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Countering the Rule of Law Backsliding in the Western Balkans

By Katrin Böttger, Dominic Maugeais
Vienna, 23 September 2021
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Policy Recommendations

1. Rule of law and enlargement should be placed high on the agenda of the Conference on the Future of Europe.
2. The EU and its member states need to increase efforts to promote rule of law in the Western Balkans.
3. There is a need to pursue the renewal of transatlantic cooperation for countering the rule of law backsliding in the Western Balkans.

Abstract

Seventeen years after the big bang enlargement and with the start of the Conference on the Future of Europe (CoFoE), the European Union (EU) and the Western Balkan countries are faced with the challenge of a rule of law backsliding. The rule of law backsliding is not only posing a risk for the EU's internal democratic foundation but also contributes to the argumentation of a de facto hold on all future enlargements of the EU. This Policy Brief seeks to put forward three recommendations that take account of the current state of the EU, the rule of law situation and democratic backsliding of the pre-accession

countries in the Western Balkans. Firstly, rule of law and enlargement must be put high on the agenda of the Conference on the Future of Europe as it is also about the future of the Western Balkans. Secondly, the EU and its member states need to increase efforts to promote the rule of law in the Western Balkans and call democratic backsliding by its name, including more substantial political consequences, and thirdly, pursue the renewal of transatlantic cooperation for this purpose, viewing the increasingly competitive influence of anti-liberal actors in the region.



Countering the Rule of Law Backsliding in the Western Balkans

Introduction

Who could have imagined that only one and a half decades after the EU's big bang enlargement, two out of the ten new European Union (EU) member states would constitute the top two countries worldwide that have experienced the most rapid autocratic transition of the last decade (2010-2020).¹ The alarm bells are ringing, as these problematic 'frontrunners' are not only posing a risk for the EU's internal democratic foundation but also contribute, besides the need for an EU internal reform, to increased scepticism towards enlargement of the EU to the Western Balkans, as the candidate countries are seen as potential importers of rule of law problems. These days, the EU accession perspective of the Western Balkan countries and the EU's internal developments are as strongly tied together as they have ever been. This Policy Brief seeks to put forward three recommendations that take account of the current state of the EU, the rule of law situation and democratic backsliding of the pre-accession countries in the Western Balkans. Firstly, rule of law and enlargement must be placed high on the agenda of the Conference on the Future of Europe. Secondly, the EU and its member states need to increase efforts for the promotion of the rule of law in the Western Balkans, and thirdly, pursue the renewal of transatlantic cooperation for this purpose.

The Conference on the Future of Europe is also about the future of the Western Balkans

The Conference on the Future of Europe (CoFoE), which officially started on 9 May 2021 should be

1) Nazifa Alizada, et.al. (2021): Autocratization Turns Viral. Democracy Report 2021. University of Gothenburg: V-Dem Institute, p. 19.

used as an opportunity for putting the Western Balkan countries higher on the European Agenda for both the policy and the institutional level. Firstly, on the policy level it is important, that the CoFoE will be discussing the state of rule of law, which is crucial both for the EU-27 and for the accession countries in the Western Balkans. Without rule of law being guaranteed within the EU, those opposed to further enlargement will argue even more strongly that the EU does not have the capacity to absorb new potentially problematic members. This factor is particularly important in light of the public opinion in some of the bigger EU member states such as France, which opposes further enlargement i.a. due to the perceived lack of the rule of law both in newer member states and in the Western Balkans.² Secondly, by discussing the future of EU enlargement during the CoFoE, the EU's commitment to support the (potential) EU candidate countries' democratic and economic development would become more visible over the scheduled 12 months period. Thirdly, although it is a missed chance that the Western Balkan countries are not officially included in the CoFoE, the platform for civic participation (<https://futureu.europa.eu/>) offers citizens of the enlargement countries de facto an opportunity to contribute to the debate on an institutional level. Ongoing and future dialogue activities such as conducted by the Friedrich-Ebert-Stiftung (FES) or the European External Action Service (EEAS) can help in communicating this opportunity and include views from the Western Balkans civil society in the CoFoE.³ Beyond discussions during the CoFoE,

2) Christine Hübner et. al. (2021): It's the EU, not Western Balkan enlargement... French public opinion on EU membership of the Western Balkans, Open Society Foundation/djpart, p. 27.

3) See: Friedrich-Ebert-Stiftung (FES): The Conference on the Future of the EU - Shaping a Progressive Future for Europe (<https://brussels.fes.de/topics/future-of-europe>) and debates organised by the EU Delegations of the WB6 countries (1st on 2 July 2021 in the framework of the Prespa Forum Dialogue)



the EU and its member states should increase their efforts to work toward preventing further rule of law backsliding in the region.

Upgrading the EU's and member states' role in promoting the rule of law in the Western Balkans

By introducing a new Enlargement Methodology in 2020, the European Union aimed to revitalise the EU enlargement policy towards the Western Balkan countries, making it more credible and giving it a stronger political agenda. The goal was to create a more dynamic process, clustering the chapters of the *acquis communautaire* in the negotiation process and put the fundamentals, notably the rule of law and fundamental rights, in the centre of the process, including clear conditions and decisive measures that would sanction non-fulfilment.⁴ This revision process was kicked-off by the French President Emmanuel Macron who, in parallel, pursued a renewal of the French Strategy for the Western Balkans that put forward security and economic development as priority areas rather than the promotion of rule of law and fundamental rights.⁵ While a more proactive political involvement of all EU member states in the EU accession process could be valuable as it would highlight the commitment to the region, the political messages that are being sent to prevent a further democratic backsliding of the region are still to be substantiated. The EU member states as well as the European Union are too often still reluctant to call democratic backsliding by its name and, instead, publicly embrace minor reform steps as promising

signals. This however, does not change the overall reform direction of the so-called 'frontrunner countries' such as Serbia and Montenegro.

“The EU member states as well as the European Union are too often still reluctant to call democratic backsliding by its name and, instead, publicly embrace minor reform steps as promising signals.”

The reform monitoring conducted by the European Commission in the field of rule of law and fundamental rights is still done in a primarily technical way, which is reflected in the reports on the EU enlargement. These reports highlight the concerns over the developments or lack of progress, but do not imply any substantial political consequences. As experts on the region highlight, there is a need for elaborating more on the rule of law development in the reports as well as the requirements for the EU candidate states to update their Actions Plans on a regular basis rendering them up to date living documents that reflect the realities on the ground more accurately.⁶

“These reports highlight the concerns over the developments or lack of progress, but do not imply any substantial political consequences.”

While the progress of the Western Balkan 6 (WB6) countries is mixed⁷, it is especially worrisome that the 'frontrunners' in the process that are negotiating already with the EU (Montenegro and Serbia), have

that should take place in all Western Balkan countries and be discussed during the EU Western Balkans summit in Ljubljana on 6 October 2021.

4) European Commission (2020): A more credible, dynamic, predictable and political EU accession process - Commission lays out its proposals, Press release, 5 February 2020, Brussels, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_181

5) France's strategy for the Western Balkans (2019), <https://www.diplomatie.gouv.fr/en/country-files/europe/western-balkans-62918/>

6) Vedran Džihić, Marta Szpala, et al. (2021): Bringing citizens into the fold – Making EU enlargement work in the (post) Covid-19 world, Weimar Plus Working Group on the Western Balkans with contributions by Adnan Čerimagić, Valeska Esch, Natasha Wunsch and Tomasz Żornaczuk, April 2021, http://www.stiftung-genshagen.de/publikationen/publikation-detailansicht/2264a26a1f6091249620469085004461.html?tx_ttnews%5Btt_news%5D=2088

7) See EU Commissions's 2020 Enlargement Package and An Economic and Investment Plan for the Western Balkans, https://ec.europa.eu/neighbourhood-enlargement/countries/package_en



not implemented required substantial reforms in the rule of law chapters 23 and 24.

The European Parliament is outspoken on the lack of progress, calling for “urgent reforms in Serbia to progress with EU accession”, thus highlighting the fact that Serbia did not open any new chapters in 2020, which would be “a clear indicator of the country’s lack of progress in rule of law”.⁸

“A more political approach to the process of democratic backsliding in the region is therefore needed, similar to what is required within the European Union.”

The past six years have shown that approx. €700 million of EU bilateral assistance to the rule of law and fundamental rights support (representing 16% of the overall EU bilateral support) are not sufficient to ensure progress in the area of rule of law and fundamental rights protection in the (potential) EU candidate countries. One of the key problems are clientelist networks that maintain control over the rule of law institutions, unintended support of the EU conditionality process to the consolidation of these structures as well as the lack of a realistic accession perspective that would counterweight a possible power loss of the political elite.⁹ A more political approach to the process of democratic backsliding in the region is therefore needed, similar to what is required within the European Union. A lack of progress and the worsening public opinion within the EU member states towards the accession of the countries of the Western Balkans will otherwise render the process a dead end. Therefore, the following

recommendations as part of the more political approach to enlargement need to be considered: Firstly, EU member states should be more outspoken on the critical developments in the Western Balkan countries, which will increase the EU’s credibility as a promoter of democratic values in the eyes of the domestic population. Secondly, it should be considered to upgrade the EU’s monitoring role in the field of rule of law with specifically mandated missions, whose reports are published afterwards to provide the public a means of advocating for reforms. Thirdly, the EU should support the establishment of a so called rule of law constituency in the Western Balkan countries (meaning a broad electoral basis for rule of law and reform agents) by enhancing the communication and outreach work of civil society organisations, especially where media freedom has been limited in recent years.¹⁰ Finally, the EU member states must withdraw support provided via political party families for political parties in the Western Balkans that contribute to the establishment of autocratic structures. In its pursuit of the aforementioned goals, the EU should reaffirm and strengthen its partnership with the U.S. administration.

A renewed transatlantic approach to the Western Balkans democratic development

“It is crucial that the EU, in parallel to stepping up its own engagement, revitalises the transatlantic approach to fostering democratic development in the Western Balkans.”

The democratic backsliding in the Western Balkans is unfolding against the background of a growing global competition between liberal and autocratic countries, which has an impact on the reform processes and hence the accession perspective of the Western Balkan countries.

8) European Parliament Communiqué (2021): Parliament calls for urgent reforms in Serbia to progress with EU accession, Statement by Tanja Fajon Chair of the EP Delegation to the EU-Serbia Stabilisation and Association Parliamentary Committee (28 January 2021), <https://www.europarl.europa.eu/delegations/en/parliament-calls-for-urgent-reforms-in-s/product-details/20210128DPU28585>

9) See Solveig Richter & Natasha Wunsch (2020): Money, power, glory: the linkages between EU conditionality and state capture in the Western Balkans, *Journal of European Public Policy*, 27:1, 41-62.

10) Nedim Hovic (2020): The European Union’s Rule of Law Promotion in the Western Balkans: Building a Rule of Law Constituency, *Croatian Yearbook of European Law and Policy*, No 16, p. 197-223.



Therefore, it is crucial that the EU, in parallel to stepping up its own engagement, revitalises the transatlantic approach to fostering democratic development in the Western Balkans. The strengthening of the transatlantic partnership is needed in response to a more or less open coquetting of some Balkan countries to extend their political and economic ties with authoritarian countries such as China, Russia, Turkey and the United Arab Emirates. The new U.S. President Joe Biden is, from his previous role as Vice President under Barack Obama, familiar with the Balkans, and has been committed to reversing the policy of his predecessor Donald Trump. Biden has announced to convene an international Democracy Summit to be held 9-10 December 2021 and defined the fight against corruption as a core national security interest of the U.S. administration.¹¹ The EU and U.S. should therefore step up their coordination efforts and further support civil society organisations and also use political leverage on the political elite, including the freezing of assets that have been moved outside the region as has been initiated already with an executive order of President Biden.¹² Previous enlargement rounds have shown that only a transatlantic coordinated approach can safeguard the integrity of anti-corruption institutions from political interference, such as e.g. the case of the National Anti-corruption Directorate (DNA) in Romania. Furthermore, the EU and U.S. should jointly call out in cases civil society organisations and journalists are attacked for fulfilling their scrutiny work and press for a decrease of media concentration in the region. Promoting media pluralism is even more important in light of the presence of external actors such as China and Russia, who exploit the

situation to spread disinformation against the EU, often without sufficient counter-efforts from the side of the public institutions in the Western Balkans, as the COVID-19 pandemic has shown.

“The EU and U.S. should jointly call out in cases civil society organisations and journalists are attacked for fulfilling their scrutiny work and press for a decrease of media concentration in the region.”

Conclusion

For both the EU and the Western Balkans the year 2021 marks a juncture with the start of the CoFoE, as well as the hope for a first intergovernmental conference marking the long-awaited start of the EU accession negotiations with North Macedonia and Albania. In light of these events, the question arises of how the democratic and rule of law backsliding tendencies within the EU and the Western Balkans could be halted and reversed. This is why we argue in favour of setting the rule of law and enlargement policy high on the agenda of the CoFoE. The future of the EU and the threat posed by anti-democratic political actors in Europe is linked to the future of the Western Balkans. Without a strong voice, engagement and substantial political and financial consequences from the EU and its member states towards tendencies of democratic backsliding, internally as well as in its neighbourhood, the issue of democratic decline will not be solved.

11) Hugo Blewett-Mundy (2021): Can the EU work with Biden in the Balkans?, <https://globalriskinsights.com/2021/02/can-the-eu-work-with-biden-in-the-balkans/> (27. February 2021)

12) Anđela Šemić (2021): New Biden Executive Order to serve as a deterrent for Western Balkan political actors, European Western Balkans, 14.06. 2021, <https://europeanwesternbalkans.com/2021/06/14/new-biden-executive-order-to-serve-as-a-deterrent-for-western-balkan-political-actors/>



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Keywords

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What can the Slovenian Presidency of the Council of the European Union do for the Western Balkans?

By Faris Kočan, Marko Lovec
Vienna, 4 October 2021
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Policy Recommendations

1. Slovenia should use the priorities of its Presidency of the Council of the European Union to further promote the geopolitical importance of the region for the EU amidst the enlargement fatigue, which is weakening the credibility of the EU vis-à-vis the Western Balkans.
2. Slovenia should use the informal EU-Western Balkans Summit to further promote the new investment plan as an economic backbone for the "Open Balkan" initiative in order to achieve positive progress in the EU accession process.
3. To prove its critics wrong, the Slovenian government should promote a positive narrative on the EU-Western Balkans relations, raise awareness regarding the negative prospects for the whole region due to Bulgaria's veto to North Macedonia's accession process and distance itself from the non-paper with a clear and credible agenda for the Western Balkans during the informal summit.

Abstract

On 1 July, Slovenia has taken over the Presidency of the Council of the European Union (EU). Its second presidency will be much different from the first one that took place in 2008. Even though the enlargement fatigue and the need to consolidate the EU first were already present at the time, the perspective of further European integration did not seem to have an alternative. Since then, the EU has been challenged by geopolitical competition from the outside and by nationalism and illiberalism from within. The EU enlargement policy has not been exempted from this trend. The slow progress of the Western Balkan countries was a result of the weakening of the EU's credibility and strengthening of the anti-reform players within the region. Meanwhile, the geopolitical framing of the reformed enlargement strategy is mobilising fresh attention and resources from the EU to the Western

Balkans; however, Slovenia under Prime Minister Janez Janša itself became a subject of illiberal trends and is no longer considered the lighthouse of transition to liberal democracy and Europeanisation it used to be. This was demonstrated by the recent non-paper on the Western Balkans attributed to Slovenia that proposed to reintroduce ethnic borders. Nevertheless, Slovenia still supports the EU enlargement to the region that would be strategically beneficial for itself. Within the Slovenian presidency several priorities are relevant from the perspective of the EU's Western Balkans strategy. Last but not least, the informal EU-Western Balkans Summit scheduled for 6 October 2021 will be one of the highlights and opportunities to achieve progress. Slovenia should thus use the presidency an opportunity to regain the lost credibility.



What can the Slovenian Presidency of the Council of the European Union do for the Western Balkans?

No longer a role model

Slovenia has assumed its second Presidency of the Council of the European Union (EU) on 1 July 2021. Since its first presidency in 2008 much has changed. Back then, Slovenia was the first of the Central and Eastern European (CEE) New Member States (NMS)¹ to preside the EU as a reward for its successful integration. While the need to consolidate the EU and the enlargement fatigue were to some extent already present at that time, the accession of the Western Balkan countries (WBC) was seen with little alternative. The Western Balkans (WB) was an important topic on the agenda of the first EU presidency. While finding a consensus among EU countries on Kosovo's independence proved too difficult, during its presidency Slovenia went forwards and recognised Kosovo.²

Since the late 2000s, on the outside the EU has been challenged by the global crises, the emergence of the new players and the weakening of the transatlantic-relations. On the inside the EU's dysfunctional policies and institutions have contributed to the specific crisis of the Union, such as the Eurozone, migration crisis, increasing Euroscepticism and nationalism, Brexit and democratic backsliding in the CEE.

Slovenia was heavily affected by the various crises and is no longer the lighthouse of transition to the liberal democracy and Europeanisation for the region it used to be. The government led by Janez Janša of the Slovenian Democratic Party (SDS)

that presided the Council of the EU back in 2008 recently used the fight against COVID-19 as pretext to interfere with the independent state institutions and free media and further align with illiberal regimes in the region and beyond resulting in tensions with the EU institutions. In April 2021 a non-paper on the "Plan B" for the WB, which was attributed to Slovenia and proposed redrawing borders along ethnic lines, was published (Slovenian authorities denied having anything to do with it).³ The non-paper triggered strong reactions and raised questions regarding the Slovenian presidency and the informal summit on the WB, the most important event that will take place in Slovenia, planned for October 2021. Since the Treaty of Lisbon, the role of the presidency has changed. The European Council President and High Representative (HR) for the Common Foreign and Security policy have overtaken the strategic and foreign policy agenda. Still, some suggested that Slovenia's presidency was a liability and the EU should work around it.

In the following, this Policy Brief will explore what can be learned from the way enlargement policy has accommodated to the changing contexts including the backsliding of the once "star pupils" such as Slovenia and how this has affected the progress of the WBC on the way towards the EU. It concludes by discussing the possible scenarios for the WB agenda during the Slovenian Presidency of the Council of the European Union.

1) In 2004, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia entered the EU. In 2007 Bulgaria and Romania entered, followed by Croatia in 2013.

2) Bojinović F., A., Šabič, Z. Slovenia's Foreign Policy Opportunities and Constraints: The Analysis of an Interplay of Foreign Policy Environments, CIRR, 2017, 32 (97), 41-71.

3) Bildt, C. The Balkans non-paper and the dangers of plan B. ECFR 10 May 2021. Accessed through: <https://ecfr.eu/article/the-balkans-non-paper-and-the-dangers-of-plan-b/>



Rules of attraction: tightened rules, weakened attraction and alternative partners

Crisis of the enlargement policy

Enlargement is still the EU's most powerful foreign policy tool. Besides various treaties, the accession remains the 'ultimate carrot' for compliance with the preconditions to membership and for the implementation and enforcement of the *acquis communautaire*.⁴ The EU obviously supports players that lead the reform process in the candidate countries and can deliver upon the predefined and agreed tasks. The state-building and socioeconomic transformation of the former socialist countries from CEE, including Slovenia⁵, is one of the greatest achievements of the post-Cold War European integration. It was a proof of the normative power, institutional strength and efficiency of the European integration and furthermore, of the progressive liberalism and multilateralism in general. It became a model for further enlargements, neighbourhood policy and external action.

However, in the last 10 years there has been a growing impression that the EU has lost its transformative powers.⁶ The WB as its closest region is particularly concerned in this regard.⁷ The weakening of the pull and push powers for the integration have been explained in terms of the triple C crisis: weakened Conditionality, Credibility loss

and higher Costs to domestic elites.⁸ The democratic backsliding in the candidate and potential candidate countries and some of the new EU members from the CEE (including Slovenia) have strengthened the need of enhanced conditionality⁹, potentially extended beyond accession and including member states conditionality in terms of rule of law. The dysfunctionality of the EU and the backlash resulted in a loss of credibility of the Union. On the other hand, member states' and candidate countries' elites wondered whether enlargements make sense due to increasing internal costs related to it. The other geopolitical players such as Russia, China and Turkey, who were increasingly present and did not set any such conditions for their support, contributed to the alternatives and perceived benefits and costs of EU accession.

“However, in the last 10 years there has been a growing impression that the EU has lost its transformative powers.”

Progress of the Western Balkan countries

The two countries that at least in terms of opened negotiating chapters have come the furthest in the EU accession process, Montenegro and Serbia, have - due to a lack of political will - in the last decade closed just very few chapters of the *acquis*.¹⁰ Bosnia and Herzegovina (BiH) and Kosovo were entrapped in a post-conflict setting. BiH that signed the Stabilisation and Association Agreement in 2008, ratified the agreement only in 2015, followed by formal application for EU membership the next

4) The body of law [accumulated](#) by the European Union.

5) Slovenia was one of the CEE-8 who became the EU members in 2004 and entered Schengen in 2007 and was the first among the CEE to adopt euro in 2007.

6) Schimmelpfennig, F. and Sedelmeier, U. (2020). The Europeanization of Eastern Europe: The External Incentives Model Revisited. *Journal of European Public Policy*, 27(6), 814–833.

7) Kmezić, M., Bieber, F., Taleski, D., Marović, J. and Tzifakis, N. (2019). Western Balkans and the EU: Beyond the Autopilot mode (Policy Brief). Centre for Southeast European Studies: BiEPAG.

8) Požgan, J., Bojinović Fenko, A. and Kočan, F. (2020). "Never Let a Good Crisis Go to Waste: Strengthening EU Actorness Amid Increased Competition of External Actors in the Western Balkans. *Teorija in praksa*, 57(4), 1124–1146.

9) Conditionality has gradually increased over the years. Since the 2004 'big bang' enlargement, additional conditions were placed on the candidate countries such as alignment of the foreign policy.

10) Both have closed the chapters on "Science and research" and "Education and culture" while Montenegro has also closed the chapter on "External relations".



year. After engaging in domestic reforms (including the change of name on the side of North Macedonia to remove the blockade from Greece) Albania and North Macedonia faced blockades from France, Denmark and Netherlands at the Summit of the European Council in October 2019, which were to an important extent related to their respective domestic political situation (see our discussion of the most recent blockade of North Macedonia by Bulgaria below). In order to save his face, French President Emmanuel Macron called for a reformed approach to enlargement. The blockades were received with huge disappointment in the aspirant countries and did not help the pro-reformist players at all.¹¹ Jean-Claude Juncker's European Commission, while distancing himself from the blockade¹², in fact paved its way long ago by accepting the integration fatigue as a fact – not just on the widening¹³ but also on the deepening – as seen in the rise of the ideas of a differentiated integration.

“The blockades were received with huge disappointment in the aspirant countries and did not help the pro-reformist players at all.”

Enlargement policy reform

The new ‘geopolitical’ European Commission under Ursula von der Leyen increasingly referred to global competition in order to mobilise support for energising the progress in several policy areas including enlargement and neighbourhood policy. However, in doing so, the Commission also created the risk of framing the neighbourhood regions as external buffer zones to the EU where pragmatic rather than normative alliances should be made, thus supporting the status quo players and resulting

in standstill. Moreover, the portfolio of the European Commissioner in charge of EU enlargement was entrusted to Hungary, a country whose own role as an EU member became the source of controversies.

“The new ‘geopolitical’ European Commission under Ursula von der Leyen increasingly referred to global competition in order to mobilise support for energising the progress in several policy areas including enlargement and neighbourhood policy.”

In February 2020 the European Commission's communication on WB¹⁴ outlined the reformed enlargement policy addressing the triple C issue by renewed conditionality (candidates could move backwards in the accession process), political clustering of portfolios to mobilise sufficient reforms and increased investment in infrastructure to cope with socioeconomic challenges and geopolitical competition. The idea of investing into infrastructure referred to in the third C was not completely new since it was already part of the Berlin Process.¹⁵ Due to heated debates on the post-Brexit EU finances, the amount of the additional resources available was unclear at that time (later this changed, we discuss this below). The big question was whether the reformed enlargement policy was in fact not offering less for more, i.e. giving less credible promises while simultaneously raising expectations, thus putting

11) Hopkins, V. (2019). Balkan leaders want that EU accession delay risks stoking tensions. Financial Times. Available at: <https://www.ft.com/content/9d0f4f6a-fbdf-11e9-a354-36acbbb0d9b6>

12) Rankin, J. (2019). Juncker says failure of EU to keep its promises was ‘major historic mistake’. The Guardian.

13) Alexe, D. (2014). The Juncker Commission: no further enlargement. New Europe.

14) Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of the Regions – Enhancing the accession process – A credible EU perspective for the Western Balkans (2020a): COM(2020)57 final, 5 February. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0057>

15) Griessler, C. (2020). The Berlin Process. Bringing the Western Balkan Region Closer to the European Union. Südosteuropa. Journal of Politics and Society, 68(1), 1–24.



the blame for lost motivation on the candidates¹⁶ and third actors.¹⁷

institutions was not yet solved and continued to serve the Eurosceptic forces.

The COVID-19 crisis

The EU's lack of effectiveness and slow motion-solidarity in tackling the COVID-19 crisis at the beginning of the pandemic and the Russian and Chinese masks and vaccines diplomacy have exposed some of the existing weaknesses of the European integration. However, within the EU more than Euroscepticism the crisis strengthened a sense of absence of the EU.¹⁸ On the other hand, the European Commission and the European Central Bank reacted swiftly to the socioeconomic crisis. The EU-27 reached an agreement on the multiannual budget and a corona recovery fund at the European Council in July 2020 and restored confidence among centrist pro-EU forces. The agreement also included the rule of law conditionality to address illiberalism and democratic backsliding in the CEE.¹⁹ After the blockade by Hungary and Poland due to the enhanced conditionality within the interinstitutional agreement and call for a compromise from Slovenia, the German presidency was able to secure the agreement by the end of the year based on a political compromise that would buy Budapest and Warsaw some time. Still, as demonstrated by the (in)effective EU procurement of vaccines, the problem of functionality of the EU

“However, within the EU more than Euroscepticism the crisis strengthened a sense of absence of the EU.”

Similarly, COVID-19 and a new geopolitical framing has mobilised EU's foreign policy with the WB and positioned it right in the centre of attention.²⁰ While the questions of EU's credibility²¹ and even of its irrelevance remained,²² some important steps forwards were made. In spring North Macedonia and Albania were given provisional green light for the start of negotiations and the Zagreb declaration²³ signed during the Croatian Council presidency, while leaving out the words “enlargement” and “accession”, provisioned for a €3.3 bn recovery package for the WB.²⁴ At the same time the negative trend in the perception of the EU across the WBC was related to the existing anti-reform and status quo political elites, who use the crisis as an opportunity to strengthen their political power (North Macedonia being an exception), while Bosnia and Herzegovina, Kosovo and Montenegro ultimately remained more

20) European External Action Service Special Report Update (2020): Available at: <https://euvsdisinfo.eu/uploads/2020/05/EEAS-Special-Report-May-1.pdf>

21) Bieber, F. and Prelec, T. (2020). Zapadni Balkan u doba globalne pandemije. Graz: BiePAG. Vladisavljev, S. (2020). Serbia the focal point of Chinese “mask diplomacy” in the Western Balkans. European Western Balkans. Available at: <https://europeanwesternbalkans.com/2020/04/30/serbia-the-focal-point-of-chinese-mask-diplomacy-in-the-western-balkans/>

22) Alexandris, I. (2020). Is the EU risking geopolitical irrelevance in its own backyard? Lessons from COVID-19. Available at: <https://moderniplomacy.eu/2020/09/30/is-the-eu-risking-geopolitical-irrelevance-in-its-own-backyard-lessons-from-covid-19/>

23) Zagreb Declaration. (2020). Available at: <https://www.consilium.europa.eu/media/43776/zagreb-declaration-en-06052020.pdf>

24) European Council. (2020). Infographic – COVID-19: 3.3 billion EUR EU package for the Western Balkans. Available at: <https://www.consilium.europa.eu/en/infographics/economic-support-to-western-balkans/>

16) Vurmo, G. (2020). A credible new accession methodology or just a face-saving exercise? Available at: <https://www.ceps.eu/a-credible-new-accession-methodology-or-just-a-face-saving-exercise/>

17) Chrzova, B. Grbovac, A., Hala, M. in Lalić, J. (2019). Western Balkans at the Crossroads: Assessing Influences of Non-Western External Actors. Prague: Prague Security Studies Institute.

