9

Law-Washing the Transitional State

The Practice of Property Restitution in Postwar Kosovo

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Following the North Atlantic Treaty Organization's (NATO) military intervention and a very wide-ranging United Nations (UN) peacekeeping and administration mission, Kosovo is nowadays the site of the largest civilian mission of the European Union outside EU borders.[1] The armed conflict of 1998–99, which was fought along ethno-national lines, led to mass atrocities and to the destruction of more than half of the available housing stock. During the conflict, Kosovo Albanians (who form the majority of the Kosovan population) were first displaced en masse, then, following international intervention and the retreat of Serbian and Yugoslav forces, Kosovo Serbs fled to Serbia and neighboring countries, and the returning Kosovo Albanians often occupied their abandoned properties.

In the aftermath of the war, to resolve the urgent issue of property rights and thus create preconditions for the return of displaced persons, the UN set up a quasi-judicial, administrative mechanism called the Kosovo Property Agency (KPA).[2] Staffed predominantly by Kosovo Albanian national legal professionals and a few international jurists, the KPA was entrusted to deal with war-related property claims submitted overwhelmingly by Kosovo Serbs.

Throughout Kosovo's internationally supervised postwar transition to (contested) independence, respecting human rights was, and still is, seen as a precondition of international recognition and, potentially, eventual accession to the European Union. The key measure of this is the

[1] EULEX's current mandate ends on June 14, 2025.

[2] The KPA started its activities in 2006 and is, in fact, the second property restitution mechanism put in place by the UN. The KPA incorporated the mandate of the previous mechanism, the Housing and Property Directorate (HPD), which was set up right after the war and only dealt with housing and possession rights.

constitutional protection of minority rights and the implementation of the rule of law. The restitution of property lost during the war to displaced Kosovo Serbs (the former "oppressors") was a cornerstone of achieving this. But what does protecting minority rights and implementing the rule of law mean in practice in such a context?

Relatively powerless and underfunded, the KPA is a paradigmatic example of a contemporary transitional justice mechanism that is understood as a short-term, bridging, technical-legal project rather than a national process of righting past wrongs. With rule of law understood as a tool of good governance, the KPA espoused neoliberal managerial logics of efficiency to organize its mass claims procedure. To "streamline" the process and allow for the "quick" and "efficient" resolution of claims, it created an "assembly line" for the production and processing of case data, and decisions were issued in batches of claims of similar legal scenarios.

In this chapter, I conceptualize the work of the KPA as "law-washing" as a characteristic move of the post-cold war juristocratic phase of international intervention and international law more generally. Law-washing involves the use of legal language and procedures to give the appearance of legitimacy to practices that may be unethical, illegitimate (or even illegal), or morally questionable. For example, corporate lawyers might engage in law-washing by creating policies or procedures that produce "compliance" with fiscal or environmental regulations but are in fact designed to circumvent those regulations or exploit loopholes. Similarly, a government might engage in law-washing by passing laws or regulations that give the appearance of addressing a particular problem, but in reality do little to solve the underlying issue.

In the context of transitional Kosovo, law-washing is the process through which the fiction of a stable, rule of law-abiding polity is produced. It implies hard legal work and that messy realities are hidden behind a clean façade of rightfulness and due process. These messy realities include an enormous amount of bricolage and negotiating within a patched-together legal system, and a real-political context that makes effective property restitution nigh impossible, as very few claimants were able to come back to Kosovo based on their newly reasserted property rights.

Juristocracy, in turn, should not be understood as the precise description of a particular political system, but as a metaphorical or rhetorical device (Bellamy 2007). In a broad sense, juristocracy is a diffuse and transhistorical ideology by which the judiciary assumes a dominant role

in decision-making and governance, and where law is "overloaded with expectations" as it used in fetishistic, instrumental ways to tackle a range of social and political issues previously not conceived as legal issues. Following the book's premise, this chapter critically examines how legal practitioners and judges I worked with applied (international or constitutional and property) law in the context of war-related property restitution, while also reckoning with the historical and political context in which this legal framework emerged. I analyze the practice of "notification by publication" in the processing of property claims (which I will describe in a later section) as a prime example of law-washing, when taking stock of the limits of the juristocractic overloading of law with expectations became unavoidable.

Looking at processes of law-washing in Kosovo, a context that is commonly depicted as a permanent state of exception (Pandolfi 2010; Mora 2020), allows us to query conventional understandings of the seeming "normal carrying capacities" of law. Rather than being exceptional, law-washing is in fact an integral aspect of making law in juristocratic times: one that is more readily ethnographically captured in seeming situations of permanent crisis, but that is in fact always present, behind the veneer of "normality."

