer, 2003), pp. 125–130.

46 Patricia Popelier, *Legal Certainty and Principles of Proper Law Making*, 2 European Journal of Law Reform (2000), 321, at 327–328.

47 Raitio, *supra* note 45, 125–136. See also Elina Paunio, *Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order*, 10 German Law Journal (2009), 1469. For a comparative overview of the principle of legal certainty, focusing on the European and U.S. legal systems, see James R. Maxeiner, *Some Realism About Legal Certainty in the Globalization of the Rule of Law*, 31 Houston Journal of International Law (2008), 27–46; James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 15 Tulane Journal of International and Comparative Law (2007), 541; and, for a broader comparative perspective, Mortimer Sellers and Tadeusz Tomaszewski (eds.), *The Rule of Law in Comparative Perspective* (Dordrecht, Heidelberg, London, New York: Springer, 2010).

It involves, among other elements, the non-retroactivity of the law, the principle of legitimate expectations as developed in particular in the ECJ jurisprudence (i. e. demanding that laws be clear and foreseeable, consistent and coherent),[48] assurance of the unitary interpretation of the law[49] (however, short of involving a right to an established jurisprudence),[50] the requirement that the final judgments pronounced by the courts to not be subject to reconsideration in the regular proceedings or the principle of *res judicata*.[51]

In other words, the emphasis of the principle of legal certainty is placed on the predictability of laws and adjudication, the certainty that legal persons have the opportunity to assert their legal case in a court of law according to a pre-determined set of legitimate procedural rules. Predictability does thus not involve the outcome of the case itself, but rather the legal and procedural guarantees of a stable and acceptable legal process. The certainty or stability of the process is in turn guaranteed through a combination of procedural safeguards (or procedural predictability that satisfy the criterion of consistent decision-making) and judicial argumentation (or rational acceptability that satisfy

48 ECJ case *Fintan Duff and Others v. Minister for Agriculture and Food, Ireland, and the Attorney General* (1996); *Facini Dori v. Recre* (1994); *Foto-Frost v. Hauptzollamt Lübeck.Ost* (1987).

49 See, e. g. ECJ, *Foto-Frost v. Hauptzollant Lübeck.Ost, Ibid*. ("Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.").

50 ECHR, *Case of Unédic v. France*, § 74 (2008) (noting that "the requirement of judicial certainty and the protection of legitimate expectations do not involve the right to an established jurisprudence."). However, in *case of Atanasovski v. the former Yugoslav Republic of Macedonia*, § 38 (2010), the Court considered that the well-established jurisprudence imposed a duty on the Supreme Court to make a more substantial statement of reasons justifying the departure from its already established case-law on the matter. As stated by ECHR, "That court was called upon to provide the applicant with a more detailed explanation as to why his case had been decided contrary to the already existing case-law." The Court therefore found a breach of Article 6(1) of the Convention in respect of the applicant's right to receive an adequately reasoned decision.

51 ECHR, *Case of Brumărescu v. Romania*, § 61 (2000). See also ECHR, *Case of Ryabykh v. Russia* (Application no. 52,854/99), § 51 & 52 (2003) ("One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question," and "Legal certainty presupposes respect of the principle of *res judicata* ..., that is the principle of finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of a rehearing and a fresh decision of the case. Higher courts' power of review should be exercised for correction of judicial mistakes, miscarriages of justice, and not to substitute a review.").

the legitimacy of law), to borrow from Habermas's discourse.[52] Reasoned judicial decision-making is already a parcel of the larger edifice of the rule of law.[53]

Next, an observation of these principles and challenges they present for the rule of law in Kosovo will be offered, beginning with challenges regarding, *first*, the accessibility, *second*, concretization, clarity, consistency and coherence of laws and, *third*, respect for the *res judicata* principle.

2.2.2 Challenges

The abundance of court practice of both the ECtHRs and ECJ has seemingly led to a key requirement for the legal clarity principle, which I would dub it as "Four Cs" requirement, namely that the laws are concrete (or precise), clear, consistent, and coherent. A fifth element of easy understanding is often added, though such a criterion would be an obvious by-product of the sufficiently clear, concrete, consistent, and coherent laws or legal provisions. A similar argument could also be advanced with regard to the foreseeablity, which could be easily obtained from a stable legal structure that is clear, concrete, consistent, and coherent.

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52 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996), p. 198 and generally pp. 194–237 ("On the one hand, established law guarantees the enforcement of legally expected behavior and therewith the certainty of law. On the other hand, rational procedures for making and applying law promise to legitimate the expectations that are stabilized in this way; the norms deserve legal obedience... Both guarantees, certainty and legitimacy, must be simultaneously redeemed at the level of judicial decision making.").