18) Krastev, Ivan and Mark Leonard (2020): Europe's pandemic politics: How the virus has changed the public's worldview. ECFR/326, June.

19) The existing procedures such as Article 7 procedure triggered by the European Commission and European Parliament against Hungary and Poland in the past years, legal infringements etc. proved to be either dead-end streets or too weak.



pro-EU than pro-Russia.²⁵ The role of foreign and state-sponsored fake reporting rather than being solely responsible for change in public attitudes exposed weaknesses in media and civil society institutions across the region.²⁶ On the other hand, during the German presidency, North Macedonia faced blockade by Bulgaria, which argued that North Macedonia "has to acknowledge that the language spoken by the Slav Macedonian majority is Bulgarian – or a dialect thereof".²⁷ Germany (and the rest of the EU) failed to prevent the blockade and convince Bulgaria to lift it which was probably not that much a matter of growing nationalism and role of third actors in the region than that of reluctance of the EU as such in seeing enlargement as a priority and best policy.

Slovenian Presidency of the Council of the European Union

In order to address the pandemic and post-pandemic recovery, the EU involved the WB in joint procurement²⁸ and in the €9 bln Economic and Investment Plan²⁹ proposed by the High Representative for Foreign Affairs and Security

25) International Republican Institute. (2020). Western Balkans Regional Poll 2020. Available at: <https://www.iri.org/resource/western-balkans-poll-shows-strong-support-eu>

26) Ivković, A. (2020). Perception of EU aid amidst the pandemic faces challenges across the Western Balkans. Available at: <https://europeanwesternbalkans.com/2020/04/17/perception-of-eu-aid-amidst-the-pandemic-faces-challenges-across-the-western-balkans/>

27) Euronews. (2020). Bulgaria's block on North Macedonia's bid to join EU 'massively endangers Europe's security'. Available at: <https://www.euronews.com/2020/12/08/bulgaria-s-block-on-north-macedonia-s-bid-to-join-eu-massively-endangers-europe-s-security>

28) European Commission. (2021). Reinforced EU support to the Western Balkans in tackling coronavirus crisis and in post-pandemic recovery. Available at: https://ec.europa.eu/neighbourhood-enlargement/system/files/2021-09/coronavirus_support_wb.pdf

29) European Commission. (2020). Western Balkans: An Economic and Investment Plan to support the economic recovery and convergence. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1811

Policy Josep Borrell to support the EU strategy with concrete activities. The plan, as well as the new enlargement methodology and clustering chapters, the Bulgarian blockade to Northern Macedonia and the need to engage more with other actors than state elites in the region, is what Slovenia inherited as the last of the EU presidency trio (Germany-Portugal-Slovenia).

“Nevertheless, by supporting the ideas of ethnic borders and of Great Serbia, Great Albania and Great Croatia it assisted nationalist status quo players in those countries, who also enjoy support of third countries.”

The SDS-led government in Slovenia, which took office after the centre-left minority government collapsed in early 2020, deescalated the dispute over the Piran bay maritime border with Croatia that has burdened Slovenian foreign and EU policy making for over a decade and strengthened the cooperation with Central Europe. It highlighted geopolitical challenges from countries such as China and Turkey. However, it also aligned with the Donald Trump administration, the illiberal regimes of Fidesz in Hungary and PiS in Poland, Aleksandar Vučić in Serbia and Milorad Dodik in the Republic Srbska. This was the context in which the non-paper on the “Plan B” for the WB proposing new borders in the region along ethnic lines was published in April and was attributed to Slovenia (the non-paper was actually written by CIA officer serving under the Trump administration some years ago but Slovenian representatives were said to distribute it even though this was officially denied). The non-paper probably did not intend to actually change the borders since this would go against the development of norms and rules since the Second World War and would most probably trigger new conflicts. Nevertheless, by supporting the ideas of ethnic borders and of Great Serbia, Great Albania and Great Croatia it assisted nationalist status quo players in those countries, who also enjoy support of third countries. In contrast, it further pressured the multinational states, such as Bosnia and Herzegovina, Kosovo and North Macedonia, where support for the EU



is currently the strongest. The criticism against the non-paper was fierce in the Atlantic community. The new US administration under Joe Biden specifically threatened any actors that would attempt to destabilise the Western Balkans with sanctions. The other reactions from Russia, Turkey together with another non-paper from Zagreb (the latter which Slovenia officially supported called for a stronger role of (Bosnian) Croats in Bosnia and Herzegovina), show that geopolitical challenges persist.

Recommendations: What Slovenia can and could do for the Western Balkans

The COVID-19 crisis has strengthened the need for the EU to retake the lead domestically and in its neighbourhood. The WB plays a specific role and its EU accession could help the Union to improve its credibility as well as to address certain policy challenges, such as security, migration and relations with third countries.

“The COVID-19 crisis has strengthened the need for the EU to retake the lead domestically and in its neighbourhood.”

The WB is perhaps Slovenia's most important strategic region. A next round of EU enlargement would therefore bring immense benefits to Slovenia in terms of trade, investment, political stability and security in the region. After the various EU as well as domestic crises, Slovenia became less of a political actor in the WB. In the early 2010s, the country was even put on the 'Balkans side' of the table at one of the Berlin Process events. Still, it continues to enjoy a relatively positive image in the WBC and is in the position to share its valuable experience with EU accession.

The WB is one of the priorities of the Slovenian Presidency of the Council of the European Union. Even though strategic and foreign policy issues are no longer part of the responsibilities of the presiding country there is much Slovenia could do. Slovenia is (along with other Central European countries) officially supporting the EU enlargement to the WB.

Yet, the non-paper affair has raised the ladder for the informal EU-Western Balkans Summit in October if Slovenia wants to regain its credibility. Thus, the informal summit is an opportunity for Slovenia to pursue at least two 'strategic' goals. The first one being the Bulgarian blockade of Northern Macedonia's EU accession process and the second the progress on the so-called "Open Balkan" initiative (formerly so-called "Mini-Schengen")³⁰. The latter would not only enhance the preparedness of the WB states for the future accession to the EU alongside with the new methodology, but would also promote good neighbourly relations and cross-border projects with regional character. This in turn would also position Slovenia as a credible actor and reliable partner of the WB states, but also an attempt to overcome the negative experience with the non-paper on the future of Bosnia and Herzegovina.

In addition, certain priorities of the Slovenian Presidency of the Council of the European Union, such as resilience to health crisis and cybersecurity, that have gained in importance during the COVID-19 pandemic, go hand in hand with the EU's strategy on WB. Next to this the portfolio on asylum and migration, which is also relevant to mobility and economic migration, including seasonal, daily migrations and tourists, bears specific importance for the region raised by the COVID-19 context. One of the specific trajectories that goes hand in hand with the question of mobility, economic migration and broader security paradigm is the question of the illegal migration, as the 2015/2016 Balkan route showed how ineffective policies can be if countries do not work together. In this context – and in line with the new types of uncertainties deriving from the withdrawal of the U.S. from Afghanistan – Slovenia could exploit further the EU Council presidency and pursue the idea of working together regionally in order to manage the regional borders and control illegal immigration.

30) More information: <https://balkaninsight.com/2021/07/29/balkan-mini-schengen-leaders-eye-open-borders-by-2023/>



Furthermore, the informal EU-Western Balkans Summit could also provide an opportunity for Slovenia to explore the potentials of the new WB (*Western Balkans: An Economic and Investment Plan to support the economic recovery and convergence*). The latter will mobilise up to €9 bln for the long-term economic recovery of the region, supporting a green and digital transition, foster regional integration and convergence with the EU.³¹ This in turn would not only strengthen the transport and energy corridors connecting North-Western and South-Eastern Europe and offer the opportunity for participating in the tenders, but would also provide an economic backbone for the "Open Balkan" initiative. In this context, Slovenia could frame the new investment plan for the WB, Green Deal and "Open Balkan" as means to achieve positive progress in the EU accession process.

31) European Commission. (2020). Western Balkans: An Economic and Investment Plan to support the economic recovery and convergence. Available at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1811



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Rule of Law and Justice – Case Serbia

By Djordje Popović
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Policy Recommendations

1. The legal framework and practice regarding elections, the election campaigns, oversight and funding of the campaigns in Serbia need to be improved.
2. Law enforcement agencies must start working together to fight organised crime, money laundering and other forms of serious crime. Furthermore, they should focus on preventing connections of organised criminal groups with politicians and political organisations.
3. All the amendments of the Constitution, although very necessary as well as a step forward in EU enlargement negotiations (Chapter 23), must be put on hold until democratic and fair elections can take place and return legitimacy to the Serbian Parliament.

Abstract

Serbia in the year 2021 is a captured state with institutions completely under control of one party. With the ruling elites involved in serious cases of organised crime and corruption, in the situation where the opposition is shattered and fragmented and where the free independent media and civil society organisations are under constant pressure of the government it is very difficult to speak about the EU integration process and the developed system of the

rule of law. It seems that the Serbian ruling elites are not very interested in the European values and on the other hand the European Union (EU) can do more in conditioning further accession with full implementation of the rule of law and parliamentary democracy. This Policy Brief will discuss several examples of the dire situation in the field of rule of law in Serbia and also offer some policy recommendations for overcoming it in the future.



Rule of Law and Justice – Case Serbia

Introduction – No Progress

In all official reports on the political situation in Serbia, from the European Union (EU) and its institutions such as the European Commission¹ and the European Parliament², through the reports of established international Non-governmental Organisations (NGOs) such as Freedom House³, the reports of Serbian Non-governmental Organisations such as CRTA (Center for Research, Transparency and Accountability)⁴, YUKOM (The Lawyers' Committee For Human Rights)⁵ and many others, it has been noted and pointed out that Serbia showed no progress in the area of rule of law and justice reform. So, it is no wonder that the rule of law, together with negotiations with Pristina is the stepping stone of this country's European integration. It is often presented by the Serbian ruling elite that "the West" will turn the blind eye on the very difficult situation in Serbia concerning the rule of law as long as the Kosovo issue is resolved in a long-lasting and comprehensive manner.

1) European Commission, Serbia 2020 Report - https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/serbia_report_2020.pdf, p.18.

2) European Parliament, 2019-2020 Reports on Serbia - https://www.europarl.europa.eu/doceo/document/TA-9-2021-0115_EN.pdf

3) Freedom House, Freedom in the World, 2020 Serbia Country Report - <https://freedomhouse.org/country/serbia/freedom-world/2020>

4) CRTA, Corruption and Organised Criminal in Serbia – What is the Price of Integrity? - <https://crt.rs/en/corruption-and-organised-criminal-in-serbia-what-is-the-price-of-integrity-and-judiciary-in-serbia-independence-on-hold>

5) Yukom, Human Rights and Democracy Violation Early Warning Weekly Newsletters - <https://en.yucom.org.rs/category/yucom-ews>

Captured State

State capture can be defined as systemic political corruption in which politicians exploit their control over a country's decision-making processes to their own advantage⁶. Serbia, as well as almost all Western Balkan states, was recognised as the place where the state is captured by the political elites – or better said by the ruling party or its leader.⁷ This capture is being implemented through total control over all institutions in the country – all three branches of power (legislative, executive and judiciary). In many ways this kind of setup hinders the prospects of European Union (EU) integration for the country which has been officially in the accession process for seven years.

“The completely new term ‘stabilocracy’ was invented to explain the situation where local autocrats are being tolerated despite their wrongdoings within their countries as long as they preserve stability in the region.”

At certain point it looked like the EU accession process is the best cure for the phenomenon of captured state since it develops the mechanisms necessary for the establishment of accountability and democratic procedures. However, not only has the EU so far been unable to counter the rise of state capture in the Western Balkans and especially

6) Maarten Lemstra, The destructive effects of state Policy Brief capture in the Western Balkans: EU enlargement undermined, Clingendael Policy Brief, September 2020 - https://www.clingendael.org/sites/default/files/2020-09/Policy_brief_Undermining_EU_enlargement_Western_Balkans_September_2020.pdf

7) European Commission, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions - https://ec.europa.eu/info/sites/default/files/communication-credible-enlargement-perspective-western-balkans_en.pdf



Serbia, but many experts now agree that the EU even contributed to state capture by providing autocrats with funding and legitimacy⁸. The completely new term “stabilocracy” was invented to explain the situation where local autocrats are being tolerated despite their wrongdoings within their countries as long as they preserve stability in the region⁹.

“By organising early elections almost every two years the ruling party is keeping the society in constant electoral campaign with huge abuse of state functionary positions.”

The Serbian Parliament, which is today without the opposition because of the boycott of the elections in 2020, is reduced to be merely a voting machine. One of the reasons for such a problem is the boycott of the elections in 2020 by major opposition parties. But what is even more important is the fact that strong state and public sphere capture of the ruling Serbian Progressive Party (SNS) has destroyed minimum precondition for free and fair elections resulting in low legitimacy of the electoral process first and then of the parliament as the consequence. Today, in the Serbian Parliament its members use their position not to elaborate on the laws that are being adopted but to spread hate speech against the opposition (not even present in the parliament as mentioned), independent media and civil society organisations. By organising early elections almost every two years the ruling party is keeping the society in constant electoral campaign with huge abuse of state functionary positions. On the other hand, the elections are being organised with immense irregularities especially on local level where groups of ruling party members are visiting small towns in vehicles without licence plates and

darkened windows and threaten people to vote for the ruling party or offer them money for doing so.

Recommendation: The legal framework and practice regarding elections, the election campaigns, oversight and funding of the campaigns need to be improved. Changes are needed in the Law on Financing of Political Activities and in the regulation of “Functionary campaigns”; the rules to prevent misuse of public funds have to be improved. Public prosecutors, the Anti-Corruption Agency and Regulatory Authority for Electronic Media should actively warn and investigate violations of the law.

The Serbian government in practice resembles rather just a technical and formal body that implements the decisions of the President with ministers in constant fear for their position and therefore in the necessity to prove their loyalty to the main decision maker. Maybe the best example of the political situation in Serbia is the fact that the Prime Minister refers to the President as “her boss”. All the other officials below the ministerial position – state secretaries, assistant ministers, directors of public enterprises, etc. – are illegally kept in acting positions in order to be able to be removed in any moment and replaced.

“There is constant campaign against independent and investigative journalists and civil society organisations which is being conducted by high state officials and ‘their’ media.”

Apart from a couple of cable TV broadcasters and newspapers all other media are totally under the control of the ruling party – including all five TV broadcasters with national frequency. There is constant campaign against independent and investigative journalists and civil society organisations which is being conducted by high state officials and “their” media. In July 2020, the Directorate for the Prevention of Money Laundering of the Ministry of Finance requested insight into financial transactions of 20 individuals and 37 organisations operating in Serbia from several commercial banks. In the

8) Solveig Richter and Natasha Wunsch, Money, Power, Glory: The linkages between EU conditionality and state capture in the Western Balkans, Journal of European Public Policy, 27(1), 2019, pp. 41–62.

9) More about stabilocracy at: <https://biepag.eu/article/what-is-a-stabilocracy/>



document sent by the administration to banks it is written that data was sought to determine whether certain organisations and individuals are related to terrorist financing or money laundering. Media associations were highlighted on the list and portals of investigative journalists, as well as civil society organisations and individuals dealing with protection of human rights, war crimes, transparency, strengthening democracy and the rule of law, the arts, film production, philanthropic work, etc. Most of the organisations and individuals who found themselves on the list are connected by the fact that they continuously call institutions and officials to account but also reveal the cases of human rights violations, abuse of office and corruption.¹⁰ This kind of pressure was not used in Serbia since the time of former President Slobodan Milošević and it raises great concern for the future work of independent organisations in this country.

Fight Against Corruption

One of the main issues raised by the Serbian Progressive Party which brought them many votes and consequently election victory was the fight against wide-spread corruption. This fight officially started with the arrest of Miroslav Mišković – one of the wealthiest men in Serbia and controversial businessman even from the Milošević period. Although Mišković spent seven months in custody, he was released and after two repeated trials any kind of conviction is still out of sight. In the meantime, Mišković returned to his everyday business, even expended his empire and is not even mentioned in the media anymore – especially those who were labelling him as the biggest criminal and opposition financier.

“One of the main issues raised by the Serbian Progressive Party which brought them many votes and consequently election victory was the fight against wide-spread corruption.”

This case was maybe a proof that this promoted fight against corruption will not go as many citizens of Serbia expected. What is even more evident is that corruption in Serbia flourished since the Serbian Progressive Party came to power. The level of corruption is maybe the best explained in the case Krušik which was brought to the attention of public by a whistleblower employed in the armament and ammunition factory Krušik from Valjevo. It showed proof that this factory was selling its products under price to a small private company in which the management was led by the father of (at the time) Minister of Interior and current Minister of Defense Nebojša Stefanović. This company exported the ammunition and armament further to many different countries struck by war, some under the United Nations sanctions even, for very high prices. One of the persons in charge of giving permissions for this kind of export was Minister Stefanović. Not only that this case never went to court but it was brutally covered up and the whistleblower spent some time in custody and lost his job.

Another example of state corruption is the case of Telekom. At the end of 2020 a plan emerged in the media where the state-owned company Telekom signed a contract with the private telecommunications company Telenor which is already present in Serbia in order to limit the share of the privately owned company SBB which broadcasts the independent news channels N1 and Nova S. This agreement in which is literally written that its goal is the destruction of SBB, was later approved by the State Commission for Protection of

10) Coalition PrEUgovor, Report on Progress of Serbia in Chapters 23 and 24 - November 2020 - <https://preugovor.org/Alarm-Reports/1611/Coalition-prEUgovor-Report-on-Progress-of-Serbia.shtml>



Competition no matter that it presents a clear case of so-called restrictive agreement.¹¹

Fight Against Organised Crime

Another point that was high on the agenda of the Serbian Progressive Party was the fight against organised crime. Although state officials convinced the public that this fight is ongoing and successful as never before it is quite obvious that this is not the case. This fight is being directed only against certain parts of the organised crime network which are not connected with the ruling elites or which became too strong and need to be disciplined.

“Another point that was high on the agenda of the Serbian Progressive Party was the fight against organised crime.”

Recently, the public of Serbia had witnessed a couple of high-level criminals arrested in spectacular police interventions. One of them was the so-called case Jovanjica in which the police arrested the owner of the biggest marihuana plantation in Europe. When some opposition leaders came out saying that this man was well connected to the President, especially his brother, there was a storm of reactions against the opposition and media that covered this information. The policemen who led the investigations were put on polygraph and had to publicly declare that Jovanjica did not have anything to do with the family of Aleksandar Vučić. However, it is still unclear how the owner of Jovanjica had police badge as well as protection which was provided to him by certain members of the police, the Security Information Agency (BIA) and the Military Intelligence Agency (VOA). Some of these people were arrested and also put on trial and some are on the run. It is also unclear why the

owner of the plantation was previously regarded as successful producer of organic food and as such visited by high state officials and even was a part of state delegations on several occasions often led by the President himself.¹²

Another case which even more disturbed the public was the arrest of the so-called Belivuk Clan. This network of criminals which was originally a group of football hooligans connected with the football club Partizan was arrested under accusation for being behind numerous cases of murders and drug trafficking. They are also accused to be a part of the Montenegrin Kavački Clan in Serbia which was in charge of liquidation of the members of the antagonist Škaljarski Clan. In their position huge amounts of weapons were found as well as secret stashes in which horrific evidence of atrocities were found – the worst of all was an industrial machine for meat grinding with traces of human DNA in it. All these dreadful evidences together with the photos of beheaded bodies of their victims were presented in March 2021 in prime time on all TV broadcasters by the President himself. Yet, it is also still not clear how the Belivuk Clan got the protection in the police for so many years and more interesting remains the question why they were in charge of the security of the President's inauguration.¹³

Recommendation: Law enforcement agencies must start working together to fight organised crime, money laundering and other forms of serious crime. Furthermore, they should focus on preventing connections of organised criminal groups with politicians and political organisations.

11) More on this case at: European Western Balkans, Do Telenor and Telekom endanger free competition on the media market in Serbia? - <https://europeanwesternbalkans.com/2021/02/22/do-telenor-and-telekom-endanger-free-competition-on-the-media-market-in-serbia/>

12) More on Jovanjica case at: Balkaninsight, Organic High: State Complicity in Serbian Drug Farm a “Stain” on Government - <https://balkaninsight.com/2020/07/27/organic-high-state-complicity-in-serbian-drug-farm-a-stain-on-government/>

13) More on the Belivuk case at: Balkaninsight, Vucic Surfs on Wave of Scandal That Should Drown Him - <https://balkaninsight.com/2021/03/03/vucic-surfs-on-wave-of-scandal-that-should-drown-him/>



Judiciary Reform

Here we come to one of the necessary key elements for resolving the issues mentioned above and many more that are not part of this analysis. For tackling all the elements of corruption and organised crime as well as the abuse of power strong and independent judiciary is *conditio sine qua non*. Unfortunately, this is something that never existed in Serbia throughout its history. Sadly, there are only few exemptions which are every time based on the personal understanding of their own task - like for example some honourable judges and prosecutors. Therefore, it is very difficult to establish the tradition of independent judiciary in such a country. Moreover, it is difficult because Serbia does not have a clear political will for such an endeavour. Selection and appointment of judges and prosecutors was always under heavy influence of the political elites – currently the parliament. Therefore, the demand of the European Commission, within the negotiating Chapter 23, to amend the Constitution in that regard that the judges themselves should have a weighty word in selection of their colleagues was obvious. This was officially accepted by the Serbian government and even introduced in the Action Plan for Chapter 23 with the deadline for constitutional amendments in 2017.

“For tackling all the elements of corruption and organised crime as well as the abuse of power strong and independent judiciary ‘is conditio sine qua non’.”

These amendments were not done until now because of a huge objection of all the parts of professional public in Serbia – judges, prosecutors, civil society and academia. The government wants to replace the original constitutional norm that the parliament appoints the judges by the norm that this appointment is made by the Supreme Judiciary Council. This looks like a much better solution and more democratic one. Only until we take a look at the members of this Council. It is proposed that the Supreme Judiciary Council has ten members out of which only five are judges and the rest are

“prominent lawyers” elected by the parliament. The President of the Supreme Judiciary Council is to be selected from the group of “prominent lawyers” and since there should be an equal number of members from the judiciary and “prominent lawyers” the President will have a decisive vote. Political influence is even more evident in the proposed norms for the appointment of public prosecutors. They will be selected by the Supreme Prosecutorial Council which will have eleven members – four elected by the prosecutors, five elected by the Parliament, State Public Prosecutor (elected by the parliament) and Minister of Justice.¹⁴ It is obvious that the political influence will not be excluded from the process of selection but merely it will be disguised into a more democratic form.

Recommendation: All the amendments of the Constitution, although very necessary as well as a step forward in EU enlargement negotiations (Chapter 23), must be put on hold until democratic and fair elections can take place and return legitimacy to the Serbian Parliament.

Conclusion

Considering all that has been said it is certain that Serbia is a country with great problems in the area of rule of law. Constant postponing of the reforms in this field showed to be crucial for the poor results in the accession process to the EU. Not opening a single negotiating chapter last year is a clear sign to Serbian authorities that the necessary reforms must take place prior to any possibility of further accession. Any trade-off between the rule of law and resolving the Kosovo issues, highly desired by Serbian political elites, must remain only wishful thinking, since there should be no shortcuts to modern democratic and accountable society that Serbia finally needs to become.

¹⁴ The proposed constitutional amendments can be seen at: Ministry of Justice, Draft Amendments to the Constitution - <https://www.mpravde.gov.rs/files/Draft%20Amendments%20to%20the%20Constitution%20of%20Republic%20of%20Serbia.pdf>



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On the other hand, the EU still has some mechanisms which could influence the situation. Since the EU is still, contrary the popular belief, the biggest provider of foreign aid and investments in Serbia this can be used as a tool to put additional pressure to the ruling elites in order to improve the state of the rule of law. This conditionality, which exists to certain extent, is maybe the best way to influence the political flows in Serbia which cannot be defined as fully democratic. This will bring into the light true character of the current political elites and show their readiness for reforms. They will have to introduce the necessary changes in everyday political life or to turn completely away from the European integration and show in that way that this process is lost in Serbia for good.



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Djordje Popović works as Program Coordinator at BFPE. He was engaged in Serbian civil society for a long time, especially in Belgrade Centre for Security Policy where he spent seven years as a researcher and education coordinator. Before he joined BFPE Djordje worked in the Government Office for Cooperation with Civil Society as an Adviser.

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Hungary, an anti-role model for successful EU integration?

By Christina Griessler, Fanni Elek
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Policy Recommendations

1. The EU needs to clearly state that the countries of the Western Balkans should not follow the role model of Viktor Orbán's "illiberal democracy", as this can hamper their accession process. Moreover, the Western Balkan states need to openly reject the authoritarian-minded ideas.
2. Hungary, which several Western Balkan countries perceive as an honest broker, should closely collaborate with EU member states that have strong ties to the region (e.g. Slovenia and Croatia). Furthermore, this close cooperation should also include countries which are sceptical about a possible EU enlargement (e.g. the Netherlands and France) to overcome indifference. Eventually, the collaboration also needs a strong advocate with significant political weight within the European decision-making process (e.g. Germany).
3. The EU institutions have to stand up and defend their values. If the European Commission cannot keep its role as a guardian of the treaties, it will lose credibility, and it will further fuel resistance within the EU against the accession of the Western Balkans. The EU needs to considerably speed up its "rule of law mechanism" against Hungary and Poland, or the accession of the Western Balkan countries will recede in the distance.

Abstract

Already from around 2007 onwards the European Union's (EU) enlargement process entered a severe crisis and attempts to overcome the deadlock have failed so far. The trust in the EU's ability to move forward and enable the next enlargement of the countries of the Western Balkans has more or less vanished. Still, there are a number of EU member states actively pursuing the EU accession of the Western Balkans. Hungary is one of those countries. However, Hungary is in conflict with the EU, due to its reluctance to comply

with the EU's values and rules, especially regarding the rule of law. This Policy Brief will look at the issue of Hungary as a role model for the countries of the Western Balkans and how securing good bilateral relations to the Western Balkan countries supports its national interests. The questions are how did Hungary turn from a good pupil to a problem child, how the conflict within the EU shaped its image of a confident critique of the "old" EU and what impact Hungary's role has on the Western Balkan states.



Hungary, an anti-role model for successful EU integration?

1. Shifts in domestic politics in Hungary - from model pupil to problem child

Hungary became a member of the European Union (EU) in 2004 as part of the Eastern enlargement that allowed ten, mostly post-communist countries to achieve their long-standing goal to join the EU. After years of communist rule, Hungary has sought to be part of the European family again and defined its values in accordance with the fundamental values of the EU. At this time, Hungary was considered a “free state” that has made significant improvements in the fields of political rights and civil liberties to be a member of the EU.¹ Hungary has converted into one of the most stable, consolidated parliamentary democracies among the ten new members of the EU.²

“During the past eleven years, Orbán has transformed Hungary into a ‘partly free’ state and a hybrid regime.”

However, the outcome of the nationwide parliamentary elections in 2010 had a significant effect on the political developments and the quality of democracy in Hungary. Viktor Orbán and his Fidesz party (Federation of Young Democrats/Hungarian Civic Alliance) were able to win the elections and secured their supermajority in the Hungarian Parliament. The landslide victory allowed Orbán to realign Hungary’s domestic and foreign political directions and choose to go off the well-known path of further democratisation and Europeanisation. During the past eleven years, Orbán has

transformed Hungary into a “partly free” state and a hybrid regime.³ His politics are based on the gradual dismantling of political rights, civil liberties, and the independence of democratic institutions which can be summarised as democratic backsliding. The consolidation of the Fidesz’s power was enabled by significant constitutional and legal changes, possible due to the legislative supermajority of the party. One of the essential characteristics of the politics of Orbán is the use of concepts of foreign enemies, e.g., International Monetary Fund, George Soros, the “illegal migrants”, and the politics of the EU, which are summarised under the term “Brussels”. However, concerning Hungary’s position to the EU, the Hungarian population tends to be rather positive, especially about the benefits of a membership within the EU. This positive tendency was still identifiable despite the “Stop Brussels” campaign in Spring 2017. The Parlemeter 2017 of the European Parliament confirms this observation by showing that 56 percent of the Hungarian population stated that Hungary’s membership of the European Union is a “good thing” and further 34 percent was neutral about the membership (“neither a good thing nor a bad thing”). Considering the benefits of the Hungarian membership of the European Union, 72 percent were convinced that Hungary had benefited from the membership and only 19 percent stated the opposite.⁴ Nevertheless, the government also identified some domestic groups which had been labelled as “hostile”, such as the entire political opposition, members of the

1) Freedom House (2005): Freedom House Annual Report. Available at: <https://freedomhouse.org/sites/default/files/inline-images/2005.pdf> (last accessed 10 May 2021).

