Black hole state: human rights and the work of suspension in post-war Kosovo

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*Much has been made of the Agambenian framework of exception and the regime of legal suspension it establishes. This article ethnographically examines the hard work that is required to produce legal suspension within the parameters of the law by looking at the practice of property restitution of transitional institutions in post-war Kosovo. Kosovo’s ‘black hole state’ reveals how the legal bureaucracies established to usher in human rights serve to perpetuate the state of suspension rather than realising their utopian goals.*

‘Kosovo is a black hole state in the EU’ concluded Mr J., the first National Ombudsman of the then five-year old, self-proclaimed, only partially recognised independent state. Mr J. had left the position of Ombudsman a few years before our discussion and was now working as a consultant for various human rights organisations. His words seemed to suck in the hopeful glow projected by the glossy human rights adverts plastering his office walls like so many lodestars.

According to the 2008 Kosovan constitution, written in collaboration with EU and American constitutional experts in the months preceding the Declaration of Independence of 17 February 2008, the European Convention on Human Rights (*echr*) is directly applicable in Kosovo. This means that the principles and jurisprudence of *echr* take precedent over national law. In practice, however, Kosovan citizens do not have access to the European Court of Human Rights (ECHR) in Strasburg. As Mr J. elaborated: ‘according to Article 6 of the [European] Human Rights Convention, which is part of our Constitution, we should be able to have access to justice. We should be able to go to Strasbourg. But we cannot because Kosovo’s independence is not internationally recognised’.

Kosovo as a black hole state is a utopian space in the literal sense of *ou-topos*, ‘nowhere’ in ancient Greek, a largely unrecognised entity of disputed sovereignty at Europe’s
frontiers. It is also a paradigmatic example of post-Cold War human rights utopianism for the liberal, perfectionist project it represents, and its intrinsic paradox. Indeed, post-conflict Kosovo is hailed as both one of the greatest achievements and most sour demises of the idea of universal human rights. Kosovo is a utopian space because it embodies the ideal of universal human rights in its very constitutional foundations. Its claim to sovereignty, in fact, stems from an international intervention which was justified (a posteriori) as just and moral: the first war fought to protect human rights.

At the same time, Kosovo’s black hole state is also a utopian space because it is trapped in the constant deferral of the realisation of the very idea of a ‘good place’ (*eu-topos*) that constitutes its present juridico-political form. This paradoxical feature stems from human rights’ shortcomings in the present, as a project conjugated in the future tense. Human rights standards are anchored in a perpetual striving for social improvement that is inevitably always in conflict with the realities on the ground. Such utopian work, which Derrida has called ‘messianic’, inexorably falls short of its utopian aims (Kosnoski 2011; Derrida 1994). The promise of human rights is stuck in recurring incompleteness and iterative ‘messianic disruption’ (Douzinas 2000: 378-379). Kosovo’s population is deprived in the present of the right of access to the ECHR because of the very hope that Kosovo might one day be recognised as a fully-fledged, European state.

This double bind, rather than being an opposition in terms, is inherent to 20th century human rights utopianism, a paradoxical condition which Hannah Arendt alerted us to: that the invocation of human rights often occurs at the very moment when those rights are being taken away (Arendt 1968 [1948]; see also Perugini and Neve 2015). Samuel Moyn sees the liberal notion of human rights as being mostly concerned with minimalist, ‘slow and piecemeal reform’ (2010: 4). But maximalist, perfectionist liberalist tendencies have very regularly invoked human rights to aggressively push for institutional reform and social betterment through the banal but not necessarily less violent curtailment of the very rights such schemes
aim to universally implement, ‘for no means—even the most violent—can be abjured when perfection is the goal’ (Popper 1986: 6; see also Sarat et al. 2014: 6).