53 See, e. g. ECHR, *Case of H. v. Belgium* (1987); ECHR, *Case of Suominen v. Finland* (2003). In the case of ECJ, the Court has a statutory duty to give reasons. See Treaty of Nice Amending the Treaty on European Union, the Treaty Establishing the European Communities, and Certain Related Acts, art. 36, February 26, 2001, 2001 O.J. (C 80) 1, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:080:0001:0087:EN:PDF>. ("Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations."). A number of European countries' constitutions also contain provisions that refer to such judicial duties to give reasons. See, e. g. Constituzione, art. 111(6) (Italy), translated in International Constitutional Law, Italy Constitution, available at: <http://www.servat.unibe.ch/law/icl/it00000_.html> ("Reasons must be stated for all judicial decisions."); Constitution, art. 89 (Luxembourg), translated in International Constitutional Law, Luxembourg Constitution, available at: <http://www.servat.unibe.ch/law/icl/lu00000_.html> ("All judgments shall be reasoned. They are pronounced in public court session."); Constitución, art. 120(3) (Spain), translated in International Constitutional Law, Spain Constitution, available at: <http://www.servat.unibe.ch/ law/icl/sp00000_.html> ("The sentences shall always be motivated and shall be pronounced in public audience.").

Accessibility is, however, distinct and clearly inescapable element. It may entail access to a variety of rights and services, legal and judicial, as it can be noted from a varied series of ECHR decisions, ranging from the establishment of accessible procedure to enable persons affected to obtain relevant and appropriate information,[54] to the right of access to administrative documents,[55] the right to institute proceedings before courts in civil matters,[56] the right for the assistance of a lawyer when such assistance proves indispensable for an effective access to court,[57] the right for access to legal representation, albeit depending upon the specific circumstances of the case,[58] and in particular when the lack of legal aid would deprive the applicant of a fair hearing,[59] or the right of access to enforcement proceedings, that is, the right to have enforcement proceedings initiated.[60] These rights or principles, taken together, give shape to the contents and contours of accessibility. In evaluating this component, one should acknowledge the differences in implementation of its various composite principles. It is henceforth plausible to have institutional practices that are in large part compliant with component requirements, but lack on specific, individual, composite principles.

a Challenges Concerning Accessibility

Kosovo's Constitution requires that laws adopted by the Assembly, ratified international agreements, and decisions of the Constitutional Court be published in the Official Gazette of the Republic of Kosovo. A number of other acts are also added to the list, such as Presidential decrees, statements and resolutions of the Assembly, and Governmental Regulations and Administrative Instructions. There is a special office on the publication of the Official Gazette. The process and procedure is detailed further in a specific law, the Law on the Official Gazette of the Republic of Kosovo.[61] The Official Gazette is published both in printed and electronic forms. It is published in the Albanian and Serbian official

54 ECHR, *Case of McGinley & Egan v. the United Kingdom* (1998).
55 ECHR, *Loiseau v. France* (decision) (2003).
56 ECHR, *Golder v. the United Kingdom*, § 36 (1975).
57 ECHR, *Airey v. Ireland*, § 26 (1979).
58 *Ibid*. See also ECHR, *Steel and Morris v. the United Kingdom*, § 61 (2005); *McVicar v. the United Kingdom*, § 48 (2002).
59 *Airey v. Ireland, supra* note 57, § 51.
60 ECHR, *Case of Apostol v. Georgia*, § 56 (2007).
61 Law No. 03/L-190 on the Official Gazette of the Republic of Kosovo, Official Gazette No. 74, July 20, 2010.

languages, as well as in English and the non-majority community languages of Bosnian and Turkish.

The publication of legal acts notwithstanding, Kosovo's rule of law system continues to face challenges concerning accessibility, in particular in the area of judicial practice. As noted in 2013 Kosovo Progress Report of the European Commission, Kosovo's "legal system has continued to suffer from poor accessibility and efficiency, delays and a backlog of unresolved cases."[62] The 2014 EC Report raises a more specific aspect of accessibility, which is the lack of publication of court decisions. As stated in the Report, "Although obliged by law, there is neither a systematic publication of court decisions, nor a systematic development of jurisprudence, raising transparency and accountability concerns."[63]

A number of concrete measures have been recently taken to mitigate the non-publicity of judicial decisions, such as the issuance by the Kosovo Judicial Council of an Administrative Instruction for the Publication of Final Judgments and appointment by all Court Presidents of Professional Associates that would anonymize those decisions for protection of personal data and make them ready for publication.[64] One of the concerns raised is, however, that not all Court decisions get published, but only those that have reached the status of final judgment. Making court decisions accessible to the wider public has tremendous potential for contributing towards greater transparency and improvement of the quality of judicial work by way of exposing them to public and professional debate and scrutiny.

Apart from this shortcoming, no structural deficiencies could be identified in the existing institutional practice.

b Challenges Concerning the Implementation of the "Four Cs"

The "four Cs" outlined above (i. e. coherence, consistency, concretization or precision, and clarity) demand sufficient determination and require rigor both in terms of conceptualizing the law and in terms of drafting of normative acts. In the existing Kosovo context, there have been considerable instances when the laws have either been insufficiently concrete or clear, or in conflict or incoherent with other laws or legal provisions.

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62 European Commission, *Kosovo Progress Report 2013* (2013), 24.