2) Bertelsmann Stiftung (2006): Hungary Country Report BTI 2006. Available at: https://www.bti-project.org/content/en/downloads/reports/country_report_2006_HUN.pdf (last accessed 10 May 2021).

3) Freedom House (2021): Freedom in the World 2021 - Country Report Hungary. Available at: <https://freedomhouse.org/country/hungary/freedom-world/2021> (last accessed 10 May 2021).

4) European Parliament (2017): Parlemeter 2017: A Stronger Voice – Citizens’ View on Parliament and the EU. Available at: <https://euagenda.eu/upload/publications/untitled-108549-ea.pdf> (last accessed 11 May 2021).



LGBTIQ⁵ community, and universities, journalists, and Non-governmental Organisations (NGOs) that are not conducting their activities according to the Fidesz's directives and policies.

“His politics are based on the gradual dismantling of political rights, civil liberties, and the independence of democratic institutions which can be summarised as democratic backsliding.”

2. The relations between Hungary and the EU - with special regards on the issue of the rule of law

After the EU accession of Hungary in 2004, the relations between Hungary and the Union have developed relatively stable. However, the after-accession crisis in Hungary, the global financial crisis in 2008, and the economic downturn caused a tendency towards Euroscepticism for the following succeeding Hungarian government in 2010. The elections and the rise of the power of Orbán in 2010 determined not only the domestic political developments but also the future of EU-Hungarian relations. Since then, several domestic reforms were adopted - the implementation of a new Hungarian constitution in 2011, the judicial reform to reduce the prerogatives of the Constitutional Court, the increasing of the voting quorum to a two-thirds majority in the Parliament for a range of policy fields, and a new media law. Thus, Fidesz could consolidate its power while undermining the independent institutions and the rule of law. Orbán described his system in 2014 for the first time as an “illiberal democracy”. He characterised these democracies as not liberal, not Western, and maybe not even democratic, but highly successful.⁶

“The elections and the rise of the power of Orbán in 2010 determined not only the domestic political developments but also the future of EU-Hungarian relations.”

The migration crisis in 2015 allowed Orbán to proceed with his domestic political strategies on a higher, European level, where he became an emblematic figure of fighting against the mandatory relocation quotas of refugees. This made him a visible Central European player, who offered an alternative to EU politics by prioritising the alleged national state interests. By pursuing his interests, he used a destructive attitude that shatters the political culture of the EU, which is based on cooperation and willingness to compromise. Beyond this dispute, Hungary's national political course also clashed with the EU law, which consequently caused prosecution by the Court of Justice of the European Union: “Hungary has failed to fulfil its obligations under EU law in the area of procedures for granting international protection and returning illegally staying third-country nationals”.⁷

During the coronavirus pandemic Hungary violated its constitution by introducing a so-called enabling act, which allowed the government to govern by decree for an indefinite period without parliamentary control. The act seemed like a peaking point of the Prime Minister's power. The EU itself was in a crisis and unable to respond adequately to several controversial laws being passed within this period, such as a crackdown law on the LGBTIQ community in Hungary. These developments further fuelled the discussion within the EU on how to proceed with its problem child. Until this point, the EU's efforts have not changed Hungary's political positions significantly. Therefore, the EU decided to implement a so-called “rule of law mechanism” to sanction Hungary financially for violating the

5) LGBTIQ stands for Lesbian, Gay, Bisexual, Transgender, Intersex and Queer.

6) Magyar Nemzet (2014): Orbán Viktor miniszterelnök teljes beszéde a 25. Bálványosi Szabadegyetem és Diáktábor rendezvényén. Available at: <https://magyarnemzet.hu/archivum/belfold-archivum/orban-viktor-teljes-beszede-2-4054256/> (last accessed 11 May 2021).

7) Court of Justice of the European Union (2020): Judgment in Case C-808/18 - Commission v Hungary, Press Release No 161/20. Luxembourg, 17 December 2020. Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/cp200161en.pdf> (last accessed 11 May 2021).



fundamental values of the EU. This mechanism was approved during the negotiation of the long-term EU budget 2021-2027 and the Recovery Fund - an answer to the coronavirus crisis. However, these laws had to be declared in unanimity; consequently, Hungary and Poland blocked all drafts of the mechanism, until it was watered-down significantly. The now existing rule of law mechanism ties financial sanctions with the rule of law, which is indeed unprecedented in EU history, yet former versions of the mechanism were much stronger and favoured more effective measures. In domestic politics Orbán achieved to sell this result to the Hungarian population as a victory against "Brussels".⁸

"Consequently, the Fidesz party decided to pull the trigger and resigned on own terms from its EPP membership - prior to a possible forced expulsion."

In a final showdown, the European People's Party (EPP) strongly considered the expulsion of Hungary's governing Fidesz party. This step was anticipated after Hungary had already been temporarily suspended of its membership, right before the European Parliamentary Elections in 2019. Consequently, the Fidesz party decided to pull the trigger and resigned on own terms from its EPP membership - prior to a possible forced expulsion.

In June 2021 the Hungarian government deepened its isolation from the European Union by passing a controversial decree called "Anti-Paedophilia Act". Supposedly, the decree shall protect children from severe child abuse, however at the same time the decree is also an "anti-LGTBIQ" legislation by banning the "promotion of homosexuality" among young people under the age of 18. The decree caused a political outcry within the European Union since the law represents a break with the main values of the Union such as

the right to freedom of expression, free trade and provision of services. The caused controversy is the latest step of Hungary towards the creation of a "perfect" illiberal democracy based on conservative, Christian values.

"In June 2021 the Hungarian government deepened its isolation from the European Union by passing a controversial decree called 'Anti-Paedophilia Act'."

3. Hungary's "à la carte-politics" towards the EU

Despite the presented tensions, a relatively stable relationship with the EU is of significant importance for Hungary; therefore, the government tries to avoid irreversible political scenarios, such as "Huxit". From a strategic point of view, an EU membership offers several advantages, which brings Hungary, for example, in the position of being one of the biggest beneficiaries of the EU budget.⁹ It seems that for the Prime Minister, the EU membership still has more benefits than costs, according to a cost-benefit rationale - in this scenario, the European project is rather of an economic nature than a political one.

"In his alternative vision of Europe, Orbán acts as self-serving strategist - EU integration is essential when it serves the national interest."

Hungary's domestic and European politics seem to be in confrontation regarding fundamental European values, especially the rule of law. Nevertheless, the Prime Minister insists that there is no disruption of the rule of law in Hungary because, from his point of view, there are no objective criteria

8) MTI (2020): Magyarország csatát nyert Brüsszelben. Available at: <https://hirado.hu/belfold/belpolitika/cikk/2020/12/10/magyarorszag-csatat-nyert-a-brusszelben> (last accessed 11 May 2021).

9) Buchholz, Katharina (2020): Which Countries are EU Contributors and Beneficiaries? Available at: <https://www.statista.com/chart/18794/net-contributors-to-eu-budget/> (last accessed 11 May 2021).



to define and measure this concept.¹⁰ Taking up a minority position on the interpretation for rule of law, this approach even strengthens his leadership over the “other Europe”. In his alternative vision of Europe, Orbán acts as self-serving strategist - EU integration is essential when it serves the national interest. Therefore, vertical integration, for example, setting the bar for the rule of law conditionality, endangers the Hungarian status quo of consolidated “illiberal democracy”. Unlike the vertical approach, horizontal European integration may further consolidate the Hungarian regime’s influence in neighbouring regions such as the Western Balkans. A horizontal European integration includes, among others, the accession of the Western Balkan region into the EU, which would be in the interest of the Orbán regime. Hungary and the region share a similar history and political systems - by leading them into the EU, Orbán might gain more followers for his “other Europe”.

4. Hungarian relations to the Western Balkans

Divisions have emerged among the EU countries, which are jeopardizing the EU’s policy on enlargement for the six Western Balkan states; Albania, Bosnia-Herzegovina, Montenegro, North Macedonia, Kosovo and Serbia. On one hand certain EU member states are not satisfied with the process of reforms by the Western Balkan countries, hence they are slowing down or even blocking the process. This again undermines the EU’s credibility to deliver on enlargement. And on the other hand, some EU countries, like Hungary and Poland, although very supportive of the EU’s enlargement process, are themselves no longer complying with the norms and rules of the EU. This provides an argument for the more cautious EU members not to accept the seemingly more reform-reluctant countries of the Western Balkans into the

EU, as long as the set conditions have not been fully implemented. Countries as the Benelux states¹¹, France and Denmark are demanding a strict adherence of the political conditionality, especially a thorough implementation of the reforms in the areas of justice and rule of law. Whereas Hungary – for example – is opposed to this narrow interpretation of conditionality, which it perceives as a political judgement of the Western Balkan countries. The Hungarian government’s position is that the current enlargement process should not be asking for stricter rules or new accession methodology than in the previous accession rounds and that exactly these changes are the reason for the delay of the process.¹² It is important to note that Hungary’s opinion does not follow a normative dimension or reasoning, meaning that there is no underlying interest in promoting liberal democracy, but is mainly motivated by strategic national interests.

“Divisions have emerged among the EU countries, which are jeopardizing the EU’s policy on enlargement for the six Western Balkan states.”

Hungary is actively advocating for the accession of the Western Balkan countries to the EU. It also took a leading role on that issue within the Visegrád Four Group (V4), consisting of the four Central European states, the Czech Republic, Poland, Slovak Republic and Hungary. Hungary as the “driving force of enlargement” also showed interest in joining the by Germany 2014 initiated Berlin Process, which aimed to reignite a new dynamic into the EU’s enlargement process. However, Hungary

11) Jungbluth, Jürgen (2020): Evaluating the Positions of the Visegrád Group and the Benelux Union on the EU Enlargement Policy and the EU Accession of the Western Balkan Countries, KKI Policy Brief, Institute for Foreign Affairs and Trade. Available at: <https://kki.hu/en/evaluating-the-positions-of-the-visegrad-group-and-the-benelux-union-on-the-eu-enlargement-policy-and-the-eu-accession-of-the-western-balkan-countries/> (last accessed 11 May 2021).

12) Huszka, Beáta (2017) Eurosceptic yet pro-enlargement: the paradoxes of Hungary’s EU policy, Southeast European and Black Sea Studies, 17:4, pp. 591-609, here p. 595.

10) Magyar Hírlap (2020): Orbán Viktor: Mi vagyunk a jogállamiság utcai harcosai. Available at: <https://www.magyarhirlap.hu/belfold/20201125-orban-viktor-mi-vagyunk-a-jogallamisag-utcai-harcosai> (last accessed 11 May 2021).



was not invited by Germany to join, only Poland, as the only country from the V4-Group, was allowed to participate. During Hungary's EU presidency in 2011 the EU accession of Croatia was made a priority by Hungary and their work has contributed hugely in pushing both parties to finalise the accession negotiations. By 2013 Croatia finally joined the EU. Hungary is overall perceived as a constructive partner in the context of the EU's enlargement process and therefore the Hungarian Olivér Várhelyi was awarded with the EU Commission's portfolio of Neighbourhood and Enlargement in 2019.

“Hungary is actively advocating for the accession of the Western Balkan countries to the EU.”

Hungary's motivation in supporting EU enlargement is driven by national interest. First of all, the geographical proximity of Hungary to the region, which in cases of instability – such as the wars in the 1990s and the migrant crisis in 2015 - affects its own security at its borders. Secondly, the Hungarian minority living in the Western Balkan region compels the Hungarian government to establish good working relationships with the regimes in the region to ensure the minorities' protection. Hungary is the country geographically the closest to the region and there are nearly 254 000 Hungarians, about 3.5% of the population living in Serbia.¹³ Thirdly, there are strong economic links and interests for Hungary in the region, despite being a rather small market. Hungary over the last years had an interest in strengthening economic ties and in increasing trade with the Western Balkans.¹⁴ For example, the Hungarian

Export Promotion Agency has launched a Western Balkan Investment Scheme in 2020 with an overall available budget of HUF 2,85b billion (approx. EUR 7 million) for Bosnia and Herzegovina, Montenegro and Serbia.¹⁵ Fourthly, the Hungarian government is looking for politically like-minded partners in the region. Victor Orbán attempts by establishing good personal relations with certain leaders in the wider region, such as the Serbian President Aleksandar Vučić or the former Macedonian Prime Minister Nikola Gruevski and recently Slovenian President Janez Janša, to build a network of sympathetic partners. And finally, enlargement is a policy area where Hungary can pursue a distinct independent foreign policy.¹⁶ Hence, the enlargement is a national interest, which is pursued by Viktor Orbán to style himself as a personal role model for the entire Western Balkan region.

“Political leaders in the Western Balkans gratefully acknowledge this much needed support from an EU member.”

Hungary is perceived by some Western Balkan countries as an honest friend. Although the case of former Macedonian Prime Minister Gruevski, who fled the country to Hungary with the assistance of the Hungarian embassy in Tirana to avoid a jail sentence and was immediately granted political asylum in Hungary in 2018, was criticised by some countries, but seemingly had not developed into an obstacle or effected the countries relations negatively. Not for all politicians in the Western Balkans Orbán might be considered as a role model, however he is well-regarded for acting in the interest of the Western Balkan states in relation to the continuation of the enlargement process. Political leaders in the

13) Statistical Office of the Republic of Serbia (SORS): Population by ethnicity, age and sex, Census 2001. Available at: <https://data.stat.gov.rs/Home/Result/3102010403?languageCode=en-US> (last accessed 10 May 2021).

14) Hettyey, András (2013): Ungarns Wirtschaftsbeziehungen mit den Ländern des Westbalkans, Donau-Institut Working Paper No. 11, Andrássy Universität Budapest. Available at: <https://www.andrassyuni.eu/pubfile/de-50-11-di-wp-hettyey-ungarns-wirtschaftsbeziehungen-mit-den-landern-des-westbalkans-final.pdf> (last accessed 11 May 2021).

15) Hungarian Export Promotion Agency (n.d.): Western Balkans Investment Scheme. Available at: <https://hepa.hu/en/tender/directorate-of-western-balkan-project-implementation/Western-Balkans-Investment-Scheme> (last accessed 11 May 2021).

16) Huszka, Beáta (2017) Eurosceptic yet pro-enlargement: the paradoxes of Hungary's EU policy, Southeast European and Black Sea Studies, 17:4, pp. 591-609, here p. 593.



Western Balkans gratefully acknowledge this much needed support from an EU member. Similarly, the conflict with Serbia over the improvement of minority rights in 2011 and the building of the fence to Serbia to ward off migrants in 2015, did not damage the bilateral relations long-term.¹⁷ During the last years the relationship between Orbán and Vučić strengthened and regular visits between these two heads of governments took place. Their cordial relationship is understandable due to their similar worldviews and interest in maintaining political control in their country.¹⁸ Orbán's anti-role model is one which politicians with a similar political outlook are considering to follow, hence it is becoming an alternative role model, one Brussels is not too keen in seeing gaining popularity.

the Western Balkan countries give the impression to follow the Hungarian model, the accession might be further delayed. It has to be made clear to the Western Balkan countries that Orbán is a negative role model, which should not be copied. Orbán's policy of supporting the Western Balkan states' EU accession on one hand, but alienating Brussels on the other could be perceived as a contracting one. However, Orbán is guided by national interests and his personal ambition to become a respected leader in his own right in the region. These can be fulfilled either way with the Western Balkan countries in or outside the EU.

“It has to be made clear to the Western Balkan countries that Orbán is a negative role model, which should not be copied.”

Hungary's scepticism towards Brussels and its stands on the rule of law, freedom of media and justice at home has actually contributed to an overall slowing down of the enlargement process, as the more cautious EU member states want to avoid a case like Hungary in the future. Due to this rhetorical distancing from Brussels, Orbán is considered to be one of the strongmen in the region, who managed to dominate the Hungarian political system over the last 10 years. The accession of countries with like-minded politicians, might in future support Orbán's stance on issues within the EU. Building an “illiberal block” of friendly states within the EU, who would take Orbán's side, when in conflict with “Brussels”, is considered as a problem. Still, all EU member states decide on EU's enlargement and if

17) Huszka, Beáta (2017) Eurosceptic yet pro-enlargement: the paradoxes of Hungary's EU policy, *Southeast European and Black Sea Studies*, 17:4, pp. 591-609, here p. 599-601.

18) Bíró-Nagy, András; Hare, James (14 November 2020): Understanding the Orbán-Vučić Relationship, Policy Solution. Available at: https://www.policysolutions.hu/en/news/511/understanding_the_orban-vucic_relationship (last accessed 11 May 2021).



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The controversy of ‘more (economic) freedom’. Can liberalisation in North Macedonia cause more problems than benefits?

By Dimitar Nikolovski, Aleksandar Stojanovski
Vienna, 28 October 2021
ISSN 2305-2635

Policy Recommendations

1. Slow down
2. Initiate public debate
3. Consider public opinion

Abstract

In the past months, the government of North Macedonia has pushed for three policies providing for different forms of liberalisation and legalisation, all with potentially significant impacts on the rule of law and justice in the country: legalisation of cannabis for recreational use, legalisation of illegally constructed objects, and the selling/privatisation of state-owned agricultural land. In the Policy Brief, the authors outline the proposed changes, possible implications, and their

opposition. They claim that all three changes at once pose the danger of overwhelming the administrative system and society. Furthermore, they argue that public institutions lack the capacity to successfully manage all changes at once. The authors recommend that the government takes a step back, enters into deep consultations with stakeholders, and makes clear distinctions within the proposal for legalisation of illegally constructed buildings.



The controversy of ‘more (economic) freedom’. Can liberalisation in North Macedonia cause more problems than benefits?

Introduction

The Macedonian political space has been burdened mostly by two issues in the past few months: the problematic EU accession process due to the first French and now Bulgarian blocking over identity, history, and language disputes, as well as the slow start of the anti-COVID-19 vaccination process. In the shadow of these events, the Macedonian government has tried to push for three policies which are designed to have a huge impact on the existing state of rule of law and justice in the country, with a potential effect on the European integration process and law enforcement in the region. All three policies can be put into the context of liberalisation and deregulation, much in line with neoliberal politics: the legalisation of cannabis for recreational use, changing the status of illegally constructed buildings, and the selling of agricultural land in the state's property. The combination of all three policies raises serious concerns regarding equality of citizens and amending the legislation to fit narrow interests, at the expense of law enforcement. This, in turn, can impact how successfully the country is reforming in lines with the Chapters 23 and 24 of the acquis communautaire.

Cannabis legalisation

Medical cannabis cultivation in North Macedonia was allowed in 2016 by modifying the Law on Control on Drugs and Psychotropic Substances. Since then, there is an ongoing debate on allowing for recreational use of this criminalised substance. Currently, the government of North Macedonia has issued close to 60 licenses to companies for the production of medical cannabis.

In this context, it is important to note that there have been several police operations with significant quantities of, allegedly, domestically produced cannabis. On 9 December 2020, 2 tons (€6 million

worth) of marijuana were stolen from a production facility near Valandovo, prompting a police raid in the village of Arachinovo, close to Skopje.¹ In the first months of 2021, another significant drug bust was conducted with the help of the United States Drug Enforcement Agency (DEA), when 200 kg of cannabis with estimated street value of about \$1 million². In support of the claim that these substances originated domestically, there is a statement in the report titled “Spot prices,” where it is stated that: “it is possible that some of this medical cannabis is making its way onto the black market.”³

Most recently, in May 2021, the Government of North Macedonia, as a part of its program, has created a wide working body to discuss the steps and dynamics for the decriminalisation and legalisation of the use of cannabis and cannabis derivatives. As of late June, the working group has started working on definitions of key terms related to the policy reform and started looking at other countries' models toward cannabis regulation.⁴ Even though there are representatives of a wide array of

1) Sloboden Pecat, “The Two Tons of Marijuana That Were Stolen in Josifovo on Thursday, Were Found Tonight in Aracinovo,” Sloboden Pecat, July 12, 2020, see: <https://www.slobodenpecat.mk/en/dvata-tona-marihuana-shto-vo-chetvrtokot-bea-ukradeni-vo-josifovo-vecherva-pronajdeni-vo-arachinovo/>.

2) Euronews Albania, “DEA Lands in North Macedonia, Deputy Interior Minister Admits Drug Ring Ties with Police,” Euronews Albania, April 16, 2021, see: <https://euronews.al/en/north-macedonia/2021/04/16/dea-lands-in-north-macedonia-deputy-interior-minister-admits-drug-ring-ties-with-police/>.

3) Walter Kemp, Kristina Amerhauser, and Ruggero Scaturro, “SPOT PRICES Analyzing Flows of People, Drugs and Money in the Western Balkans” (Geneve: Global Initiative Against Transnational Organized Crime, May 2021), p. 25.

4) Government of R. N. Macedonia, “The cannabis working group defined the terms decriminalization, legalization and depenalization, cannabis policies will be analyzed in 10 countries in the region, Europe and the world”, June 24, 2012, See: <https://vlada.mk/node/25693?ln=mk>.



government and non-government stakeholders included in this working group, the concerns about the readiness and maturity of the state institutions, as well as the problems linked to the rule of law and corrupt structures within the police and judiciary remain strong. The notion of entering a wide debate on decriminalisation and legalisation of recreational use and small-scale production of cannabis is still viewed as controversial, especially considering all the other economic, political, and societal challenges that the Macedonian society currently undergoes.

“Liberalisation initiatives such as this one can be either very beneficial or very damaging to a developing society such as North Macedonia.”

The authors can underline that it is of utmost importance that this ongoing debate and the eventual change of the legal framework which might lead to a large-scale policy change take place in a slow and well thought out manner. Liberalisation initiatives such as this one can be either very beneficial or very damaging to a developing society such as North Macedonia. If such an undertaking happens in a lax and hastened manner, the health, economic, social and security implications for any country can be vast. This is one of the reasons most European countries have not embarked on such an adventure, despite its cash revenue potential. The regional implications of wider decriminalisation or legalisation of cannabis have also been a tripping stone in the relations between more developed and more resilient countries such as Netherlands and its neighbours. In a Dutch government commissioned study, it was estimated that almost 85% (conservative estimate) of Dutch produced cannabis ended up being trafficked to the surrounding countries.⁵ This trend has produced a significant domino effect on illicit trade and the shaping of criminal networks, not just in the country

5) Mark van der Giessen, et al, “Estimating the production, consumption and export of cannabis: The Dutch case,” International Journal of Drug Policy, Volume 31, 2016, p.157.

of origin, but also in the surrounding countries.⁶

“If such an undertaking happens in a lax and hastened manner, the health, economic, social and security implications for any country can be vast.”

There is no harmonised EU law on cannabis use. In the document titled “Cannabis legalization in Europe: An overview”⁷, issued by the European Monitoring Center for Drugs and Drug Addiction, it is well noted that the criminal or administrative response to drug use offences is the responsibility of EU member states, not of the European Union. These circumstances provide for uncharted waters for the accession countries and their individual attitudes and policies toward cannabis use and its cultivation. However, the current evidence shows a limited capacity of institutions to ensure the security of the current medical cannabis production. The introduction of recreational cannabis holds the danger of making the situation even worse, with significant illicit spillover to neighbouring countries. This phenomenon, on the other hand, can have a detrimental effect on the accession process, considering the significance of Chapters 23 and 24.

“The introduction of recreational cannabis holds the danger of making the situation even worse, with significant illicit spillover to neighbouring countries.”

Free-for-all construction projects

Another controversial change was the enactment of the Law on Determining the Legal Status of Illegally Constructed Buildings, which

6) Deutsche Welle, “Germany: Cannabis legalization becomes election campaign issue”, June 26, 2021, See: <https://www.dw.com/en/germany-cannabis-legalization-becomes-election-campaign-issue/a-58049354>.

7) European monitoring center for drugs and drug addiction, Cannabis legalization in Europe: An overview, 2017, See: https://publications.europa.eu/resource/cellar/c0703c01-0d38-11e7-8a35-01aa75ed71a1.0001.03/DOC_1, p.9.



the Macedonian parliament voted on with a wide political consensus across all political parties on May 11, 2021. It provided for the legalisation of garages, pools, houses, etc. which had been built without permits, even in national parks, natural reserves, natural monuments, as well as protected areas of cultural significance and intangible heritage. It even provided for said legalisation in protected areas and drinking water basins, with special permissions from local authorities. According to this draft law, the legalised objects need to be finished by the time it enters into force. The only exception are the illegally constructed buildings in the Ohrid region, considering its protection under UNESCO (United Nations Educational, Scientific and Cultural Organization).

The deadline of the previous such law was in March 2021.⁸

Bearing this in mind, the owners would need to pay municipal taxes that are more expensive than if they had built their objects legally – 50% more. Only social welfare users, public institutions, and religious communities would be exempt. The logic presented by the government was that it was trying to help citizens who had built but had no economic means of acting within the confines of the law. At the moment, estimates say that there are over 50,000 such objects. There are reports that illegal builders are now in a hurry to catch up with the law, speeding up their building processes in protected areas.⁹

8) Kostadin Delimitov, “Легализација На Дивогорадби- Нови Поволности Наместо Санкции,” Deutsche Welle Macedonia, November 3, 2021, See: <https://p.dw.com/p/3qSz9>.

9) For example, weekend houses have been built in the protected area of Osogovo Mountains. This area was pronounced a protected area last year. After hearing of the new legalization, and the possible time limitations, builders have accelerated their work, in order to catch up. Media has reported that even the chief of police in Kochani, whose wife works at the municipality, were building their weekend house there. There is already a court case against them for this reason, but the expectation is that the planned legalization will override this case. Others have bought land with already illegally built houses, with the plan to upgrade them and sell them afterwards as legal ones. Usually, people buy land labelled as agricultural. Then,

“There is clearly an unequal treatment and discrimination against those who had built with permits, and those who did not, yet receive now the right to legalise.”

Critics, as well as those few members of parliament who did not support this law in the parliament, would say that this is the ‘burial of the rule of law’. There is clearly an unequal treatment and discrimination against those who had built with permits, and those who did not, yet receive now the right to legalise. They claim that all proceedings that have initiated demolishing of illegal objects are now stopping.¹⁰ Despite the fact that proponents of this law claim to be helping citizens of lower economic status, the most viable effects of this change would be to give impunity to powerful individuals and companies who have built private and commercial properties in natural areas under protection. By simply stopping to prosecute law infringement and making it legal, this policy can have a negative effect on the EU accession, especially in light of the provisions on fighting against crime, as stipulated in Chapter 23, considering the issues with ‘urban mafia’, and the Chapter 27, considering the invasion of natural areas under protection.

“At its 74th session, the government retreated, promising to propose a new law after careful consultations with key stakeholders.”

they simply build weekend houses on that land, without any permits, at the end, they hope to legalize it afterwards. Many of these objects have been previously legalized, with the previous Law. Source: Irena Karevska, “ВИДЕО) Забрзано Бесправно Се Гради Во Заштитената Осоговија: ‘Чекаме Заев Да Го Донесе Законот За Легализација,’” 360 Степени, May 25, 2021, <https://360stepeni.mk/video-zabrzano-bespravno-se-gradi-vo-zashtitenata-osogovija-chekame-zaev-da-go-donese-zakonot-za-legalizatsija/?fbclid=IwAR1IQ1ZkaSuyGMUa4-y6l5lsm1J80tKw-mTFL6dlsoQB5AGPXWYTjJ0t2OY>.

10) D.T.Z., “Погребана Ли е Правната Држава? Нова Масовна Легализација На Дивогорадби,” Deutsche Welle Macedonia, December 5, 2021, <https://p.dw.com/p/3tGXu>.



The President of the country, who has a veto power, did not approve of this law. At the 71st session of the government, it opened the debate to determine the state of this bill. This prompted the government to open a wider public discussion with stakeholders, as well as consultations with partisan groups in the parliament.¹¹ At its 74th session, the government retreated, promising to propose a new law after careful consultations with key stakeholders.

“Selling out the land” or “good business practices”?

The Ministry of Agriculture announced that they are working on a new Law for the Commercial Sale of State-owned Agricultural Land. The plans are to start from June, 2021. “Defining criteria for choosing publicly-owned agricultural land, planning special procedures for the privatisation of said land which has already been rented as well as vacant, taking into account the size of plots, the existence of objects and long-term plantations offered to be sold,” said the announcement.¹²

According to Prime Minister Zoran Zaev, the state owns up to €2,5 billion worth of agricultural land. The plan is to sell 10-15%, which means that €200-300 million will be sold. The minimum planned size is less than 10 hectares of land per buyer. Initially the plan is to allow only domestic physical and legal persons, but the companies are allowed to have foreign capital. The planned price is to be €250-450 per acre, advantage would be given to concession

owners, and the land would not be allowed to be re-defined as a building plot.