Kosovo’s black hole state and the paradoxical effect of international tutelage on the human rights situation have been described in the language of exception. Building on Giorgio Agamben, Mariella Pandolfi, for example, has portrayed Kosovo as being locked in a normalised and permanent state of exception: ‘a state of limbo of inclusive exclusion on the threshold of Europe’ (2010: 155). Agamben (1998) tells us that a state of exception’s correlate regulatory regime is legal suspension: ‘The exception is an element in law that transcends positive law in the form of its suspension’ […] ‘What is excluded in the exception maintains itself in relation to the rule in the form of the rule’s suspension. The rule applies to the exception in no longer applying, in withdrawing from it’ (17). […] ‘The state of exception is thus not the chaos that precedes order but rather the situation that results from its suspension’ (18).

Agamben’s state of exception and the concept of regulatory suspension are useful analytical tools to understand the juridico-political framework of the European post-war period, and the normalisation of the paradox of human rights utopianism more generally. The state of exception is used to justify the suspension (or even annulment) of certain rules and to legitimate extraordinary forms of intervention by invoking a state of emergency that these interventions were supposed to tackle in the first place (Pandolfi 2010: 153).

In this article, I draw on my discussions with national and international legal professionals and the observations of quotidian legal practice carried out over 14 months between 2012 and 2013 within the post-war apparatus of property law, to engage with how Kosovo’s utopian black hole state operates in the everyday. Property law, the domain in which I carried out my research, is an apposite site to observe the utopian work of legal professionals in action and how they work the ‘black hole’ system from within. Resolving property issues was seen as central to state-building efforts and re-establishing the rule of law,
on the one hand to allow for the return of displaced Kosovo Serbs, and on the other hand to create the preconditions for Kosovo’s economic development. At the same time, as I will detail, property law was itself especially full of black holes, making property judges and their staff masters at navigating this very uneven legal territory. In this article, I focus on an instance that pushed the limits of the black hole system and that throws into sharp relief the modalities of discordance at the heart of the nebula, that which makes it beat. The first section looks in greater detail at what the transitional state looks like and the kind of black holes national and international legal professionals encountered in the everyday. The chaos of transition, I advance here, is not a systemic failure, but intrinsic to how the transition operates, in suspension.

Agamben’s framing, however, does little to explain how the law actually operates within such regime. What happens to law in situations of increasingly banal but often perfectly lawful exceptions to international human rights law? Agamben explains that a state of exception doesn’t abrogate the juridical order as such, rather creating ‘a zone in which application is suspended, but the law [la legge], as such, remains in force’ (Agamben 2005: 31; pace Cooper-Knock 2018: 25). Law is not abolished, but certain rights are more banally undermined or subverted (Fassin and Vasquez 2005: 391). The second section of the article looks at one exemplary instance of banal subversion, which led to a crisis of interpretation from within the legal apparatus.

Following Mark Neocleous, the key to understand how legal suspension actually works ‘is the acknowledgment that “evading legal difficulties” takes place. This evading often involves some real casuistry […] and serious attempts to interpret the law from within’ (Neocleous 2006: 205). In the case presented here, legal difficulties were not evaded, but argued over between the different judicial organs involved in the property restitution process. These arguments, which I present in the third section, show how legal professionals work the
system from within: interpreting the system as a way of grounding, of normalising, and of contesting it, by way of legal reasoning, casuistry and the construction of a jurisprudence.

Much like the invisible hand of the market, suspension is no mean feat. It requires heavy bureaucratic and legal lifting. Suspension demands constant renegotiations of legality and reasonableness. The result is not only unstable, but always contingent. While this is, in effect, always the case, in any context, the articulating and ritualising of hegemonies, which are more easily concealed in stable situations, are laid bare and hence more easily ethnographically graspable in a situation of crisis (Greenhouse 2002; Herzfeld 1993; Moore 1993). The black hole state is thus, counter-intuitively perhaps, a black box that is more easily prised open than a tight-knit, seemingly ‘ordinary’ and accomplished sovereign state.