63 European Commission, *Kosovo Progress Report 2014* (2014), 13.

64 Kosovo Judicial Council, *Administrative Instruction on Anonymization and Publication of Final Court Judgments* (2016), available at: <http://www.gjyqesori-rks.org/en/legislation/list?id=0&type=3>, accessed December 11, 2018.

i Incoherent Laws

The 2014 EC Progress Report notes inconsistencies among justice-sector laws. As stated in the Report,

> the laws on courts, the state prosecutor, the judicial council and the prosecutorial council ... need to be harmonized to address inconsistencies on issues such as dismissal, appointment, transfer, disciplinary system and procedures for the review of decisions taken by the councils.[65]

Other such instances of conflicts between laws have been constantly noted. For instance, the Constitution requires that

> Everyone who is deprived of liberty without a court order shall be brought within forty-eight (48) hours before a judge who decides on her/his detention or release not later than forty-eight (48) hours from the moment the detained person is brought before the court.[66]

This requirement, after the entry into force of the Constitution in 2008, was subsequently reflected in the Provisional Code of Criminal Procedure through a legal amendment that was adopted in November 2008.[67] However, there were instances, such as in the case of Article 14(2) of the Provisional Code of Criminal Procedure, when the earlier period of detention of seventy-two (72) hours remained. At the very least, this was a source of confusion. This was finally addressed in the 2012 Criminal Procedure Code, which is 4 years after the Constitution came into effect.[68]

The same case was with the defamation, which was decriminalized by the 2008 Civil Law against Defamation and Insult.[69] At the same time, the Criminal Code contained criminal provisions against defamation. This was finally corrected in the 2012 Criminal Code.[70]

Another case in point is the certification of court translators and interpreters. The 2012 Criminal Procedure Code empowers the Ministry of Justice to issue regulations on the certification of translators and interpreters to interpret

65 European Commission, *Kosovo Progress Report 2014*, at 13.

66 Constitution of Kosovo, art. 29(2).

67 Law No. 03/L-003 on Amendment and Supplementation of the Kosovo Provisional Code Criminal Procedure, art. 4, available at: <http://www.gazetazyrtare.com/e-gov/index.php?option=com_content&task=view&id=292&Itemid=28&lang=en>, accessed December 11, 2018.

68 Criminal Procedure Code of Kosovo, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2861>, accessed December 11, 2018.

69 Civil Law against Defamation and Insult, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2503>, accessed December 11, 2018.

70 See Criminal Code of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2834>, accessed December 11, 2016.

and translate professionally in criminal proceedings in those languages commonly used in criminal proceedings.[71] Another law, the Law on Courts, allocates this power to the Kosovo Judicial Council. It authorizes the Judicial Council to determine, through a special regulation, the appointment procedures, conditions, rights and obligations for translators, interpreters and judicial experts.[72] This caused significant delays in the certification of judicial translators and interpreters. The ultimate decision was taken by the Judicial Council, authorizing the initiation of procedure for licensing judicial translators and interpreters.[73] The controversial part remains the fact that, although the Judicial Council can take decisions that relate to the court system (e. g. certification of court translators and interpreters), it is seemingly beyond its authority to license translators and interpreters that offer general services, beyond the judicial setting. This controversial regulation is presently being discussed by the legislature. While these deficiencies will, in principle, be eventually addressed or rectified, their presence and continuation hinders the efficiency and effectiveness of the system.

ii Inconsistencies in the Legal Order

All laws adopted by the Assembly of Kosovo need to be published in the two official languages, Albanian and Serbian. In practice, incorrect and/or incomplete translations are not an unknown or uncommon phenomenon. It therefore leads to inconsistencies between the two language versions of laws. On top of this comes the international community's need (in particular the EU's Rule of Law Mission in Kosovo – EULEX) to have English translations of laws, which complicates the situation further.[74]

Kosovo's legislative state has rapidly and uniquely evolved, creating over time a very complex historical layering of several jurisdictional eras. From the side of international actors, in particular EULEX, which once exercised executive powers in Kosovo, one of the fundamental practical questions has been that of applicable law or, even more specifically, what law takes precedence in what case. Yugoslav, UNMIK, and Kosovo laws all were referenced as it was necessary

71 Criminal Procedure Code of Kosovo, *supra* note 66, art. 215, para. 2.

72 Law No. 05/L-032 on Amending and Supplementing the Law No. 03/L-199 on Courts, art. 13, para. 2.

73 Kosovo Judicial Council, Decision Nr. 145/2016, dated November 18, 2016.

74 Maria Derks and Megan Price, *The EU and Rule of Law Reform in Kosovo* (The Hague: Netherlands Institute of International Relations *Clingendael*, 2008), p. 28.

or as status neutrality dictated, without sufficient consistency in practice as to what laws were to be applied.[75]

iii Lack of concretization or precision

The question as to how concrete or flexible a legislative piece should be is open to some debate. The fundamental position taken by the ECtHRs is that the degree of precision required of any given law will depend upon the particular subject-matter.[76]

What, however, is particularly disconcerting in Kosovo's context is either of the two phenomena: frequent changes in legislation and incomplete secondary legislation or significant delays in its adoption.