It was initially announced by Prime Minister Zaev last year, that the agricultural land is a serious resource, which would allow for the rejuvenation of economy. He had mentioned Middle-Eastern companies interested in investing in livestock in North Macedonia, and that they were interested in over 3,000 hectares of land.¹³

The law from 2007 provided that: agricultural land in state ownership cannot be used for purchase. It was only allowed to be used for rent or enjoying the fruits. However, the 2013 law was somewhat softer: Foreign physical and legal persons cannot become owners of state property, unless regulated otherwise by international agreement. The exception are citizens of an EU member state, only 7 years after North Macedonia has joined the EU. Later, it was amended by giving the opportunity for foreign capital to enter, but only if the company is legally connected with domestic firms, with not more than 49% ownership. It was, in fact, part of the alignment with EU law.¹⁴

With the planned privatisation (and including the announcement of the Prime Minister that not only EU member states will be allowed), the Ministry is promising that the national interests will be protected, because the participation of foreign persons will be strictly regulated. Land close to inhabited areas will not be sold, in order to avoid the ‘attractiveness’ of abusing the law and ownership, i.e. building.

Critics say that this can endanger the country’s sovereignty and is not in line with the national interests. It is considered a resource for the

11) Government of R. N. Macedonia, “Од 71-Та Седница На Владата: Итна Одлука За Детални Проверки На Сите Објавени и Необјавени Информации За Случајот ‘Увоз На Нафтени Деривати’; Владата Ке Ја Продолжи Јавната Дебата За Законот За Легализација На Бесправно Изградените Градби,” May 18, 2021, <https://vlada.mk/node/25287>.

12) А.Т., “Од Јуни На Продажба Државното Земјоделско Земјиште: За Купците Парцели Над 10 Хектари, За Владата 300 Милиони Евра,” Faktor Portal, accessed May 30, 2021, <https://faktor.mk/od-juni-na-prodazba-drzavnoto-zemjodelsko-zemjishte-za-kupcite-parceli-nad-10-hektari-za-vladata-300-milioni-evra>.

13) Ibid.

14) P. Dzambazoski, “Тивко Се Подготвува Продажба На Државно Земјоделско Земјиште,” October 3, 2021, MKD Portal edition, <https://www.mkd.mk/makedonija/ekonomija/tivko-se-podgotvuva-prodazhba-na-drzhavno-zemjodelsko-zemjishte>.



production of food, and it always holds the danger of readjusting the land for building, or using natural resources that are found on and under the land, such as minerals, oil, wood, etc. It can go so far as to even use for intelligence purposes. In sum, it is considered a strategic question.

Conclusion and recommendations

As has been mentioned earlier, the three proposed changes have a huge impact on the rule of law. They will de-regulate an area otherwise strictly controlled by both domestic and international law enforcement agencies, such as cannabis. The legalisation for recreation purposes, coupled with the large production of medical cannabis in the country, will definitely have an effect in neighbouring countries, thus might push for further coordination efforts and potential disputes between individual states. In addition, the Law on Legalisation of Illegally Constructed Buildings, and the transfer of public land into private can combine into a further destruction of the environment. On a positive note, all three changes would offer additional funds to the state, either through revenue from taxes from cannabis, municipal bills and other fines from the legalization of objects, or from direct sale of agricultural land. As mentioned earlier, they can have an impact on the accession process, in particular to Chapters 23 and 24.

Interestingly enough, the EU Delegation to North Macedonia and other international community representatives have kept quiet regarding the three policy changes, despite the government's intention to use the "European flag" provision, i.e. fast parliamentary procedures due to alignment with European legislature, when passing the cannabis law in parliament. The government, however, has failed to provide exactly how this law is relevant to European integrations.

Bearing in mind this significant liberalisation of the country, our recommendations are the following:

1. Slow down: All three changes have a huge policy impact on more than one legislative area, and will impact the alignment to the *acquis communautaire* in several ways. It is perhaps better to go with one change at a time, rather than all three at once, in order to avoid unforeseen effects.

2. Initiate public debate: The government should invest more efforts into informing the public and opening the debate. Transparency is always an issue, and these three processes, as complicated as they are, are difficult for the public to comprehend.

3. Take into account the reactions of the public: In particular with the Law on Legalisation of Illegally Constructed Buildings, the strongest criticisms were regarding the environmental impact of legalisation. The government should change the criteria, and give different categories of such documents, with clear distinction between those with negative environmental impact, and those built in urban and populated areas. It is positive that the draft law was retreated, but the promised consultations should have been done preemptively, rather than suffer further tensions with the public.

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The Rule of Law and Foreign Direct Investment in the Western Balkans: The Greek Experience

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Policy Recommendations

1. Western Balkan states should reinforce the regulatory and institutional framework and empower independent authorities so as to mitigate political bargaining and interventions.
2. Western Balkan states should establish appropriate environmental standards for business activity in line with the EU's *acquis communautaire* in order to attract 'green' Foreign Direct Investments.
3. The EU should focus on the genuine compliance of Western Balkan states with EU standards and on the comprehensive application of adopted legislation.

Abstract

The rule of law is positively correlated to the attainment of economic growth and sustainable development and to the attraction of Foreign Direct Investment. However, the Western Balkan countries feature inconsistent application of laws, the absence of a solid regulatory framework equal for all, corruption and clientelism. These countries' weak rule of law systems renders their economies less attractive to 'healthy' investors. Important reforms should take place to speed up the path towards sustainable development and European Union (EU) accession. Taking as an example the

Greek business/investing experience, the Policy Brief articulates some recommendations that are useful for the European investment community in general. The Western Balkan countries should vigorously carry out structural reforms in the judiciary, improve the legal and institutional framework, and contain corruption. On its side, the EU must pay more attention to the genuine (rather than procedural) implementation of reforms and hold the local leaderships accountable for persistent rule of law deficiencies and state capture practices.



The Rule of Law and Foreign Direct Investment in the Western Balkans: The Greek Experience

Rule of Law and Foreign Direct Investment

The rule of law is an indispensable dimension of a liberal democracy. It entails the protection of political rights and civil liberties, the maintenance of order, and the establishment of mechanisms of government accountability that are essential to safeguard ‘the political equality of all citizens and constrain potential abuses of state power’ (O’Donell, 2004: 32). It implies that no one is above the law, which is enforced consistently by an independent judiciary. Thus, the prevalence of rule of law contributes to building mutual trust among all sides of the triangle formed by the justice and its institutions, political institutions, and the citizens (RCC, 2020: 32).

Strong institutions, mechanisms of checks and balances, and an independent judiciary also have a positive impact on economic development. A solid legal system, supported by a set of political checks on state power, reduces the uncertainty of doing business. It also implies the protection of property rights and the reliability of contractual relations. The rule of law also seems to stimulate the attraction of Foreign Direct Investment (FDI). The political risk (which is about political stability, the quality of institutions, and the transparency of transactions) is the most important factor affecting the decisions of prospective foreign investors (IMF, 2018: 14; CEA, 2020: 35). Having said that, some analysts have found out that deficiencies in the rule of law, manifested, for example, in widespread corruption, have not impeded the flow of FDI to countries in transition, which have not established solid market institutions yet. The question is what kind of investors who take advantage of loopholes in the regulatory system an economy attracts. In these cases, governing elites create favorable conditions to potential investors who would have not under different circumstances entered the market at all. In

other words, the quality of FDI attracted is directly related with the state of the rule of law in a country. Yet, anticipating sustainable FDI requires a robust legal framework and an independent and competent judiciary.

“In other words, the quality of FDI attracted is directly related with the state of the rule of law in a country.”

Rule of Law and FDI in the Western Balkans

During the last decade, the Western Balkans have experienced democratic backsliding. Semi-authoritarian regimes have been consolidated in the region that rely heavily on weak rule of law mechanisms, which allow them to exercise unrestrained power and control various aspects of a country’s activities, including its economy. Although this trend has not clearly impeded economic development in the region per se, it raises questions about the sustainability of economic growth and the cost in both institutional and environmental terms.

“There is also a rising concern about the environmental standards of recent investment projects.”

As observed by several institutions assessing the business environment across the region (World Bank, European Commission, U.S. Department of State), the rule of law in all Western Balkan countries is practically under siege. Judicial reforms (e.g. vetting of judges) are taking place at a very slow pace. The backlog of pending court cases remains a major issue (see the 2021 European Commission reports for the six Western Balkan countries and the RCC 2020 Report: 33), while in most cases legislation at all levels of government must be aligned with the EU’s *acquis communautaire*. Lack of transparency in public procurement and poor



enforcement of contracts (SELDI, 2020: 9), along with problems in establishing property rights are manifested in all Western Balkan countries (with the exception of North Macedonia that strives to make some progress during the last years). The investigation of cases of corruption often remains incomplete. Even in cases like Montenegro, where the institutional framework against corruption has been set up and considered adequate, there are issues in functioning and coordination of the related agencies. The Anti-Corruption Agency, for instance, faces challenges regarding its independence and the quality of the decisions issued among other things (European Commission country report, 2021: 24). Examples of selective application of laws or court decisions not being implemented strengthen public mistrust, casting doubts about the fairness in the business arena and thus preventing 'healthy' private investments. The lack of public trust in institutions, such as the judiciary, has been registered in several region-wide surveys (Regional Cooperation Council 2021: 89-90). There is also a rising concern about the environmental standards of recent investment projects. Indeed, recent studies confirm that the Western Balkan countries are attracting investments with negative environmental footprint as a result of weak and easy to penetrate environmental legislation (Pavlovic et al. 2021: 16). Although these investments may have a positive economic impact, they raise questions about the sustainability of development in the region. Therefore, the Western Balkan countries need to find 'optimal solutions and balances' between the need of attaining economic growth, on the one hand, and the need for avoiding environmental degradation, on the other (Pavlovic et al. 2021: 16).

“Although these investments may have a positive economic impact, they raise questions about the sustainability of development in the region.”

Not surprisingly, a series of reports (European Commission country reports, World Bank Doing Business reports) concur on the assessment that the business climate has deteriorated for

the entire region during the last years (see figure 1). With almost no exception (only Serbia shows a small recovery from last year), the position of Western Balkan countries went downhill, indicating a deterioration of the basic rule of law principles. Although the prospect of EU accession sets up a positive momentum for the attraction of sustainable FDI, yet structural deficiencies deter investors from perceiving the region as a secure destination.

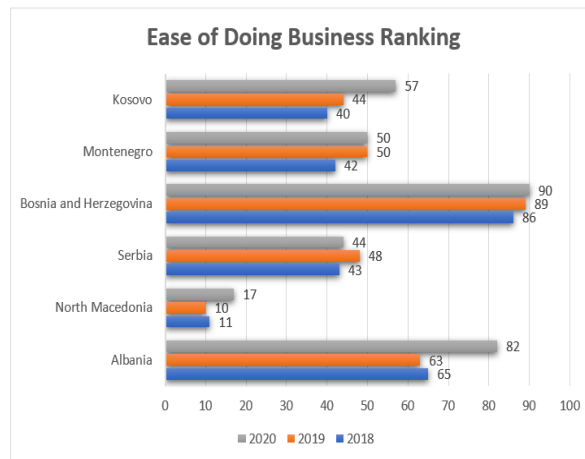


Figure 1: Data collected from World Bank Doing Business Reports (2018, 2019, 2020)

Captured institutions and corruption remain the major impediments to economic development and democratic consolidation in the region. Progress seems to be inadequate at best so far, denoting a procedural rather than genuine compliance with prescribed reforms. Loopholes in the generally accepted far-reaching legal framework are still present, mainly in terms of its implementation. This is best manifested in the engagement of specific non-Western countries in business deals in the region. Indeed, grand-scale projects in the Western Balkans have been implemented under state-level agreements with countries such as China, Russia, and the United Arab Emirates. The conclusion of these agreements has been frequently kept under a mystery veil, with very little publicly released information about their specifications. This kind of agreements has been described with the term 'corrosive capital', which, according to the Center



for International Private Enterprise (CIPE) refers to business deals that “not only exploit governance gaps in countries with weak or corrupt structures, but also make the gaps wider”. It concerns big agreements, which are not properly documented and may even result in countries losing “ownership of key resources” to their business partners (CIPE, 2018: 2).

“Captured institutions and corruption remain the major impediments to economic development and democratic consolidation in the region.”

Very worryingly, while the pandemic deteriorated the macroeconomic outlook of all countries in the region, local leaderships have used the health emergency as an excuse for the delay in the reforms pertaining to the rule of law.

The Greek Experience

During the first decade of the new millennium, Greece established itself as the largest investor in Albania and in North Macedonia and constantly figured among the three most important investors in Serbia. The economic crisis and the sell off by the Greek banks of most international subsidiaries inevitably impacted upon Greek businesses, many of whom disinvested from the region. Still, while the Greek economy has been recovering since 2016, the departure of Greek businesses from the Western Balkans has not been halted (see figures 2 & 3). In 2019, Greece was the 3rd largest investor in North Macedonia (Larda & Xydia, 2020: 21) and the 8th most important investor in Albania (Greek Embassy in Tirana, 2020: 31), while the stock of Greek FDIs in Serbia amounted to €1.5 bn, which is more than €1bn down, in comparison to a decade ago (Skronias & Belibasakis, 2020: 61-62).

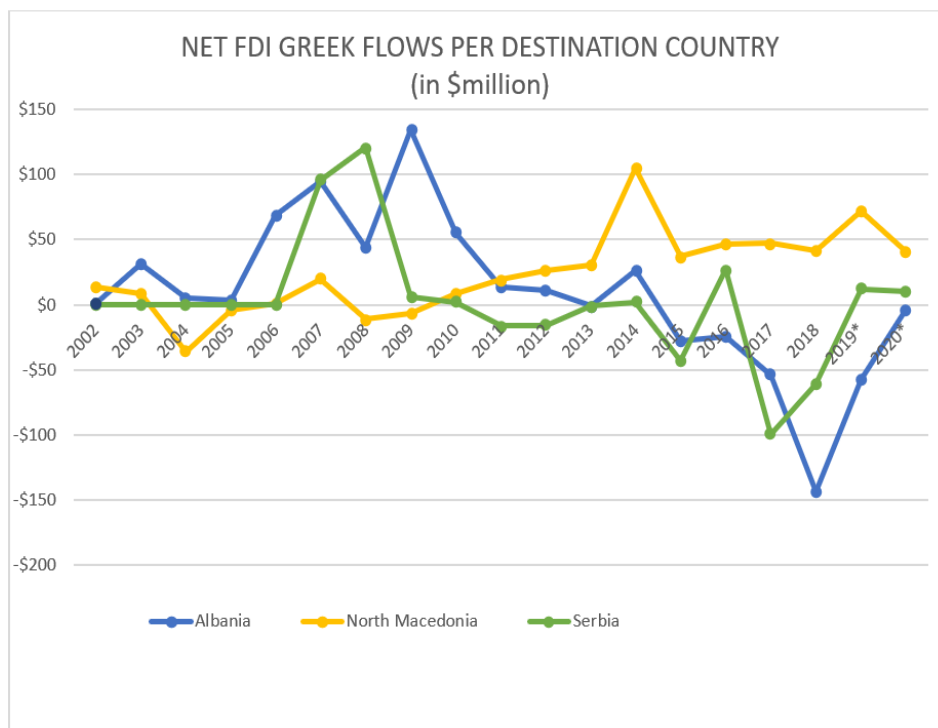


Figure 2: Data collected from the Bank of Greece

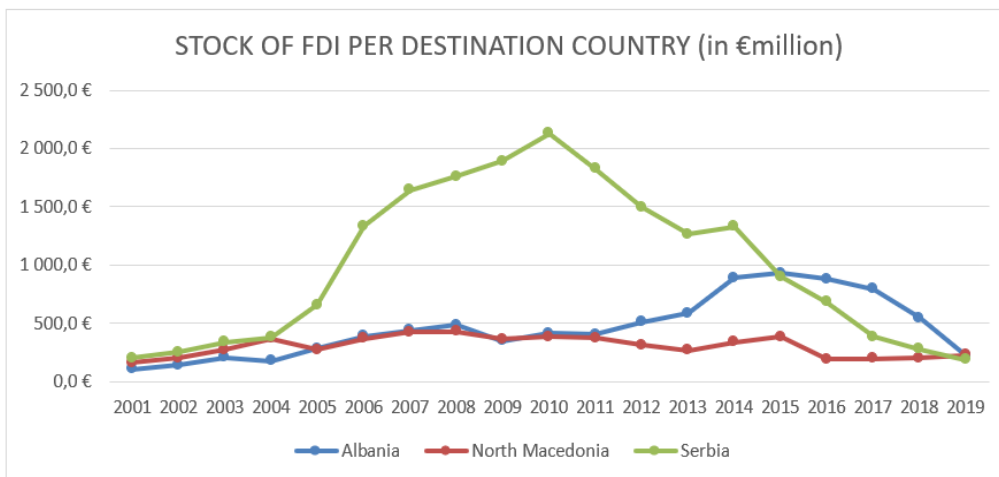


Figure 3: Data collected from the Bank of Greece

“Still, while the Greek economy has been recovering since 2016, the departure of Greek businesses from the Western Balkans has not been halted (see figures 2 & 3).”

Notwithstanding the region’s proximity, its low labor cost, and the very favorable corporate tax regimes for foreign businesses in most Western Balkan countries, many Greek corporations have shifted their attention to other markets. To get acquainted with the problems facing Greek enterprises in the region, it suffices to review the most recent annual reports by the Economic and Commercial Affairs Offices of the Greek Embassies in the region. The 2020 report by the Greek Embassy in Albania outlined a series of problems that Greek corporations faced in the country. These included issues pertaining to the rule of law such as: corruption and informal economy, practices of unfair competition, and poor justice performance. The Greek Embassy in Tirana also disclosed that it has received complaints by Greek businesses about cases of trademark infringements and industrial plan thefts that the Albanian authorities have been unable to investigate and stop from occurring (Greek Embassy in Tirana, 2020: 32, 34). Likewise, the corresponding Report by the Greek Embassy in Serbia presented a long list of obstacles to the everyday work of Greek corporations, most

of them related to the country’s weak rule of law institutions. These comprised: the gap between the adopted legislation and its practical application; non-transparent public procurement processes for the selection of contractors; unfair competition and uneven treatment between national and foreign investors; very slow judicial processes; vaguely determined legal requirements for imports of commodities subject to different interpretations by the relevant custom officers; and inadequate protection of land use rights (Skronias & Belibasakis, 2020: 73-76). As for the Greek Embassy in North Macedonia, its 2019 Report (released in 2020) pointed to the main challenges that had already been mentioned in the Foreign Investors Council’s White Paper, which among others, consist of the informal economy, uneven competition, the slow operation of judicial institutions, and instances of arbitrary administrative decisions (Larda & Xydia, 2020: 21).

“However, we cannot refrain from remarking the simultaneous increase of the economic footprint in the Western Balkans of foreign corporations, coming from countries with authoritarian regimes and similarly very weak rule of law institutions such as China, Russia, Turkey and the Gulf countries.”



The Greek disinvestment from the region should not be exclusively attributed to the deteriorating state of the rule of law. However, we cannot refrain from remarking the simultaneous increase of the economic footprint in the Western Balkans of foreign corporations, coming from countries with authoritarian regimes and similarly very weak rule of law institutions such as China, Russia, Turkey and the Gulf countries. Admittedly, the Western Balkans business playfield does not look that unfamiliar for many businesses coming from these countries. As Prelec (2020: 75) explained, a “vicious cycle” is at play in the Western Balkans where semi-authoritarian leaders facilitate the entry in their countries of corrosive capital from external illiberal actors, which in turn contributes to the consolidation of those local leaders’ rule and the entrenchment of state capture in the region. Therefore, the weak state of rule of law in the Western Balkans has been a pull factor for business deals and investments by illiberal external actors, at a time when the EU interest in the region waned due to the emergence of issues and problems elsewhere in the world (Bieber and Tzifakis 2019: 8-10).

Policy Recommendations

The Western Balkan countries should move on with the implementation of all prescribed rule of law reforms to boost competitiveness and re-calibrate their business environment. Indeed, the World Bank (2021:2) anticipates an economic rebound of the region with a 4.4% expansion in the economic activity in 2021 and a growth rate of 3.7% in 2022 and 2023 respectively. Likewise, the Vienna Institute for International Economic Studies, foresees that the Western Balkan economies will grow over the next two years, by 4.1% in 2022 and 3.9% in 2023.¹ Yet, the Western Balkan countries should not

downplay the need to render their economies more competitive to meet these expectations.

To this end, the Western Balkan countries should:

1. Reinforce the regulatory and institutional framework so as to mitigate political bargaining and interventions.
2. Speed up the examination of pending court cases.
3. Complete the vetting of judges.
4. Empower independent authorities by assigning to them the necessary human and material resources.
5. Establish appropriate environmental standards for business activity in line with the EU’s *acquis communautaire* in order to attract ‘green’ FDI.

The EU should:

1. Focus on the genuine compliance of Western Balkan states with EU standards and on the comprehensive application of adopted legislation.
2. Defend more efficiently the rights of European corporations investing in the region when they are treated unevenly and fall victims of weak rule of law practices. Improving the rule of law in the Western Balkans is fundamentally about the everyday lives of people in the region. Having said that, we should not pretend that it is not also a question of an EU enlightened self-interest.

1) <https://wiiw.ac.at/overview-2019-2020-and-outlook-2021-2023-dlp-5866.xlsx>



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The Conditionality Regulation: A true European means to face a rule of law crisis in wider Europe and foster media freedom

By Eleonora Poli, Margherita Salvia
Vienna, 1 December 2021
ISSN 2305-2635

Policy Recommendations

1. To avoid an institutional crisis, and restore its internal and external credibility the EU needs to foster member states' and candidate countries' compliance with its rule of law standards.
2. The Rule of Law Conditionality Regulation needs to be applied in order to push member states to act in the respect of the rule of law.
3. The respect of the rule of law has a direct impact on many aspects of functioning democracies, such as media freedom, and will allow the EU to control the spread of fake news.

Abstract

The respect of the rule of law is central to the functioning of democracies within the European institutional settings and has become even more relevant in the aftermath of COVID-19, to counter, for instance, an unprecedented diffusion of disinformation registered during the pandemic. While disinformation does not affect rule of law per se, the lack of guarantees for media freedom and independence is a clear symptom of rule of law breaching, as it perpetuates an uncontrolled circulation of disinformation with negative effects on democratic political systems.

When it comes to EU member states but also Western Balkan countries, it is important for the EU to set the bar high and make governments acting in compliance with its fundamental values. The Rule of Law Conditionality Regulation introduced in December 2020 by the European Parliament and the Council of the European Union is a first step towards a more credible Union, and will certainly allow the EU to tackle different violations of citizens' rights such as the limitation of media freedom in many European countries.



The Conditionality Regulation: A true European means to face a rule of law crisis in wider Europe and foster media freedom

Introduction

When it comes to European integration and democratisation, the COVID-19 pandemic had mainly the positive outcome of pushing the European Union (EU) to an even closer integration. Plans such as the NextGenerationEU (NGEU), however, have urged member states to pay more attention to the need to effectively harmonise many policy areas, and in particular, to the respect of the rule of law standards, even at the cost of sanctioning countries acting in disregard of such principles. For this very reason, the European Council Conclusions of July 2020 highlighted the need for a so-called conditionality mechanism to link the Multiannual Financial Framework, (MFF) and the NGEU to the principles of the rule of law. By December 2020 the Rule of Law Conditionality Regulation was finally passed.

Facing a rule of law crisis in wider Europe

The respect of the rule of law is central to the functioning of democracies within the European institutional settings and has become even more relevant to counter the unprecedented diffusion of disinformation registered in the last years. While [disinformation does not affect rule of law](#) per se, the lack of guarantees for media freedom and independence, which favour the diffusion of misleading information, is a clear symptom of rule of law breaching, which negatively reflects on human rights and democracy itself.

Rule of law tackles a variety of individual fundamental rights. It is the set of regulations, institutions, entities, and general conditions that allow citizens to live in a safe and prosperous environment, where human rights' norms, transparency, and fairness at the very basis of a functioning democracy are protected and enforced. Since when the EU was mainly a utopian idea created by some intellectuals

to avoid any other future continental war, the rule of law has become central to the development of the Union and to its integration process. For instance, when it comes to enlargement, the strengthening of the rule of law is the cornerstone of the EU Western Balkans strategy of 2018 and of the new accession talks [framework \(new methodology\) of 2020](#).

“Yet, precisely because of the democratic backsliding registered in Hungary and in Poland the EU is putting so much more emphasis on the rule of law when it comes to its enlargement policy.”

Rule of law represents one of the hardest conditions to comply with. There are two negotiating chapters dedicated to assist enlargement countries to develop institutions in line with specific democracy and human rights principles: Chapter 23 on Judiciary and Fundamental Rights and Chapter 24 on Justice, Freedom and Security. Compared to the previous enlargement rounds, the EU has been placing greater emphasis on the quality of the rule of law reforms developed by candidate countries and it has been closely monitoring the achieved results. Yet, the situation of the rule of law in some EU member states is not euphemistically in its best shape. In 2020, the introduction of the NGEU plan to provide an unprecedented financial assistance to EU countries in facing the economic recession generated by the COVID-19 crisis, has resulted in Poland and Hungary attempting to block it, because of the conditionality issues that many member states wanted to introduce. Although a rule of law mechanism that ties respect for the rule of law with EU funding has been finally approved, it is difficult to implement. Indeed, Hungary and Poland have filed a complaint with the Court of Justice of the European Union on 11 March 2021 over such a mechanism, which necessarily has resulted in a delay of its implementation. According to the [V-Dem's rule of law index](#), which measures the level of transparency



and impartiality of Eastern European Countries, from 2000 to 2019, Hungary and Poland have been the two countries standing out for worsening their rule of law standards, with their scores on the rule of law index decreasing respectively from 0.89 to 0.71 and from 0.96 to 0.83. Certainly, the lack of internal compliance of rule law standards by some member states affects the credibility of the EU externally. It might well push candidate countries to question the rigidity of the rule of law chapters for their accession process. Yet, precisely because of the [democratic backsliding](#) registered in Hungary and in Poland the EU is putting so much more emphasis on the rule of law when it comes to its enlargement policy. Indeed, the lack of respect by a single member country to the rule of law standards affects indirectly all European citizens as it hampers the exercise of individuals' rights EU-wide. Moreover, it might encourage other countries (EU members or candidates) to follow the same path, so that rule of law violations become contagious. Rule of law is not only a value per se; it serves the purpose of keeping liberal democracy alive. Indeed, the deterioration of judicial powers has the potential to lead to unrestrained political control over different areas, which are vital for democracies to be functioning and not just to be [dictatorships of the majority](#).

“Rule of law is not only a value per se; it serves the purpose of keeping liberal democracy alive.”

Media freedom under pressure

A perfect indicator of a functioning democracy and rule of law is freedom of media, which is a fundamental tool to counter disinformation and the diffusion of fake news. In the last years, disinformation and the spread of fake news have been often attributed to an uncontrolled flow of misinformation wrongly linked to the freedom provided by traditional and online media channels, exploited then by third actors. As defined by the [European Parliament](#), disinformation is a conscious dissemination of

verifiably false or misleading information created, presented and spread to deceive the public for economic or political gains but it is not correlated to media freedom. On the contrary, the more freedom of media is guaranteed, the less disinformation becomes a powerful weapon to disrupt traditional policy making processes.

“A perfect indicator of a functioning democracy and rule of law is freedom of media, which is a fundamental tool to counter disinformation and the diffusion of fake news.”

While much of the attention on disinformation campaigns both in the EU member states and in the Western Balkans has been linked to third countries, such as Russia or China, the reality is that the latter are often minority players in the disinformation game, which is frequently led by internal media systems or domestic actors and it is consequently related to an issue of media independence. For instance, in the Western Balkans, as highlighted by Freedom House and Reporters Without Borders in 2021, Serbia's status changed from 'Free' to 'Partly Free' due to the constant attempts by the Serbian government to jeopardize independent journalists through legal harassments and smear campaigns. The attack on investigative journalism is of particular concern; journalists working for investigative portals experience threats, intimidations and inflammatory rhetoric increasingly coming from governmental actors, often unanswered by authorities. Similarly, in Kosovo some media have banned their reporters from publishing investigative reports that are critical of the government or not aligned with the political narratives of the government. More generally, within the Western Balkans there are signs of continuous political interferences, direct and indirect, aimed at censoring independent media content; such interferences cannot be attributed only to pressures exerted by external actors.