This chapter is based on over ten years of intellectual involvement and fourteen months of "observant participation" as a research intern at the KPA and the Supreme Court KPA Appeals Panel in 2012–13. Here, I describe law-washing through the techno-bureaucratic processing of war-related property claims. This process is accompanied by a political instrumentalization of law. By techno-bureaucratic processing, I mean the juridification and rendering legal-technical of a complex sociopolitical and historical problem, in this case, the property rights of the Serbian minority in Kosovo. From a legal perspective, mass claims property restitution required the lowering of evidentiary and procedural standards. Yet, paradoxically, such a lowering of standards produced "adherence" to human rights and the rule of law, legitimizing the postwar status quo, and Kosovo's existence as a modern sovereign state.

9.1 Juristocracy and Juridification

Law-washing is a distinct modality of international intervention in the name of human rights, using law to justify certain forms of violence and transitional state-building. It shows clear continuity with older logics of civilizing interventionism that can be traced back to eighteenth- and

nineteenth-century liberal rationalism and colonialism, but is a specific product of post-cold war juristocratic times.

Juristocracy, a term first coined by Hirschl (2004), depicts a situation in which law's reach and hegemony attain new heights, where "law-saturated practices" shape social relations in ever more central and ubiquitous ways. The rule *of* law becomes a tool of governance *by* law. Hirschl analyses juristocracy as a tool of interest-based hegemonic preservation (Hirschl 2004: 214), not primarily driven by a genuine commitment to expanding rights, but rather as a means to enshrine the dominant social and political order in law, thereby insulating it from the vicissitudes of everyday politics. He traces the expansion of this new mode of rule to the first decade after the end of the cold war, when foundational nation-building challenges were transferred into the realm of the judicial (Hirschl 2004: 170). As a consequence, law exceeded its previous limits, and was "over-inflated" as a way of coming to terms with no other viable alternatives (e.g., Marxism, see Moyn 2010) and western ideological dominance.

Similarly, Martti Koskenniemi's analysis of international law in the late twentieth and twenty-first century diagnoses its "fall" into the pervasive hold of a form of "managerialism . . . the idea that global problems may be overcome through technical expertise, rather than political struggle" (Koskenniemi 2007; Lang & Marks 2013: 438). It is surely no coincidence that such pessimistic diagnoses coincide with the rise of big international legal bureaucracies and international courts that seek solutions to social and political problems by legal and increasingly bureaucratic and technical means. Liberal triumphalism and the "end of history" meant a lot of faith was put in technocratic rule to find solutions to enduring social, political, and economic claims.

The picture that I draw of transitional state-building as law-washing in Kosovo is a particularly salient illustration of the rise of juristocracy as the ideological handmaiden of juridification in the aftermath of the cold war (Goodale, this volume, p. 125). The transposition of social and political problems in the domain of law has often been called "juridification." Juridification judicializes contentious social problems while dispersing political responsibility for their solution by making them fall under the remit of seemingly apolitical, technical experts (Blichner & Molander 2005; Eckert et al. 2012). This "turn to law" is thus accompanied by a process of "rendering technical," by which power relations and power struggles are depoliticized, especially in the context of international cooperation, through technical, "best practice" solutions (Ferguson 1994; Mora 2023).

While juristocracy in the Global North is a product of post-cold war politics, juridification and techno-politics predate it. Already in a 1940 address, the prominent international law scholar Hans Morgenthau warned interwar liberal international lawyers that "fundamentally political questions such as constituting new orders could [not] be approached in the technical manner of 19th century liberal rationalism, with its belief that a social world can be known and manipulated in the manner of nature" (quoted in Bhuta 2008: 519). In fact, Nehal Bhuta's postcolonial critique of liberal reformism as a political technology draws a direct line from colonial state-building projects in Africa and Asia that "were laboratories for the liberal reformist fantasy that whole peoples could first be grasped as objects of knowledge, and then reconstituted as political subjects through long-term intervention and oversight" (Bhuta 2008: 519).

So, the United Nations Administration Mission in Kosovo (UNMIK)'s intervention in Kosovo should also be seen in continuity with a liberal-rational colonial project of techno-politics. This includes the humanitarian and "mission civilisatrice" impetus to intervention, which was also a key justification for colonialism in the eighteenth and nineteenth centuries. Similarly, a critique from a Latin American perspective shows that what Hirschl terms juristocracy predates the end of the cold war, where political issues – especially regarding the status of indigenous populations – were transposed into the realm of law (Sieder, this volume).

