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ANTI-DISCRIMINATION LEGISLATION, IDPS AND INTERNATIONAL STANDARDS FOR THE PROTECTION AGAINST DISCRIMINATION IN THE POST-CONFLICT KOSOVO*

Abstract. In 2004 the comprehensive Anti-Discrimination Law, modelled after the EU equality directives, entered into force in Kosovo. The Law was part of a wider agenda, pursued by UNMIK, which relied on the transposition of international and regional human rights standards into the domestic legal system as one of the peacebuilding methods. The author investigated to what extent the transposed equality provisions were fine-tuned to the post-conflict reality of Kosovo. The inquiry, which was conducted by analysing the new Anti-Discrimination Law with regards the special needs of internally displaced persons, lead to the conclusion that its provisions did not reflect the specific features of Kosovo. This was a consequence of the fact that, while pursuing this legislative project, UNMIK used a „one-size-fits-all" blueprint rather than being guided by the goal of effectively addressing discrimination.

Key words: anti-discrimination legislation, Kosovo, EU equality standards, IDPs, legal transplant.

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*This designation is in line with the United Nations Security Council Resolution 1244/99 and the International Court of Justice (ICJ) Opinion on the Kosovo Declaration of Independence.

1. INTRODUCTION

1.1. Globalisation and peacebuilding

There seems to be a general agreement among the dominant actors in the international arena of what methods should be used to respond to a conflict. They are premised on a liberal set of assumptions of how a contemporary society should look like. Democratisation, free market reform, human rights protection, and development are seen as the cornerstones of liberal peace and the only ways forward for the war-torn territories.[2] Over the years, the steady affirmation of these approaches to peace has lead to the globalisation of responses to conflict.[3]

The basic elements, nature and effectiveness of the liberal answers to conflict can be observed in the practice of peacebuilding missions. They are, by rule, exercised in completely or at least partially „desovereignized" territories, which makes the peace restoration activities decided on and carried primarily by the international agents. Given this lack of sovereign state, it is expected that the distortion in transposition of liberal conceptions of peace in the societies hosting peacebuilding missions should be decreased to the minimum. As such the peacebuilding missions provide an excellent opportunity to study the capacity of international agents to export liberal values, as well the effectiveness of the „globalised responses to conflict".[4]

1.2. UN Mission in Kosovo, diffusion of human rights and the legal transplants theory

The UN Transitional Administration Mission in Kosovo (UNMIK) was the largest UN peacebuilding mission ever mounted, „an unprecedented experiment in international affairs".[5] No previous UN peace operation had ever exercised such level of direct control over a territory.[6] Established after the civil conflict, in June 1999, UNMIK took over the governorship of the provinceby assuming „all legislative and executive authority with respect to Kosovo, including the administration of the judiciary".[7] Its officials performed practically all

[2] See Boutros Boutros–Ghali, *An Agenda for Democratization (*New York: United Nations Department of Public Information, 1996); Roland Paris, *At War's End: Building Peace after Civil Conflict (*Cambridge: Cambridge University Press, 2004).

[3] Oliver P. Richmond, „The Globalization of Responses to Conflict and the Peacebuilding Consensus," *Cooperation and Conflict* 39 (2004): 129–150.

[4] Oliver P. Richmond also uses the term „peacebuilding consensus". Ibid., 131–133.

[5] The Independent International Commission on Kosovo, *Kosovo Report (*Oxford: Oxford University Press, 2000), 114.

[6] Paris, *At War's End,* 213.

top-administrative functions, from establishing tax system to designing educational curricula and maintaining health service, while the Special Representative of the Secretary General in Kosovo had a right to appoint (or remove) any person to the civil administration and the judiciary.[8] It could be said that, at least in theory, such extensive powers enabled „the seamless import of international liberal practices and value schemes".[9]

Diffusion of human rights norms ranks high on the list of globalised responses to conflict and is one of the most prominent peacebuilding tools. Hence, the creation of an effective system of human rights protection was among the main responsibilities assigned to UNMIK. As in many transitional societies, approach of UNMIK to this matter relied on the concept which Cummings and Trubek call „human rights domestication".[10] The process was facilitated by the transplantation of human rights standards from international and European law into constitutional provisions and on the adoption of progressive human rights laws modelled after the western „ideal types".