“A stronger rule of law within the EU will result in better democratic standards reflected by quality information and more open political debates.”



How to avoid a wider rule of law crisis and foster media freedom?

“A stronger rule of law within the EU will result in better democratic standards reflected by quality information and more open political debates.”

Toxic media environments are mostly a symptom of weak rule of law standards, rather than the cause. Indeed, in the case of Hungary and Poland, where the rule of law has been put under stress, data on media freedom are negative and have gradually worsened over the past years; both countries' governments are censoring journalists or accusing independent or private media outlet to spread fake news. The two countries are the most problematic within the EU, ranking respectively 64 and 92 out of 180 countries taken in consideration by the [2021 World Press Freedom Index](#). While the use of social media platforms to spread disinformation is unfortunately diffused also in the rest of the EU, media freedom is of fundamental importance to keep the bar high when it comes to effective and vibrant democratic standards. Before accusing the internet or third parties to conspire against the stability of its political systems, to foster its democracy and be a credible model for candidate countries, the EU needs to tackle the rule of law issue internally, pushing member countries to be accountable and respect the standard they agreed upon their membership. A stronger rule of law within the EU will result in better democratic standards reflected by quality information and more open political debates. This will certainly reinforce the EU model externally, making Western Balkan countries and citizens more willing to support and perform the reform needed and thus to become full EU members. The EU already has the instrument to do that. Under current treaty law, violations of the rule of law can be tackled by initiating infringement proceedings (Article 258 *Treaty on the Functioning of the European Union* (TFEU)) or by taking political actions relying on Article 7 *Treaty on European Union* (TEU) to address a 'serious' or a 'serious and persistent' breach of values. Both [instruments](#),

however, have had limited effects so far. Against this backdrop, the Conditionality Regulation introduced in 2020, which links the EU funding to the respect of rule of law, might be an effective deterrent. It still needs to be reviewed by the Court of Justice of the European Union; however, such ongoing legal actions should not have any suspensory effect or delay its implementation.

“Against this backdrop, the Conditionality Regulation introduced in 2020, which links the EU funding to the respect of rule of law, might be an effective deterrent.”

The Conditionality Regulation certainly represents the first step for avoiding a wider rule of law crisis, at the time the EU seems to have just weathered the storms, by overcoming Brexit, an economic and financial crisis, a migration crisis, and lastly the pandemic. The fact that the rule of law is at the basis of EU values is not just rhetoric. The respect of the rule of law indeed, impacts European citizens at large in so many aspects, not at least by granting them the chance to live in an environment where their right to be informed and media freedom is honoured should be guaranteed. This is the basis for functioning democracies upon which the EU has been built and should continue to develop.



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Rule of Law and Justice in Croatia after the EU accession

By Nikica Kolar
Vienna, 3 December 2021
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Policy Recommendations

1. An independent and professional judiciary stands as the cornerstone of strong democracies which are based on the rule of law. A reformed judiciary affects every segment of a society, and promoting judicial reform must remain at the heart of the EU accession process.
2. Independent watchdog organisations as well as well-funded and professional prosecution bodies have positively contributed to the implementation of judicial reforms in Croatia. These efforts must be continued towards a reform of the court system and overall professionalisation and depolitisation of the judiciary.
3. The EU enlargement process is not value-neutral and is not a one-way process. The EU focuses on the rule of law and order as to install strong, liberal democratic political systems in new member states, which, in return, strengthen the EU as a cohesive body. With this in mind, the EU's efforts in sanctioning member states that deviate from liberal democratic standards should be fully endorsed and sanctions against EU member states that violate the EU's rule of law standards should be applied.

Abstract

Every accession into political alliance is a matter of political negotiations. During the accession process Croatia advanced but did not completely execute a judicial reform that met the European Union (EU) rule of law standards. After Croatia's accession, the Croatian judiciary even regressed significantly towards the path of semi-liberal or illiberal democracies in the aspect of judiciary practice. In this Policy Brief recent and major court cases (the Mamić brothers, Horvatinčić,

ex-Prime Minister Sanader, and war criminals Glavaš and Jelić) are presented, demonstrating that Croatia has structural and fundamental obstacles in implementing the rule of law and delivering fair, efficient and just final decisions for all its citizens equally. The rule of law assumes that every person before the law is equal. In major cases, which are presented in this paper, it is evident that some people are more equal than others.



Rule of Law and Justice in Croatia after the EU accession

Introduction

It can often be heard in the Croatian public, especially in the media, that the problem of the Croatian judiciary is the root of all the problems in the society. However, this is not just a phrase used by various political actors — from ‘independent’ political analysts to new ‘challengers’ among populists — but a rather accurate analysis of Croatia’s socio-political situation. The judiciary is a system that, through enacted laws and its established bodies, should administer justice and thus correct injustice in society. Nevertheless, every day Croatian citizens witness that such a model of justice is not present in Croatia. The Croatian judiciary is neither independent of politics nor unbiased, especially when it is necessary to prosecute more powerful actors in major corruption cases and war crimes against undesirable ethnic minorities. Nor is the judiciary professional enough to handle cases without breaching judiciary ethics, and it is all too well known that court cases, even if they are ordinary and insignificant in nature, take an unreasonably long time to conclude and deliver justice. This acute lack of justice administration and injustice prosecution has persisted for decades and has remained essentially unchanged.

“It can often be heard in the Croatian public, especially in the media, that the problem of the Croatian judiciary is the root of all the problems in the society.”

During the 2000s when the Croatian government representatives expressed their interest in joining the European Union (EU), the hope emerged that this system would be changed. The EU, as the new political alliance of European states, presented itself to the world as the most liberal and prosperous political system. That entailed for EU candidate countries that they had to meet very high liberal standards in terms of the rule of law, free market

and human rights protection. In case of Croatia, the country could not join the EU without negotiating and implementing institutional reforms of its political system under what is called the Copenhagen criteria, especially by securing the rule of law as the core value of its judiciary. In principle, this was the state of affairs regarding the judicial reforms of this era and this mirage had been perpetuated throughout the years in the European Commission reports on Croatia’s progress with fulfilling the reforms stipulated in the accession agreement (from 2005) until the full membership in the EU that officially started on 1 July 2013. Leading Croatian politicians secured that the prevalent judicial reform paradigm in Croatia was expressed in a way that everything must be changed in order to keep everything as before. Even though progress needed to be seen or perceived in resolving corruption and organised crime (see the case of ex-Prime Minister Ivo Sanader,) the judiciary remained stubbornly dependent, biased, unprofessional and inefficient after the accession process. In 2013, joining the ranks of Bulgaria and Romania, Croatia became another new EU member state with dysfunctional institutions of liberal democracy.

“Leading Croatian politicians secured that the prevalent judicial reform paradigm in Croatia was expressed in a way that everything must be changed in order to keep everything as before.”



An unprofessional judiciary against the rule of law

“In terms of justice and rule of law the political establishment has never tried seriously to change the situation in the judiciary.”

In March 2021, the Supreme Court of the Republic of Croatia confirmed the verdict by the Osijek municipal court in the case of Zdravko and Zoran Mamić and others, finding them guilty of embezzlement in the amount of €15.4 million from the transfers of football players from CFC Dinamo Zagreb and €1.6 million of tax evasion in the business dealings of CFC Dinamo Zagreb, which made the final decision¹. The convicted Zdravko Mamić was sentenced to six and a half years in prison; however, he has been on the run from the Croatian judiciary in the neighbouring state of Bosnia and Herzegovina (BiH) since 2018². After the confirmation of his sentence by the Supreme Court, Zdravko Mamić addressed the public at a press conference, and in a speech that lasted several hours he described in detail exactly how, when and where he bribed the Croatian judges who handled his court case. For a convict to claim that he bribed the judges who had just convicted him is an extremely unusual situation³. However, the runaway manager Zdravko Mamić had numerous authentic pieces of material evidence, such as photographs and videos of the unethical practices of judges, which he explained during the press conference and later published on social media. He also told the public that he already has sent the evidence on a USB stick to

the State Attorney's Office in October 2020⁴. Since then, the media have not stopped with coverage of the discrepancy between the obligation to execute rule of law and unusual practices of the Croatian judiciary, and the Croatian public has become more aware of the extremely unprofessional behavior of Croatian judges. After exposing judges for their unethical behavior with undeniable evidence, Zdravko Mamić is now being perceived in some parts of public opinion as a key-actor in promoting judicial reform. Furthermore, the secondly accused Zoran Mamić, along with his brother Zdravko, was clearly allowed to evade serving his sentence by escaping to the neighbouring state of BiH⁵. In this case it is evident that the more powerful citizen can avoid justice and that the rule of law does not apply to all citizens equally. To make matters worse, there are yet more judicial cases in Croatia that demonstrate the situation in the Croatian judiciary as even more absurd. In terms of justice and rule of law the political establishment has never tried seriously to change the situation in the judiciary.

The inefficiency and bias of the Croatian judiciary

In August 2011, the entrepreneur Tomislav Horvatinčić killed two Italian citizens in a maritime accident with his yacht. During the long trials at the Municipal Court in Šibenik, various unfavorable outcomes for the rule of law occurred in Horvatinčić's case: in the first trial Horvatinčić was sentenced to probation; in the second trial he was even acquitted on the grounds that at the moment the accident happened he suffered the so-called syncope (sudden loss of consciousness), although the defense did not include a syncope scenario in

1) Croatian Supreme Court Confirms Prison Sentences for the Mamić Brothers, Vrbanović. <https://www.total-croatia-news.com/sport/51423-mamic-brothers>

2) Zdravko Mamić, Croatian football's Mr Big, given jail term. <https://www.bbc.com/news/world-europe-44381167>

3) Zdravko Mamić Press Conference in Mostar: "Lovren and Modrić are Accomplices!". <https://www.total-croatia-news.com/sport/51445-zdravko-mamic-press-conference>

4) Supreme Court: All accusations against judges need to be investigated. <https://hr.n1info.com/english/news/supreme-court-all-accusations-against-judges-need-to-be-investigated/>

5) Convicted Dinamo Zagreb coach Zoran Mamić joins fugitive brother in Bosnia. <https://hr.n1info.com/english/news/convicted-dinamo-zagreb-coach-zoran-mamic-joins-fugitive-brother-in-bosnia/>



the first trial⁶. At last, in 2019, Horvatinčić was finally convicted to a four years and ten months prison sentence⁷. However, even to this day Tomislav Horvatinčić has not served this prison sentence, justified by his bad health condition, which the prison hospital confirmed with the opinion that Horvatinčić's treatment cannot be provided within the prison system⁸. The picture that speaks more than words about the rule of law in Croatia is that of Tomislav Horvatinčić, convicted of a serious crime and regularly seen in city cafés drinking coffee and enjoying the sun, far away from his prison cell⁹. In the meantime, since the first draft of this Policy Brief, Horvatinčić has been finally imprisoned but only due to the fact of the very intensive public opinion pressure.

The lack of an independent judiciary

“The trial in the case of the former Prime Minister Sanader is clear evidence of the inefficiency and lack of independence of the judiciary from the ruling political party HDZ.”

During the accession negotiations for the membership of the Republic of Croatia to the EU, it truly seemed that progress was being made in implementing the rule of law and creating an independent, impartial and professional judiciary. The European Commission, among other points, persistently emphasised the reform of

the Croatian judiciary as a key Europeanisation process, promoting the fight against corruption and organised crime in order to establish the rule of law and an independent judiciary¹⁰. Croatia seemed to be moving in a positive direction towards strengthening the rule of law and fighting corruption, as the Croatian Prime Minister Ivo Sanader resigned at the time and was soon indicted in five corruption cases. In one case even, the ruling political party Croatian Democratic Union (HDZ)¹¹ was charged with participating in organised crime¹². In December 2011, proceedings were initiated against the former Prime Minister Sanader and other accomplices, and against the HDZ as a legal entity. However, the process had been going on for years, with extremely different decisions and the sidelining or backtracking of the case to the beginning of the trial. Finally, in 2020, after nearly 9 years, a non-final decision was passed and the defendants were found guilty¹³. The trial in the case of the former Prime Minister Sanader is clear evidence of the inefficiency and lack of independence of the judiciary from the ruling political party HDZ.

Croatian political parties are currently engaged in a battle for the influence on the judiciary through the election of the President of the Supreme Court. In order to prevent the HDZ from influencing the work of the judiciary, especially the courts, the newly-elected President Zoran Milanović currently seeks to use his constitutional authority to nominate a candidate for the President of the Supreme Court by deliberately

6) Što je to sinkopa koja je Horvatinčića spasila od zatvora? <https://www.tportal.hr/vijesti/clanak/sto-je-to-sinkopa-koja-je-horvatincica-spasila-od-zatvora-foto-20171013>

7) Final Verdict Delivered in Case of Businessman Tomislav Horvatinčić. <https://www.total-croatia-news.com/politics/40032-tomislav-horvatincic>

8) Horvatinčiću opet odgođen odlazak u zatvor, ali ne baš toliko koliko je tražio. https://www.novolist.hr/novosti/crna-kronika/horvatincicu-opet-odgoden-odlazak-u-zatvor-ali-ne-bas-toliko-koliko-je-trazio/?meta_refresh=true

9) Što radi pravomoćno osuđeni Horvatinčić? Pije kavu i šetucka po Cvjetnom. <https://www.telegram.hr/politika-kriminal/sto-radi-pravomocno-osudeni-horvatincic-pije-kavu-i-s-etucka-po-cvjetnom/>

10) Barroso cools down Croatia's accession fervour. <https://www.euractiv.com/section/enlargement/news/barroso-cools-down-croatia-s-accession-fervour/>

11) HDZ – Hrvatska demokratska zajednica (eng. Croatian Democratic Union).

12) Croatia jails ex-PM Sanader for 10 years over graft. <https://www.reuters.com/article/us-croatia-sanader-idUSBRE-8AJ12F20121120>

13) Sve što trebate znati o aferi Fimi Media. <https://hr.n1info.com/vijesti/a575075-sve-sto-trebate-znati-o-aferi-fimi-media/>



refusing to confirm an HDZ party's candidate¹⁴. In turn, President Milanović demands that Zlata Đurđević, publicly recognised as an independent expert and a university professor of criminal law at the Faculty of Law in Zagreb, be elected to serve as President of the Supreme Court¹⁵. Despite the President's request and the indisputable expertise of the candidate Đurđević, the HDZ government persistently refuses to accept Đurđević's candidacy, which suggests that the government does not intend to reform the judiciary to become independent from the ruling political party.

“Croatian political parties are currently engaged in a battle for the influence on the judiciary through the election of the President of the Supreme Court.”

Political unity against the rule of law

In the case of the election of the President of the Supreme Court, it may seem that President Milanović cares very much about promoting and protecting the rule of law, after all he pledged to respect the Constitution and declared himself several times before and recently as an ombudsman of the Constitution¹⁶. However, in other situations the scenario is completely different. Particularly, the formerly convicted war criminal Branimir Glavaš, charged with war crimes of murdering seven Serb civilians and torturing others, committed under his command responsibility, was due to the final verdict stripped of his rank and war honours by the former

President Ivo Josipović¹⁷. In the meantime, Glavaš was hiding from imprisonment in the neighbouring state of BiH until 2015, when the Constitutional Court overturned Glavaš's verdict for war crimes and decided to revert the court case back to the beginning. Since then, Glavaš demanded all incumbent presidents to give him back his rank and war honours because he was now formally legally innocent again (in spite of being once convicted as a war criminal), but former President Kolinda Grabar-Kitarović did not show the political will to do so. However, the incumbent President Milanović, who regularly invokes the Constitution, and expresses his will to act according to the law, has carried out Glavaš's request to give him back his rank and honours. President Milanović explained his decision by only having respected the legal norms of the Republic of Croatia¹⁸, even though President Milanović's act was not constitutionally binding¹⁹.

“This and the following event suggest that President Milanović's respect for the rule of law is arbitrary.”

This and the following event suggest that President Milanović's respect for the rule of law is arbitrary. In case of Zlatan Mijo Jelić, Milanović demonstrated his interpretation of justice. In January 2016, General Jelić was indicted in BiH for killing and wounding at least 40 prisoners of war during the 1993 Mostar conflict. According to the indictment, Jelić, as a general of the HVO military police²⁰,

17) Croatia Strips Glavas War Honours. <https://balkaninsight.com/2010/08/20/croatia-strips-glavas-war-honours/>

18) President Milanović: Glavaš Asked for his Decorations To Be Returned, I'm not a Judge, but the President of the Republic. <https://www.predsjednik.hr/en/news/president-milanovic-glavas-asked-for-his-decorations-to-be-returned-im-not-a-judge-but-the-president-of-the-republic/>

19) Documenta: Milanovićeva odluka o Glavašu neprimjerena i etički neprihvatljiva. <https://www.jutarnji.hr/vijesti/hrvatska/documenta-milanoviceva-odluka-o-glavas-u-neprijemljiva-i-eticki-neprihvatljiva-15076941>

20) HVO (Hrvatsko vijeće obrane – Croatian Defence Council) is an acronym for the the official military formation of the Croa-

14) President Milanović: Government Is Absolutely Unconstitutionally Interfering in Election of Supreme Court President. <https://www.predsjednik.hr/en/news/president-milanovic-government-is-absolutely-unconstitutionally-interfering-in-election-of-supreme-court-president/>

15) Election of Supreme Court president in Croatia sparks debate. https://www.euractiv.com/section/politics/short_news/election-of-supreme-court-president-in-croatia-sparks-debate/

16) Milanović: Idemo u drugi krug, a ne u rat. <https://vijesti.hrt.hr/hrvatska/milanovic-idemo-u-drugi-krug-a-ne-u-rat-705813>



was the director of the Heliodrom concentration camp in Mostar, where about 200 prisoners were detained on an ethnic basis for being Bosniaks and enslaved to be subjected to forced labour on the front line, by which at least 50 victims were killed, 188 were seriously and lightly injured, while about 40 victims were tortured and physically abused by HVO members²¹. In December 2015, just before the announcement of the indictment, Jelić escaped from BiH to Croatia. Jelić has been evading BiH's judiciary for five years now, and President Milanović has not said a single word about his evasion of justice, moreover, in 2020 he awarded Jelić with a medal of honour for his participation in the operation Storm²², thus symbolically making Jelić and his unit war heroes, not alleged war criminals²³.

Conclusion

Recent cases mentioned in this Policy Brief clearly prove that Croatia has a long way to go to achieve the rule of law, an independent judiciary and a political leadership with the will to create a more just legal and political system. In order to implement and secure the rule of law in the judiciary, all relevant actors in Croatia and the institutions of the European Union need to recognise this state of affairs, and must act to promote and facilitate liberal democratic values in Croatian politics and society. One more illiberal democracy in the Western Balkans would seriously damage the Europeanisation process of the whole region, and undermine the EU as a peace-building project across Europe.

tian Republic of Herzeg-Bosnia during the war in Bosnia and Herzegovina 1992-1995.

21) [Tko je general Zlatan Mijo Jelić kojeg Milanović planira odlikovati? - Index.hr](#)

22) Operation Storm (Operacija Oluja) is a last military operation of Croatian army and their allies in wars in Yugoslavia which had ended war in Croatia in 1995.

23) [Croatian President awarded Mijo Jelic, indicted for War Crimes in Bosnia and Herzegovina - Sarajevo Times.](#)



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State Capture versus Contestatory Citizenship in Bulgaria

By Anna Krasteva
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Policy Recommendations

1. The fight against corruption in Bulgaria should result in a solid track-record of final convictions in high-level corruption cases, meeting the expectations of active citizenship and increasing trust in institutions, which is critically low at present.
2. National legislation, court case-law and political practice should envisage mechanisms for responding to international reports of large-scale corruption such as those under the Magnitsky Act.
3. Raising the awareness of citizens and the business community about the effects of (the lack of) reforms in the judiciary.

Abstract

The Policy Brief argues that Bulgaria is experiencing a negative transformation, a transition from post-communism to post-democracy expressed in the transition from corruption to endemic corruption and state capture. The Policy Brief is structured in three parts. The first part introduces the theoretical model of the post-communist post-democracy (Krasteva 2019) based on the concept of "symbolic-ideological hegemony" (Schmitter 1994). It articulates three different transformations in Bulgaria's post-

communist development, each one of them defining in a different way the rule of law and justice as well as the Europeanisation of the country and region as a political project. The second part examines civic mobilisations for rule of law and justice as an expression of and catalyst for the formation of active and contestatory citizenship. The third part analyses the three-pole model of state capture. The article examines also the alliance for change and rule of law.

* June-December 2021: The author started writing the Policy Brief in June 2021 during the Magnitski scandal, the final corrections are from December 2021.



State Capture versus Contestatory Citizenship in Bulgaria

Introduction

By a symptomatic coincidence of the academic and political calendars, I am writing this Policy Brief amidst a major corruption scandal sparked by the largest single action to date targeting corruption in a particular country under the Magnitsky Act.¹ The objective of this Policy Brief is twofold: on the one hand, to analyse the current heated political debate on rule of law and justice in Bulgaria, and on the other, to conceptualise, in an innovative and original way, the political transformations that make giant corruption scandals – such as the present scandal, many past and, most probably, future ones, too – foreseeable and inevitable. The Policy Brief is structured in three parts. The first part introduces the concept of the transition from post-communism to post-democracy (Krasteva 2019; Krasteva and Todorov 2020), which articulates three different transformations in Bulgaria's post-communist development, each one of them defining in a different way the rule of law and justice as well as the Europeanisation of the country and the region as a political project. The second part examines civic mobilisations for rule of law and justice as an expression of and catalyst for the formation of active and contestatory citizenship. The third part analyses the corruption model of state capture.

1) On 2 June the United States (US) announced it was sanctioning six Bulgarian individuals and more than 60 entities associated with them over their involvement in significant corruption. The Global Magnitsky Human Rights Accountability Act (2016) allows the U.S. government to sanction foreign government officials implicated in human rights abuses and corruption anywhere in the world. 'The man behind the global Magnitsky push, US financier Bill Browder, says the beauty of the penalties is that they target individual wrongdoers rather than putting whole nations under punishing economic sanctions' (Croch and Galloway 2020).

From post-communism to post-democracy an unfinished battle between democracy and state capture

This part seeks an answer to the question of why rule of law is more problematic in Bulgaria today than at the earlier stages of the country's democratisation. The answer is sought in the perspective of the post-communist transformation of the transformation (Mickenberg 2015; Krasteva 2019). The theoretical model of the post-communist post-democracy (Krasteva 2019; Krasteva and Todorov 2020) is based on the concept of "symbolic-ideological hegemony" (Schmitter 1994) as a key criterion for distinguishing the transformations: the transformation of a particular transformation project into a hegemonic project that dominates political discourses, strategies and policies, on the one hand, and values and attitudes on the other.

The first *democratic transformation* started as "the end of history" (Fukuyama 1992), as the end of rivals of liberal democracy and the rise of the latter as the grand narrative of the post-communist transformation. Rule of law and justice were key elements of this grand narrative together with the geopolitical reorientation of Bulgaria through Euro-Atlantic and European integration. The democratic transformation in Bulgaria was designed as a strategic and long-term horizon. The country's political development, similar to the one in Central and Eastern Europe (Levitsky and Way 2010; Zankina 2016) however, significantly modified the linear teleological vision and only a decade and a half after the beginning of the transition set out to "transform the transformation" (Mickenberg 2015).

"The national-populist transformation in Bulgaria has still not crystallised into an illiberal democratic project."



The *national-populist transformation* is the second after the beginning of the post-communist transition and the first that has reversed the direction of the democratic transformation. National populism erodes democracy by both creating democratic and institutional deficits (Zankina 2016) and by eroding the foundation of democracy. Whereas the democratic transformation began from the centre – not in the partisan but in the political sense, as a critical majority of politicians and citizens in favour of consolidating Bulgaria's democratisation – the second began from the national-populist far right (Krasteva 2016a). The national-populist transformation in Bulgaria has still not crystallised into an illiberal democratic project. Two negative changes of the transformation are key to the present analysis. The first is the shift of priority from rule of law and justice to identity politics. It is no accident that the key party actors of identity politics, the VMRO (Internal Macedonian Revolutionary Organisation) and the DPS (Movement for Rights and Freedoms), are among the most corrupt parties in Bulgaria. The VMRO, which is using Bulgarian national identity for political purposes, 'sells' one of its most respected forms – Bulgarian citizenship. The State Agency for Bulgarians Abroad, which is headed by VMRO representatives, has been at the centre of many scandals and investigations about corruption in granting Bulgarian citizenship. The DPS is an example of an oligarchic and clientelistic party. Representatives of both parties are among the targets of the sanctions under the Magnitsky Act. The second change is the mainstreaming of far-right populism which has gradually encompassed key political actors like the BSP (Bulgarian Socialist Party), President Rumen Radev, and the fluid GERB (Citizens for European Development of Bulgaria). Identity politics has begun to shape not only Bulgaria's domestic policy but also its foreign policy. Most indicative in this respect is GERB's radical reorientation. During the Bulgarian Presidency of the Council of the European Union (EU) in the first half of 2018, Bulgaria's strategic priority was Europeanisation of the Western Balkans. After it ended, the ruling coalition of GERB and the United Patriots blocked North Macedonia's EU accession.

“A popular saying summarises this specificity: other states have the mafia; in Bulgaria, the mafia has the state.”

Post-democracy is the latest wave of post-communist transformations. Post-democracy is understood in the vein of Colin Crouch (2004) as a regime in which there are democratic institutions but they are empty shells – stripped of the function to serve the public interest, they have been subordinated to private interests. At the centre of this transformation is state capture. State capture conceptually synthesises the transition from corruption as a deviation from the system to a fundamental transformation of the political system itself which is increasingly dominated by “policy for cash” (Power and Taylor 2011: 7). Whereas in some countries in Eastern Europe “private actors buy influence over legislation and regulation in order to produce favorable laws for their businesses” (Hulsey 2018: 16), in countries like Bulgaria and Hungary political parties are at the centre of state capture “as core initiating actors who are at least as interested in political control as illicit economic gain” (Hulsey 2018: 16–17). A popular saying summarises this specificity: other states have the mafia; in Bulgaria, the mafia has the state. The post-democratic transformation is invisible: it is not a publicly declared project of the elites, let alone of citizens. It does not propose a new political project but deprives democracy of attractiveness, content, a horizon, a “metaphysics of hope” (Ganev 2007: 197), transforming politics and governments into a “web of political relations” (Tilly 1975: 25).

The degradation of the rule of law is one of the most conspicuous manifestations of the post-democratic transformation: “the rule of law in Bulgaria during the last decade has been backsliding. The Rule of Law Index (2017-18) gives evidence that Bulgaria, together with Hungary, have the lowest and declining overall rule of law scores among the EU member states (Todorova 2020: 235). Velina Todorova (2020) demonstrates that the impartiality and the independence of the judicial system are in constant decline, identifies the political capture of



the judiciary, and concludes that “all three powers use the law in such a way as to generate channels of corruption, which undermine the law’s fundament” (Todorova 2020: 251).

The deterioration of the democratic transformation into a nationalist-populist and a post-democratic one explains the dethroning of the rule of law and justice from their priority position of key pillars of the democratic project. The next part will examine the antidote to this trend – namely, the formation of a contestatory civic ethos.

Anti-corruption civic mobilisations and the formation of contestatory citizenship

“If the key actors of the first democratic revolution were the elites, in the second it was the citizens who took the democratic project into their own hands, striving to refound democracy.”

On 14 June 2013, controversial media mogul Delyan Peevski was elected by Parliament as head of the State Agency for National Security. This triggered the largest and longest protests in contemporary Bulgarian history, which lasted about 400 days. They were against state capture – against the behind-the-scene networks, shady backroom politics, the oligarchic interests pulling the strings of the political game. These protests did not achieve their goals – neither the resignation of the coalition government of the Bulgarian Socialist Party and The Movement for Rights and Freedoms nor the dismantling of the model of shady backroom politics. But they achieved another two significant results that are key to this Policy Brief. The first is the formation of contestatory citizenship through mass protests. The protests become social movements when they leave the virtual world and flood the public square, when the “space of flows” merges with the “space of places”, when virtual networks are extended to the occupied buildings and blocked streets (Castells 2012). The protests that started in June 2013 were a watershed: if until then young people were passive

or mobilised in relatively small-scale green actions or online, the year of protest catalysed contestatory citizenship formed around four axes: – “augmented citizen”, “indignation”, “voice”, and “networked individual”. The second change was so significant that it has been defined as a “second democratic revolution” (Krasteva 2016b). If the key actors of the first democratic revolution were the elites, in the second it was the citizens who took the democratic project into their own hands, striving to refound democracy.