As noted in the 2014 Kosovo Progress Report, "in order to ensure full implementation of the laws on the judicial and prosecutorial councils, both councils still need to adopt several pieces of implementing legislation."[77] The 2016 Kosovo Report of the EC also notes a series of instances when secondary legislation had not been adopted or delayed. For example, the secondary legislation required by the 2015 Law on the Ombudsperson had not been adopted yet.[78] The same applied to the Law on Gender Equality,[79] and the Law on the Protection from Discrimination.[80] In other areas, such as competition, the secondary legislation is required to be further aligned with the EU *acquis*.[81]

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75 *Ibid*., 28. One practical challenge for the EULEX customs officers has been the uncertainty about the jurisdiction under which EULEX Customs operated. The debate has been between applying the UN Security Council Resolution 1244-compliant UNMIK Customs Code of 1999, though outdated as it did not reflect the EU standards, or applying the 2004 Kosovo Customs Code, which was more aligned with EU standards, but required reporting to the Government of Kosovo, which incurred questions of status recognition.

76 ECHR, *The Sunday Times v. United Kingdom*, § 49 (1979) (stating that "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.").

77 European Commission, *2014 Kosovo Progress Report* (2014), 13.

78 European Commission, *2016 Kosovo Report* (2016), p. 9.

79 *Ibid*., 26.

80 *Ibid*., 52.

81 *Ibid*., 47.

Frequent changes of laws, or even amendments to the Constitution, have also been a relatively common occurrence. As noted in the 2016 Kosovo Report, "the legislative agenda remains subject to frequent changes. The practice of repeated amendment of the laws undermines the stability of the legislation and reveals shortcomings in planning and coordination at the heart of government which weaken parliamentary oversight."[82]

The Constitution has also been subject to significant and frequent amendments. For slightly over 8 years since its entering into force, 25 amendments have been introduced to the Constitution.[83]

iv Clarity: Better Drafting and Scrutinizing Draft Laws

A key challenge in terms of producing clearly drafted laws is the limited capacity of the Assembly committee to scrutinize the draft laws and legislative amendments. This has been noted in the 2013 Kosovo Progress Report.[84]

Instances of unclear legal provisions have also been present. A number of provisions in the Criminal Procedure Code related to the admissibility of evidence and on search and seizure have been qualified to be "unclear" by the 2016 Kosovo Report.[85] The same comment would apply in the case of another law, the Law on Conflict of Interest. Categories of public officials covered by this law are not clearly defined, same as measures or procedures to prevent and sanction situations of conflict of interest.[86]

2.2.3 Challenges with respect to the Application of Res Judicata Principle

The principle of *res judicata* has been of relative challenge for Kosovo's legal system, though one which has been on several cases corrected by the Constitutional Court. The violation of *res judicata* was expressed in two main variations: *first*, through the non-execution of a decision having the status of *res judicata* and, *second*, through the re-opening of a court judgment that has become *res judicata*. This challenge has been, however, remedied by the Constitutional Court through its application of the ECHR case law, which is

82 European Commission, *2016 Kosovo Report*, at 8.

83 See *Amendment of the Constitution of the Republic of Kosovo – 2016*, Official Gazette of the Republic of Kosovo, available at: <https://gzk.rks-gov.net/ActsByCategoryInst.aspx?Index=1&InstID=1&CatID=1>, accessed December 12, 2018.

84 European Commission, *2013 Kosovo Progress Report* (2013), 7.

85 European Commission, *2016 Kosovo Report*, at 69.

86 *Ibid*., 19.

otherwise a constitutional obligation deriving from Article 53 of the Constitution of Kosovo, demanding that all human rights and fundamental freedoms guaranteed by the Constitution be interpreted in accordance with the ECHR jurisprudence.[87]

In a judgment of 19 June 2012, the Constitutional Court of Kosovo held that a District Court (of Gjilan) had acted contrary to the fair trial provision by failing to execute a previous *res judicata* decision affecting the Applicant's rights to immovable property.[88] In this Judgment, the Court considered that the competent authorities have a positive obligation to establish a decision enforcement system, which is effective both in legal and practical terms, and which ensures their enforcement without undue delay. The Court reasoned that the execution of a judgment rendered by a court should be considered as a constituent part of the right to a fair trial, guaranteed under Article 31 of the Kosovo Constitution and Article 6 of the European Convention on Human Rights.

The Constitutional Court had also dealt with another significant case that concerned the non-execution of a final court decision that had become *res judicata*, in Case No. KI 08/09, known as the *Independent Union of Workers of IMK Steel Factory Ferizaj*. In this case, the Court, referring to ECHR court practice, affirmed that the rule of law is one of the fundamental principles of a democratic society and presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become *res judicata*. The Court reasoned that "the reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law."[89]

In Case No. KI132/15, *Visoki Decani Monastery*, the Court framed the issue to be addressed as one of the compatibility of reopening a court decision that has become *res judicata* with the requirements of Article 31 of the Kosovo Constitution and Article 6(1) of the European Convention on Human Rights. The Court made its final determination based on the broader consideration of the principle of legal certainty, encompassing the principle that final judicial decisions which have become *res judicata* must be respected and cannot be reopened or otherwise appealed. In the present case, the Court considered that

87 Kosovo Constitution, art. 53 [Interpretation of Human Rights Provisions] ("Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.").