The chaos of transition

The international intervention in Kosovo is emblematic of the 20th century utopian project of realising human rights (Douzinas 2000: 129). The NATO military intervention, carried out to prevent further grave human rights violations, was followed by unprecedented UN involvement in the peace building and reconstruction process. Shortly after the end of the war in 1999, The UN passed resolution 1244 and established UNMIK, the United Nations Administration Mission in Kosovo. This international involvement was marked by an emphasis on establishing the rule of law, that is, the safeguarding of human rights and the promotion of ‘good governance’ through institution building, and a short term, technical-legal approach to ‘transition’.

The goal was to help Kosovo on its way to becoming a functioning, ‘modern’, EU-compatible and multi-ethnic state. This, to act as a buffer state on the EU’s outside borders, but also to mitigate tensions with Serbia and avoid territorial divisions along ethnic lines. While this was the long-term goal, the international territorial administration operated from the beginning in a logic of emergency and security risk management from the humanitarian
The declaration of independence on 17 February 2008 marked a new chapter in Kosovo’s post-conflict transition. However, independence didn’t solve the issue of Kosovo’s disputed sovereignty — only about half of the world’s states recognise it — nor did it end the perpetuation of Kosovo’s international tutelage and emergency rule. On the contrary, independence served to entrench international institution-building as the condition of Kosovo’s newly self-asserted statehood (Pandolfi 2010; Sahin 2013). The constitution is a case in point: it was drafted with the help of EU and US experts as a stepping stone towards realising the utopian goal of a viable EU compatible state but that included transitional provisions that stipulated a continued role for the international community in Kosovo, especially for its judiciary.

As part of this continued institutionalisation, UNMIK was succeeded in 2008 by the European Rule of Law Mission in Kosovo (EULEX). From the perspective of these allegedly apolitical international custodians of sovereignty, Kosovo was transitioning not only from war to peace but also from allegedly nothing — the famous ‘tabula rasa’, i.e., no infrastructure, no functioning institutions, no homogeneous legal framework, etc. — to rule of law. In that logic, establishing the rule of law and protecting human rights were seen as the best tools for, and ultimate goals of, such a transition. Sovereignty issues were transformed into technical problems that required international solutions because of the perceived governance ‘failure’ of not only the former Yugoslav institutions, but also of Serbia (Sahin 2013: 25).

The national courts, in this context, were seen as unable to cope with the demands and requirements of such technocratic, human rights-compatible rule. One solution to this was to pump in international legal professionals charged to draft legislation, train ‘locals’, do MMA: monitoring, mentoring and advising, and oversee ethnically sensitive legal cases. Another was to create special courts and quasi-judicial institutions independent from the national judiciary.
(which was also led, to a certain degree, by international staff) to deal with some of the most pressing and contentious property issues: the privatisation of socialist immovable assets (The Privatisation Agency of Kosovo, PAK) and war-related property restitution (The Kosovo Property Agency, KPA). These agencies had time-bound, technical, mandates to find quick solutions without digging too deep into the murky waters of sovereignty issues.

However, the lack of a shared information system among the entities dealing with property law (the civil courts, the independent bodies such as PAK and KPA, the Kosovo Cadastre Agency, as well as the Supreme Court) made it very difficult for judges acting at the municipal level and cadastre officials, for example, to understand and thus respect the mandates of PAK or the KPA. This led to constant jurisdictional conflicts, and of contested views about the appropriateness of the regulatory framework of the internationally-managed independent bodies. For instance, because the KPA was inscribed in the constitution as an independent institution, it operated under *sui generis* procedural rules that, according to its staff, superseded the national legal framework. As we shall see in the next two sections, the primacy of those rules over national laws was contested by the judges of the Supreme Court KPA Appeals Panel (hereafter Appeals Panel).