“Civic mobilisations are the immune system of democracy.”

Protesting citizens are the antidote to state capture and post-democracy. Civic mobilisations are the immune system of democracy. This is precisely what we can argue for Bulgaria too. In the summer of 2020, Bulgarian citizens once again took to the streets, aspiring to reconquer the state captured by the post-democratic elites (Krasteva 2020). The main demands were the resignations of Prime Minister and GERB leader Boyko Borisov, carrier and upholder of endemic corruption, and Prosecutor General Ivan Geshev, who has turned the prosecution service into a weapon against the government’s political opponents and a shield for the GERB-affiliated oligarchs. Two characteristics of the 2020 protests are important for this analysis – their faces were young, they were educated and active people; rule of law and reform of justice were the key slogans:

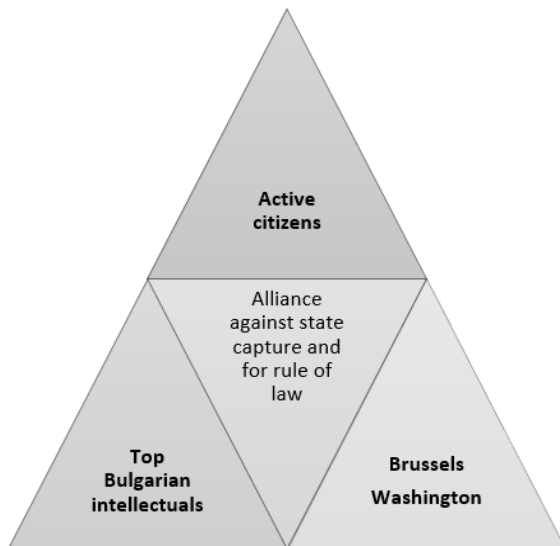
- ***No accountability without justice and rule of law.*** The protests went beyond the mere resignation of the Prosecutor General and demanded a fundamental reform – the convocation of a Grand National Assembly to amend the Constitution regarding the judiciary. The reform of the judiciary should even precede the political transformation.



As a protestor² pointed out: “It doesn’t matter who rules if there is no independent prosecutor’s office to work for the rights of the people, not the oligarchs and the mafia” (Krasteva 2020).

- **Transformation, not only resignation.** “Systemic change, not replacement”, demanded another protestor. A student in philosophy summarised the ‘total’ protest for radical transformation: “against the violation of law, against the authoritarian, pseudo-democratic power linked to the mafia, against the politicisation of all spheres of life, against the status quo and against conformity with the status quo, which cries ‘everyone is a bad guy, what to do?’” (Krasteva 2020).

Alliance against state capture and for rule of law



Source: Author’s elaboration

The summer 2020 protests outlined the alliance for change, against state capture, and for rule of law. At its top are active citizens. They appear in two roles – contestatory and supporting. Protesters brought a future into the political temporality blocked by anti-reformist post-democratic elites in three fundamental ways:

- **Formation of a new generation of contestatory citizens:** “These protests are the beginning of a new generation of Bulgarian citizens, more responsible, more vigilant, more critical” (Kamen, 21); “We are the alternative – voting, protesting, fighting in all democratic ways” (Dafina, 22, law student);
- **Building a political culture of activism for making the elites accountable:** “Civic engagement and social activity, no matter who is in power! Today’s protests should not be the end of a struggle, but the beginning of a more awake society” (Ani);
- **Defining the political temporality not as a continuation of the post-democratic status quo, but as a future and change:** “I want a future in Bulgaria” (Ani); “It’s time for change!” (Bojidar) (Krasteva 2020).

The majority of Bulgarian citizens supported the protests and shared their critical position. This support had two faces as well – ad hoc support for the protests’ demands and agreement as to their main cause – approximately 80% of Bulgarian citizens thought that there is widespread corruption in Bulgaria (Eurobarometer 502, 2019).

The second pillar of the alliance for change is the elite of Bulgarian culture – 123 intellectuals, internationally acclaimed artists such as Theodore Ushev and writer Georgi Gospodinov, who signed an Open Letter in support of the protests.

The contestatory ethos (Krasteva, Saarinen and Siim 2019: 275) and active citizenship with two types of agency – protesting youths, and the intellectual

2) All quotes are from the “Voices of protest” platform of the Policy and Citizens’ Observatory, analysed on OpenDemocracy (Krasteva 2020).



and cultural elite – are an outstanding expression of the broad public support for the demands for accountability of elites, reform of the judiciary, and restoration of the rule of law in Bulgaria.

The third pillar of the alliance for change are Brussels and Washington. During the protests, a report by two US senators on endemic corruption in Bulgaria was released, and so was the European Commission's successive critical report on the rule of law situation in the country: 'Lack of results in the fight against corruption is one of the key aspects raised throughout the summer 2020 protests. A solid track-record of final convictions in high-level corruption cases remains to be established' (EC 2020). It is not the Bulgarian authorities, it is the Bulgarian citizens in the public square who speak in the language of EU institutions and the US administration.

The Magnitsky Act – paradoxically, disclosures of abuses known to all come like a bolt from the blue

The Magnitsky disclosures came like a bolt from the blue to Bulgaria's political landscape. Two groups of reasons explain this shattering impact.

The first are *external* reasons and find expression in the sanctions imposed against six Bulgarian individuals and more than 60 entities in Bulgaria. They are sanctioned under two different laws³ which provide for a variety of restrictions ranging from ineligibility for entry into the US to cutting off access to the US financial system. These sanctions are unprecedented in Europe – before them, Magnitsky sanctions had been imposed on only one oligarch from Slovakia with six companies, and one in Latvia with four companies. These sanctions are unprecedented in scope and weight in the entire history of the Magnitsky Act. They are an expression

of President Biden's doctrine that corruption is an international problem, a risk and threat to international security. They are also unique in that, unlike the European Commission's criticisms, they have named the oligarchs and senior public officials involved in corruption.

The second group of reasons are *domestic*. The impact of the sanctions has been intensified as it coincides with the caretaker cabinet's efforts to conduct a sweeping audit of GERB's rule and bring to light large-scale corruption schemes and practices in numerous spheres.

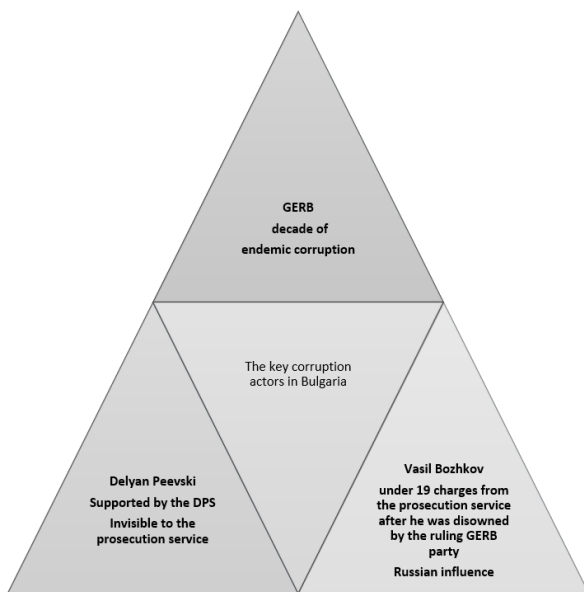
“The disclosures under the Magnitsky Act clearly outlined the three-dimensional structure of corruption in Bulgaria.”

The paradox of the disclosures made under the Magnitsky Act is not in that they said hitherto unknown things and names; it is in that they said, with the power of the American voice, things which theory had conceptualised and analysed, and names which the protesters had shouted in the public square. The disclosures under the Magnitsky Act clearly outlined the three-dimensional structure of corruption in Bulgaria.

³ The Global Magnitsky Human Rights Accountability Act and Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act.



The three-dimensional structure of the corruption model in Bulgaria



Source: Author's elaboration

At the top of the pyramid is GERB which, having been in power for a decade, bears the brunt for the rise of *endemic* corruption – the term sums up the US diagnosis. Its other pole is Delyan Peevski with the support of the DPS. He is ample proof of the political bias of the prosecution service which never pressed charges against him in all those years when it was crystal clear to Bulgarian public opinion, the European Commission, and the US administration which side of the law he was on. The same political bias of the prosecution service can be seen in the third pillar – Vasil Bozhkov, a gambling tycoon nicknamed The Skull, who is under 19 charges, which, however, were pressed against him only after the end of his close relationship with GERB.

The final remarks can be summarised in four groups.

The transition from post-communism to national-populism to post-democracy is an expression of negative transformations, of transition from corruption to endemic corruption and state capture.

The agency of the post-democratic transformation is the politico-oligarchic elite. It does not have a definite political colour, but the primary responsibility rests with GERB, which was in power for a whole decade, the VMRO, GERB's coalition partner, and the DPS, its unofficial partner. The prosecution service is more often part of the problem than of the solution – it has kept its eyes wide shut when it comes to the oligarch Delyan Peevski, and pressed charges against the oligarch Vasil Bozhkov only after the end of his close relationship with GERB.

The electoral expression of the civic mobilisations is the restructuring of the party scene. Three parliamentary elections in just one year (2021) were needed for the fundamental transformation of the party system - three new parties and coalitions, named 'parties of the protest' or 'parties of the change', entered the Parliament: 'We Continue the Change' 'There Is Such a People', 'Democratic Bulgaria'.

"The electoral expression of the civic mobilisations is the restructuring of the party scene."

Citizenship remains a significant site through which to develop a critique of pessimism about political possibilities' (Isin and Nyers 2014: 9). The last few years have seen the formation and consolidation of an active civic ethos and contestatory citizenship which demand accountability of elites, reform of the judiciary, and rule of law in Bulgaria. Did they find an adequate political representation in the parties of the protest and will the latter would engage in reforming Bulgaria from post-democratic state capture to revitalised democracy – is the major challenge for the months and years to come...



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The rule of law in Montenegro between deep polarisation and an unstable majority – how to get back on track?

By Nikola Mumin
Vienna, 20 December 2021
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Policy Recommendations

1. The government should develop precise roadmaps in the EU accession talks and a clear framework for strengthening the rule of law. The measures should include better defined indicators and activities while insisting on more specific tasks on an annual basis within the interim benchmarks to facilitate both performance assessment and monitoring of progress. A new model of reporting based on a simplified form, which would include an overview of key challenges in meeting the benchmarks and thus strengthening the rule of law, would be advisable as well.
2. The new parliamentary majority and all parties in the parliament should strive to remove political influence from the judiciary and find solutions that will enable the strengthening of institutions and ensuring their impartiality. As the EU insists on a broad consensus on these issues, and society is in a state of deep polarisation, a kind of mediation between the two blocs, the majority and the opposition, is needed. In this way, the selection of the best candidates in the judiciary, especially where envisaged membership of the academy (civil society), which will not be close to any party, and thus impartial law enforcement will be ensured and politicisation avoided.
3. The government should fully open the reforms to the public to allow public scrutiny and impartial evaluation.

Abstract

Although it has been negotiating EU membership for more than nine years and thus carrying out certain activities to strengthen the rule of law under the umbrella of EU conditionality, Montenegro continues to struggle with pervasive corruption and politicised institutions. While it managed to overthrow the 30-year-old regime in August 2020, which was the main cause of the elements of the captured state that the European Commission recognised in its 2018 Strategy, it is unclear to what extent the new government is able to deal with burning issues. This is predominantly due to the composition of parties/coalitions that are now part of the parliamentary majority, which cannot reach the necessary consensus

on important subjects to strengthen the rule of law. The main obstacle in this direction is the situation in the judiciary, which is still strongly influenced by the previous government, while the new majority does not have enough knowledge, experience and capacity to swiftly make the much-needed departure from undemocratic practices. An additional problem is growing nationalism and deep polarisation in society, so the two blocs, instead of getting closer for the benefit of citizens and rapid democratisation, are blocking further progress. Although it has adopted a new enlargement methodology, Montenegro is slowly adjusting its structure and directing available capacities towards its implementation.



The rule of law in Montenegro between deep polarisation and an unstable majority – how to get back on track?

Context

The new 42nd Montenegrin Government was elected in the parliament on 4 December 2020 after the 30-year-long period of the same party's participation, the Democratic Party of Socialists (DPS), in the executive branch. The unstable support in the parliament, since out of 41 members of parliament/deputies who are now part of the new majority,¹ many of them, i.e. their parties, only conditionally supported the new government, and from the very beginning they were its harshest critics, alongside with the composition of the new parliamentary majority, with several parties from the extreme right to parties with a civic orientation, are the reasons why it is difficult to predict how stable the new government will be and to what extent it will be able to cope with growing economic problems, nationalism, widespread corruption, and organised crime in the country.

It was clear from the very beginning that the new government would not have an easy task as regards democratisation and strengthening the rule of law, given the situation in the country and widespread corruption and organised crime while other branches, such as the judiciary, are not depoliticised.

The fight against corruption and organised crime is at the centre of the activities and priorities of the new government, at least in terms of declarative statements and revealed cases. During this first period, many irregularities and wrongdoings of

the previous government were exposed, and they were accompanied by the arrests of the former director of the Investment and Development Fund for distribution of funds in the form of agricultural loans from the Abu Dhabi Fund for Development.² However, these, as in many other cases of arrests, were only informative talks in the prosecution, and it remains to be seen in which direction the investigations will go. The National Council for the Fight against Corruption³ was established on the initiative of the Deputy Prime Minister with two prominent representatives of civil society were included in its composition. However, this again raised the question of whether Montenegro needs new bodies when it has already reformed its institutional framework for fighting corruption and organised crime.

“Yet, for a decisive fight against corruption and organised crime much more would be needed.”

The initial steps of the new government do not encourage or give reason for optimism that in the coming period we will have a strong departure from nepotism and clientelism while we have witnessed many confusing and controversial moves. What still gives reason for optimism is that there is the political will to prosecute and reveal all the illegalities of the previous government. Yet, for a decisive fight

1) The new government was supported in the parliament by the *For the Future of Montenegro* (27 seats), a conservative populist coalition headed by the radical *Democratic Front (DF)*, *Peace is Our Nation* (10 seats) led by centrist *Democrats*, and moderate *In Black and White* (4 seats) led by the social-liberal, progressive and green civic movement *URA (United Reform Action)*.

2) “Former director of the IRF, Zoran Vukčević, was arrested”, RTCG, 4 February 2021, <http://www.rtcg.me/vijesti/hronika/309016/uhapsen-bivsi-direktor-irf-a-zoran-vukcevic.html>

3) “National Anti-Corruption Council established”, the Government of Montenegro, 27 January 2021, https://www.gov.me/naslovna/Savjetodavna_tijela/Nacionalni_savjet_za_borbu_protiv_korupcije_na_vis/237869/Odluka-o-izboru-kandidata-predstavnik-NVO-za-clana-icu-Nacionalnog-savjeta-za-borbu-protiv-korupcije-na-visokom-nivou.html



against corruption and organised crime much more would be needed.

The framework offered by the EU – is it sufficient to strengthen the rule of law?

The negotiation process with the European Union (EU) has been stagnating for several years. Although Montenegro opened the last negotiating chapter in June 2020, one cannot talk about any progress in the process in recent years. Even though strengthening the rule of law remains the major precondition for closing the negotiations, the situation in the chapters related to the rule of law is still far from satisfactory.

In accordance with the new enlargement methodology, presented by the European Commission in February and accepted by the government in May 2020, the negotiation process depends, as before, on meeting interim benchmarks. These benchmarks were defined eight years ago and have so far proved to be broad and do not provide clear guidelines for improving the rule of law. In addition, in order to respond to them, Montenegro has prepared action plans for Chapters 23 (Judiciary and Fundamental Rights) and 24 (Justice, Freedom and Security), which have been updated only once so far, in 2015, and as such are outdated, with poor defined indicators, and are not a good basis for making a turnaround and providing measurable results. In response, the government has prepared new dynamic plans, but it is still unclear to what extent they can respond to the many challenges that stand in the way of strengthening the rule of law in the country. According to the new methodology, there is no progress in the negotiations until the results are provided in the first fundamentals' cluster, which includes Chapters 23 and 24.

“In response, the government has prepared new dynamic plans, but it is still unclear to what extent they can respond to the many challenges that stand in the way of strengthening the rule of law in the country.”

What the European Commission points out in its latest non-paper, a document representing the assessment of the situation in Chapters 23 and 24, is that it is not only focusing on fulfilling the activities from the action plans for Chapters 23 and 24, but also on international obligations. The European Commission assessment once again confirmed how serious the tasks before Montenegro are on the road to the EU and how little has been done to strengthen the rule of law, even though the state has been negotiating for more than nine years. The fulfilment of the obligations is hampered by various problems that the European Commission repeats from year to year in all its documents, such as lack of money laundering verdicts, the manner of applying the plea agreement, and the functioning of the Anti-Corruption Agency.

“The European Commission assessment once again confirmed how serious the tasks before Montenegro are on the road to the EU and how little has been done to strengthen the rule of law, even though the state has been negotiating for more than nine years.”

How to ensure independent institutions?

When it comes to the necessary changes in the judiciary, appointments to some key positions so far have required a two-thirds majority in the parliament, which couldn't be achieved in conditions of deep polarisation. In the last non-paper, the European Commission highlights the role and position of the Special State Prosecutor's Office (SDT), and the importance of the Venice Commission's⁴ opinion, while avoiding commenting on the newly adopted amendments to the Law on the State Prosecution. It is repeated what is expected but not whether the changes are the basis for such a thing, which leaves a lot of room for arbitrary interpretations. In fact, in

4) The European Commission for Democracy through Law – better known as the Venice Commission as it meets in Venice – is the Council of Europe's advisory body on constitutional matters. <https://venice.coe.int>



the last European Commission's country report it is stated that 'the May 2021 amendments to the Law on the State Prosecution Service, which entered into force in June 2021, failed to fully address the Venice Commission's recommendations concerning risks of politicisation of the Prosecutorial Council'.⁵

“An additional obstacle, as pointed out at the outset, is the composition of the parliamentary majority, which so far has not proven to be able to reach agreement on important issues.”

Amendments to the Law on the State Prosecution, which were adopted in May 2021, imply that the Prosecutorial Council, which is responsible for electing the Special State Prosecutor and other prosecutors, is elected by a simple (41 out of 81 deputies) instead of the two-thirds majority. In this way, the election of the Prosecutorial Council is possible only by the votes of the parliamentary majority, which is the main subject of criticism. Another important novelty in relation to this Council refers to its composition and now it is planned to consist of five representatives of the prosecutor's office and another five from the academy (civil society in general), along with a representative of the Ministry of Justice, who, in this case, is on the side of the parliamentary majority. Hence, many interested parties criticise that this is a placing of the Prosecutor's Office under the control of the new government. The position of the Venice Commission is that the election of the Prosecutorial Council by a simple majority in the parliament cannot ensure its impartiality.

An additional obstacle, as pointed out at the outset, is the composition of the parliamentary majority, which so far has not proven to be able to reach agreement on important issues. This turned out to be an issue in implementing the new

solutions, as the three coalitions that make up the parliamentary majority could not agree on a list of candidates for the Prosecutorial Council at the end of July. The whole process was accompanied by strong pressure from the EU and Germany not to make the choice hastily and to ensure a broad consensus.

As for other solutions, the Venice Commission also pointed to the controversial manner of electing the acting Supreme State Prosecutor and recommended that the person should be elected from the active prosecutors, again pointing to the need to find a broad consensus among all political parties. In addition, the Supreme State Prosecutor's position has been in the acting position for a long time due to the impossibility of securing a two-thirds majority on his/her election to parliament.

Civil society and transparency – is it time to make a real impact on policymaking?

“With the change of government in December 2020, there have been significant gaps in the formal adherence to procedures for involving civil society in policy making.”

Civil society involvement in policy making has in the previous period been significantly improved by the procedures for participation in working groups for drafting laws, but also by prescribing mandatory public hearings/debates. However, although formally involved, essentially the role of civil society was marginalised by the previous government, as most of their proposals were rejected without clear justification, which the European Commission itself recognised in its reports calling for an evaluation of their proposals in a meaningful way. With the change of government in December 2020, there have been significant gaps in the formal adherence to procedures for involving civil society in policy making. Already during the first month of its mandate, the government failed to hold public hearings/debates on important laws such as the controversial Law on Freedom of Religion, which

⁵) Montenegro 2021 Country Report, European Commission, October 2021, p. 18, https://ec.europa.eu/neighbourhood-enlargement/montenegro-report-2021_en



was the subject of protests for months last year, or amendments to the Law on Civil Servants and State Employees, which significantly reduced employment criteria, problematic from the aspect of public administration reform and merit-based approach to employment. In this way, the door is open for less experienced individuals to take certain positions in public administration. The same applies to the first phase of work on amendments to the Law on the State Prosecution, while in the second phase civil society was involved selectively, and the public debate was shortened. In addition, the government, although announced by political parties during the election campaign, is lagging behind in publishing documents that were classified as internal during the previous government, while some important negotiations, such as negotiations with the Serbian Orthodox Church (SOC) on the Basic Agreement, taking place behind the eyes of the public.

“In this way, the door is open for less experienced individuals to take certain positions in public administration.”

Although some of these might be justified by the inexperience, this trend should not be continued, as due to the integration phase in which Montenegro finds itself, but also the extremely important tasks facing it, the inclusion of all available capacities and external expertise, support and control are more than needed along the way. This implies not only formal compliance with procedures for involving civil society, but also substantial consideration of received proposals, strengthening of communication channels, and joint campaigns that will inform citizens about the mechanisms at their disposal for the control of executive branch. Given that representatives of civil society in Montenegro are directly involved in the negotiating working groups with the EU, significant support can be provided in defining guidelines for the application of the new enlargement methodology and especially in defining new measures and activities related to strengthening the rule of law as well as indicators based on which their fulfilment will be measured.



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Nikola Mumin works as an executive director of Politikon Network and a researcher at Civil Freedoms Center in Montenegro. He holds a Bachelor's degree in Economics from University of Montenegro and is currently enrolled in MA studies of Cultural Differences and Transnational processes at the University of Ljubljana. He is currently involved in several initiatives concerning monitoring of negotiation between Montenegro and the European Union in Chapters 23 and 24.

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Lessons learned from the justice reform in Albania

By Inva Nela*

Vienna, 22 December 2021

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Policy Recommendations

1. The **political will** of the domestic political elites – or the lack of it – should be taken into account when initiating such deep reform(s) because it is a precondition for an efficient implementation of the required changes and results.
2. The **good governance** features should apply to the newly established judicial institutions and structures. Their implementation is crucial in determining the outputs and the long-term impact of the reform.
3. The **citizens**, who are the main beneficiaries of the reform, should be involved throughout the whole process from the design of the reform to its implementation and operation. Thus, there is a need to prepare information in a way that makes it easier for citizens to understand and to create external mechanisms such as involving representatives of civil society, academia or bar associations to monitor the strategic action plans of the new justice institutions.

Abstract

Judiciary and rule of law, more specifically, is a core element for the accession negotiations with the European Union (EU). In this regard, since 2014 and well before the decision of the European Commission to recommend the start of EU accession negotiations, Albania initiated a deep-cutting reform of its judiciary system. However, while the reforms in Albania were advancing, an increasing role of the member states in the EU accession process emerged. The 2020 enlargement strategy of the European Commission confirms this increased role and involvement of the member states in setting benchmarks, monitoring the progress of the reforms and providing technical

assistance on the ground in selected sectors. In the case of Albania, the enlargement instruments have been primarily focused on the justice reform, therefore, it gives the opportunity to go beyond the simply adoption of the *acquis communautaire* and of the capacity building approach (i.e. the formal establishment of new structures and institutions). This Policy Brief aims to draw some lessons from the implementation of the justice reform in Albania, which also allows to build a coherent body of knowledge that will assist to better plan, implement, monitor and maintain a sustainable institutional reform dynamic all over the Western Balkans region.

* This Policy Brief is inspired and draws its reflections based on CDI's previous research conducted in the framework of [ALBE initiative](#) focused on Justice Reform and Enlargement.



Lessons learned from the justice reform in Albania

Introduction

In the progress report of 2014, the European Commission emphasises the need to reform the judiciary, especially the key institutions such as the Constitutional Court, High Court, the High Council of Justice and the prosecution.¹ Since 2014 and well before the decision of the European Commission to recommend the start of accession negotiations with the European Union (EU),² Albania initiated a deep-cutting reform of its judiciary system. However, while the reforms in Albania were advancing, the new enlargement methodology allowed an increased role of the member states in the EU accession process. While the European Commission applies its chapter-based methodology, now cluster-based, member states tend to focus more on the progress of reforms, to include a high degree of political conditionality, and to apply such conditionality before the official opening of accession negotiations as the case of Albania (and North Macedonia) shows.

“Since 2014 and well before the decision of the European Commission to recommend the start of the accession negotiations, Albania initiated a deep-cutting reform of its judiciary system.”

The new enlargement methodology includes the “rule of law” and “functioning of democratic institutions” into the cluster of “fundamentals” – which eventually leads to higher scrutiny during the

implementation phase and on the good governance component. This development brings to the fore the importance of the implementation of the *acquis communautaire* (vs. the adoption) of the European Union and the functioning of the reformed local institutions (vs. the institution building).

In the case of Albania, the enlargement instruments of political dialogue, conditionality and assistance have been primarily focused on the justice reform. Likewise, the shift towards fundamentals and the increased role of the EU member states may lead to a longer and more complex enlargement process. Therefore, the justice reform in Albania gives us the opportunity to go beyond the simply adoption of the *acquis communautaire* and of the capacity building approach (i.e. the formal establishment of new structures and institutions), by allowing us to analyse the complex issues that emerged during the implementation of the *acquis communautaire* and in the good governance mechanisms of the newly established structures. It also provides a unique experience where enlargement is intertwined with the country’s institutional reforms, and where EU member states have taken a leading role in the scrutiny of the progress towards EU membership.

Reforming the justice

While the EU has repeatedly reported on Albania’s progress on the path of reforms subject to the countries accession into the EU, an Ad-Hoc Parliamentary Committee on Justice Reform³ composed by a group of high-level experts from the EU, the United States (US), and other international and local experts, prepared an Analytical Document of the Justice System in Albania which later served

1) European Commission (2014), “Albania Progress Report”. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014D0096>

2) EU Council, Council conclusions on enlargement and stabilization and association process — Albania and the Republic of Northern Macedonia. <https://www.consilium.europa.eu/en/press/press-releases/2020/03/25/councilconclusions-on-enlargement-and-stabilisation-and-association-process/>

3) Established with the Decision 96/2014, 27.11.2014. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0096&from=EN>



as the cornerstone in developing a strategy and action plan for the judicial reform.⁴ The main purpose was that the reform should address the re-set the existing corrupt, inefficient and dysfunctional justice system, strengthen the existing institutions and wherever necessary establish new efficient ones.⁵

“The will of the main political actors was crucial in pushing forward institutional reforms.”

The reform included, among others, setting up a fully-fledged system of vetting judges and prosecutors, establishing new institutions governing the judiciary, creating a special prosecution and courts for the fight against corruption and organised crime, and substantially reforming existing institutions, including the Supreme Court, Constitutional Court and General Prosecutor's Office. But mid-way and blocked by an absent Constitutional Court and a High Court, it was realised the existence of a Catch-22 situation: The will of the main political actors was crucial in pushing forward institutional reforms.⁶

The same scenario applies also in other Western Balkan countries: The good governance approach does not apply in an institutional environment that does not guarantee full democracy (as illustrated from the Freedom House's downgrading Serbia and Montenegro – from “semi-consolidated democracies” to “hybrid regimes”), respect for human rights and rule of law (as illustrated by the governing by decree during the COVID-19 pandemics), or where there is not a critical mass of political will in favour of these institutional changes (as in the confrontations

between the government, the parliament and the president for the appointment of the Constitutional Court judges in Albania).

Compared with the Western Balkan enlargement front-runners, in Albania the constitutional process of reorganising the judiciary was completed before the start of the EU accession negotiation process. The focus now has shifted towards the proper functioning and efficiency of the newly established structures and institutions. Frontloading conditionality has allowed Albania to mark a significant progress in many areas covered by Chapter 23, even if the accession negotiations with the EU have not been officially opened yet.

