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THE FUNCTIONAL REVIEW OF THE KOSOVAR JUSTICE SYSTEM: AN OVERVIEW OF THE PROCESS SO FAR

Introduction

In late November 2016, the Government of Kosovo launched a functional review of the whole Rule of Law sector under the lead of the Ministry of Justice, as mandated by Government Decision No. 07/117 – Annex 1. The review would comprise all institutions related to the topic and seek to impose a comprehensive strategy for the development of effective Rule of Law in the country. The main aim of this policy note will not be on the intricate content but rather to trigger discussion and raise questions with a focus on organizational issues related to the functional review of the Rule of Law in the Republic of Kosovo. For this purpose, this document will start by laying out which strategies and organisms the functional review entails followed by a comparative look into the functional review processes other countries from the region – Serbia, Bosnia and Herzegovina and Romania - have undertaken. This will lead to a final section on the main issues regarding the process in Kosovo, and how to successfully move forward.

This policy note argues that, in order to achieve the all-inclusive approach privileged in the Terms of Reference of the government decision itself, a clear look at shortcomings of the institutional setup must be done in order to determine how to best move forward. This would enhance the potential for sustainable success, as well as prevent the country from projecting an external image as a state which undertakes important reforms in an unplanned or uncoordinated manner.

What is the functional review: terms of reference, methodology, working groups, and unpredicted changes

The Government Decision No. 07/117 of 23 November 2016 remains the cornerstone of the whole functional review process in Kosovo. According to the terms of reference, the final purpose of the review is to prepare a comprehensive national strategy for the Rule of Law. In line with this, five main objectives were originally defined: establishing strategic objectives to enhance the efficiency of the involved institutions, reviewing the legal framework and the existing cooperation arrangements between said institutions, assessing their capacities to fulfil their functions, providing recommendations on the legal framework, capacities and cooperation processes on the field of Rule of Law and, lastly, creating a national strategy on Rule of Law. In its first version, the functional review process was envisioned to have a mostly technical nature, being directed by institutions with a relevant role in the Rule of Law¹. Due to the change of government in 2017 following snap elections, very little developments took place on this regard until March 2018, when the new government took over and the process was formally launched. It established working groups and defined a methodological approach for the review. In this instance, the review was made more political as the offices of the President and of the Prime Minister became involved, while

¹ Republic of Kosovo, Government Decision No. 07/117, 23 November 2016. Available at: http://www.kryeministri-ks.net/repository/docs/Vendimet_e_Mbledhjes_se_117-te_te_Qeverise.pdf.

law enforcement institutions were relegated².

Regarding the methodology adopted, the review is directed by a Steering Committee charged with defining the general guidelines and ensuring the coherence of all activities. It is composed of representatives from the ministries of Justice, Internal Affairs and Finances, the offices of the President and of the Prime Minister, the Judicial and Prosecutorial Councils, international donors engaged in the Rule of Law and even the University of Pristina. In its first iteration, the State Prosecutor, Police, Customs and Intelligence Agency would have also been part of the Committee, but were later not included in the final decision issued in 2017. Once more, the original terms of reference shifted due to unpredictable political circumstances. Supporting this Committee, a Secretariat was established from the permanent structure of the Ministry of Justice, led by the Secretary General himself, to provide the necessary technical assistance during the process. This Secretariat also assists the working groups, which in turn are conducting the main activities of the review.

These working groups amount to seven, divided in thematic areas, which conduct the assessment of the state of play of the judicial and law enforcement agencies of Kosovo in order to compile a final report to be approved by the Steering Committee, and then presented to the Government for consideration. The thematic areas tackle the following topics: legal and institutional framework, functioning of the judiciary, transformation of the penal system, improvement of mechanisms for access to justice, inter-institutional coordination and

development management of aid, anti-corruption measures and commercial justice. Of these working groups, the first one, legal and institutional framework, is charged with centralizing and managing all legal aspects, which in practice means any finding made by other groups related to potential legal changes must be sent and approved here first. This is expected to ensure the harmony and coherence of the outcome, while the specialized nature of the other groups will allow for a comprehensive assessment of the state of play in each sector and institution. To that end, every working group will have representatives of the institutions directly involved with the topic, even if they are not part of the Steering Committee (i.e. police or state prosecution).

Aside from intensive desk research, discussion within the working groups and report analysis, the most innovative aspect of the review was the introduction of some systemic methodology by using the Rule of Law Checklist of the Venice Commission and the Checklist for promoting the quality of justice and the courts of the Council of Europe European Commission for the Efficiency of Justice (CEPEJ) as guidelines for the assessment. Even though this was hailed as a very positive step from previous unsystematic, *ad hoc* studies to measure and consider when assessing the functioning of a judicial/law enforcement system, the idea has seemingly not been incorporated into the review process thus far.