The international protectorate that UNMIK established saw itself as a way out of the chaos of war and the discriminatory politics of late Yugoslav rule into an efficient and accountable regime. During the conflict itself, Albanians were first displaced *en masse*, then, following the international intervention and the retreat of Serbian forces, Kosovo Serbs fled to Serbia and neighbouring countries and the returning Albanian often occupied their abandoned properties. During their retreat, Serbian forces removed a large part of cadastre and civil registers, leaving Kosovo without reliable information in those two key domains of governance. My informants also complained that property law was itself full of black holes. Older (1970s to 1980s) laws lacked commentaries, some laws mentioned in property documents were missing altogether, previous but still applicable rules conflicted with
subsequent legislation, and what remained of the old Yugoslav legislation and commentaries had not been translated into English.

The transitional legal system and its regulations added a layer of uncertainty to what was decidedly not the imagined ‘tabula rasa’ but rather both a complex apparatus and a complex palimpsest of laws still relevant to contemporary property relations, from the Ottoman empire to the Yugoslav kingdom and later Federal Socialist Republic, to the discriminatory laws of the Milošević era. The uncertainties of transition rather than mitigating, compounded the already existing problems. Procedural rules were constructed from scratch, and UNMIK regulations were drafted in a ‘very poor, unprofessional’ and ‘superficial’ manner according to the national and international judges.

UNMIK, in a salient example, failed to provide a list of discriminatory laws that should be repealed, leaving each judge to make their own interpretation and decide on a case-by-case basis which law applied when, and how. Neither UNMIK nor EULEX seemed keen on consolidating what the national Appeals Panel judge coined the ‘ocean’ of property law. Legal professionals had to rely on ‘flimsy regulations’ and ‘cryptic rules’. ‘When they have problems’, the Appeals Panel judge continued, ‘the judges go to their older colleagues. There is no reliable text’. The new ordering devices that the international bureaucracies of UNMIK and EULEX created to make a ‘fresh start’ thus compounded the existing judicial chaos.

**Adhocracy and the ‘good enough’ of property restitution**

Elizabeth Dunn has characterised humanitarian intervention as adhocracy: a system which uses ‘rough-and-ready ways of knowing to quickly arrive at improvised solutions’ (Dunn 2012: 15); a system that implements ‘good enough’ measures, even if they do not correspond to the population’s needs (Dunn 2012: 14). For Dunn, the ad hoc-ness and the ‘good enough’ are intrinsic to the system, not a deviation from ‘proper’ or normal functioning, or its
abrogation (Dunn 2012: 19-20). They stem from the humanitarian bureaucracy’s ways of knowing and acting.

Similarly, the chaos of reconstruction created by the juxtaposition of the crisis of the war and of the crisis of transition — in other words the structural conditions of exception — is not simply a failure or shortcoming of implementation but intrinsic to the ways in which the legal bureaucracies of UNMIK and EULEX have grasped post-war issues and governed the transition. The ‘good enough’ is predicated by a short-termist and technical approach to solving issues. Property restitution, with a mandate limited in time, scope and funding, is a good example of such practice, which took the form of a mass claims mechanism: property claims had to be submitted within strict deadlines and were adjudicated in large batches of similar legal scenarios.

The restitution agency, the KPA, was conceived as a ‘bridging’ solution of transition to ‘resolve’ war-related property rights. The KPA mandate defined war-related property loss within a strictly limited time window of 27 February 1998 to 20 June 1999. This time window had the effect of excluding most Kosovo Albanian war-related property issues (except for claims to property situated north of the Ibar River in the Serbian-dominated part of Kosovo) from the mandate of the agency, as they had often lost possession of their properties before the conflict proper. The international community put a premium on the return of displaced Kosovo Serbs as a way of promoting multi-ethnicity through the liberal formulation of ‘property rights are human rights’.