Without entering into the value-laden debates about the applicability of the western human rights standards in non-Western cultural settings, this paper attempts at addressing certain pitfalls of the actual peacebuilding practice in this field. As such it belongs to the wave of studies the objective of which is to show the contrast between the ideals and realities of the globalised liberal responses to conflict. In addition, by choosing for the object of its analysis the situation where western standards are transposed by an international agent in the desovereignized territory, it also aims at shedding additional light on the relationship between the political and ideological dimensions of globalisation and the sovereign state.

The article analyses, in a form of a case study, a particular instance of UNMIK's legislative activity directed at transposing the progressive anti-discrimination standards into the domestic law. The starting point of the analysis is the proposition, developed within the legal transplant theory, that an ideal type law does not exist and that every reception of foreign law must involve fine-tuning of the model law to the local context.[11]

[7] UNMIK Regulation No. 1999/1 On the Authority of the Interim Administration in Kosovo, 25July 1999, Section 1, Para. 11.11.

[8] UNMIK Regulation No. 1999/1, Section 1, Para. 12.12.

[9] Bernard Knoll, „Beyond the Mission Civilisatrice: The Properties of a Normative Order within an Internationalized Territory," *Leiden Journal of International Law* 19 (2006): 280.

[10] Scott L. Cummings and Louise G. Trubek, „Globalizing Public Interest Law," *University of Wisconsin Legal Studies Research Paper No. 1073* (2009): 29.

[11] See Esin *Orucu*, „*Law as Transposition*," *International and Comparative Law Quarterly* 51 (2002): 207–08.

The hypothesis on which the case study is based is that the level of adjustment of the anti-discrimination norms transposed by UNMIK into the Kosovo legal system can be best observed if one analyses the extent to which the new laws reflect the post-conflict context of Kosovo.

The first part of the paper sketches the post-conflict context of UNMIK's activities by briefly portraying, as one of its most apparent features, the position of internally displaced persons (IDPs) who fled Kosovo in the aftermath of the 1999 conflict. A brief comparison of the Kosovo anti-discrimination legislation with its *acqui communautaire* counterparts is provided in the second part of the paper. In its third part the UNMIK's legislative undertakings in the anti-discrimination field are examined with regards to the special needs of IDPs, following which the author attempts at arriving at a more general conclusions about the Kosovo Anti-Discrimination Law seen as a legal transplant.

2. POST-1999 FORCED DISPLACEMENT OF MINORITY COMMUNITIES

On 10 June 1999 NATO ceased its 78-days air campaign against the Federal Republic of Yugoslavia (FRY) and the UN Security Council passed the Resolution 1244. The endorsement of the UN SC Resolution 1244 mandated the withdrawal of the Yugoslav state administration and its security forces and set the legal basis for the establishment of the UN Interim Administration Mission in Kosovo (UNMIK).[12]

In parallel with the deployment of the international civilian and military presence in Kosovo and return of more then 700.000 Kosovo Albanians who were forced into refuge during the NATO air campaign,[13] after June 1999 a new wave of ethnic cleansing took place in Kosovo. Widespread crimes and aggression against minority communities, mostly Serbs and Roma, forced into displacement more than 200.000 persons.[14]

[12] UN Security Council, *Security Council Resolution 1244* [on the deployment of international civil and security presences in Kosovo], 10 June 1999, S/RES/1244 (1999).

[13] The Independent International Commission on Kosovo, *Kosovo Report,* 90.

[14] Figures vary depending on the source. According to the UNHCR statistics, in 2012 Serbia (excluding Kosovo) hosted approximately 210.000 internally displaced persons (IDPs), while around 20.100 so–called „internally internally displaced persons (IIDPs)" were displaced within Kosovo. See UNHCR, *2012 UNHCR Country Operations Profile – Serbia (and Kosovo: SC Res. 1244)*: 252, http://www.unhcr.org/4ec2310915.pdf; cf. *S. C. against UNMIK (*Case No. 02/09), Human Rights Advisory Panel Opinion of 6 December 2012, para. 14; Ibid., 7.