“Compared with the Western Balkan enlargement front-runners, in Albania the constitutional process of reorganising the judiciary was completed before the start of the EU accession negotiation process.”

Considering the political component in the “good governance” approach reiterates the importance of politics in the design, functioning and sustainability of the institutions. Weak administrative capacity, missing or incomplete rules of procedure, ad-hoc solutions and by-passing of institutional procedures, low transparency, weak fight against corruption, etc. happen because political leaders don't want strong institutions that can question or curtail their will. In the case of Albania, this was reflected also in the confrontations between the government, the parliament and the president for the appointment of the Constitutional Court judges, – which was a clear lack of critical mass of political will in favour of the institutional changes. Hence, **the legitimacy of political will becomes a key condition for good governance**. In this regard, **the role and impact of the political will and of good governance in the progress of the countries towards EU membership remains crucial**.

4) The Strategy on the Justice Reform and Action Plan. <http://www.reformandrejtisi.al/dokumenti-strategjik-dheplani-i-veprimit>

5) Cooperation and Development Institute, Albania “EU Enlargement in SEE6 and Country Reforms – The Justice Reform in Albania as a Case Study”. <https://cdinstitute.eu/wp-content/uploads/2020/09/EU-Enlargement-in-Balkans-and-Justice-Reform-in-Albania-1.pdf>

6) Ibid.



Lessons learnt

The justice reform in Albania is one of the deepest, largest and most complex institutional reforms in the country. Approved in July 2016, the justice reform is known mainly for the vetting process and the long time it took to put the new justice institutions into operation. But the Albanian experience is much broader. It first involves mobilising political will as a prerequisite for the successful start and implementation of any reform, and not just in the justice sector. The political will is needed to bring forward change though the reform has a systemic importance. Inducing and implementing systemic changes when corrupt elites are still in charge requires a broad basis of participation to succeed. It is highly unrealistic for those complex tectonic changes to happen in a short period of time, to be quantifiable in minute detail, and to be implemented with non-political instruments.

“Inducing and implementing systemic changes when corrupt elites are still in charge requires a broad basis of participation to succeed.”

While intergovernmental partnerships are the way the EU works to support good governance, to be successful in such endeavours, the main local partners of the EU should include broad national coalitions. If they do not exist, the contribution of the international community could be to identify them, and then support in becoming both broad and powerful.

The process of reform monitoring and reporting should be more inclusive and extend also to those actors (i.e. Civil Society Organisations) outside from the captured institutions. The institutional reform programmes should be designed taking into account this political approach. While, the EU instruments for political dialogue should also act in line with the assistance and conditionality, promoting representative local pro-reform actors and avoiding the ‘professionalisation’ of reforms by limiting it to a circle of ‘experts’ only.

From the good governance perspective, five years after the adoption of the justice reform allow to identify and assess different issues impacting the good governance components. By all acknowledging its undeniable achievements, with the hindsight it appears that the main hurdles faced by the justice reform in Albania are rooted in the design phase, accompanied with the need to show swift results demanded by the EU integration agenda.

“From the good governance perspective, four years after the adoption of the justice reform allow to identify and assess different issues impacting the good governance components.”

In addition, the short time allocated to complete deep changes (including amending one third of the Constitution), the socio-cultural context, the oversized role of current political elites in the design and implementation, the overriding of good governance promotion by other strategic priorities, insufficient involvement of the citizens and an overestimation of the country’s abilities to produce new qualified members of the judiciary willing to become part of the new institutions, are some of the main setbacks of the reform implementation.

In this context, it should be understood that the complexities of this reform especially when it comes to implementation partially arose from systemic flaws that altogether need to be tackled in the broader reform’s framework suggested by the EU.

Due to the decade long scepticism over the impartiality and fairness of the justice system before the reform, a sense of doubt from the general public (the citizens) over the results of the reform is present. Therefore, it is important that the efforts in the future with regard to the justice reform should be in the good governance aspect of the new institutions as it is about time that they gain their own value and legitimacy.



Conclusions and recommendations

The justice reform in Albania has demonstrated the complexities of associating the progress of a country towards complying the EU conditionality while undergoing into a costly and long process of deep reforms, and of showing quick tangible outcomes and results. Yet, notwithstanding its downsides and imperfections, the scope and depth of the justice sector reform in Albania represents a case study to understand, assess and adapt the systemic importance of EU membership-driven reform processes in the Western Balkans. Having amended more than one third of its Constitution, Albania can be considered as a reform front-runner when compared with other EU candidate countries in the region. Seen from this perspective, the experience of the justice sector reform in Albania and the lessons learned during design and implementation of the justice reform can be applied in other sectors as well as in the other Balkan countries.

As a consequence, an important part of the EU foreign policy instruments of political dialogue, conditionality and assistance applied to the Balkan country must be re-oriented and redesigned to focus on the good governance and resilience of new justice institutions.

“In the case of Albania, the process of reforming the justice system, though it had the political will of the government, many times also pulled out the confrontation between the government and the opposition, and most recently with the president.”

The role and impact of both political will and of good governance are essential in the progress of Albania towards the EU membership.

The *political will* of the domestic political elites – or the lack of it – should be considered when initiating such deep reform(s); a clear political will is necessary to conduct the required changes and produce the desired results in an effective way. In

the case of Albania, the process of reforming the justice system, though it had the political will of the government, many times also pulled out the confrontation between the government and the opposition, and even the president. Nonetheless, in terms of EU enlargement process, the challenges for the country now have shifted towards the functioning and efficiency of the newly established structures. The frontloading of conditionality has allowed Albania to mark a significant progress in many areas covered by Chapter 23, despite the setbacks or weaknesses of the EU enlargement policy.

“[...] the challenges for the country now have shifted towards the functioning and efficiency of the newly established structures.”

The *good governance* features should apply to the newly established judicial institutions and structures. Implementing good governance in the newly established justice institutions and structures is crucial in determining the outputs and the long-term impact of the reform.

The *citizens* who are the main beneficiaries of the reform should be involved throughout the whole process from the design of the reform to its implementation and operation. Thus, there is a need to prepare information in a way that makes it easier for citizens to understand and create external mechanisms involving representatives such as the civil society, academia or bar associations to monitor the strategic action plans of the new justice institutions.

Through the weight given to the “fundamentals” chapter, the EU finally brings to the fore of its relations with the six Western Balkan countries (WB6) the democratic legitimacy of the institutional framework and ensures the sustainability and efficiency of its functioning. This development provides a much-needed contribution for the WB6 countries to raise the political will of their citizens to exercise their democratic rights and obligations and to ensure the good governance of their democratic institutions.



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Keywords

Albania, justice reform, political will, good governance, European Union

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Considering EU enlargement through the prism of security cooperation

By Elise Bernard, Joseph Leloup*
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Policy Recommendations

1. A joint European operational security strategy should be established to counter Eurosceptic and Europhobic arguments in the Western Balkans and foster the rule of law in the region.
2. In the area of security EU member states should provide candidate and potential candidate countries technical cooperation, including equipment donations, strategic advice and training in order to promote the transfer of know-how, consolidate networks of trust with partner services, while enhancing the values inherent in European integration and bilateral relations.
3. A more fluid flow and exchange of information would be the necessary basis for further bilateral and multilateral funding.

Abstract

Security, trafficking and the rule of law are major concerns for all European actors, whether private or public, EU member states, candidate countries or potential candidate countries. In fact, it would be a mistake to consider the Western Balkans as a periphery of the European Union (EU) and on the margins of the decision-making process. According to Angela Merkel during her visit in Belgrade on 13 September 2021: *“We, who are already members of the European Union, should keep in mind that there is an absolute geostrategic interest for us to include these countries in the European Union.”*

As stated by the European Policy Centre in a discussion paper about the Conference on the Future of Europe, *“Allowing the Balkan countries to witness and contribute to this initiative could foster a sense of togetherness and partnership that has been lacking from the long, drawn-out formal accession process”* (Stratulat, Lazarević 2020). This is true for

economic matters as well as for security issues, joint actions and existing common initiatives that are carried out. Yet, for the moment, already existing structures and cooperation seem insufficiently promoted to the general public and need to be reinforced.

The security rhetoric that is flourishing within Europe and beyond its borders pushes states to turn less towards and to welcome less migrants. The subject has become the flagship of populist speeches that use it as a justification for their attacks on the rule of law. This counter-productive dynamic must be combated by increased cooperation between the competent services and the demonstration of success stories. Moreover, the purpose of working closer together on these issues remains, with a view to building a common security, to properly prepare the EU accession of the Western Balkan countries. This is what is at stake in this reflection, between observation, awareness and proposals for action.

* The authors started writing the Policy Brief in June 2021, the final corrections are from December 2021.



Considering EU enlargement through the prism of security cooperation

Introduction

“Today, there is an aspiration for a more united and more sovereign Europe that must be met; for a Europe that asserts itself as a citizen space of shared cultures, where an identity rich in diversity but based on common principles and values develops; for a Europe that exploits all the potential of economic recovery and of the ecological and digital transition.” Clément Beaune, French Secretary of State to the Minister for Europe and Foreign Affairs, in charge of European Affairs, 4 November 2020

Without directly mentioning it, this Communication on the French Presidency of the Council of the European Union refers to the malaise that has persisted since 2004, the year of the so-called ‘great enlargement’ of the European Union (EU). Seventeen years ago, ten candidate countries, mostly from Central and Eastern Europe, joined the EU and two more countries from Eastern Europe followed in 2007. These enlargement rounds lead to a significant extension of the territory covered by the law of the EU from [15 to 27 member states](#), after [several years of negotiations which appeared – particularly in France – based mainly on economic considerations](#).

The post-1989 geopolitical recomposition took place within a European framework, responding to a ‘demand of Europe’ and integration into its economic and political model. The democratic transition in the post-Soviet countries should allow for the installation of a Western-style political normality, with a functional political system and consensual programmes around European integration.

“[...] these Eurosceptic populist waves with authoritarian tendencies can be observed in Western Europe as well, that’s why it is essential to foster cooperation going further simple ministry notes.”

However, these state constructions, sometimes very recent, have differences with their Western counterparts. The institutional apparatuses appear to be less adapted and structured; moreover, [they are partly established on a background of clientelism and corrupt behaviors](#) but the Eastern states are not the only ones to be affected, these facts do not spare their Western neighbours. In addition, to these considerations, there [is the rise of populist and national-populist Eurosceptic parties in some of the countries, as shown in the image](#). They are taking over the leadership of the executive, have a majority in parliamentary assemblies, and are reshaping laws and constitutions, quite virulently in [Central and Eastern Europe](#). Once again, these Eurosceptic populist waves with authoritarian tendencies can be observed in Western Europe as well, that’s why it is essential to foster cooperation going further simple ministry notes.

“The driving force behind the political discourse of these Eurosceptic, or even Europhobic, currents is the ‘lack of security’ on the continent.”

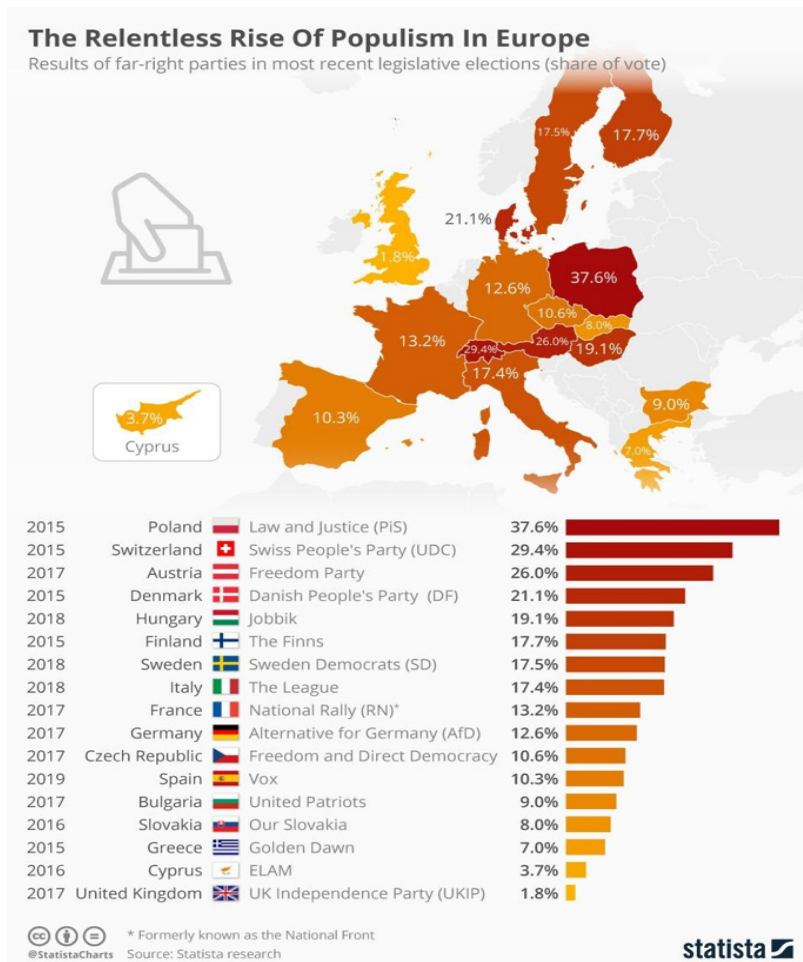
These waves are also increasingly making their mark on the daily life of the European Parliament. This phenomenon generates functional problems within the institutions, as illustrated recently by the blockages of the Post COVID-19 Recovery Plan or the adoption of the 2021-2027 European budget by the [Polish-Hungarian](#) duo. The capacity of this Eurosceptic ‘fortress’ to entrench the parliamentary proceedings weakens the European structures and maintains numerous misunderstandings with the candidate countries.

The driving force behind the political discourse of these Eurosceptic, or even Europhobic, currents is the [“lack of security” on the continent](#). In the public opinion of the older EU member states, the 2004 and 2007 enlargements were often perceived as a



problem in terms of intra EU migration and trafficking, with uncontrolled flows of refugees intensifying since 2015, [endangering the security of national territories](#). The geographical location of the Western Balkan countries is exposed as an expansion of the geographical borders of the EU and raises the problem of [the surveillance of its perimeter](#).

field of justice, the fight against organised crime and corruption. After the accession of Croatia on 1 July 2013, these issues emerged in the framework of the EU enlargement strategy until it was endorsed in the Sofia Declaration of 17 May 2018, [following the EU-Western Balkans Summit](#) of the Bulgarian Presidency of the Council of the European Union.



Source: <https://www.statista.com/chart/17860/results-of-far-right-parties-in-the-most-recent-legislative-elections/>

However, it is clear that joint actions are being taken to put in place an operational security strategy based on the cooperation of the competent services. In 2007, with the accession of Bulgaria and Romania, a ["cooperation and verification mechanism"](#) was set up in order to evaluate the progress made in the

"The authors of this Policy Brief seriously hope the French Presidency of the Council of the European Union will pay sufficient attention to the Western Balkans."



Thus, in order to counter the Eurosceptic and Europhobic arguments, while [accompanying the candidate and potential candidate countries](#) towards a better guarantee of the rule of law and a successful accession, the authors of this Policy Brief believe it is essential to promote an operational strategy on security. Refusing to stop at the unpleasant state of affairs in the Western Balkans and the gloomy atmosphere in the EU member states, some practical reforms – well beyond declarations of intent – are expected from the French Presidency of the Council of the European Union. The authors of this Policy Brief seriously hope the French Presidency of the Council of the European Union will pay sufficient attention to the Western Balkans.

An unpleasant state of affairs

The Western Balkans must be considered as a priority area of interest and be the subject of a multisectoral response because the issues at stake are numerous and interdependent.

One of these challenges is [the endemic presence of polycriminal groups](#) drawing on Western European diasporas, coupled with continuing political tensions – corruption and weak administrative structures. They make security cooperation measures particularly difficult to implement. The lack of coordination with EU member states and [among the Western Balkan countries](#) further complicates any action on the ground.

From a French point of view, the Western Balkans are still a transit area for criminal trafficking, the legacy of the 1990-2000 conflicts also generates [significant arms trafficking](#). As the main [road for illegal immigration](#), the passage of large population movements through these countries fuels human trafficking, often coupled with pimping and drug trafficking networks. Eurosceptics insist on this negative image to justify their harsh criticism on the EU and to undermine Europe. According to the authors the EU should foster cooperation and communicate on the success stories.

“The Western Balkans must be considered as a priority area of interest and be the subject of a multisectoral response because the issues at stake are numerous and interdependent.”

Problems, although common to the region, should not be approached in a uniform manner: [each country](#) has its own specificities that must be taken into account. This situation unfortunately hinders the full effectiveness of operational cooperation. The treatment of these threats suffers firstly from the [weakness](#) of police and [military](#) cooperation. Information exchange is particularly lacking, mainly due to an absence of trust in local partners, preventing the establishment of a reliable and dynamic network in the area. Secondly, [the corruption of these actors remains a concern](#), particularly because of the impunity of political decision-makers – chapters based on the rule of law have to be reinforced, specially throughout a [European pillar on criminal law must be adopted](#).

These combined weaknesses represent threats to internal security throughout the continent. Therefore, it is essential to formalise an operational strategy adapted to the context and needs. Successes should be widely communicated.

Collection and exchange of information between EU member states and candidate countries

“New working methods, open to a dense multilateral network, are needed with the aim to reinforce the pre-existing bilateral cooperation.”

The nature of the threats outlined above in the region makes it necessary to rely on a structured network of officers deployed in these countries in order to create strong links between the EU member states and local security services. The effectiveness of this European network could be based on effective interoperability with international organisations, such as the [United Nations Office on Drugs and Crime](#) or the [Organisation for Security](#)



[and Cooperation in Europe](#), and the EU agencies, [Frontex](#) and [Europol](#), based in the region. New working methods, open to a dense multilateral network, are needed with the aim to reinforce the pre-existing bilateral cooperation.

At present, the countries in the region, with the exception of [Kosovo](#), are connected to the Interpol network and are operational third states with Europol. However, the standardisation of access of corrupt services to European and international operational information systems still needs to be supported in order to intensify exchanges between investigative services in the Western Balkans and the EU member states.

“Of particular note are the permanent French criminal intelligence units, which have been proving their worth in Serbia for several years and more recently in Bosnia and Herzegovina.”

With regard to bilateral relations, with a view to national and European influence, the sending of liaison officers to the region must continue in order to adapt the network to the challenges in the area. Of particular note are the permanent French criminal intelligence units [which have been proving their worth in Serbia](#) for several years and more recently in [Bosnia and Herzegovina](#). This is a model that should be developed and perpetuated for better intelligence gathering but also because it offers an outreach which will be taken seriously in particular if we want to prove the existence of an efficient rule of law.

Based on the existing structures, the authors believe that it would be judicious to extend the prerogatives of these units to other criminal fields, such as human trafficking and the fight against drugs, and at the same time to extend the nature of the information collected to include bank data. This would increase the efficiency of investigations, establish the legitimacy of these structures and publicise their successes, at a time when the EU seems to be distinguished only by its “soft consensus” and the member states appear to be

pursuing only their own interests. These bilateral structural developments should aim to extend the model of the Permanent Criminal Intelligence Units to other countries in the region to create a true intelligence community – with or without the EU – whose birth would be driven only by its indispensability.

Support and monitoring of migration flows

In the context of this reflection, the region must be considered [as a transit zone rather than a place of origin of migration](#). Without evading this last point, it should simply be emphasized that migrants from the Western Balkans move mainly because of corruption and unemployment in their countries as well as because they belong to a discriminated group. What the authors are interested in here are the important flows in the area, which require networking to facilitate information exchange. It is therefore necessary to pool the efforts undertaken by each EU member state in monitoring flows and in the fight against human trafficking networks. Focusing exclusively on the illegal nature of a border crossing is of no use: it is necessary to support the areas that have to deal with these crossings on a daily basis, to study them in preparation and to identify businesses that do not respect European values.

Support for the initiatives carried out in the framework of the European Multidisciplinary Platform Against Criminal Threats ([EMPACT](#)), which aims to gather information through targeted checks, [including documentary checks](#), would strengthen operational cooperation in the fight against human trafficking.

Beyond the pre-existing tools requiring a commitment from both EU member states, candidate and potential candidate countries, an inclusive approach should be envisaged in order to involve, for example, private transport actors. In this context, it is essential to be clear about the objectives pursued and to develop the exchange of information with the economic actors concerned.



“In the context of this reflection, the region must be considered as a transit zone rather than a place of origin of migration.”

The evaluation of migratory flows and the resulting traffic must be carried out through the development of new tools. Thus, the support given to local Structural Innovation Funds should be redirected into the creation of units dedicated to the collection of strategic information and the provision of equipment adapted to the processing of these data. Finally, this capacity building should include training on documentary, banking and tax fraud as well as the creation of dog units, to name a few examples. Benevolence must be shown, both to the authorities of the territories crossed and to the people who are the “objects” of this trafficking, because what poses a problem in the first place is the vigour with which transnational organised crime operates.

Combating transnational organised crime activities

Existing structures, which are not well known to the public, deserve to be promoted and developed. The EMPACT cycle appears to be the main operational tool in the fight against organised crime: its use in the Western Balkans must now be increased. This should be accompanied by an awareness of the [FATF and MONEYVAL](#) (Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism) standards, allowing for the development of “mirror investigations” and increasing the effectiveness of money laundering investigations. Following the same logic, as regards the fight against arms trafficking, the effort to deploy the [EVOFINDER](#) ballistic analysis system software must be continued. Finally, the adaptation of criminal information exchange tools to operational needs is essential. In this respect, extending the search possibilities in the [EUCARIS](#) (European car and driving licence information system) system would increase the chances of identifying the heads of criminal networks and thus the efficiency of investigations.

Structural cooperation must obviously be followed by operational cooperation with the aim of putting an end to arms trafficking and related criminal activities. Proving the effectiveness of this cooperation will reassure investors and decrease a – too often – shared feeling of legal insecurity. Procedures must therefore be put in place to enable all actors involved – local and Western – in the fight against organised crime to systematically rely on the Permanent Criminal Intelligence Units and to develop common tools and practices with the actors involved in the area.

“Structural cooperation must obviously be followed by operational cooperation with the aim of putting an end to arms trafficking and related criminal activities.”

All this should be complemented by: full cooperation in the framework [of international commissions rogatory](#) to avoid that many requests addressed to the Western Balkan authorities remain unanswered; the training of specialised local services; and the implementation of joint investigations that are widely publicised. All this must be supplemented by the development of the cyber investigation capabilities of the security forces of the countries in the region in order to detect criminal networks exploiting the capabilities of the internet to develop their trafficking.

These institutional frameworks can only be effective if they are backed up by cooperation with the private actors involved – often unwillingly – in trafficking. This would take the form of a framework for cooperation with money transfer companies present in the Western Balkans in order to ensure that [the fundamentals of compliance](#) are respected, over and above the advantages in terms of intelligence that this could provide.

“These institutional frameworks can only be effective if they are backed up by cooperation with the private actors involved – often unwillingly – in trafficking.”



In conclusion, structural and operational cooperation between EU member states, candidate countries and potential candidate countries, but also between private and international actors, seems to be the best solution to fight against Europhobic discourse, to guarantee the rule of law and finally, to combat the various types of trafficking that take place in the Western Balkans. These joint efforts should strive towards preparing EU accession of the Western Balkan countries in a very efficient way.

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Building a constituency for rule of law. Lessons from the Romanian anti-corruption drive

By Oana Popescu-Zamfir
Vienna, 10 February 2022
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Policy Recommendations

1. Do not trade long-term sustainability (accountability, due democratic process, stakeholder negotiation) for short-term efficiency. Yet, short-term results and investment in drivers of change are necessary to build up the credibility of the process. Striking the golden mean is painstaking, but rewarding.
2. Hold out credible reward for performance (EU accession) and build a rule of law constituency (invest in independent media, civil society organisations, public communication). Empower them to carry the flag and be domestic agents of change. Beware of window-dressing reformers using the accession process for their own ends.
3. Treat rule of law, anticorruption and good governance as cross-cutting issues to be incorporated and monitored in every chapter of negotiation and partnership with the EU; ensure stakeholder participation up and down the decision-making process; maintain focus on values, not just ticking boxes.

Abstract

Romania's experience is that of the most intensive push for rule of law and anti-corruption among new European Union (EU) members, given that the country joined in 2007 before it had met EU conditionality. The outcome has been a mixed bag of spectacular short-term successes and long-term frustration. While not transferable as such to its neighbours, Romania's experience is perhaps especially indicative of both 'how to' and 'how not to' go about building rule of law. The benefit of hindsight helps, as does awareness of current challenges to democracy across Central and Eastern Europe.

Alongside Bulgaria, Romania is one of only two countries to have become EU members and still be subjected to an ongoing monitoring mechanism on justice and the rule of law. Pressure from the EU (and the United States) and political will at home concerning the accession and integration process to both the North Atlantic Treaty Organization (NATO) and the EU, against the background of massive popular support for reintegration with the West, have allowed for a comprehensive institution-building effort to be deployed (albeit not with the most democratic

means). This in turn has led to a societal process, i.e. building an actual constituency for rule of law among the general population. As both the domestic political will and external leverage have started to wane in recent years, the long-term sustainability of this endeavour seems to lie more with this constituency than with the structural elements at play (relevant institutions, legislation, etc.). At present, the Western Balkans and other EU neighbours do not enjoy the luxury of a similar mix of circumstances: the overall credibility of enlargement has diminished over time and is very low, governments and societies do not feel that they necessarily have to make an exclusive 'East/West' type of choice, the incentives to effect painful reforms are proportionally reduced and the EU has put most of its eggs in the baskets of regimes that have lost much of their internal legitimacy and used the EU to consolidate power. Yet, a few important principles of action can be extracted which have universal applicability and point at lessons that can be taken for the Western Balkans and the EU based on the Romanian experience.



Building a constituency for rule of law. Lessons from the Romanian anti-corruption drive

Unanimous, unconditional support for Euro-Atlantic accession creates a national identity agenda

The particular background of the anti-corruption and justice reform drive started in the course of North Atlantic Treaty Organization (NATO) and European Union (EU) accession in the 2000s (one that can hardly be replicated today¹) was the enormous popularity of the Europeanisation and Westernisation process among the Romanian population which throughout the years has constantly remained the highest² among the Eastern bloc. Seen as an existential, identity issue, the rectification of a historic injustice done to Romania after the Yalta Conference that relegated it to the domination of the Soviet Union, the prospect of returning to the bosom of the West was met with almost unanimous approval from both society and political actors. It was constructed as the country's sole national project for a decade and a half and beyond³, giving the EU and the United States unmatched leverage over the internal agenda. It was also the subject of an unprecedented accord among all political parties, ratified in the Snagov Declaration of 21 June 1995, which granted their full support to the national EU accession strategy⁴.

“In practice, the monitoring process as well as the constant attention and pressure from outside partners has functioned as a very strong enabler of reforms.”

1) <https://www.eastern-focus.eu/2019/08/rule-law-decade-eastern-partnership-lets-talk-political-change/>

2) <https://europa.eu/eurobarometer/surveys/detail/583>

3) Romania initiated relations with NATO in 1990, immediately after its regime change in December 1989, and officially notified the Secretary General of its intention to join the Alliance in 1993. The same year, the country signed its Association Agreement with the European Union. It became a member of NATO in 2004; democratic reforms started in view of its membership of the North Atlantic Alliance paved its way to EU accession in 2007.

4) http://old.presidency.ro/pdf/date_arhiva/370_ro.pdf

Political will was therefore paramount to the full implementation of justice and good governance reforms, building democracy and rule of law. It reflected also the widespread option of the electorate, but it was embraced by the top levels of the country's leadership and seen as an exclusive strategic West vs. East choice. This choice would ensure nothing less than the country's survival as an independent state, providing security guarantees in an otherwise troubled region. The political and socio-economic integration with the EU would further guarantee the de facto structural transformation of the country into a Western democracy. After the initial focus on liberalising the economy Chapter 24 Justice and Internal Affairs was opened in 2002 and it became the main sticking point in negotiations between Romania and Brussels, given the high level of corruption in the country. Romania eventually became an EU member without having fully met all of the criteria regarding judicial reform and corruption. Therefore, the Cooperation and Verification Mechanism (CVM)⁵ was set up as a transitional mechanism to ensure delivery of reforms in these fields. Politically, the CVM has positioned Romania and Bulgaria as 'second tier' EU member states, a very uncomfortable status vis-à-vis the other 25 (later 26, as Croatia entered without a CVM), where reports by the European Commission of transgressions very similar to those of Bucharest or Sofia had much less bearing on their conduct of domestic politics or ability to negotiate their interests at EU level. The trade-off though was seen as the only win-win option: giving the EU a big say in Romania's internal affairs in exchange for ratification of accession in 2007. In practice, the monitoring process as well as the constant attention and

5) https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en



pressure from outside partners has functioned as a very strong enabler of reforms.