The focus on private property and ownership meant that ownership claims superseded other issues, including discrimination in property allocation and fraudulent property transactions, which had contributed to the conflict in the first place. By affirming the universality of the right to property and to property restitution, such a framing removed community-based divisions and conflicts from the remit of property issues tackled by the agency. It thus made it impossible to redress underlying, older historical injustices that might
have happened before the more recent claims of war-related loss of property. This limitation was justified in the name of human rights and the respect of ‘neutral’ rule of law principles.

Property restitution was to be a short-term, technical-legal human rights project rather than an inclusive, national process of righting past wrongs. The KPA regulation (i.e. UNMIK reg. 2006/50 and related Administrative Directions, transformed into a Kosovo law in 2008) was thus not a restitution law aimed at legitimising a certain political reading of history over time. It was an extraordinary measure, and the KPA was given leeway to implement its mandate as long as it did this in a ‘reasonable’ manner considering the circumstances of transition.

The practice of notification adopted by the KPA is a good illustration of how the agency interpreted its mandate. Its rules of procedures stipulated that when someone lodged a claim for a property, the notification team had to physically go inspect the property and put up signs that it was being claimed so that potential other parties (the current occupiers, e.g.) could constitute themselves as respondents to the process. However, the lack of reliable cadastre and geodesic data made it difficult to make sure that the properties claimed were in effect the properties that the KPA had identified.

In 2009, it became evident that about thirty per cent of all claims notified over the past three years had been wrongly notified. ‘Wrong notifications’ as they were called — notifications that did not follow ‘Standard Operation Procedure’ or were performed on the wrong property — were a problem that took on such an amplitude that international donors and the Appeals Panel alike started doubting the credibility of the entire KPA process: what was the point of property restitution if the physical location of properties claimed was put in doubt? If occupants were not duly informed of the procedure, how could they constitute themselves respondents to the claiming process? All these cases had to be notified again, while decisions for cases that had already been adjudicated were quashed and the cases reopened, costing the agency precious time and money, and doing damage to its reputation.
To save time and appease international donors (the agency’s main source of funding) after the notification fiasco of 2009, the KPA Supervisory Board (in agreement with the three KPA claims commission members) decided that the KPA should start using an alternative notification procedure it called ‘notification by publication’. Instead of physically identifying properties claimed and notifying potential respondents of the claiming process in person, notification was now to be performed via the publication of the claims’ information in Kosovo and Serbia-wide newspapers and on notice boards in municipal offices. Potential respondents were themselves responsible for taking note of the published information. This was mostly done for certain types of single-party claims, including a great number of agricultural cases. Out of the 42,749 claims processed by the agency, about 30,000 cases were notified this way.

This practice elicited mixed responses from the Appeals Panel team and some KPA lawyers, who called into question the reasonableness of such due process measures. They thought that notification by publication was insufficient to ensure that potential respondents know about their property being claimed; physical notification was fairer and more likely to reach potential respondents. KPA lawyers knew of no cases notified by publication that had been contested by a responding party. Yet, they also accepted the constraints of working in a transitional context and recognised the limitations of the institutional and legal set-up under the premise of ‘providing human rights’.

**Negotiating reasonableness**

‘When Kosovo declared its independence in 2008, the international community didn’t declare the new constitution void. They just said, “We’re very worried”. What were we supposed to do, us international judges? Pack our bags and leave?’ Judge A. and I were sitting at a small table outside a café in Pristina’s old town centre. He had walked a kilometre from his office to meet with me, not wanting colleagues or parties to interrupt our conversation, but also
because he avoided recurring patterns. As one of the top judges of the Privatisation Agency, his safety depended on it. When I met him in April 2013, Judge A. had been in Kosovo for five years, and he was about to leave. One of the first international judges seconded to EULEX to take office, he had arrived in the country just after the 2008 declaration of independence.