What is specific to the post-cold war period, however, is the "unprecedented ideological hegemony achieved by the liberal democratic states of the West, and the geopolitical hegemony of the United States" (Bhuta 2008: 521), which had the effect of legitimizing new forms of liberal, state-building interventions. In this moment, "democratization, good governance and now, state-building, [emerge] not only as normative ideals, but forms of expertise characteristic of politics-as-technology" (Bhuta 2008: 521). This idea of politics-as-technology leads to the rise of juristocracy, by which these normative ideals, now almost uncontestably hegemonic, become enshrined in law. This, in turn, leads to what Goodale and Zenker (this volume) call "law in excess": the overloading of law with expectations and objectives.

9.2 Juristocratic Transitology

The Kosovo war can be seen as the apotheosis of juristocracy, an international military intervention conducted in the name of human rights that fundamentally changed the face of international law.

Although not sanctioned by the UN Security Council, the NATO intervention and bombing of Belgrade was *violence justified by law in the name of law*.[3] The Kosovo conflict was seen as a "moral or ethical issue, a matter of rights or principles" (Koskenniemi 2002: 161). Whereas cold-war politics were about "a calculation of military force and balance of power," the Kosovo war had become "a matter of moral ideals, self-determination, democracy and human rights" (Douzinas 2000; Koskenniemi 2002: 161). Following the international community's abject failure to protect civilian lives a few years earlier in Bosnia and Herzegovina, the bombing of Serbia by NATO forces was envisaged in humanitarian terms, to "save" the Kosovo Albanian population from Serbian violence. Through this, the international intervention in Kosovo became a determining factor in shaping "what "we" [in the Global North] hold as normal and what as exceptional, and through that fact, about what sort of international law we practice" (Koskenniemi 2002: 162). At the same time, NATO's intervention in 1999 normalized international intervention and brought it within the purview of international law (through, e.g., the indictment of Slobodan Milošević in The Hague).

The NATO military intervention, conducted to prevent further serious human rights violations and civilian deaths, was followed by unparalleled UN participation in postwar peace-building and reconstruction (the only comparable case being East Timor, see Wilde 2008: 11). Very quickly after the end of the war, the UN passed Resolution 1244, which established UNMIK. A keystone of international intervention was the establishment and promotion of the rule of law, that is, the safeguarding of human rights and the promotion of "good governance" via the strengthening of institutions, and a short-term technical-legal approach to "transition."

The goal was to transform Kosovo into a functioning, sovereign, "modern," multiethnic state compatible with possible future EU accession criteria. Thus, it could act as a buffer state on the EU's outside borders, but also mitigate tensions with Serbia and avoid territorial divisions along ethnic lines (i.e., not to reward ethnic cleansing by the

[3] Samera Esmeir makes a similar point about the war in Iraq as a post-cold war site of "transition to democracy" and a "zone of intervention" (Esmeir 2007: 101). She writes that post-cold war "juridico-democracy ... declares the confinement of its violence to the sphere of means employed to the end of eradicating all other violence threatening security. It promises an endpoint of non-violence alongside its own *instrumentalized* violence, and proposes itself as an alternative to other non-juridical formations of violence that themselves anticipate nothing but further violence" (Esmeir 2007).

kind of ethnic federalism established in Bosnia and Herzegovina). While this was the long-term goal, the international territorial administration operated from the beginning in a logic of exceptionality derived from the humanitarian catastrophe of mass displacement that justified the institu tionalization of "interim" governance mechanisms (Sahin 2013).

And in the perspective of these international custodians of Kosovo's sovereignty, the country was not simply transitioning from conflict to peace, but rather was a blank slate waiting to be filled: Where there were no institutions, no infrastructures, and no coherent legal framework the rule of law would now be established. In that logic, safeguarding human rights became the most appropriate tool and ultimate goal of transition. This transformed the thornier questions of sovereignty and living together after conflict into technical issues – and these required international solutions, because of the perceived failure of governance of former Yugoslav and Serbian institutions (Sahin 2013: 25).

The legal apparatus and regulations of transition added a new layer of legal uncertainty to what was clearly not the blank slate imagined by the ideologues of transition, but rather a complex, historically grown judicial system and a complicated palimpsest of property laws still eminently relevant to current property relations – from Ottoman Empire *tapija* titles, to the land concessions of the Yugoslav kingdom, to usage and occupancy rights of the Socialist Federal Republic of Yugoslavia, to the discriminatory laws of the Milošević era. Rather than mitigating existing issues, the ambiguities of transition compounded these. Procedural rules were created from scratch, and UNMIK regulations were written in a "very poor, unprofessional" and "superficial" manner, according to judges I spoke to.