The functional review was formally launched in a conference held on 8 March 2018 in Prishtina. As determined by the previous government, the deadline for the completion of all activities would be 1 June 2018. As things stand, the original deadline has already passed and the work on analysis and assessments continues. The expected output remain: a Final Evaluation Report on

² Republic of Kosovo, Government Decision No. 07/117, 23 November 2017. Available at: http://www.kryeministri-ks.net/repository/docs/Vendimet_e_Mbledhjes_s%C3%AB_15-t%C3%AB_t%C3%AB_Qeveris%C3%AB_s%C3%AB_Republik%C3%ABs_s%C3%AB_Kosov%C3%ABs_2017_.pdf.

the Rule of Law Sector (to be compiled by the Secretariat) and a National Strategy for the Rule of Law Sector (drafted by MoJ and approved by the Government).

The problem of decentralization: ongoing parallel processes

The main standing issue is the fact that the functional review triggered by Government Decision No. 07/117 of 23 November 2016 relays an extremely decentralized and uncoordinated approach.

Since February, the Assembly has approved a number of laws directly linked to the scope of the Review, thus proving the decentralization which overpowers the functional review process. Examples to take into consideration are the amendment on the Law on the State Prosecutor (06/L-025), on State Border control and surveillance (06/L-013), on Mediation (06/L-009) and on Conflict of Interest in discharge of Public Functions (06/L-011). Other relevant, sectorial regulations include the Laws on Asylum (06/L-026) and on Foreigners (06/L-036), the Law on Treatment of constructions without permit (06/L-024) and on Independent Oversight Board for Civil Service of Kosovo (06/L-048). Furthermore, currently a new Criminal Code and a new Criminal Procedure Code are being drafted by the Ministry of Justice. All of these initiatives have been taking place in parallel to the execution of the Functional Review. It remains unclear whether and to what extent these developments have been taken into consideration during the review process, since they substantially alter the conditions of work of a number of institutions related to Justice and Law enforcement.

It is thus worth remembering that, while the review takes place, the political and administrative cycles do not stop. The Ministry of Justice is at the same time sponsoring a number of important initiatives and the functional review must not be unconnected, or its conclusions may well be

obsolete before compilation. For this reason, it is essential that the Functional Review fit in the broader working programme of the Ministry of Justice in order to ensure the outcome of the process does not collide with other lines of activity, but enhances them.

Also operating in parallel is “Justice 2020”, flagship initiative led by the Kosovo Minister of Justice in cooperation with the Chairs of the Kosovo Judicial and Prosecutorial Councils and supported by the EUSR/EUO, EULEX as well as the U.S. and UK Embassies in Pristina³. During its launch event in September 2018, the initiative was marketed as focusing on making the justice system better performing and more accountable, with the ultimate goal of effectively serving its citizens. However, great uncertainty remains on what it means in praxis, what is the main target(s) and under which scope it is operating under. Insofar as it has proved to be yet another flashy endeavor with no consequential results, further sending the message of Kosovo as a state with no concrete or lasting agenda.

In the original terms of reference, it is noted in the concluding remarks that the functional review will not obstruct the established policy processes which will continue in parallel to the revision – however the question remains on why the chosen, optimal approach was to launch a different over-reaching process instead of merging open-ended policies into one solid framework of coordinated action. The fact that parallel processes remain hinders the efficiency of the functional review launched. This not only discredits Kosovo in matters of the Rule of Law, but more so means a loss of momentum and a difficulty to deliver since there is no single source of institutional pressure being applied, but

³ EULEX Kosovo, ‘EULEX at the launch of Justice 2020’, 26 September 2018, Available at: <http://www.eulex-kosovo.eu/?page=2,11,862>.

rather scattered efforts and many parallel agendas.

Comparative outlook into review processes of other countries

In the region, other countries have undergone functional review processes in similar terms as Kosovo. In this section we will offer a general outlook into the coordinated processes undertaken in Serbia, Bosnia and Herzegovina and Romania in order to better evaluate the strengths and shortcomings of the Kosovar approach.

