

Co-operation between International Experts and the UN - Lessons Learned in Kosovo -

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A great number of international legal experts advise the Kosovo government and its ministries on the development of a broad range of legislation. This applies also to the field of land administration where in the last two years international experts have drafted laws like the Law on the Establishment of an Immovable Property Rights Register, the Law on Mortgages, the Law on Cadastre or the Law on Spatial Planning. All these laws are subject to final approval by the United Nations Interim Administration Mission in Kosovo (UNMIK). Accordingly, the legislative process requires close co-operation between the international experts who are drafting the laws and UNMIK which finally approves and promulgates these draft laws.¹ The following presentation reviews this co-operation.

1. Legal Framework

Kosovo is facing the rather unusual situation of two distinct legislators. On the one hand, UNMIK has the authority to issue UN regulations in the field of so called reserved powers; those powers reserved to UNMIK include the protection of minority rights, security issues, all matters of an international nature and – most important in the present context - the administration of so-called socially-owned land.² On the other hand, the Kosovo Provisional Institutions of Self-Government are responsible for the adoption of laws in the field of so-called transferred powers which include *inter alia* all issues relating to agriculture, forestry, rural development and spatial planning.³ Laws adopted by the Assembly of Kosovo in the field of transferred powers, however, are subject to final approval and promulgation by UNMIK. Considering that almost 50 per cent of Kosovo land is socially-owned, it is rather obvious that laws relating to the administration of land have some impact on the reserved power of UNMIK to administer such socially-owned land. Additionally, all land related laws may have some negative impact on the reserved power to protect the rights of minorities. The conflicting competences of UNMIK and the Kosovo Government in the field of land administration have created and continue to create

The comments and ideas expressed in this article are based on the experience the author gained during his employment with the Kosovo Cadastral Agency. They are those of the author and do not represent in any way the Kosovo Cadastral Agency or UNMIK.

¹ While it is understood that most of the laws have been developed in close coordination with local experts, the co-operation between international and local experts shall not be subject of this review.

² Without analysing it in detail, socially-owned land may be best qualified as land belonging to the somehow anonymous body “society” and which has been administered by the municipalities. It is often referred to as land belonging to anybody and nobody.

³ For a detailed list of the transferred and reserved functions see UNMIK Regulation No. 2001/9 on the Constitutional Framework for Provisional Self-Government. UNMIK regulations are published at <http://www.unmikonline.org/regulations/index.htm>.

confusion and misunderstandings which in turn have an impact on the quality of legislation. Although these misunderstandings could be easily overcome by a better co-ordination between the original drafters of the laws, i.e. the international legal experts, and UNMIK, such co-operation has not been introduced for the majority of the already adopted and promulgated laws. This failure is based on a variety of reasons which shall be presented from both perspectives, i.e. the perspective of the international experts and UNMIK.

2. Mistakes and Failures of International Experts

The prevailing public opinion blames UNMIK for deficiencies in the law making process. However, international experts have also contributed to the existing problems.

a. Lack of Consideration of the Factual and Legal Situation

International experts have a certain tendency to focus on the subject matter of laws without taking into account the special factual and legal situation of Kosovo.

Learning from initial mistakes, international experts try to tailor draft laws according to the special factual situation of the province which is characterized by Kosovo being a post conflict area with a post socialist economy and administration and still being subject to a final decision on its future status. However, some international experts do not consider this special factual situation to the extent necessary. This applies especially to the protection of minority rights. The draft Law on Spatial Planning for instance did not provide safeguards against the determination of sensitive areas, such as e.g. a waste dump, in minority regions. UNMIK, following its obligation to protect the interests of minorities, promulgated the draft Law under the condition that kosovo-wide spatial plans require its prior approval and that all other development plans have to be prepared in co-ordination with it.⁴ Taking into account that UNMIK does not employ the necessary experts for the development and approval of spatial plans, this solution is obviously not optimal. A better co-ordination between international experts and UNMIK could have provided for a better solution.