A good example of this is that UNMIK failed to provide a list of discriminatory laws that needed repealing, which meant that judges had to decide for themselves and on a case-by-case basis, which laws would apply when and how. Legal professionals relied on "flimsy regulations" and "cryptic rules." The new, supposedly efficient instruments created by the international territorial administrations to make a "new start" in effect compounded the judicial quagmire.

Kosovo's contested declaration of independence on February 17, 2008 represented a next step in the tortuous road of transition. It did not, however, solve the problem of sovereignty, nor announce the end of international supervision and a regime of emergency. Rather, internationally supervised institution-building became the yardstick to assess Kosovo's statehood (Pandolfi 2010; Sahin 2013). The new Constitution,

written with active support from the US and the EU, exemplifies this: On the one hand, it created the framework for an effectively existing, EU-compatible state; on the other hand, the Constitution still included "transitional provisions" that gave the international community a continued role in the country's institutions, especially the judiciary. As a mark of this ongoing institutionalization, the European Rule of Law Mission in Kosovo (EULEX) replaced UNMIK in 2008.

National courts, in this context, were scripted as being incapable of dealing with the requirements and standards of human-rights-compatible, technically "correct" rule of law. One solution, then, was to "build capacities": International legal professionals were flown in to help draft new legislation, train "locals," do "MMA" (monitoring, mentoring, and advising), and, with their "neutral and disinterested professionalism," oversee and adjudicate "ethnically sensitive" cases. Another approach was to create special courts and quasi-judicial institutions that would stand outside the national (read: supposedly inefficient, corrupt) judiciary and tackle the most pressing and contentious property questions: the privatization of socialist immovable assets (the Privatization Agency of Kosovo, PAK) and war-related property restitution (the Kosovo Property Agency, KPA). Their mandates were limited in time and scope to find quick solutions to pressing issues without addressing underlying questions of historical discrimination and injustices, or the future of Kosovo as a sovereign state.

These interim, technical-legal governance mechanisms themselves helped perpetuate a permanent state of exception. One example, which I discuss in greater detail elsewhere (Mora 2020), is the paradox whereby the European Convention on Human Rights is directly applicable in Kosovo, as it is enshrined in the 2008 Constitution, but Kosovo has no access to the European Court of Human Rights, as it is not a state party to the European Convention on Human Rights. This also works at the level of legal practice, where the gap between "ordinary" applications of legal principles and some of the legal solutions used in the everyday in Kosovo is justified in the same language of transitional exceptionalism, as we shall see in the case of the KPA and its notification practice.

The fact that things do not seem to work as well as they should under transitional conditions of exception, however, is not an aberration or a wrinkle to be ironed out over time. It is, in fact, absolutely essential to what "transition" actually does. Transition works as an ideological device justifying a state of exception, built on the premise that the challenges of postwar reconstruction are such that things *could never* work as they

would under "normal" circumstances. The international law scholar Ruti Teitel thus writes that in such "hyper-politicized" conditions, "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 furthermore suggests, "[is] to be determined from the transitional position itself" (Teitel 2003: 54–55). The problem with this perspective is that it furthers the idea that law's ethical or moral standards must *necessarily* be lowered in situations of transition. It thus participates in the normalization of the state of exception, allowing for a gap between ethical legal standards such as due process standards that would ordinarily apply and everyday legal practice "in transition" to grow and flourish. Of course, a gap between theory and practice always exists, but short-sighted, technocratic measures of transitional governance create legal inadequacies in the name of law; the law becomes a "front" of good governance through processes of law-washing. In other words, law-washing leads to a "hollowing out" of the law, in which legal norms and procedures become detached from their underlying moral or ethical foundations.

Judge Irina, a formidable EULEX civil judge in secondment from Bulgaria whom I shadowed in 2013 gave me an example of such "hollowing out." She explained that the Kosovan judiciary, partly run by EULEX, was good at "processing" cases, but not good at "finalizing" and implementing them. Instead of solving property cases, she explained to me over coffee one day, the Supreme Court "quashes and returns [them] back to District and Municipal Courts with a very short judgement . . . It's not even very clear why they return back." Then:

> District court judges send their cases back to municipal courts with new numbers, even if they are actually very old. They say: "we're only three judges, with not enough courtrooms." They keep the cases with the judges, in their wardrobes. They don't know what they have in there. The norm at Municipal and District level is thirty cases per month. We are far from achieving that. They used to finalize the easy cases, but the more complicated property cases remain pending because no one dares to take a decision.