In the following years, the return of displaced persons was hampered by a volatile security situation. The restricted freedom of movement, which firmly marked the entire period of UNMIK's administration of the province, was also joined by other important factors that have negatively affected return, many of which have remained unaltered until the present day.

In Kosovo, IDPs have been facing obstacles in almost any segment of their social life. The process of post-conflict property restitution has not been completed yet, neither are the displaced owners adequately protected from the widespread illegal occupation or other violations of their property rights.[15]IDPs' access to courts is hindered by the barriers, such as lack of postal services between Kosovo and Serbia proper, problems with legal representation and the use of own language, high court fees, etc., which prevent them from effectively protecting their rights.[16] IDPs are also often denied access to public services.[17]If they make a decision to return they face numerous difficulties when trying to realise their housing, employment and other socio-economic rights that are indispensable for a sustainable return.[18]

Many of the obstacles to the effective realisation of their human rights in Kosovo are consequence of discrimination, which is often embedded in the legal and institutional framework and as such of systemic character.[19]The discrimination they are exposed to is not solely related to their status of displaced persons. Given the fact that IDPs belong to minority communities they are also ex-

[15] See, for instance, figures about the multiple occupations of the immovable property of IDPs committed by the same persons, in: Kosovo Property Agency, *Annual Report for 2011* (2012): 12 21, http://www.kpaonline.org/PDFs/AR2011.pdf. See, also, OSCE Mission in Kosovo, *Third Community Rights Assessment Report* (July 2012): 14–15; OSCE Mission in Kosovo, *Municipal Responses to Security Incidents Affecting Communities in Kosovo and the Role of Municipal Community Safety Councils* (December 2011): 1, 26.

[16] See EU–funded Project „Further support to refugees and IDPs in Serbia", *Access to Justice for the Internally Displaced Persons from Kosovo* (June 2012) http://www.pravnapomoc.org/web/Access_to_ Justice.pdf.

[17] See Milica V. Matijević, „On Certain Aspects of the System of Taxation of Immovable Property in Kosovo and Property Rights of Internally Displaced Persons", *Strani pravni život* 3 (2012): 31.

[18] European Commission Staff Working Paper, *Kosovo* 2011 Progress Report (*SEC (2011) 1207 final, Brussels, 12.10.2011): 21.

[19] See: Report of the Special Representative of the United Nations Secretary General on the Human Rights of Internally Displaced Persons on his follow–up visit to the Mission to Serbia and Montenegro (including Kosovo) in 2005, of 11 December 2009, A/HRC/13/21/Add.1, paras. 21 78; U.S. Department of State, *2010 Human Rights Report: Kosovo*, (April 2011): 37, http://www.state.gov/g/drl/rls/hrrpt/2010/eur/154432.htm; *Georgina Stevens*, *Filling the Vacuum: Ensuring Protection and Legal Remedies for Minorities in Kosovo* (London: Minority Rights Group International, 2009), http://www.minorityrights.org/7856/reports/filling–the–vacuum–ensuring–protection–and–legal–remedies–for–minorities–in–kosovo.html.

posed to discrimination on the other related grounds, such as their ethnic origin, language and religion.

The problems encountered by IDPs are affecting their ability to exercise an informed choice of whether to return or integrate in the place of displacement and are causing their further marginalization, isolation and dependence on aid. This in turn leads to an even greater scarcity of economic opportunities for members of both majority and minority communities and is further undermining the interethnic relationships in Kosovo.

3. KOSOVO ANTI- DISCRIMINATION LAW AND ITS EU MODELS

In summer 2004, after more than a year of a preparatory work, the Assembly of Kosovo adopted the Anti-Discrimination Law.[20] The Law entered into force on 19 September 2004, after being promulgated by the Special Representative of the Secretary General (SRSG).[21]Although formally adopted by the Kosovo Parliament, the drafting process was initiated and completed under the direct lead of foreign experts working for UNMIK and several other international organisations.