Because the declaration of Independence had not been agreed to by the UN Security Council, the ensuing Kosovo Constitution was, according to most commentators, illegal and hence not applicable. But as Judge A. said, the international community hadn’t explicitly said so. How were legal professionals supposed to navigate this legal limbo? As he continued,

Judges apply the law, but the establishment of the legal material is an executive task. No judge can create his own code. We were left alone with this. I’m bound to act with the means that are provided to me. Then I say, of course I could go away and dismiss everything as inadmissible. But from another point of view, our mandate is to distribute justice ethically as per Article 6 of the European Human Rights Convention. Acting in an illegal court is closer to this higher goal than going away. This is what we call ‘Notstand’ in German: urgency or emergency. You get means attributed by the law which you don’t have in a normal situation. We even increase this emergency if we close the courts. We would be even further away from fair trial, from Article 6, but also from UNMIK regulation 1244 and the Athisaari plan. So we stayed, which pleased our national colleagues very much… We do what we can with what we have.

For Judge A. and many others, it boiled down to respecting echr. Doing ‘what we can with what we have’ rather than leaving or closing the courts was a better way of working towards that end. In a black letter law understanding, one could surmise that article 15 of the echr — that under circumstances of emergency a signatory state may take measures derogating from its obligations — would be invoked to justify Notstand (Agamben 2005: 23; see also
Humphreys 2006: 678). However, the situation is more complex than that. The attitude of the legal professionals I worked with is that they should be striving to work for human rights even under imperfect circumstances. This higher goal justifies muddling through, including the lowering of standards of due process precisely because Kosovo is seen as a black hole state at the threshold of European human rights jurisdiction.

The political ideology of suspension — transitionality in our case — is built on the premise that the particular circumstances of post-war reconstruction justify why things do not work as well as expected. Ruti Teitel thus suggests that in hyper-politicised moments of transition ‘the law operates differently, and often is incapable of meeting all of the traditional values that are associated with the rule of law, such as general applicability, procedural due process, and more substantive values of fairness or analogous sources of legitimacy’ (Teitel 2014: 4). ‘What is fair and just in extraordinary political circumstances’, Teitel submits, ‘[is] to be determined from the transitional position itself’ (Teitel 2003: 54-55).

Muddling through under conditions that international judges and lawyers feel fall short of their standards of due process under ‘ordinary circumstances’ is justified by reference to the echr. Doing ‘the best one can’ in the spirit of the echr operates as a self-justifying ethos for implementing ‘good enough’ remedies. The threshold of reasonableness legal professionals use is lower than in their own countries because the normality of transition as permanent emergency requires and justifies ‘necessary adjustments’: for judge A. and his colleagues at the Appeals Panel, including the head judge, judge M.: ‘rough remedies are better than no remedies at all’. But what does doing ‘what we can with what we have’ actually mean in practice?

P., the registrar at the Appeals Panel explained: ‘The whole situation was and still is extremely chaotic. You have to be more flexible and open [than under normal circumstances]. It leaves more room for interpretation’. And indeed, while utopian work is inherently disruptive (Douzinas 2000), working for human rights under circumstances where the
threshold of normalcy is lower than ‘ordinarily’ does not boil down to impunity or unchecked executive decisional powers. It rather translates into casuistry, and the interpretation of what can be deemed reasonable, that is, in this case not the production of a ‘permissive’ (illegal), relational space of impunity that Sarah-Jane Cooper-Knock describes (Cooper-Knock 2018), but rather to negotiations of a space of reasonable legality.

Negotiations of reasonableness are a form of legal interpretation from within. The casuistry of transition emanates from differing legal interpretations. And for this work of interpretation, as evinced in Judge A.’s statement above, Article 6 of the echr is key. Due process, in such an understanding, is based on Article 6 that ensures certain rights to claimants, such as access to and exclusivity of claims proceedings, the impartiality of adjudication, as well as the fairness, timeliness, finality, and implementation of decisions (van Houtte and Yi 2008: 83). However, the same article is also invoked to allow for ‘specific circumstances’ of emergency to ‘lead to some flexibility’ (van Houtte and Yi 2008: 70). Indeed, Article 6 is also an important doctrinal source in international human rights law for defining ‘reasonableness’ as ambiguous and context-dependent (Corten 1999: 613).