For Irina and other (national and international) legal professionals I interviewed and worked with, this epitomizes a major issue of internationally supervised governance in Kosovo: UNMIK and EULEX set up huge legal bureaucracies that are very good at "processing" cases and

showing that "something is being done," but not good at all at *solving* problems. Irina emphasized: "Stacking up cases in wardrobes is not the job we [EULEX] were supposed to do."

While the problem is perhaps more visible in ethnically sensitive, or in war-related property cases, it also goes beyond exceptional scenarios. Irina gave the example of a friend who, at the time, was a EULEX civil judge and sat in the municipal court of Podujevo in the northeast of the country. The judge mostly dealt with divorce proceedings, and her decisions were very seldom executed. In one case, the father had received legal custody; the mother visiting rights every weekend. The mother came back to see the judge several months later, crying: she had not been allowed to see her child at all. The judge, who was by that time on the brink of a mental breakdown, then took it on herself to drive to the father's house, take the child, and bring them to their mother. She then went to pick up the child on Sunday evening and brought them back to their father's house.

For Hilmi Jashari, a chain-smoking, congenial human rights lawyer and former Kosovan Ombudsperson, whom I've known since 2012, the nonfinalization and nonexecution of decisions was a major issue across the judicial system. In an interview for the magazine *Kosovo 2.0*, Hilmi made plain:

> We conducted a national study where we found that a high number of cases are hardly executed. Despite the fact that they are determined by court decisions. According to our research, the number of unexecuted cases [in 2019] on the national level is 117,000. This creates a defect within the system – when court decisions are not implemented. The state undermines the whole of the justice system because it has no effect. This also makes people lose their trust in the system. (Rama 2019)

The limitations or problems of transition and reconstruction are produced by the structural conditions of exception, which are owed to the confluence of two emergencies: the war, and the transition. It would, however, be misplaced to see this situation as a "failure of implementation." Rather, it is an essential feature of how the legal bureaucracies of UNMIK and EULEX have understood and framed postwar issues to govern the transition.

In this context, I develop the notion of law-washing as a framework to reckon with the effects of the overloading of law with expectations in the post-cold war juristocratic moment. Law-washing allows me to conceptually grapple with the gap between the promises and achievements of law in Kosovo's postwar transition to statehood. Law-washing, as I show, describes the processes by which decision-makers abdicate political

responsibility for eminently political problems by demonstrating adherence to the rule of law and human rights – adherence which is produced by technocratic measures that evacuate human rights of their radical potential.

9.3 Property Restitution as Techno-politics

The KPA is empathetically not a national process of "dealing with the past" and righting wrongs. It is an ultimately relatively powerless, underfunded, and temporarily delimited institution that is paradigmatic for the kind of short-term, bridging, technical-legal solutions that define post-cold war, internationally supervised and funded humanitarian emergency and postconflict transition situations. With rule of law conceived of as a tool of "good governance," neoliberal managerial logics prevailed, leading to the set-up of the KPA as a mass claims mechanism. The internal organization of its data collecting and processing technologies created an "assembly line" of case processing, allowing for the bundling of claims of similar legal scenarios and the "quick" and "efficient" adjudication of claims.

To streamline the claiming process and ensure efficiency, the KPA adopted several managerial techniques to create a "mass claims" processing system. Such mass claims mechanisms have been in use since at least the 1980s. This approach supposedly ensures "effective remedies to claimants within a reasonably prompt period of time and in a manner which was economical and consistent" (Cordial & Rosandhaug 2008: 29). One of the three KPA commissioners (i.e., judges) described the mass-claims mechanism as such:

> A mass claims process can be broadly understood as a process designed to deal with a high number of claims that arise out of the same extraordinary situation or event and are filed with the decision-making body within a limited period of time; thus, claimants in a mass claims process are generally in the same situation, having suffered the same or similar losses within the same period of time … In view of the high number of claims and their similarity, a mass claims process must be organised in a fair and efficient manner to ensure that claimants are treated equally and all the claims are resolved within a reasonable period of time. (HPCC/RES/7/2003, in Heiskanen 2006: 29)

Other mass claims mechanisms usually sought to provide "fair and just" compensations to claimants (Holtzmann & Kristjánsdóttir 2006; Das & van Houtte 2008). The KPA, however, as Heiskanen put it, provided the

"simple form of relief [that is] property restitution" (Heiskanen 2006: 30). This, Heiskanen implies, is a good thing. Proponents of such ad hoc arbitration mechanisms argue that the requirements of mass-claims processing, such as lower procedural and evidentiary standards, make sense from a cost–benefit viewpoint without necessarily undermining the quality of judgments (Das 2006; van Haersolte-van Hof 2006; Das & van Houtte 2008). Yet, as I show in the next section, this can have extremely problematic consequences.