The writers of the Anti-Discrimination Law took as a primary model the European Union anti-discrimination laws: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (so-called „Race Equality Directive")[22] and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation prohibiting discrimination on the grounds of religion or belief, disability, age or sexual orientation (so-called „Employment Equality Directive")[23]. These two legal acts served as an „ideal type law" both with regards the structure and the content of the Kosovo Anti-Discrimination Law.

[20] Anti–Discrimination Law No. 2004/32.

[21] UNMIK Regulation No. 2004/32 On the Promulgation of the Anti–discrimination Law, of 20 August 2004.

[22] Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (published in OJ L 180 of 19 July 2000) and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (published in OJ L303 of 2 December 2000).

[23] Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (published in OJ L 180 of 19 July 2000).

Modelled after the „Race Equality Directive" and the „Employment Equality Directive", the Anti-Discrimination Law introduced into the Kosovo legal system an advanced set of legal norms for prevention, prohibition and sanctioning of discrimination. The Law contains an open-ended list of prohibited grounds of discrimination; it outlaws discrimination in all its forms, including indirect discrimination and segregation; it guarantees protection against both discriminatory behaviour of public bodies and private organizations and individuals; it endorses the positive action measures; and finally, it establishes the extra-judicial mechanism for the prevention, protection and sanctioning of discriminatory behaviour.

The legislator went further than its EU counterparts when it comes to the material scope of the anti-discrimination provisions. As different from the two Council Directives, the application of which is limited *ratione materiae* to only certain set of rights, the Kosovo Anti-Discrimination Law prohibits discrimination in access to and enjoyment of any right set forth by the law in Kosovo.

Despite the fact that it was enacted five years after the end of the civil war, the Anti-Discrimination Law does not in any substantial sense reflect the post-conflict settings of Kosovo. The clash between the two major ethnic groups was at the core of the hostilities that took place throughout 1998 and 1999 yet the Law does not place any emphasise on the prevention and protection from discrimination on the basis of ethnicity and related grounds. Neither does the Anti-Discrimination Law, which was drafted to serve in the society where the significant portion of its pre-conflict inhabitants is living in displacement, reflect this particular feature of Kosovo. This becomes the most evident in the analysis of the personal scope of the Anti-Discrimination Law and of the related equality legislation.

4. LIMITATIONS OF THE KOSOVO ANTI-DISCRIMINATION LEGISLATION

4.1. *Ratione Personae* limitations of the Anti-Discrimination Law

Not only that the Anti-Discrimination Law does not provide special protection to IDPs but they are actually left outside of the system of protection therein established.[24] Namely, Article 1 of the Law limits its personal scope of application to the persons holding citizenship of Kosovo:

[24] As well as the several other categories of individuals, such as migrants and asylum seekers.

"The purpose of this Law is prevention and combating discrimination, promotion of effective equality and putting into effect the principle of equal treatment of *the citizens of Kosovo* under the rule of Law (italic added)".[25]

This raises a perplexing issue of the purpose of this legislative project given the fact that IDPs are suffering from a greater vulnerability and are exposed to discriminatory treatment more often than the rest of the Kosovo population. What was the intention behind the UNMIK's activities directed at enriching the Kosovo legal system with the set of highly advanced anti-discrimination standards?

When an international peacebuilding mission ventures on transposing into the local law the progressive anti-discrimination standards, it could be expected that its objectives be determined by its own *raison d'etre* – rebuilding of peace in an ethnically divided society. This purpose would not only mandate an inclusionary approach,[26] covering by the system of equality protection all segments of the Kosovo pre-conflict and post-conflict population, but would actually place IDPs at the centre of it.

The Anti-Discrimination Law was enacted just five years after the civil war, in a society still divided along ethnic lines and whose many inhabitants belonging to minority communities were forcefully displaced from their homes. Hence, it could be logically expected that the need to cope with the ethnic discrimination, including discrimination against IDPs, would be the main purpose for the adoption of the new anti-discrimination legislation. However, as illustrated on the example of its Article 1, this was not the case.