The key contention between the factions of the judiciary, including the KPA and the Appeals Panel was how to assess the reasonableness of the due process measures taken at different levels. In the specific case of property restitution, the language of the KPA mandate dictated that solutions had to be efficient yet ‘reasonable’ considering the mass claims limitations and exceptional circumstances of transition. For reasons sketched out above, the KPA created and assessed its own due process solutions. It could decide what constituted ‘reasonable efforts’ and when those efforts had been realised, without having to comply with general rules. But the judges of the Appeals Panel and some lawyers at the KPA defined reasonableness differently in seeking to ensure compliance with Article 6.
For the latter, notification by publication was insufficient to ensure that potential respondents knew about their property being claimed. As one KPA national lawyer I discussed with reasoned:

KPA is faster than the courts. But for me, there are serious violations of human rights when we notify by publication. [...] KPA could have done better. Pressure is no excuse. The goal should be to do the job well, not just to get it over with. I don’t think the KPA claims reflect the real situation, especially in uncontested cases because of the notification by publication. I’ve never seen a claim where people actually responded to notification by publication. A lot of these claims are not properly adjudicated because of that. It doesn’t solve the situation.

Still, the KPA commissioners decided that notification by publication was a ‘reasonable effort’ considering the circumstances. To judge M., this was unacceptable: ‘How are people to know that they have to check if their property is under scrutiny or not? It’s not normal for them to go to the municipality to check the notice board’. She added, apologetically, ‘The KPA are very insecure about what to do. Notification by publication is not good enough, but sometimes it is necessary’. And this ambivalence was perpetuated. The Appeals Panel judges eventually issued an opinion that notification by publication was insufficient. Yet they also recognised the institutional contingencies that curtailed or redefined due process in the way the KPA worked. They considered these shortcomings necessary under the circumstances. Judge M. continued: ‘It’s not a criticism, a mass claim mechanism leads to rough justice. You cannot afford to go into detail’.

For her, the KPA’s solutions were neither illegal nor outside the law, they were ‘good enough’ considering the circumstances, and judge M. had to be realistic: The Appeals Panel, she explained, had very limited capacity to reverse the legal opinions taken by the KPA commissioners. It did not have the means to carry out independent investigations and hearings and it was not clear whether Appeals Panel judges had the power to send decisions back to the
KPA if those did not comply with the judges’ opinion. Ultimately, the Appeals Panel operated under the same logics of legal suspension, also justifying its own limitations by invoking the exceptional circumstances.

Nonetheless, the Appeals Panel’s criticism did not go unnoticed. The international staff at the KPA reacted with annoyance and anger at what they saw as a profound misunderstanding of the KPA’s exceptional mandate and of donor pressure. Here in the words of D., a senior international lawyer:

[The Appeals Panel] didn’t bother finding out about or reading our procedures. This is lazy lawyering by the judges. […] They didn’t take what the UNMIK regulation call the ‘reasonable means’ for notification under consideration; they didn’t consider the present circumstances KPA faces, with 40,000 claims to adjudicate and financial difficulties. There was a huge debate regarding notification by publication. Is it enough? But we had no choice, we had to continue; otherwise the donors would have bailed out.

As judge M. expressed, the judges at the Appeals Panel saw their role as a way to ‘soften’ the limitations of the restitution process ‘according to the spirit of the law’. To them, negotiating the modalities of ‘reasonable’ due process measures meant upholding their professional project of ‘working for human rights’.