88 Constitutional Court of Kosovo, Judgment of June 19, 2012 in Case No. KI51/11, *Rexhep Raimaj*.

89 Constitutional Court of Kosovo, Judgment of December 17, 2010 in Case No. KI 08/09, *Independent Union of Workers of IMK Steel Factory Ferizaj*, § 62.

the Applicant had a legitimate expectation that its case had been decided in final instance by the Specialized Panel on Ownership of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters and that it could not be re-opened before the Appellate Panel.[90]

No further or systematic repetition of this practice would seem to have been in place. The specific instances brought into this discussion display the content and shape in which constitutionalism could come into play in the domain of the rule of law.

2.3 Prevention of Abuse / Misuse of Powers

2.3.1 Content

Prevention of abuse or misuse of powers means first and foremost the existence of legal safeguards in the legal system against arbitrariness. These legal safeguards would thus aim at two principal objectives: *first*, to limit the discretionary power of officials and, *second*, to regulate that power by law. In the words of British jurist and renowned constitutional theorist Albert Venn Dicey – who is credited with coining the phrase "rule of law" or at least made it popular –t he principal objective of rule of law is to discipline and regulate official power.[91]

2.3.2 Challenges Concerning Prevention of Abuse / Misuse of Powers

Besides the earlier discussed unprecedented powers of the UN SRSG in Kosovo, there have been other instances, expressed in different contexts, of failure to prevent abuse of powers.

As documented by the EC 2015 Kosovo Report, the Office Disciplinary Council (ODC), the responsible institution to conduct disciplinary investigations, initiated around 40 cases against prosecutors on disciplinary and ethical grounds. Based on recommendations made by the Judicial and Prosecutorial Councils, respectively, the President of Kosovo dismissed from office one judge

90 Constitutional Court of Kosovo, Judgment of May 20, 2016 in Case No. KI132/15, *Visoki Decani Monastery*.

91 See A.V. Dicey, *Introduction to the Study of the Law of the Constitution, supra* note 24. Dicey's description of the rule of law entails three basic prerequisites: First, the supremacy of law over arbitrary power; second, equality before the law of all, including government officials; and, third, constitutional law as fundamental law. See generally *Ibid*.

and one prosecutor. Five judicial administration officers under suspicion of abuse of power were suspended and later dismissed. In addition, one judge was suspended by the ODC due to allegations of taking bribes.[92] Under applicable laws, judges and prosecutors are obliged to declare their assets and gifts received, and report any possible conflicts of interest.

Recent amendments to money laundering and anti-terrorism legislation have led to the suspension of 14 NGOs, possibly allowing for arbitrary decisions on suspensions of civil society organizations.[93]

Another variation of abuse that could be identified is the violations of the rules of procedure by the government arbitrarily withdrawing draft laws submitted to the Assembly.[94]

2.4 Equality before the Law and Non-Discrimination

2.4.1 Content

Equality before the law is probably the principle that most essentially embodies the notion of the rule of law. The indispensable requirement is that the law guarantees the prohibition and/or absence of any discrimination on grounds such as race, sex, color, language, religion, political opinion, birth, political power, and related criteria. Affirmative or positive measures could be exceptionally allowed as long as they are proportionate and necessary.

Indeed, in this connection, Kosovo's Constitution is an exemplar of precision and comprehensiveness. Its relevant anti-discrimination provision reads: "No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status."[95] When it comes to positive measures, it provides:

> Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.[96]

92 European Commission, *2015 Kosovo Report* (2015), 14.
93 *Ibid*., 9.
94 *Ibid*., 7.
95 Constitution of Kosovo, art. 24(2).
96 *Ibid*., art. 24(3).

2.4.2 Challenges Concerning the Equality before the Law and Non-Discrimination

As just presented, equality before the law and non-discrimination is expressed in multiple ways and on multiple grounds. Overall, Kosovo has established a sound legal framework.

Kosovo's legal framework for equality between women and men is broadly in line with international standards. Efforts to align existing legislation by drafting a unified Civil Code (inclusive of property rights, law obligations, family, and inheritance) are an opportunity to bring it fully into line with European standards. Key challenges concern implementation, which is particularly slow when it comes to the Law on Gender Equality.[97] The vacancy for the Head of the Agency of Gender Equality has, for example, not been filled yet. This has hampered implementation of the action plan to implement UN Security Council Resolution 1325 on women, peace and security. Overall, the role of the Agency of Gender Equality in policy-making needs to be further strengthened.[98]

Gender-based violence, including domestic violence, is a challenge with severe limitations in protection systems for victims of domestic violence. Another challenge is the lack of a system of regular data collection across institutions, which is undermining the ability to cross-track and monitor cases in investigation and judicial proceedings. Units for gender-based violence need to be set up in the northern municipalities. Reintegration programs for survivors of domestic violence need improvement.