Apart from raising doubts over the purpose and effectiveness of the reception of the EU anti-discrimination standards, this feature of the Anti-Discrimination Law also raises the issue of consistency of UNMIK's work on transposing international human rights standards into the domestic law. The analysed provision of Article 1 of the Anti-Discrimination Law is in stark contrast with the other international and European equality standards that were inbuilt into the local law. During the UNMIK's reign a number of the international instruments

[25] The words „citizens of Kosovo" are also contained in Article 2 (c). The SRSG has pro–mulgated the Anti–Discrimination Law provided that „[t]he words 'citizens of Kosovo in Articles 1 and 2 (c) shall be replaced by 'persons in Kosovo'" and by ordering that these amendments „be reflected in the final official text of the Law" (UNMIK Regulation 2004/32 on the Promulgation of Anti–Discrimination Law Adopted by the Assembly of Kosovo). Yet, the problematic wording was never changed and the text of the Anti–Discrimination Law, as published on the official web site of the Kosovo Assembly, retained the given wording.

[26] See more on the inclusionary approach to the protection against discrimination in the EU con–text in: Bob Hepple, „Race and Law in Fortress Europe," *Modern Law Review* 67, no. 1 (2004):1–15.

prohibiting discrimination were made directly applicable in Kosovo through the constitutional provisions.[27] This list includes the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention for the Prohibition of All Forms of Discrimination (CERD), the European Convention on Human Rights (ECHR), etc.

Even more importantly, Article 1 of the Anti-Discrimination Law is contrary to the international standards on the protection of displaced persons. In the United Nations Guiding Principles on Internal Displacement, a soft law document developed to ensure effective protection of IDPs, the prohibition of discrimination both in their place of displacement and in their place of origin has an important place.[28] Despite the fact that the international legislator in Kosovo was the extended hand of UN, in its legislative activities it entirely disregarded this legal document which „restate (s) in greater detail guarantees relevant for the displaced that are implicit in the more abstract prescriptions of [international human rights law]".[29] As a consequence of this, the Anti-Discrimination Law also ran counter to the special obligations of the international and local authorities concerning return of IDPs.[30]

4.2. *Ratione Personae* limitations of the Law on Ombudsperson

The described deficiency of the Anti-Discrimination Law is also found in the principal legal act for its implementation. The Law on Ombudsperson[31] was adopted in 2009 to govern the work of the Ombudsperson Institution, the main equality enforcement body in Kosovo.[32]

According to Article 3 of this law, its provisions apply to all persons in Kosovo and abroad whose rights are affected by action or failure to act of the public authorities in Kosovo. Yet, its Article 15 specifies that the duty of the Ombudsperson to provide assistance to those who temporarily live outside of Kosovo is restricted to the persons holding the post-UDI citizenship of Kosovo:

[27] Chapter 3 of UNMIK Regulation No. 2001/9 On the Constitutional Framework for Provisional Self–Government in Kosovo of 15 May 2001; See also Article 22 of the post–UDI Constitution of Kosovo of 15 June 2008.

[28] According to Principle 29 of the UN Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2.), IDPs who have returned or resettled „shall not be discriminated against as a result of their having been displaced".

[29] Brookings Institution – University of Bern Project on Internal Displacement, *Protecting Internally Displaced Persons: A Manual for Law and Policy Makers* (October 2008): 3.

[30] The duty to facilitate the safe and dignified return of refugees and internally displaced perso–ns, was explicitly laid down in the UN SC Resolution 1244, para. 11 (k) and in Article 3.4 of the Constitutional Framework for Provisional Self–Government in Kosovo of 15 May 2001.

[31] Law on Ombudsperson No. 03/L–195, of 27 August 2010.

[32] According to Article 10 of the Anti–Discrimination Law.

„The competences of Ombudsperson extend to the entire territory of the Republic of Kosovo. In exercising his/her functions related to cases that arise within the territory of the Republic of Kosovo, the Ombudsperson can provide good services to the citizens of the Republic of Kosovo who temporarily live outside territory of the Republic of Kosovo."

While it has to be recognized that at the time of the adoption of this law UNMIK was not anymore governing Kosovo, the given example could illustrate how the errors committed in the process of diffusion of the human rights standards affect the subsequent legislative activities of the local authorities.