Serbia conducted a Judicial Functional Review in the first half of 2014, covering the developments occurred in the country since 2010⁴. Its aim was to establish an analytical baseline to assess the status of the judiciary and steer future actions in order to enhance the functioning of the Courts based on solid data. The scope of this review was thus limited to the judiciary, which was assessed in terms of external and internal performance. External performance was defined as the efficiency, quality and easiness of access to justice services, while internal performance revolved around processes and arrangements, such as its governance, financial and human resources and the use of ICT means, as well as their effect in service delivery. The assessment executed by the World Bank on this topic was very focused in this service-delivery dimension. After review, they noted that the country should reconsider some traditionally-pinpointed problems which were not backed by evidence, and focus on a number of issues that had not been previously identified. That perspective allowed finding gaps between the *de iure* and the *de facto* situation, usually due to an

⁴ Open Bank Repository, ‘‘Serbia Judicial Functional Review, 1 October 2014, Available at: <https://openknowledge.worldbank.org/handle/10986/21531> .

improper alignment between law and practice.

Bosnia and Herzegovina similarly undertook a review process to identify and analyze the responsibilities and core functions of the Ministries of Justice (MoJs) and other institutions within the justice sector, in the first half of 2004⁵. The aim was to plan and manage the operation of that sector at all levels within the country, by assessing how the responsibilities are divided and the functions performed. To a possible extent, the review sought to compare their domestic reality with the situation in other European countries. The process in BiH looked to make recommendations that would allow the functional competencies of the MoJs and other relevant institutions to be rationalized and reorganized to promote efficiency and to enhance performance.

In 2013, Romania, already an EU Member State, also launched a review of its Rule of Law sector⁶. The review examined three main issues related to the judicial system performance, looking at both the individual agency level and the collective performance. First, efficiency as measured by the timeliness of case dispositions and productivity. Second, quality as indicated by corruption in the judiciary, the judicial system’s effectiveness in addressing corruption in the broader public sector, and the extent to which there is uniformity in legal interpretations by courts. And third, access referring to whether ordinary citizens can and do use court services.

A Functional Review is, by definition, an assessment activity. Once the process has

⁵ Functional Review of the BiH Justice Sector, March 2005, Available at: <http://parco.gov.ba/wp-content/uploads/2016/09/functional-review-of-the-justice-sector-in-bh.pdf>

⁶ World Bank, ‘‘Romania judicial functional review’’, 28 October 2014, Available at: <http://documents.worldbank.org/curated/en/971981468293466653/Romania-judicial-functional-review>

been completed and a national strategy adopted, it is essential that action is taken based on the recommendations. For comparative purposes, the Romanian Functional Review was followed by extensive legal reforms, while the Serbian one gave way to a number of interventions at a micro-level to enhance service-delivery. Functional reviews must be framed in a broader strategy and not remain an isolated program with no continuity.

Example of a thematic area in the review process: the Anti-Corruption Action Pillar

One of the pillars of the functional review for the Rule of Law sector is Anti-Corruption Action Pillar, for which a working group was created. For a better understanding of the works of the groups set up for the purpose of this review process, this section will lay out the efforts of the working group of the sixth pillar, regarding anti-corruption measures.

During the first meeting, it was agreed that a preliminary analysis would be conducted on matters of corruption, as well as the prevention and fight against this phenomenon. It would consist of a summary based on conclusions and recommendations from international and local organizations. From thereon, objectives and measures were defined, such as strengthening inter-institutional coordination in preventing and combating corruption, boosting the mechanisms for the confiscation of illegally acquired property, improving the implementation of policies in the Public Procurement System (and therein harmonization of legislation with EU directives), strengthening measures to prevent conflict of interest, and increasing transparency on the financing of political parties. Advancing and completing the legal framework on the aforementioned sub-topics is the end goal, by means of supplementing legal loopholes and avoiding overlapping competencies between

institutions. A matrix was designed for the collection of findings and conclusions on these matters in order to proceed in an organized way. The second meeting, held recently on 28 September 2018, continued discussions on all the sub-topics and the respective objectives set for each. It was highlighted, for instance, that the MoJ has drafted a new Law on Enhanced Competencies for Confiscation of Illegally Acquired Assets which, once it enters into force, will bring new responsibilities to the institutions that, in turn, require additional capacities and resources for proper implementation. Another proposal derived from the meeting regarded a requested that the Law on Declaration and the Descent of Assets be reviewed for, as is, it lacks uniformity and the Agency Against Corruption exerts penalizations which don't contribute to combating corruption.

The importance of clear efficiency and transparency in this particular pillar lies in it being one in which public pressure is high.

Main issues pertaining to the Functional Review process in Kosovo

Unlike the other country cases, the Kosovar Functional Review has been framed in quite vague and ambiguous terms. All three of the abovementioned countries undertook similar processes as a part of a broader reform strategy or after an initial assessment recommended deeper review. In the case of Kosovo, both elements are missing given that the original Decision states the purpose is to prepare a sectorial strategy for the Rule of Law. Thus the work is ongoing in parallel to other processes within the Ministry of Justice, raising a number of questions regarding the technical adequacy of the process.