A precedent for Kosovo was the South African post-apartheid restitution model, which was, because of its overreliance on oral hearings and adversarial proceedings, seen as too slow (Das 2004: 436). In Kosovo, the drafters of the KPA mandate thus opted to make the institution rely almost exclusively on written submissions and evidence. They installed a hybrid system, whereby cases would be bundled into batches of similar types by KPA lawyers, and decided on the basis of "Standard Operation Procedures (SOP)" [*sic*]. Only contested claims, or especially tricky uncontested ones, were read and adjudicated as individual cases by one of the three commissioners.

An in-house IT system and tailor-made applications designed specifically for each unit at HQ and the regional offices were a further central element in improving the efficiency of the KPA. These, in turn, helped produce specific institutional logics and procedures to the case processing, the consequences of which I address elsewhere (Mora 2023).

The KPA was a bridging solution designed to resolve war-related property disputes in this difficult period of "transition." The KPA mandate defined war-related property loss as falling within a strictly delimited time window of February 27, 1998 to June 20, 1999. This had the effect of excluding many if not most of Kosovo Albanian potential claimants, as these had largely lost their properties to discriminatory practices in the years leading up to open war (except for properties in the Serbian-dominated areas north of the Ibar River). This was intentional: the international community wanted to ensure the return of displaced Kosovo Serbs to promote the establishment of Kosovo as a multiethnic *Rechtsstaat* through the stated logic of "property rights are human rights."

But it was also to exclude the thornier question of older, historical underlying injustices that took place before the conflict from the process. The exclusive focus on private *ownership* meant that more recent ownership titles superseded older (socialist) *occupancy* rights, and issues of discrimination in property allocation and fraudulent property

transactions in the 1990s, which had centrally contributed to the conflict. By framing the right to property as a universal human right, community-based conflicts and cleavages were removed from the agency's remit. And this wilful blindness was justified by invoking human rights and "neutral" rule of law principles.

The regulation that set up the KPA (UNMIK reg. 2006/50 and related administrative directions, transformed into national law in 2008) was not a restitution law that reflected (and legitimized) one specific political reading of history, but rather an extraordinary measure of transition. This meant the KPA (as a constitutionally independent agency) was given administrative and legal leeway to implement its mandate within the allotted period of funding, so long as it did it in a "reasonable" manner judged from the "exceptional" circumstances of transition.

In what follows, I look into how the KPA informed the public about properties for which a claim had been submitted, highlighting the practice of "notification by publication" as a key instantiation of law-washing. This, as I show next, reveals the limitations and consequences of the juristocratic use of law "in excess."

9.4 Wrong Notifications

Large patches of high grass strewn with wildflowers were broken up irregularly by mounds of earth. This land had not been worked in a long time. Perhaps some of the larger mounds hid the remnants of a house, or of a cowshed. Perhaps they hid other debris of war that had been deposited there by returning neighbors in need of a dump pit. In the adjacent parcel stood a recently built one-room brick house that looked inhabited. We walked for about twenty minutes in search of the two claimed plots of land. Under a scorching sun, a GPS device donated to the KPA by the Norwegian Development Cooperation and a hand-drawn map guided our progress. I was given huge rubber boots to wear over my sandals, which made me walk like Charlie Chaplin in *The Tramp* and gave me blisters. The men on the team cracked jokes about me in Albanian as we walked. Finding claimed lots was not always easy, and KPA field officers and regional cadaster agents, with the help of GPS devices and cadastral and hand-drawn maps, spent most of their working days driving around in white UN 4x4s and walking, alone or in pairs, along half-hidden paths across Kosovo, carrying wooden poles and large KPA notification stickers.

We had four claimed properties to find and "notify" that day. Lirim, the head of our group of four (with two cadaster experts and myself) was a burly, self-confident man aged 37. He had a wife and two primary-school-aged children with whom he lived on the outskirts of Pristina. During the war he had fled to Germany where he had become a cook and where, unexpectedly, he had learned rudiments of Hindi. Laughing, he told us horror stories of his job as a KPA field officer: such as having a (thankfully malfunctioning) hand grenade thown at him by a former soldier of the Kosovo Liberation Army (the Kosovo Albanian separatist militia of the 1990s), who was very unhappy about being considered an "illegal occupant"; or being threatened at gunpoint by a Kosovo Albanian policeman for similar reasons. In these stories Lirim portrayed himself as the good guy, fighting impunity within the Kosovo Albanian community, despite expressing deep personal resentment against the Serbs who occupied Albanian lands in the north of the country.