Although being, at least nominally,[33] the principal barrier to IDPs having access to this equality enforcement body, the „citizenship" requirement, is not the only limitation of the Law on Ombudsperson *vis-a-vis* the realization of the principle of equal treatment of IDPs. Its other deficiencies can be divided in two categories. The first category ensues from the general limitations, which are negatively affecting the Ombudsperson's powers to enforce the Anti-Discrimination Law. They were thoroughly elaborated by the Council of Europe European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights (ODIHR), during the three years lasting process of drafting the Law on Ombudsperson.[34] The second group of obstacles to the effective equality protection of IDPs is a consequence of the fact that the legislator did not pay adequate attention to the vulnerability and special needs of IDPs.

4.3. Limitations of the Ombudsperson's competencies with regards to the special needs of IDPs

Certain limitations of the Ombudsperson's competencies in the equality sphere disproportionally affect IDPs given their greater vulnerability in comparison with the rest of the Kosovo population and, in particular, the obstacles to their effective access to the courts. Two of them will be singled out because of their importance for an efficient realisation of the Ombudsperson's responsibilities in ensuring protection of IDPs.

[33] There is no information in which way the Ombudsperson interprets the wording of this provision and whether in practice it presents a real obstacle to the access of IDPs to this institution.

[34] In 2007 the Council of Europe's European Commission for Democracy Through Law (Venice Commission) submitted opinion on one of the first versions of the draft Law on Ombudsperson. See, Venice Commission, *Opinion no. 434 / 2007 on the Draft Law on the People's Advocate of Kosovo of 4 May 2007*, accessible at http://www.venice.coe.int/docs/2007/CDL (2007)018–e.pdf. This was followed by the OSCE Office for Democratic Institutions and Human Rights *Comments on the Draft Law on the Ombudsperson in Kosovo* (April 2010).

The first shortcoming relates to the fact that the Law on Ombudsperson does not authorise the civil society organisations to plead on behalf of a victim.[35] This is in general an important constraint to the existing system of protection against discrimination since the civil society organisations are often better placed to identify and conceive the anti-discrimination cases.[36] When it comes to IDPs, the advantage of enabling the civil society organisations to initiate cases on behalf of victims becomes even more important in the light of the obstacles faced by IDPs in accessing the Ombudsperson institution such as: remoteness of IDPs from the Ombudsperson's offices; travel expenses to be bore by the impoverished IDP population for reaching the Ombudsperson offices; the lack of postal services between Kosovo and Serbia proper preventing an effective communication between IDP claimants and the Ombudsperson Institution; frequent changes of address of IDPs in the place of displacement[37]; the general lack of awareness among IDPs about the Ombudsperson's mandate, etc.

The second shortcoming arises in relation to the Ombudsperson's power to initiate *ex officio* investigations of human rights violations, including unequal treatment of individuals. According to Article 15.4 of the Law on Ombudsperson, even if the Ombudsperson starts a procedure on his/her own initiative, he/she needs to obtain an explicit consent from the person whose rights and freedoms have been violated. As noted by ODIHR, „it may at times be difficult or inappropriate to obtain such consent, e.g. if the individual concerned has changed address or is otherwise difficult to reach, or if the continuation of a case may be in the general interest".[38] Prescribing this condition for *ex officio* investigations indeed restrict Ombudsperson's capacity to investigate potentially serious violations of the rights of IDPs because of the specific features of the life in displacement.

[35] See OSCE Office for Democratic Institutions and Human Rights, *Comments on the Draft Law on the Ombudsperson in Kosovo*, para. 54.

[36] See on this „Additional principles concerning the status of commissions with quasi–judicial com–petence" in: Principles relating to the Status of National Institutions (The Paris Principles) A/RES/48/134, of 20 December 1993. See also Article 7 (2) of the „Race Directive" and Article 9 (2) of the "Employment Equality Directive".

[37] As a matter of illustration, the statistics collected by the UNHCR and the Serbian Commissariat for Refugees show that an average IDP household moved three more times after the displacement from Kosovo. See UNHCR and Commissariat for Refugees, *Assessment of the Needs of Internally Displaced Persons in Serbia* (February 2011): 4.