The first issue worth rising relates to delays harmful to the credibility of the process. Due to the long impasse in 2017 and the change of government, the Functional Review only

started its work in March 2018, more than a year after the initial decision and less than 3 months before its formal deadline of June 2018. The deadline arrived and passed with the work still at an initial stage. In order to set a better precedent and higher standards of work conduct, the government should make use of its prerogative under the framework it established itself and set a new, realistic deadline.

Secondly, even though the formal purpose remains upheld - creating a national strategy and enhancing the implementation of the legal framework - the procedures put in place (i.e. the working groups) appear more focused on introducing new legal changes instead of building on developments. This could be linked to the unique policy-making in Kosovo as a new state. In light of the intense state-building process which occurred before and after independence, policy-making in Kosovo is inherently linked with creating and reshuffling institutions as a whole, which has consequently become the instinctive approach of policy-makers. This approach puts the unhindered success of the Review into question, as the leadership must exert a proper balance between improving efficiency and disrupting the institutional setup. For instance, different reforms on the Judiciary and Prosecutorial Council have failed in the past because the laws were amended too quickly.

Furthermore, the lack on inclusivity in the review process could also disrupt the end goals. In the composition of the working groups, there was a late incorporation of civil society and no presence from members of the opposition, nor international experts. The Parliamentary Committee on Legislation has not been involved in the process, although the end result has been put in the legal field and is to include proposals to amend laws in the framework of the Assembly.

The aim of the functional review according to the Ministry of Justice is to provide a review of the whole legal system in order to identify whether changes must be made or the status quo must be preserved. In consideration of these key issues, it is highly advisable that no new legal developments should be pushed in Kosovo. Instead, priority should be on increased efficiency of the existing frameworks and a strict focus on implementation. In this way, the proposed targets for advancement and improvement are the processes and procedures, not further legal changes that additionally disrupt efforts. Related to that, any following action should take into consideration the need of legal certainty and institutional stability. In the last ten years since independence, the country has been engaged in a major state-building campaign in which creating new institutions and introducing radical changes was the go-to approach. Despite any mature legal system requiring such tweaks and patches, major changes should be few and more far apart.

Concluding Remarks

Proceeding from a short examination of the Functional Review of the Rule of Law sector in Kosovo, this policy notes denotes that a systemic lack of coordination has critically hindered the smooth execution and timely assessment of the review. The functional review in Kosovo, unlike similar processes undertaken in countries of the region, appears as an isolated program while other relevant legal changes and policies are developing in parallel.

As a new country with a track record of tendency for excessive policy-making, the question of legal certainty must start to be prioritized. Stability and consistency of laws, reforms, structures and processes must prevail over the need to revitalize entire institutions or frameworks. This would certainly also serve the purpose of the review of the rule of law sector, which is one

of focusing on its functionality and in order to increase the efficiency, transparency and accountability of the justice system.

In light of all the issues raised throughout this note, further discussion on the development of the process is encouraged and, hopefully, fueled – a focus could fall on which elements of the original setup have had a positive impact, how could they be boosted, and which changes could be implemented to better proceed with the review. For instance, the review should not disregard Administrative, Commercial and Civil jurisdictions, for often the privileged jurisdiction in such endeavors is the criminal one. Thus far, the review has focused mainly on the legal and regulatory framework with the aim of proposing specific normative amendments from a mostly internal, institutional perspective. Moving forward, it would also be interesting to consider the external dimension of Justice (i.e. service-delivery and user satisfaction). Moreover, a substantial oversight is latent with regards to the judiciary in the Serb Northern areas and respective the integration in the judicial system, a matter which deserve more attention.

The Concept Document states the need for an evaluation of legal framework and strategies according to quantitative and

qualitative data. Regarding the overall approach taken, Kosovo presents many different sectorial strategies and policies, as noted in the official Terms of Reference document itself.

Domestic affairs, such as the present one on the functional review of the Rule of Law sector in the Republic of Kosovo, may be an internal matter but they are key in projecting an external image. The process has been uncoordinated thus far, to which this note calls attention to in order to encourage discussion and improvement. Moving forward, this policy note sought to lay out that the feasibility of reform success lies in a coordinated effort designed into a single, detailed revision framework. In this way the pressure exerted is targeted and the work is dutifully geared. Most importantly, such an approach acclaims Kosovo as a functioning state in due command of its domestic judicial affairs and policy-planning.

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