In March 2016, measures were adopted to regulate the registration of joint immovable property in the name of both spouses, thereby strengthening legal protection of women's right to inheritance. In practice, implementation remains limited, which directly undermines women's economic empowerment.[99]

On equality between women and men, Kosovo may need to reform the system of maternity and parental leave. In its current form, it is presenting obstacles to the hiring of women, in particular in the private sector. Limited access to child care and to flexible work arrangements are also found to be related barriers to women's employment, as formal options for care beyond maternity leave are limited, and family-friendly schedules are often not avail-

97 European Commission, *2016 Kosovo Report*, at 26.
98 *Ibid*., 26.
99 See generally *Ibid*., 27.

able.[100] More broadly in this connection, there is a special need for addressing discrimination against women, especially during hiring processes in private sector.[101]

As regards non-discrimination, legislation to implement the Law on Protection from Discrimination has not been adopted. The number of ex officio investigations on discrimination grounds by the Ombudsman Institution has seen an increase. The Kosovo Prosecutorial Council's tracking mechanism still needs to be extended to cover cases of all kinds of discrimination, not only those based on ethnicity. The performance of institutions in processing and investigating discrimination cases is considered to remain poor.[102]

Beyond a relative consolidation of the legal framework, once could still note significant obstacles in implementation of that framework. On a more conceptual level, it ought to be noted that the discussion here about gender equality in the context of the substantive law, as opposed to only procedural equality and access to justice, signifies the need for employing a "thick" conception of the rule of law.

2.5 Access to Justice

2.5.1 Content

Access to justice implies the presence of an independent and impartial judiciary, and the right to have a fair trial. The judicial independence and impartiality are also critical for purposes of public perception of justice, hence public trust. While there are different ways to coherently and comprehensively capture the notion of judicial independence and impartiality, structural insulation from political pressure is the typical requirement.[103] In turn, judicial independence is not a privilege of judges that sequesters them from proper public scrutiny and accountability for their actions. Rather, it is "justified by the need to enable judges to fulfill their role of guardians of the rights and freedoms of the

100 *Ibid*., 52.
101 *Ibid*.
102 *Ibid*., 26.
103 See, e. g. Lewis A. Kornhauser, "Is Judicial Independence a Useful Concept?," in Stephen B. Burbank and Barry Friedman (eds.), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Thousand Oaks, CA: Sage Publications, 2002) 45, at 47 (stating that "an independent judge is not subject to the 'power' of another individual or institution.");

people."[104] Article 6 of the ECHR is interpreted as prohibiting executive or legislative authorities from giving binding instructions to the courts in the exercise of their functions.[105] Next, some of the presently persisting challenges in Kosovo in relation to the access to justice will be offered.

2.5.2 Challenges Concerning Access to Justice

Digital technologies can help judges fulfill their mission and achieve greater efficiency while protecting and respecting judges' independence and impartiality. The use of electronic case management systems and information communication technologies has been specifically recommended by the Council of Europe, same as their generalized use in courts.[106] Such systems would enable the application of uniform standards of access to justice by all judges, a higher degree of transparency, and more efficient planning and organization. In the case of Kosovo, however, there is still no comprehensive functional electronic court case management system in place. The exception, on the positive side, is the tracking mechanism for high-level corruption cases and organized crime.

Allocation of cases to judges is regulated and carried out by the drawing of lots. Urgent cases are allocated to the presiding judge. Sensitive cases are being allocated, but not always dealt with.[107]

Another obstacle is that the number of judges dealing with serious crimes remains low. Some progress is evident through a new regulatory policy that allows for more effective transfer of judges. Judges, including Court Presidents, have been occasionally threatened. There is a need for an effective policy in case of threats to judges, as well as an increased awareness-raising among judges of existing protection mechanisms to protect them, in cooperation with the

Charles Gardner Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (Ann Arbor: University of Michigan Press, 2006).

104 Venice Commission, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, adopted by the Venice Commission at its 82nd Plenary Session (March 2010), available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e>, accessed April 28, 2018.

105 ECHR, *Beaumartin v. France*, judgment of November 24, 1994.

106 Council of Europe, Recommendation CM/Rec (2010)12 (November 2010), available at: <https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true>, accessed May 3, 2018.

107 European Commission, *2015 Kosovo Report*, at 13.

police.[108] The Kosovo Judicial Council and Kosovo Prosecutorial Council are responsible for taking action if judges or prosecutors are threatened.