[38] OSCE Office for Democratic Institutions and Human Rights, *Comments on the Draft Law on the Ombudsperson in Kosovo*, para. 49.

5. KOSOVO ANTI-DISCRIMINATION LAW AS THE LEGAL TRANSPLANT

The anti-discrimination legislation in Kosovo, as shown in the previous analysis, suffers from several deficiencies *vis-a-vis* the effective protection of the displaced persons. Here it is argued that there is a link between these deficiencies and the process of drafting the Anti-Discrimination Law.

The legal transplant theory singles out two important aspect of the process of foreign law reception: comparison and adaptation. Comparison is a tool used by the legal drafters to falsify or verify the presence of a link between the „exporting" and "receiving" legal systems. While in the past this link was mostly sought in the similarity of the legal traditions, today the point of departure is the functionalist theory according to which what matters is not the origin of the legal transplant but the goal of reception. As argued by Zweigert and Kotz, the comparative examination should start from the question of what is the social need that the new law is supposed to address.[39] The concept of adaptation, as the second criteria for the successful foreign law reception, similarly stresses the need to adapt the legal transplant to the local conditions characterising the society of reception.

The characteristics of the Kosovo anti-discrimination legislation suggest that in the process of transposition of the EU equality standards in the local law, UNMIK was lead by the "prescriptive content-based approach"[40]rather than by the criteria formulated by the legal transplant theory. This approach, „holding out rules, practices, and institutions found in Euro-America as models for adoption,"[41] often relies on what Miller calls „the legitimacy-generating transplants".[42] This can be easily observed in the proclaimed *ratio legis* for the adoption of the Anti-Discrimination Law. As stated by one of its key drafters, Gregory Fabian,[43] the Law was enacted with the aim of fulfilling the duty of the au-

[39] France Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (Oxford: Oxford University Press, 3rd ed., 1998).

[40] Randall Peerenboom, „Toward a Methodology for Successful Legal Transplants," *The Chinese Journal of Comparative Law* 1, no. 1 (2013): 19.

[41] Ibid.

[42] Jonathan M. Miller, „A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process," *American Journal of Comparative Law* 51 (2003):854–67.

[43] Gregory Fabian, „Implementation of the Anti–discrimination Law in Kosovo: A Plan in Need of Execution," (31 January 2006), http://www.errc.org/article/implementation–of–the–anti–discrimination–law–in–kosovo–a–plan–in–need–of–execution/2459.

thorities in Kosovo to align their legislation with relevant European and international standards:

„The Provisional Institutions of Self-Government shall be responsible for aligning their legislation and practices in all areas of responsibility with relevant European and international standards and norms, with a particular view to facilitating closer economic, social and other ties between the people of Kosovo and other Europeans, and in awareness that respect for such standards and norms will be central for the development of relations with the Euro-Atlantic community".[44]

Other features of the law-drafting process also suggest that the functionalist theory is of little avail in the attempt to understand what guided UNMIK's legislative work in the anti-discrimination field. There is scarce if any significant similarity between the western European legal systems, from which this legal transplant was taken, and the post-conflict reality of Kosovo. The EU anti-discrimination legislation has been applied in societies characterised by more than 60 years of uninterrupted peace and stable legal and institutional systems. Kosovo, on the other hand, just went out from the civil war, its institutions are fragile, there is tense relationship between the ethnic groups and discrimination continues to permeate the everyday life of its minority communities.

The lack of fine-tuning of the legal transplant to the local conditions is especially evident when one analyses it in relation to the existence and the specific position of IDP population. As shown previously, the Kosovo Anti-Discrimination Law does not contain a single provision that refers directly or indirectly to IDPs. In fact, these pre-conflict inhabitants of Kosovo are left outside of its scope of application. Here, as already noted, the question arises why UNMIK, while drafting the Anti-Discrimination Law, failed to observe the UN-developed human rights guidelines for the protection of IDPs?

For the end, as Twining points out, even if there was vagueness of what principles should be observed when transplanting the law, „one common assumption seems to be that if it has survived for a significant period 'it works'".[45] Since the question of the efficiency of the analysed equality legislation remains outside of the scope of this paper, in this context it could just be useful to note the fate of the Anti-Discrimination Law. Namely, the Law has been so rarely in-

[44] Section 5.7 of UNMIK Regulation No. 2001/9 On the Constitutional Framework for Provisio–nal Self–Government in Kosovo.