Notification was a crucial step in the quasi-judicial administrative procedure meant to give back property rights to persons (mostly Kosovo Serbs) who had lost possession of land, houses and/or commercial spaces during the 1998–9 war. The KPA's original internal regulations (SOPs) specified that all claimed properties had to be physically inspected by KPA staff. A wooden pole and sticker with the claim number and explanations about how to become involved in the claim process had to be planted on each parcel claimed. For many lawyers and judges I worked with, this was key to ensure that potential respondents (the current occupants, or other family members, for example), could take part in the legal process.

We did not make any inauspicious encounters that day, but perhaps too busy telling heroic stories, or simply too unbothered with procedure, Lirim went about notifying properties in a somewhat unconventional manner. After having compared the printed cadastral information to the actual situation on site and collected the grid reference for both parcels, Lirim proceeded to drive a wooden pole into the ground of the first parcel. He then pasted a sticker on which he had written the KPA code for both parcels and other relevant information and took a couple of photographs of the pole. Contrary to KPA notification instructions, he then removed the pole that he had just planted and photographed and walked to the second plot with it. There, he replanted it, took a second set of pictures, and removed the pole from the earth again. No evidence remained that the KPA had "notified" the plots.

I turned to look at Lirim's two colleagues to observe their reactions. One of them also noticed and somewhat clumsily asked Lirim to explain himself. The fact that I was present added a significant level of formality to the entire situation. Back at the KPA Pristina headquarters, I recounted the story to the head of the notification unit and to the KPA director. Both of them expressed shock and seemed extremely uncomfortable.

Perhaps wary of what might happen if this became known to the Supreme Court or to donors, they gave me reassurance that this was an isolated incident, which they attributed to individual "incompetence." But both also alluded to more structural issues to do with notification practices that had occurred before 2009, which, they said, made the present situation quite problematic. Lirim received a warning and stopped talking to me, and I went poking further into notification issues.

The issue of "wrong notifications," as KPA staff called it, had reached a critical point in 2009, as it became evident that more than 30 percent of claims that had been notified since 2006 had been done so incorrectly. These were notifications performed on the wrong field or plot of land, or that had not followed the SOP. The problem was such that many KPA lawyers, KPA international donors, and the Supreme Court KPA Appeals Panel saw the credibility of the whole KPA adjudication process in jeopardy. How could property restitution ever be made to work when the actual, physical location of these properties was uncertain? If the current occupants were not correctly informed about the legal proceedings, how could they constitute themselves as respondents to cases? All cases were checked, those that had been wrongly notified were reopened and renotified, and the decisions for already adjudicated cases were quashed, at great cost and reputational damage to the institution.

The "notification fiasco" of 2009 led the KPA to revise its notification procedure. An alternative, "notification by publication" method was introduced, to save time and reassure the agency's international donors. According to the new method, instead of physically checking and identifying plots and buildings, and informing occupants and other possible respondents in person of the opening of the claims process, claims were now published in Kosovan and Serbian newspapers and other media, and lists of claims were affixed on municipal notice boards. However, this new notification procedure was arguably even more problematic than the wrong notifications, as it was now the responsibility of potential respondents to identify the notified property as one they had a claim to, and take

note of the existence of the claiming process. Many potential respondents, moreover, did not have access to newspapers or municipal offices, especially those living in rural and remote areas in Serbia. Although this procedure was mostly used for single-party agricultural cases, out of the 42,749 claims processed by the agency, about 30,000 cases were eventually notified in this way.

The KPA mandate required solutions that were both efficient and "reasonable," and that took into account the limitations of a mass-claims mechanism and the exceptional circumstances of transition. Because the KPA was an independent, administrative agency understood to be tackling extraordinary issues of transition, they were entitled to develop and evaluate their own due process solutions.[4] This gave the KPA commissioners the authority to determine what qualified as "reasonable efforts" and to decide when those efforts had been successfully met, without being bound by general rules; and they ruled that notification by publication constituted a "reasonable effort."

The Appeals Panel team and certain KPA lawyers had mixed reactions to the introduction of the new method and the KPA commissioners' opinion on the matter. They acknowledged that notification by publication was not illegal, but raised concerns about the practice's reasonableness and fairness. They thought that notifying properties through publication was inadequate to ensure access to justice for potential respondents. Physical notification was, according to them, a fairer and much more effective way of reaching them. No one at the KPA was aware of any cases that had been challenged by a responding party on the basis of a notification made through publication. The KPA appeals panel judges even took the unusual step of publishing a differing opinion that stated that, for them, notification by publication was "insufficient."