Judicial backlog is another significant problem, resulting in delays that could infringe upon the right to a fair trial. As of July 2015, court backlogs stood at 400,000 cases.[109] The backlog of all cases that were filed through 31 December 2011, including execution cases, was 233,000.[110] The judicial system's overload by a large backlog of cases is in part considered to be a result of UNMIK's legacy, and at least partially a result of the lack of will and capacity of Kosovo's judicial institutions to address the backlog.[111]

Legal safeguards on the independence and impartiality of judges and prosecutors are enshrined in the Constitution, the Law on Courts, and the legislation governing the Judicial and Prosecutorial Councils. Strong concerns, however, remain with regard to public comments by high-level officials on ongoing court proceedings that are tantamount to interference with the judiciary. Another troubling fact is that there are many corruption-related offences involving members of the judiciary and prosecution service.[112] Judicial independence can also be threatened by the ill-advised practice of individual judges making themselves available for private meetings with members of the public, including parties to cases heard before them. It exposes judges to improper influence and can foster the appearance that judges do not exercise their authority in an independent and impartial manner.[113]

A measure that could exert positive influence on the members of the judiciary would be the effective implementation of the performance evaluation for judges and prosecutors and the publicity of such evaluations. Similarly, disciplinary proceedings for judges and prosecutors should be public. The public conduct of disciplinary proceedings would involve the hearing and disciplinary decision, excluding only the investigation. The key to reform would thus be existentially linked to the indispensable notions of accountability and transparency. Given the dominant factual circumstances defined by an unprecedented large international presence in Kosovo, also with varying degrees of competencies to intervene, any examination of the rule of law system in Kosovo, its results or their absence, would be incomplete without an observation of the role played

108 *Ibid*., 14.

109 European Commission, *2016 Kosovo Report*, at 36.

110 Kosovo Judicial Council, *National Backlog Reduction Strategy 2013*, at 2.

111 Maria Derks & Megan Price, *supra* note 74, at 28.

112 European Commission, *2016 Kosovo Report*, at 14.

113 This practice has been reported on regularly by the OSCE Mission in Kosovo. See OSCE, *Independence of the Judiciary in Kosovo: Institutional and Functional Dimensions* (January 2012), available at: <http://www.osce.org/kosovo/87,138?download=true>, accessed May 3, 2018.

by such actors. For reasons of geography, but also of political ambitions for future membership in the Union and, in this connection, through the policy of conditionality, the EU's involvement has been direct and decisive on a number of occasions, effectuating changes to the system.[114]

3 EU's Rule of Law Conditionality

The rule of law has been the key and constant phrase in every major arrangement between the EU and Kosovo. Rule of law occupies a significant place in the EU's annual assessment of Kosovo's progress towards the EU integration. It is a key component of the EU-Kosovo Stabilization and Association Agreement, which entered into force on 1 April 2016. To guide reforms under the SAA, the Commission and Kosovo started work on a European Reform Agenda for Kosovo, which includes the rule of law among priority actions. Delivering a wide range of rule of law reforms has also been a fundamental prerequisite for Kosovo's transfer to the Schengen visa-free list. The Commission's proposal to lift visa requirements for Kosovo citizens is currently being considered by the European Parliament and the Council, pending fulfillment of two remaining requirements by Kosovo.

3.1 Concrete Instances of EU-dictated Change

3.1.1 Constitutional Provisions Governing Membership of KJC

Article 108(6) of the Constitution requires that the KJC be composed of 13 members. Out of those 13, only 5 members are judges elected by the members of the judiciary. The majority, 8 KJC members, are elected by the Assembly of Kosovo. This appears to be contrary to the European Charter on the Statute for Judges and Council of Europe Recommendation CM/Rec 2010(12).

114 On the role of an "EU factor", see, e. g. Bruno S. Sergi and Qerim Qerimi, *The European Union and its prospective enlargement to the south-east*, 8 South-East Europe Review, no. 4 (2005), 15–32; Qerim Qerimi and Bruno S. Sergi, *On the relevance of the EU as a means of spurring a socially-sustainable south-east Europe*, 8 South-East Europe Review, no. 3 (2005), 111–120; Qerim Qerimi and Bruno S. Sergi, *A regional-based approach towards economic development in the Western Balkans*, 4 World Review of Entrepreneurship, Management and Sustainable Development, no. 2/3 (2008), 182–202.

According to the European Charter on the Statute for Judges, decisions affecting the selection, recruitment, appointment, career progress or termination of office of a judge should be undertaken by an authority independent of the executive and legislative powers. At least one-half of the membership of that authority should be judges elected by their peers following methods guaranteeing the widest representation of the judiciary. Similarly, the Council of Europe Recommendation CM/Rec 2010(12), addressing the role and functions of Councils for the judiciary, stipulates: "No less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary."

Inconsistency of the KJC membership with European standards resulted in the European Union's (EU) intervention in the form of a specific recommendation made in its 2014 Kosovo Progress Report. The EU Commission's Report noted the absence of amendments made to the Constitution, and stated that the Constitution should be modified so as "to ensure that a majority of KJC members are elected by their peers, in line with Venice Commission recommendations." As a result of the EU Commission's Report, the President of the Assembly of Kosovo submitted an amendment to the Constitutional Court of Kosovo for review.