My informants also all agreed that rough solutions were better than doing nothing at all. Although the international staff at the KPA and the judges of the Appeals Panel had differing opinions as to what was ‘reasonable’ under transitional circumstances, the idea that transition was a state of exception that justified pragmatic adaptations of due process was not itself questioned. These divergent interpretations of ‘reasonableness’ were not a questioning of the philosophical, let alone the political foundations of property restitution. The judges differed in their views on the reasonableness of KPA procedures in light of their interpretation of the spirit of the KPA mandate and of echr’s Article 6. These divergences emanated from
the language of the law as manifested in the term ‘reasonable’: ‘The use of “reasonable” [in law] rests on the possibility of maintaining divergent interpretations. It excludes fixed, static and definitive interpretations’ (Corten 1999: 620). As such, the black holed and liminal legal framework of transition itself dictates the framework of knowledge and the limits of action.

Building castles in the sky

The rebuilding of Kosovo’s judiciary is emblematic of post-1980s of transitional justice, which moved away from ideals of restorative justice and national reconciliation to focus on the strengthening of state bureaucracies through the fostering of liberal constitutionalism, rule of law, and human rights (Anders and Zenker 2014: 404; Di Lellio and McCurn 2013; Subotić 2012; Teitel 2003; Wilson 2001). Similarly to Richard Wilson’s analysis of the Truth and Reconciliation Commission in South Africa, perhaps the greatest ‘tragedy’ (Goodale 2012) of such transitional justice instruments is that somewhere along the way of purporting to rendering justice in the name of human rights, they lost sight of the very ideological claims of a universal good in which human rights were originally grounded (see also Merry 2016).

The paradoxical effect of international tutelage on the human rights situation in Kosovo has been described in the language of exception. The chaos of transition, however, is not a systemic failure, but intrinsic to the feat of suspension that the transition operates. Suspension does not mean the abrogation of the law but rather the continued functioning of the law under the premises of transition. Acting in this liminal, paradoxical state whereby *echr* is directly applicable but Kosovo has no access to the ECHR demands a constant renegotiation of the tension between legality and reasonableness. Much like under ‘normal’ circumstances, the law is interpreted and negotiated in its application. However, while under ‘ordinary’ circumstances, legality and reasonableness are thought to be almost coterminous, the conditions of transition reveal the hard work required to plug the gaps in the system and deal with the black holes of the transitional judiciary.
Negotiating what is reasonable due process is conditioned by the circumstances of transition: on the one hand, the chaos and adhocracy of the transitional legal apparatus. On the other hand, utopian work justifies working with what you have towards a utopian goal rather than fundamentally challenging the bureaucratic logics of the black hole state. Because human rights are utopian, they are constantly deferred. There is no perfect application of human rights, one can only strive towards making the best out of the situation. In that sense, international judges decided it was better to stay and work towards Article 6 of _echr_ within a very messy and incoherent judicial framework than leave. But because it can only be imperfect, the threshold of reasonableness can also be lowered, almost at will.

Kosovo’s post-conflict intervention is thus emblematic of what Julie Billaud calls the ‘dark side of utopia’, an elegant analytical shorthand to describe the growing disconnect between ‘the explicit aims of human rights institutions, the bureaucratic apparatuses and technologies that they set in motion and the increasingly harsh reality of life under neoliberal governance around the world’ (2016: page n.g.). This, Billaud argues, ‘reveals the moral faultiness of human rights and their structural incapacity to bring about global justice’ (ibid; see also Niezen and Sapignoli 2017; Müller 2013; Shore et al. 2011). ‘Doing what you can with what you have’ does not result in finding solutions for Kosovan parties and displaced persons, or granting them access to a fair trial as per Article 6 of the _echr_. Rather, it justifies the role of legal professionals within the transitional legal bureaucracy, and their part in perpetuating it.

In 1922, Lewis Mumford wrote, ‘Our most important task at the present moment is to build castles in the sky’ (1922: 307). A century later, human rights utopianism has been thoroughly subjugated by the political forces of exceptionalism and legal suspension. We should not stop building castles in the sky, but we should know that the cost of the work of suspension comes at the expense of those for whom the castles are purportedly being built.
Bibliography