I asked Bardhana, a national Kosovo Albanian KPA lawyer in her early thirties whose desk was next to mine in the case-processing offices what she thought of all this. She reflected:

[4] Due process here is understood based on Article 6 of the European Convention on Human Rights, which provides for access to and exclusivity of claims proceedings, the impartiality of adjudication, and the fairness, timeliness, finality, and implementation of decisions (van Houtte & Yi 2008: 83). However, the same article serves to allow for "specific circumstances" of emergency to "lead to some flexibility" (van Houtte & Yi 2008: 70). As Olivier Corten notes, Article 6 is an important doctrinal reference in international human rights law that interprets "reasonableness" as "ambiguous" and "context-dependent" (Corten 1999: 613).

> 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. (Mora 2020: 91)

However, KPA and Supreme Court staff also acknowledged the challenges of operating in a transitional context and the inherent limitations of a temporary mass-claims, quasi-judicial mechanism. In the end, the ability of the Appeals Panel to overturn the legal opinions and decisions taken by the KPA commissioners was very limited, if inexistent. The panel lacked the resources to conduct its own investigations and hearings, and it was uncertain whether the judges on the Appeals Panel had the power to quash and return cases to the KPA if they did not align with the judges' perspectives. The state of exception justified "necessary adjustments" and a lowering of due process standards. Marianne, the German head judge on the KPA appeals panel, summatively put it: "rough remedies are better than no remedies at all." Legal practitioners and judges simply do "what [they] can with what [they] have" (Mora 2020: 90). Marianne thought that "notification by publication [was] not good enough," "but sometimes," she said, contritely, "it is necessary." She went on: "It's not a criticism, a mass claims mechanism leads to rough justice. You cannot afford to go into details."

9.5 Concluding Thoughts

Juristocratic exceptionalism, itself justified and normalized by international law, produces a gap between the promises of the law and the achievements of the law: The lowering of due process standards in war-related property restitution cases produces not fast-track fairness or justice as hoped, but adherence to the letter of the law and thus to human rights from a purely technical-legal, proceduralist perspective.

As Jessica Greenberg has observed for the European Court of Human Rights, the "efficacy" of international human rights bureaucracies is an epistemic and semiotic construct. In such a context, legal procedural constraints *produce* rather than hinder a sense of efficacy and ethics (Greenberg 2020). Human rights are thus "made real" by these legal

bureaucracies through procedural conformity first and foremost. Change is deemed to have happened when actors involved decide that the benchmark – very often from a procedural standpoint – has been reached, and this is not necessarily something that is observable or made tangible outside the realm of law. Such a narrow, proceduralist (or managerialist, à la Koskenniemi) understanding of human rights not only erases historical and other kinds of violence; it also locks these erasures into place through measures that more often than not fail to address harm and provide justice substantively and extralegally. In such cases, "efficacious" human rights work is just as likely to undermine and obstruct substantive change for claimants and other beneficiaries.

Achievements in the form of proceduralist, technical-legal human rights solutions only make sense within the relatively hermetic realm of EULEX–KPA judicial practice, solely through epistemic measurements of "efficacy" and the language of the exceptional. In such heightened situations of bureaucratization of human rights, the notion that their efficacy should have anything to do with justice and the social world at large is lost. Irina, the EULEX civil judge, was about to leave Kosovo. She had lost sense of "the bigger picture," as she put it, and was not very optimistic about the fate of the rule of law mission. She expressed cynicism about the solutions offered: "they are not just often enough," she told me. Practices of law-washing result in the hollowing out of the law's critical substance, where legal standards and procedures lose their connection to their fundamental moral or ethical foundations.

Rather than serving as load-bearing walls of democracy, human rights and the rule of law become wallpaper for political gain; being seen to "implement" the rule of law legitimizes Kosovo's claim, backed by the EU and the United States, to recognition as a modern, sovereign state. So, in parallel to the juridification of politics, law-washing also participates in the politicization of law, in which the idiom of the rule of law acquires new political capital and political deals are brokered through formal adherence to the law. This, in turn, helps cement the political status quo as all political actors involved – Kosovan and Serbian politicians and EU representatives – are thereby able to show compliance with the rule of law. By ticking the box of compliance, they satisfy the requirements of state-building on the path to EU accession, while washing their hands – literally, through law – of the insolvability of Kosovo's definitive status.

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