In its Judgment in Case KO 61/12, the Constitutional Court observed that Article 108 of the Constitution, paragraphs 1 and 2, provide that "The Kosovo Judicial Council shall ensure the independence and impartiality of the judicial system" and that it is "a fully independent institution in the performance of its functions." In addition, the KJC is required to "ensure that the Kosovo courts are independent, professional and impartial." The Court, therefore, considered that the proposed changes in the composition of the KJC Council do not affect the character of an independent institution and, further, do not diminish any of the rights and freedoms set forth in Chapter II of the Constitution; hence, those proposed changes are constitutional.

The constitutional amendment has been subsequently adopted and is now into force.[115]

3.1.2 Decriminalizing Defamation

One of the earlier concrete recommendation put forward by the European Commission has been decriminalization of defamation, so as to bring it in line with the European standards.

115 See *Amendment of the Constitution of the Republic of Kosovo – 2016, supra* note 83.

As noted in the 2011 Kosovo Progress Report,

> five media professionals and one mayor were indicted for alleged threats and defamatory comments towards an independent investigative journalist. Journalists continue to face political pressure and intimidation, which is threatening the still fragile investigative journalism. The amendment to the Criminal Code putting an end to defamation as a criminal offence still needs to be adopted.[116]

This change was made in the following year and reflected in the 2012 Kosovo Criminal Code.

4 Appraisal and Conclusion

This article has identified a series of challenges concerning the rule of law in transitional context, as presented in the case of Kosovo. Those challenges have been identified by way of operationalization of the Rule of Law concept advanced by the Venice Commission. Its testing reveals the valid potential it contains to evaluate real-life rule of law situations.

One particularly unique characteristic of the rule of law in Kosovo has been the significant involvement of international actors, who not only promoted but also enforced the rule of law through the executive authority vested on them at various stages of the process. What could be observed from the wider picture portrayed by this article, the results have often been contradictory and insufficient to reach the desired goals.

On the overall, however, Kosovo's rule of law model, from the UNMIK inception in 1999 to the EULEX and simultaneous involvement of various donors up to present days (EU, USAID, UNDP, OSCE, CoE, GiZ, etc.) is an inherently international model.[117]

One key deficiency would appear to be the simplification of the rule of law concept by the international actors involved in Kosovo, maintaining the focus on a narrower set of institutions and problems, primarily security-related and mainly in the area of criminal justice reform. The judiciary, prosecution, police, and customs would seem to have been the key beneficiaries of the rule of law dynamic developed by the heavy and influential international presence in Kosovo. Persisting problems outside the domain of the justice sector have

116 European Commission, *2011 Kosovo Progress Report* (2011), 16.

117 See Richard Zajac Sannerholm, *Rule of Law Promotion after Conflict: Experimenting in the Kosovo Laboratory*, in *Rule of Law Dynamics in an Era of International and Transnational Governance, supra* note 33, at 276.

been largely left unaddressed, as it appears to have been outside the rule of law model promoted by the international actors. This way, the institutional surroundings outside the justice sector strictly speaking, such as for example the legislature, the executive, or the supervisory accountability institutions, have been treated comparatively unfavorably and with a degree of presumption that they operated according to standard.[118] This has not been without impact on the ultimate quality of the legislation proposed by the executive branch and ultimately adopted by the Assembly. There is thus a critical interconnectedness among the various rules of law institutions, whereby shortcomings in one institutional setting have repercussions on the others.

In assessing the quality of rule of law today, one has to also recall the state of affairs at the time of the UN deployment in Kosovo in 1999, which has been characterized by a collapsed and dysfunctional rule of law system. This system, now clearly revived, has been defined by notable deficiencies, as revealed by this article, such as the persisting judicial backlog and concerns related to the independence and impartiality of the judicial system. Yet, a number of other deficiencies have been successfully corrected, such as the ending of the practice of unchecked executive orders for prolonged detention and, indeed, an overall more effective implementation of the rule of law standards, including by increasingly commendable reference to the court practice of the ECtHRs.

Ultimately, despite continued institutional efforts and reforms in the rule of law sector in Kosovo, including a process driven by the international actors, implementation shortcomings continue. This article has identified the underlying shortcomings, with an aim to improve future decision processes and policies that would serve the desired goal of a functioning and effective rule of law. It has further revealed the imperative value for the rule of law reform of accountability and transparency, the two grand pillars most in need of strategic intervention. Additionally, the article has displayed the unprecedentedly unique, yet contingent, role of constitutionalism on the rule of law, same as the indispensable role an independent judiciary plays, including some of the prevailing deficiencies that hinder its operation in real life.

Ultimately, this article has sought to test and advance an operational qualitative-oriented framework of the rule of law measurement framed around the Venice Commission's rule of law criteria, in an attempt to move the concept away from the "lingering puzzlement"[119] it often resonates to an implementable framework with identifiable operational tasks, challenges, and strategies.

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118 See generally *Ibid*., 277. See also Qerim Qerimi, *The Quest for Operational Priorities: Areas in Need of Strategic Development Intervention*, 11 Law and Development Review, no. 1 (2018), 1–29.
119 Richard H. Fallon, Jr., *supra* note 14, at 56.

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