In some instances, even worse, international legal experts did not consider the special legal situation of Kosovo. This is the only possible explanation for the fact that the draft Construction Law determines that the Ministry of Spatial Planning shall be competent to issue construction permits for military premises. This sensitive issue definitely does not fall under the authority of the local government but is a function reserved to UNMIK. The lack of consideration of the powers transferred to the local government and those reserved to UNMIK on the part of international legal experts is indeed rather stunning.

b. Lack of Explanation and Follow-up

It is understood that international experts have a very good knowledge of the draft laws which they have developed. However, the competent legal officer at UNMIK has not necessarily the same level of expertise in the subject matter. Therefore, international experts are well advised to explain in detail their drafts. Better documentation

⁴ UNMIK Regulation No. 2003/39 on the Promulgation of the Law Adopted by the Assembly of Kosovo on Spatial Planning.

accompanying draft laws would foster UNMIK's capacity to review such draft laws and thus certainly speed up the review process.

At the same time, international experts should seek to attract UNMIK's interest in the relevant draft law and give the reasons why it is required. Quite understandingly, international experts consider their draft laws to be rather important. However, UNMIK, for a variety of reasons, often does not give these drafts the same priority as the experts who developed them. In fact, the importance of a real property rights register for a functioning land administration system is not necessarily very evident for a lawyer not specialised in land issues. Accordingly, the draft Law on the Establishment of an Immovable Property Rights Register was not processed for several months after its submission to UNMIK. Although UNMIK is to be blamed for this delayed review, the international expert could have facilitated a speedier review process had a written detailed justification of the need for such legislation accompanied the draft.

In addition, international experts are responsible to track the progress of a draft law once it leaves their hands. The author was rather surprised when the long-term international expert for the Register Law told him upon his arrival at the Kosovo Cadastral Agency that he had no idea what happened to the draft Law during the last six months. Obviously, the procedure for drafting and finalising this Law would have required some improvements.

c. No Ongoing Presence

Finally, the law making process is very often complicated through the absence of the international experts after the finalisation of their drafts. The Law on Mortgages for instance has been drafted by short-term consultants. By the time the draft Law has been submitted to UNMIK for approval, these consultants were not available to explain their draft. In fact, they could not even be identified. Depending on the extent and nature of the underlying project, it should be ensured that the experts or properly instructed personnel present in Kosovo are able to explain the laws and their rationale.

Even better is the development of an ongoing personal working relationship between UNMIK's legal officers and international experts. Such a personal relationship makes it easier for both parties to exchange information in an informal and expeditious manner. Furthermore, the establishment of a personal relationship encourages the UNMIK's legal officer to process the draft law which is now somehow linked to a face and no longer only a work product of some anonymous international expert. A good example of an ongoing well-established working relationship exists, for instance, with the experts on immovable property taxes which facilitated necessary amendments to UNMIK Regulation No. 2003/39 on Taxes on Immovable Property in Kosovo within a very short period of time. It is surprising that the international legal experts of the Kosovo Cadastral Agency did not develop such working relationships during their 2 years presence in Kosovo. It seems rather likely that such a relationship could have prevented many of the misunderstandings of the past.

3. Mistakes and Failures of UNMIK

Although the above mentioned failures of international experts have caused many problems in the law making process, it is not to deny that also UNMIK is to blame for the deficiencies of many of the land related laws.

a. Lack of Review Procedure

Ideally, a draft law should be submitted to UNMIK for review before it is sent to the Assembly for adoption. This procedure allows the necessary amendments to be made at an early stage and therefore guarantees the promulgation of the law after its adoption by the Assembly without conditions or restrictions. Unfortunately, UNMIK does not follow this procedure in all circumstances.