[45] William Twining, *„Diffusion of Law: A Global Perspective," J. Legal Pluralism and Unofficial L.* 1 (2004): 16.

voked before the courts in Kosovo[46] that in 2013 a process of drafting the new law was initiated.[47]

6. CONCLUSION

The diffusion of international and regional human rights standards across the national legal systems has become a steady feature of the globalized world. By using the human rights standards as the globalised „peace tool", the peace-building missions have been playing an important role in that process.

As it was the case in many other post-conflict societies, UNMIK attempted at transposing the international and European human rights standards into the local legal system through the process of „human rights domestication". The major international and regional human rights instruments were made directly applicable in Kosovo and a number of new laws were adopted with the aim of enriching the domestic legal system with the progressive human rights standards. The adoption of a comprehensive Anti-Discrimination Law was an important part of this strategy.

Yet, as shown by the above analysis, instead of considering the needs of the society to which the new legislation was supposed to serve, UNMIK used the EU equality laws as „one-size-fits-all" blueprint. This lead to the adoption of the law – as illustrated in the way its provisions disregard the existence of IDPs – that could not answer the many equality challenges faced by this post-conflict society.

The case study could be useful in understanding the capacity of globalization to export liberal values and mechanisms. After the conflict, the legislative activity in Kosovo was fully controlled by UNMIK as an international agent, meaning that any possible deficiency of its legislative outputs could not be ascribed to the resistance of a sovereign state. Yet, as shown on the example of drafting the new anti-discrimination legislation, this UNMIK's legislative project suffered from the number of limitations that undermined the entire concept of the human rights norms diffusion.

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Anti-Discrimination Law No. 2004/32.

Assessment of the Needs of Internally Displaced Persons in Serbia (February 2011): 4.

[46] See, for instance, Bertelsmann Stiftung, *BTI 2012 — Kosovo Country Report* (2012): 22.

[47] According to the information provided by the representative of the OHCRH Office in Kosovo, during the interview held on 21 May 2013 in Pristina (notes on file with the author).

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АНТИДИСКРИМИНАЦИОНИ ПРОПИСИ У ПРИМЕНИ НА КОСОВУ НАКОН 1999. ГОДИНЕ, ИНТЕРНО РАСЕЉЕНА ЛИЦА И МЕЂУНАРОДНИ СТАНДАРДИ ЗА ЗАШТИТУ ОД ДИСКРИМИНАЦИЈЕ

Резиме

Општи закон против дискриминације на Косову је ступио на снагу 2004. године. Усвојиле су га Привремене институције самоуправе предвођене УНМИК-ом и другим међународним организацијама које су у то време управљале провинцијом. Закон је написан по узору на два главна правна акта Европске уније у области заштите од дискриминације, такозвану Директиву о расној једнакости и Оквирну директиву, одражавајући настојање законодавца да његове одредбе буду у складу са највишим европским стандардима.

Реферат сагледава одредбе примарног антидискриминационог законодавства на снази на Косову у светлу потреба интерно расељених лица, које су као такве заштићене посебним међународним стандардима. Анализа је спроведена на два начина. Прво су релевантни закони поређени са стандардима Европске уније у области заштите од дискриминације. Потом, осврнувши се на постојање више од двеста хиљада интерно расељених лица, ауторка истражује да ли је и у којој мери законодавац приликом доношења новог закона узео у обзир посебне потребе ове групе.

Закључак спроведене анализе је да је приликом усвајања нових антидискриминационих прописа на Косову УНМИК био руковођен пре потребом да задовољи своје уско дефинисане циљеве, него да омогући адекватан ниво заштите од дискриминације. Нови Закон против дискриминације тако представља пример правног трансплanta неприлагођеног специфичним околностима које карактеришу живот на Косову након конфликта из 1999. године.

Кључне речи: антидискриминационо законодавство, Косово, интерно расељена лица, стандарди Европске уније за заштиту од дискриминације, правни трансплант.