The Law on the Establishment of an Immovable Property Rights Register, for instance, was discussed in detail between the international experts and UNMIK's legal officers. When the Law was eventually adopted by the Assembly and sent to UNMIK for promulgation some 12 months later, UNMIK raised - rather surprisingly for all stakeholders - completely new conditions for the draft Law to become effective. Needless to say that this conflict could have been prevented through a better co-ordination.

The Law on Spatial Planning was submitted for review prior to its finalization. However, UNMIK did not take action until the Assembly adopted the Law. It then promulgated the Law with a number of restrictions. It is obvious that the political conflict arising out of UNMIK's late action could have been easily prevented.

These two examples are characteristic for UNMIK which has not implemented a clear procedure on how to process a law submitted for review. Given these circumstances, the "disappearance" of laws for several months within UNMIK is not surprising. The establishment of a personal working relationship with UNMIK's legal officers and the constant follow up on submitted draft laws may counter the problems arising out of this lack of review procedure.

b. Lack of Expertise

Another problem in the law making process is the lack of legal expertise on the substantive issues on the part of UNMIK. Although most of its legal officers are in general highly qualified, they often have not the same level of legal expertise on the specific laws as the initial drafters and, perhaps even more important, they have not the same knowledge of the factual situation and the needs that caused the development of the law.

Furthermore, it is to be considered that UNMIK's legal officers come from many different jurisdictions. This may result in situations where a draft law confronts the UNMIK lawyer with a legal concept not familiar to him. The Anglo-Saxon lawyer, for instance, is familiar with a real property rights regime which is rather different from the continental-European system. The lawyer of a country with a market-economy may be rather unfamiliar with the concept of state or socially owned property.

A better explanation of draft laws by means of accompanying documentation or personal meetings may help the competent legal officers to better assess the drafts. Again, a better and earlier co-operation could have prevented many of the mistakes done in the past. However, UNMIK on its part should have developed a better expertise on land related issues. Although it is the competent authority for the administration of socially-owned land, no thorough investigation on the future development of such land has been undertaken.

c. Lack of Will to Co-operate

While UNMIK is not expected to have legal expertise for all specialist fields of law, it is guilty of an at times arrogant attitude in not contacting the drafters of a law in order to get information necessary for its review. A very good example of this failure is the promulgation of the Law on the Establishment of an Immovable Property Rights Register which required additional legislation providing for a public notification of future entries for the Law to become effective.⁵ However, this is not a requirement of comparable European register laws. UNMIK later seemed to acknowledge its mistake by not insisting on the initially envisaged full-fledged public announcement of future entries in newspapers and by allowing for a timely very limited announcement on municipal public boards.⁶ The development of this futile additional legislation imposed by UNMIK required further financial funding and delayed the implementation of the Register Law for another 8 months. Given the fact that the misconception of UNMIK could have easily been subject to a clarification by the international expert drafting the law prior to its promulgation, this result is rather frustrating. This frustration is exacerbated when one considers that UNMIK's legal officers were participating in the development of the Law and that they knew the stakeholders involved.

4. Conclusions

The development of laws in the field of land administration during the last three years has been characterised by many mistakes of both the international experts and UNMIK. Since the structure and approach of the latter is not very likely to change, international experts will have to cope with the current situation. Learning from past mistakes, international experts should establish better and ongoing working relationships with UNMIK's legal officers in order to assist them in the review of draft laws. This would require a farewell to the mission accomplished approach. Instead, international experts will have to follow up on their drafts also after they submitted their results to the respective ministry responsible for the development of laws. Future legislative projects should consider these findings and therefore ask the international experts to track their draft laws in the legislative process until their final promulgation by UNMIK.

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⁵ UNMIK Regulation No. 2002/22 on the Promulgation of the Law Adopted by the Assembly of Kosovo on the Establishment of an Immovable Property Rights Register.

⁶ Law No. 2003/13 on Amendments and Additions to Law No. 2002/5 on the Establishment of the [sic] Immovable Property Rights Register.