Political elites reluctantly relinquish illicit influence, in hopes of a trade-off

One can only speculate as to the reasons why the ruling political class of the time consented to relinquish some of their privileges and the domestic environment of impunity they had enjoyed until then. Prime Minister Adrian Năstase (2000-2004) was instrumental in kick-starting the anti-corruption campaign and taking Romania into the EU. Just like his counterpart Ivo Sanader in Croatia, he would later go to jail on charges of high-level corruption. Perhaps they held the belief that toeing the EU line would allow them some wiggle room for their own influence or give them an edge in negotiating their own exit from the political stage with Brussels and Washington. Also, at a later stage, powerful players such as President Traian Băsescu (2004-2014) deployed a full-fledged effort to build institutions able to take on state capture (such as the National Integrity Agency/ANI or the National Anticorruption Directorate/DNA, which were studied as models of good practice for a number of years before quietly slipping into irrelevance of late) in an attempt to use the anti-corruption fight as an influential instrument to eliminate political adversaries under the cloak of legitimacy and commitment to EU benchmarks.

Whatever its reasons, the strong political will behind the anti-corruption drive and building rule of law has translated in practice into a forceful top-down, centralised and highly efficient process⁶, unlike, for instance, in Bulgaria, where there was never any genuine reform effort. Corruption was framed as a national security threat, and thus the anti-corruption fight was placed under the authority of the Supreme National Defence Council (CSAT), which made it relatively easy to rally behind it all the institutions of force, including the intelligence services. This also

gave the president decisive influence, including through appointments of the heads of the DNA, the Attorney General, the magistrates of the Supreme Court and Constitutional Court. In so doing, he often bypassed the Parliament completely (either in its legislative functions or as the institution exercising control over the executive) – and hence the mechanisms of democratic accountability. This has led to a highly personalised system, where political support was key and allowed institutions such as the National Integrity Agency under its Secretary General Horia Georgescu to increase the transparency of the fortunes of political leaders; or the Supreme Council of Magistrates to become a dominant body regulating the profession; or the head of the DNA and current European Chief Prosecutor Laura Codruta Kovesi to pursue high visibility cases of high-level political corruption, in close cooperation with the National Intelligence Service, or former Justice Minister Monica Macovei to implement robust reforms⁷.

“Whatever its reasons, the strong political will behind the anti-corruption drive and building rule of law has translated in practice into a forceful top-down, centralised and highly efficient process, unlike, for instance, in Bulgaria, where there was never any genuine reform effort.”

Building democracy through undemocratic means

The resulting system thus had important loopholes, legislation was at times sketchy and not debated in parliament, the courts were inefficient and access to justice remained a problem for both the common citizen, the business environment and high-ranking politicians. The latter often accused political vendettas as the reason for their prosecution, with cases often tried in the court of public opinion, following leaked information to the press, yet later dismissed in court due to

6) <https://www.eastern-focus.eu/2019/05/romanias-permeability-authoritarian-tendencies/>

7) <https://www.politico.eu/article/the-dna-of-romanias-anti-corruption-success-eu-transparency-international/>



inconclusive evidence⁸. The press as a watchdog remained endemically unprofessional, underfunded, politicised and corrupt (with virtually all owners of the major media groups having been indicted by now on corruption charges or at least investigated, and most of them using the outlets they owned to cater to the interests of their political patrons and secure protection for their other business interests). Civil society was as intensely polarised as the justice system itself; neutrality became a rare commodity, as influencers would rally behind what they regarded as the 'righteous camp'. Which one this was could be hard to make out at times, since the battlefield was divided between those who were essentially the flag-bearers for anti-corruption and building rule of law, and those who accused them of instrumentalising these goals for their own interest. Opposing the former would be seen as lacking integrity and going against 'the good fight', while supporting the latter would necessarily translate into weakening the anti-corruption drive itself.

“The political investment in rule of law and anti-corruption over the years, the centrality of the subject in media and public debate, and the constant attribution of poor governance to endemic corruption had eventually managed to build a constituency among the population.”

Whether it was making progress or experiencing setbacks, anti-corruption became the buzzword for over a decade, it was making the political and public agenda and concentrating around it much of the effort aimed at building and then consolidating democracy. Two impeachment attempts of former President Traian Băsescu were grounded in accusations of abuse of power against political rivals through politicisation of the appointment of prosecutors, use of national intelligence services and illegal phone-tapping. Current President Klaus Iohannis won his first term almost exclusively on an anti-corruption agenda. The government of

Prime Minister Victor Ponta collapsed following a fire in the Colectiv nightclub in Bucharest, which left 65 dead, and whose underlying causes were attributed to corruption. When people took to the streets calling for the government's resignation, chants of "corruption kills" were heard for the first time. Then the Social-Democrat Party (PSD) under leader Liviu Dragnea came back to power in 2017 and spent two years having as its primary agenda the reversal of justice, rule of law and anti-corruption reform, in order to spare its members (who had been the prime, though largely legitimate targets of prosecutors supported by former President Traian Băsescu) lengthy jail sentences. The PSD was eventually ousted at the polls, where it first lost elections for the European Parliament and then local and national elections.

The political investment in rule of law and anti-corruption over the years, the centrality of the subject in media and public debate, and the constant attribution of poor governance to endemic corruption had eventually managed to build a constituency among the population. Rule of law had primarily resonated with the growing professional middle class, mostly urban, increasingly educated and financially independent, who could afford to speak truth to power, developed a notion of active citizenship and were reclaiming political agency.

Civil society – more resilient than institutions

“It [the process] morphed, however, into a bottom-up, grassroots movement demanding accountability for the political class in how they implement the self-professed European values of rule of law and integrity.”

The unprecedented protests that preceded the fall of the Dăncilă⁹ government, mostly organised spontaneously, on social media, as well as the amount of public debate over executive measures

8) <https://www.eastern-focus.eu/2019/08/beyond-dna-steroids/>

9) <https://www.bbc.com/news/world-europe-49998670>



targeting the justice system testify to the importance that regular people had come to attach to the anti-corruption fight. The process had started out as top-down, highly centralised and, in all truth, not very democratic, reliant on political will and geared very much toward the defence of one's own political interests at the expense of one's adversaries. It morphed, however, into a bottom-up, grassroots movement demanding accountability for the political class in how they implement the self-professed European values of rule of law and integrity.

“The quiet slide into irrelevance of the tremendous institution-building effort in Romania should be a stark warning for the EU in its approach to rule of law in the Western Balkans.”

As history has shown, however, the effort of building or sustaining democracy does not end with victory at the polls; it often just begins anew then. Similarly, in Romania, a weak president and a government still dominated by the old political guard have – at least temporarily – put an end to political will and the efficiency of the anti-corruption fight. They are now aware of the full extent of the storm that can await them, should they lose their grip on power and remain within reach of the hand of the law. The topic has gradually evaded public attention, relevant institutions have been decapitated and/or deprived of the resources to do their job to the full extent needed and their lack of sustainability became obvious. The main buffer against democratic backsliding remains, at this point, the enduring societal condemnation of corruption – but it remains to be seen if this can be a strong enough element of pressure on the institutions and the political class. So far, the signs are not encouraging.

The quiet slide into irrelevance of the tremendous institution-building effort in Romania should be a stark warning for the EU in its approach to rule of law in the Western Balkans. So far, both Brussels and the member states have mostly focused on getting the executives and political majorities of these countries to enact measures improving the

legislative and institutional environment for rule of law. Gradually though, the carrots have multiplied and the sticks have been inefficient, and as the EU engaged in political haggling with political leaders it lost both legitimacy and impact within the larger society, thus disempowering and alienating its likeliest allies. Increasingly authoritarian governments have become very adept at implementing reforms on paper, while in practice silencing their critics.

“EU integration is a whole-of-society process, not a bureaucratic effort.”

A look at Romanian society over the past two decades shows that strategic EU orientation at the political level can well be an opportunistic choice, whose aim is to handpick the benefits, while trying to avoid the costs and pains of reform as much as possible, rather than a genuine transformative endeavour stemming from a convergence of values. EU integration is a whole-of-society process, not a bureaucratic effort.



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Is there hope for Kosovo's rule of law system? Three immediate actions needed

By Bardha Tahiri
Vienna, 16 February 2022
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Policy Recommendations

1. Strengthening the administration of judiciary should be given more attention and be considered as a crucial part of rule of law reforms, as justice needs to be delivered fairly and on time.
2. Reforming the disciplinary system for judges and prosecutors will derive as a mean for sustainability of the system.
3. Vetting is a very sensitive process that will need a strong commitment from the government to push it forward.

Abstract

Starting just after the war and for more than 20 years now, Kosovo has had international community as the strongest provider of support to strengthen the rule of law. Even though many reforms were undertaken, the country still faces persistent problems. Rule of law in Kosovo, being on top of the state reforms priority list like the European Reform Agenda as well as those requested by the European Union (EU), has not stopped Kosovo's judiciary system to continue being fragile and inefficient. Moreover, this has also not stopped the delay in delivering justice,

piling of the backlog of cases at courts, and corruption as a mean to mediate resolution of cases. As stated in many international reports, especially in the Kosovo Country Reports delivered by the European Commission over years, the current state of rule of law in Kosovo affects the country's democratic and economic development, the approximation with the EU and overall consolidation of the state. Thus, robust actions that are targeted to amend Kosovo's fragile judiciary system are needed immediately.



Is there hope for Kosovo's rule of law system? Three immediate actions needed

The European Commission in the 2021 Kosovo Country Report specifically states that “Kosovo is still at an early stage in developing a well-functioning judicial system, and has some level of preparation for applying the EU acquis and the European standards in the area of the judiciary and fundamental rights. During 2021, a limited progress regarding the judiciary and prosecution has been made”.

“Nevertheless, the reforms that are needed in Kosovo to uplift the rule of law and judiciary sector should have been done already in the past and be considered old by now.”

The past 20 years should have provided enough lessons for Kosovo's current state of rule of law. Each former government is responsible for it, as they have all been pushing the most fragile and sensitive matters to the next one, leaving Kosovo way behind with reforms. Having a new government on the scene always brings aspirations for a better future. Nevertheless, the reforms that are needed in Kosovo to uplift the rule of law and judiciary sector should have been done already in the past and be considered old by now.

The new Government of the Republic of Kosovo was voted on 22 March 2021. On 7 May 2021, the government has approved its programme for 2021-2025. This programme as well as Vetëvendosje's¹ 2021 electoral campaign for Kurti II government² and the eighth legislature of Kosovo's parliament, stated that its vision for rule of law is an independent, impartial, efficient, and professional justice, which they aim to achieve by strengthening the judiciary system and increasing trust of citizens. Moreover, they said that the government will demonstrate commitment in the fight against organised crime

and corruption and in this regard will increase human and professional capacity in the special department within the Basic Court in Pristina and the Court of Appeals, and in the departments for organised crime, corruption and financial crimes within the Special Prosecution³.

The Functional Review of the Rule of Law Sector was launched on 26 September 2018. It started as a flagship initiative led by Kosovo's Minister of Justice at that time, in cooperation with the Chairs of the Kosovo Judicial Council and Prosecutorial Councils and supported by the European Union Special Representative/European Union Office in Kosovo, The European Union Rule of Law Mission in Kosovo (EULEX) as well as the U.S. and UK Embassies in Pristina.⁴ It was designed to analyse the judiciary, the prosecution, police, agencies and line ministries, or other independent bodies, and the rule of law processes, to identify key obstacles and measures to be taken to address them. This included main institutions but also the specific bodies within them, processes, legal and sub-legal framework, daily practices, daily followed protocols, human resources, etc.⁵ that should be a solid ground for reforming the judiciary. Moreover, the Country Report 2020 has encouraged the process of the review to be moved forward. The Functional Review of the Rule of Law Sector resulted in a Rule of Law Strategy and Action Plan, which outlines the main challenges in the rule of law system and was adopted in August 2021.⁶

1) Lëvizja Vetëvendosje (LVV; Self-determination Movement)
2) Second government of Prime Minister Albin Kurti

3) https://www.vetevendosje.org/alternativa_vv/prioritetet2021/#e-drejta-e-drejtësia

4) <https://www.eulex-kosovo.eu/?page=2,11,862>

5) Ministry of Justice of Kosovo. <https://md.rks-gov.net/page.aspx?id=1,144>

6) Kosovo Country Report 2021, page 4, https://ec.europa.eu/neighbourhood-enlargement/kosovo-report-2021_en



In the latest meeting of Kosovo and the European Union (5th Stabilisation and Association Agreement Sub-committee on Justice, Freedom and Security) held on 9-10 June 2021, it was agreed from both sides that a full implementation of all rule of law related legislation remains crucial.⁷ Therefore, immediate action with targeted results is awaited from the government in the sector of rule of law in Kosovo. Acknowledging the importance, IPA III also provides its support for the rule of law, as it “presents a solid policy-driven approach, with strategic and dynamic deployment of assistance, putting the “fundamentals” at its core: focusing on rule of law and respect of fundamental values; strengthening democratic institutions and public administration reform; promoting economic governance and reforms towards competitiveness.”⁸

This Policy Brief provides recommendations that are some of the many needed actions to be implemented for strengthening the rule of law sector by reforming its functioning and administration.

1. Strengthening the administration of judiciary

The 2021 EC Kosovo's Country Report states that overall administration of justice continues to be slow, inefficient and vulnerable to undue political influence.⁹ On the other hand, Kosovo's courts continue to have an enormous number of backlogged cases. As an illustration for the Basic Court of Pristina in the 2020 report from the Kosovo Judicial Council, there were around 13,760 cases older than three years. From those, 35% were of backlogged criminal cases (in General Department),

44% of civil cases, 43% of cases in Serious Crimes Department.¹⁰ For some of these cases, due to the delay at the court's proceedings, their statute of limitation passes, and they remain without a chance to be brought before justice.

“As the administration of judiciary remains old, slow and inefficient, Kosovo's courts continue to have an enormous number of backlogged cases.”

To make a change for this situation, there were a number of U.S. and EU projects embedded at the courts throughout Kosovo and within Kosovo Judicial Council, whose main purpose was to provide directly on-the-job assistance in administration of cases. These projects have raised the awareness about the role of the supportive staff at the courts by proving directly and through concrete figures about the effect that they have for a well administered court. Engagement of external support staff consisted of direct support in daily assignments, job-coaching and capacity building for internal staff. These projects have also provided technical support, being with hardware and software for managing cases.

Despite all the external support through years now, the courts have failed to internalise all the experience, and advance its administration to a desirable level, and continue to benefit from international projects designed accordingly. Kosovo rolled-out an electronic case-management system and offset-up a central criminal records system, however challenges remain¹¹, as it is still common for some Kosovo's courts to have handwritten registries for managing cases and hardcopy documents and filling system, and judges to not have support staff. In many cases judges need to share the support

7) JOINT PRESS RELEASE 10 June 2021, EUROPEAN COMMISSION-DG FOR NEIGHBOURHOOD AND ENLARGEMENT NEGOTIATIONS, KOSOVO GOVERNMENT-OFFICE OF THE PRIME MINISTER, 5th Stabilisation and Association Agreement Sub-committee on Justice, Freedom and Security.

8) https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2810

9) Kosovo Country Report 2021, page 4, https://ec.europa.eu/neighbourhood-enlargement/kosovo-report-2021_en

10) KJC annual report 2020. https://www.gjvqesori-rks.org/wp-content/uploads/reports/39897_KGJK_Raporti_Vjetor_2020_SHQ.pdf

11) Kosovo Country Report 2021, page 16, https://ec.europa.eu/neighbourhood-enlargement/kosovo-report-2021_en



of one legal clerk/professional associate as the number of support staff in comparison to the number of judges continues to remain low. Thus, judges are being overburdened with administrative tasks, rather than focused with their engagement and energy in the matters of the case.

“Despite all the external support through years now, the courts have failed to internalise all the experience, and advance its administration to a desirable level, and continue to benefit from international projects designed accordingly.”

Taking all the above mentioned into consideration, administration of judiciary is of outmost importance for a delivery of justice. See below the main issues that need immediate attention and concrete action for administering the court cases and proceedings properly and efficiently:

- In order for the courts to provide better services and transparency for public, they should together with the Kosovo Judicial Council, as well as international project(s) that are involved in supporting administration of justice in Kosovo, ensure they have the necessary technical means and provide continuous support for capacity building of administrative and professional support staff to use modern technology in the administration of courts.
- The courts and the Kosovo Judicial Council should increase the number of judges, and appoint at least one professional support staff and one administrative support staff per judge. This increase should be done based on an analysis that responds to their needs and number of cases, so that judges would be given more time and energy to deal with merits of the case.
- The courts should be held responsible for the full implementation of electronic Case Management Information System followed

with capacity building of staff, so that data entered are correct and the system is used properly and sustainable.

- Public awareness programmes are needed to encourage the usage of mediation system and familiarity with alternative dispute resolution tools, as that would unload a number of cases from the courts. In this matter, courts and the Kosovo Judicial Council can also be supported by the Ministry of Justice.

2. Reforming the disciplinary system for judges and prosecutors

“Nevertheless, fundamental problems are still encountered in the judiciary and prosecution in Kosovo.”

The Kosovo Judicial Council (KJC) and the Kosovo Prosecutorial Council (KPC), whose mandate is determined by the Constitution, Law 06/L-055 on the Kosovo Judicial Council and Law No. 06/L-056 on Kosovo Prosecutorial Council, respectively, are the main institutions responsible for the functioning of judiciary and the prosecution. Whereas the Law Nr. 06/L – 057 on disciplinary liability of judges and prosecutors is the main legal act that regulates the process and measures for the discipline of judges and prosecutors. Impartiality, integrity, professionalism, and independence are the main principles that should lead the work of judges and prosecutors, and these Councils are responsible to act and discipline judges and prosecutors once these principles are not being applied. The Country Report 2021 by European Commission states that the composition and appointment procedures of these institutions are broadly in line with European standards.¹²

¹²) KJC Report 2020, page 122, chapter 11, “Challenges”. https://www.gjvqesori-rks.org/wp-content/uploads/reports/39897_KGJK_Raporti_Vjetor_2020_SHQ.pdf Kosovo Country Report 2021, page 17. https://ec.europa.eu/neighbourhood-enlargement/kosovo-report-2021_en



Nevertheless, fundamental problems are still encountered in the judiciary and prosecution in Kosovo. By now, Kosovo is well known for the phenomena of having political interference in the rule of law sector, poor performance of judges and prosecutors, low level of professionalism and competence, and corruption present among them.

When it comes to the application of law on disciplinary liability of judges and prosecutors, the proceedings and measures taken as per the law, the Kosovo civil society organisations that have been monitoring the process all agree about its lack of implementation thus resulting with inefficiency of the process¹³. More efforts are still needed to ensure more consistent and effective implementation of the law, procedures and disciplinary measures.

“As with many other laws in Kosovo, even though the legal framework is in place, they lack in implementation.”

Based on the Country Report 2021 findings, the law in force on disciplinary liability of judges and prosecutors has shown some initial implementation, nevertheless that is not sufficient. As with many other laws in Kosovo, even though the legal framework is in place, they lack in implementation. Moreover, the legal framework fails to provide a clear safeguard for the independence and impartiality of the judiciary from pressure and interference in practice. Codes of ethics that are already in force for judges and prosecutors have the same fate as the legal framework – its implementation is crucial and more than needed in practice.

“Moreover, the legal framework fails to provide a clear safeguard for the independence and impartiality of the judiciary from pressure and interference in practice.”

13) Levizja Fol and BIRN: <http://levizjafol.org/wp-content/uploads/2020/02/AL-Ankesat-Disiplinore-ndaj-Gjyqtar%C3%ABve-31.01.pdf>, GLPS: <http://www.rolpik.org/wp-content/uploads/2020/10/Template-Disciplinary-measures-against-judges-and-prosecutors--English.docx.pdf>, KLI: <https://kli-ks.org/llogaridhenia-e-gjykatesve-dhe-prokuroreve/>

Based on all explored above, the next step by step recommendations to be implemented by the Kosovo Judicial Council and the Kosovo Prosecutorial Council to reform the system are:

- Ex-post analysis of the system, taking into account the analysis by civil society organisations in Kosovo that have been monitoring the work of KJC and KPC;
- Full implementation of legislation in force;
- Monitoring together with civil society organisations that already were involved the implementation with clear indicators;
- To put emphasis on the quality of performance evaluations conducted by both Councils;
- Gap analysis of the implementation deriving from the monitoring;
- Action plan with concrete step to address the findings of the analysis.

3. Vetting

After the completion of the Functional Review of the Rule of Law, the vetting of judges and prosecutors is the next step needed. As there were cases of political interference in the judiciary identified¹⁴, vetting should provide an assessment for the integrity of judges and prosecutors to determine their suitability for engagement in their roles for delivering justice.

Some representatives of civil society organisation in Kosovo that monitor developments and institutions within the area of rule of law and judiciary are convinced that the situation in the justice system cannot change without a vetting process, which needs to be transparent, based on law and legal

14) Ibid.



procedures and to guarantee the integrity of this process.¹⁵

“After the completion of the Functional Review of the Rule of Law, the vetting of judges and prosecutors is the next step needed.”

On 6 May 2021 was held the first meeting of the Working Group for drafting the concept document for the vetting process. The Minister of Justice in the Government of Kosovo, Albulena Haxhiu said that the institution she leads has not yet decided on the scenario with which the vetting process will take place in the justice system. During a press conference, after the government meeting, Haxhiu stated that they are working intensively to do the vetting, because as she said, this process is a “social demand”.¹⁶

Up to date, the government has proceeded with its commitment to undergo the vetting process and the concept document is already finished by the Ministry of Justice.

On the other side, European Union has stated its scepticism about the vetting process, and has stated also its position in the Country Report 2021. The vetting is considered “only as an exceptional measure of last resort, once all existing tools and mechanisms to ensure integrity and fight corruption of judicial officeholders have been exhausted, and should be in line with European and international standards as well as Venice Commission advice”. The EU proposes to thoroughly utilize existing mechanisms, and after that to see for the need of improvement, including legislative changes.¹⁷

In favour of the vetting process, below are the needed steps. Firstly, key procedures for implementing the process should be designed addressing the lack of professionalism, inefficiency and political influence dominating the rule of law sector. Secondly, clear benchmarks for assessing concrete results, quality, effectiveness, independence, and impartiality should be established, and integrated into the vetting process. Concretely, officials should be vetted on key principles, such as ethical integrity, level of professionalism, proximity to criminal and/or political circles, and assets’ declaration. Thirdly, the key categories to undergo the vetting process should be the whole staff of the rule of law sector such as judges, prosecutors, the police, and other core agencies’ officials. One aspect that should continuously accompany the vetting process is inclusiveness of local and international experts from academia and civil society. Attention should be also put on the lessons learned from the Albanian experience of vetting process for previous mistakes to be omitted. The presence of the European Union through the International Monitoring Operation, composed of judges and prosecutors from EU member states, can be replicated in Kosovo as well.¹⁸

Conclusion

Kosovo’s rule of law sector has many loops that need to be straightened simultaneously. The common denominator for most of them is political will.

Strengthening the administration of judiciary should be given more attention and be considered as a crucial part of rule of law reforms, as justice needs to be delivered fairly and on time.

15) <https://www.koha.net/arberi/202398/viti-i-vetingut-edhe-ne-kosove-kerkohet-nisja-e-procesit-per-filtrimin-e-sistemit-te-drejtises/>

16) <https://top-channel.tv/video/top-news-vetingu-edhe-ne-kosove-ministria-e-drejtisesi-ende-nuk-e-dijme-skenarin/>

17) Kosovo Country Report 2021, page 16, https://ec.europa.eu/neighbourhood-enlargement/kosovo-report-2021_en

18) “Five Integral Questions about the Vetting Process”, GLPS, Rreze Hoxha Zhuja, April 21, 2021. <http://www.legalpoliticalstudies.org/five-integral-questions-about-the-vetting-process/>



Reforming the disciplinary system for judges and prosecutors will derive as a mean for sustainability of the system. Throughout the process of amending the rule of law in Kosovo, judges and prosecutors need to be held continuously accountable for their engagement in delivering justice.

Vetting, even though a highly controversial topic between the government on one side and the EU on the other side, is a very sensitive process that will need a strong commitment to push it forward. What is certain until now is the support of Kosovo's citizens to get the vetting done once and for all. In the meantime, Kosovo will continue to rely on international support for the rule of law reforms for another period of time in the future.

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Rule of Law in Bosnia and Herzegovina – the Transformation of the High Judicial and Prosecutorial Council

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Policy Recommendations

1. Full institutional and financial independence of the judiciary must be ensured on judicial levels, following the example of the Brčko District.
2. Amending specific aspects and provisions of disciplinary procedures and elaborating ethical codes in order to further develop, clarify and promote the application of highest ethical standards within the judiciary would be a measure particularly important for restoring the public trust in judiciary.
3. The revised Law on the High Judicial and Prosecutorial Council should ensure a comprehensive reform of its functioning given its immense influence – while the independence from external factors should be strengthened, internally it should be restructured to avoid the concentration of power. The Office of the Discipline Council, particularly, needs full institutional, financial and personal independence from the High Judicial and Prosecutorial Council.

Abstract

In its Analytical Report from 2019 and consequent Report on Bosnia and Herzegovina (BiH) 2020, the European Commission has pointed that judiciary in the country, in general, is barely at an early stage, meaning that it has only some level of preparation for the integration in the European Union. In addition, for many years the level of public trust in the judiciary in BiH has been consistently low and further diminishing the independence of judges and prosecutors. Several studies and research projects only confirm the worrying trends (Blagovčanin et al., 2021; *Expert Report on Rule of Law Issues in Bosnia and Herzegovina*, 2019; *USAID Justice Project in BiH*, 2015). Although numerous reforms would be both essential and urgent, this Policy Brief focuses on those that take the precedence, simply because they can help create the

environment or for more demanding structural reforms. The latter namely concern strengthening independence, especially the financial independence of the judiciary; reintroducing ethics and integrity by amending specific aspects and provisions of disciplinary procedures and elaborating ethical codes in order to further develop, clarify and promote the application of highest ethical standards within the judiciary, that would eventually contribute to restoring the public trust in the judiciary; both leading to a comprehensive restructuring of the High Judicial and Prosecutorial Council which would strengthen its independence from external factors, while simultaneously avoiding over-concentration of power in that central body especially in relation to the Office of the Disciplinary Council.



Rule of Law in Bosnia and Herzegovina – the Transformation of the High Judicial and Prosecutorial Council

Introduction

Judiciary is, commonly, considered to be one of the key factors for resilience of democracy, good governance, rule of law and fight against corruption in any society. As such, it has for long been in focus of both attention and efforts of international community in Bosnia and Herzegovina (BiH). Since the judiciary is not explicitly mentioned in the Constitution of Bosnia and Herzegovina (European Commission Staff, 2019, p. 29), and had been regulated only in the entity constitutions and in the Brčko District Statute, the international community in BiH engaged heavily and enabled important progress in establishing and strengthening the judicial system at the state level. The early phase of the engagement, 1998-2006, has been particularly successful and resulted in the establishment of the High Judicial and Prosecutorial Council in 2004, that replaced entity-level judicial and prosecutorial councils, on the basis of a transfer agreement from the entities, confirmed by the Constitutional Court. In addition, the Court of Bosnia and Herzegovina and the Prosecutor's Office have been established in the period 2000-2004 to fulfil the constitutional obligations of the state. The Constitutional Court confirmed their compliance with the Constitution in 2001. The initial success, but also the changes of the "hands-on" approach of the international community and the reliance on the European Union (EU) conditionality in the later phase, slowed down the pace of the reforms significantly. The international presence was reduced and ceased eventually, thus creating a power vacuum that was filled by local political actors whose agenda quickly turned against the still fragile independence of judiciary and established strong and elaborate mechanisms of undue influence.

In its Analytical Report from 2019 (European Commission Staff, 2019, p. 28) and consequent Report on Bosnia and Herzegovina 2020 (European

Commission Staff, 2020, p. 15), the European Commission has stated that judiciary in BiH, in general, is barely at an early stage, meaning that it has only some level of preparation for the EU integration. Both take very detailed accounts of the issues in the area of the judiciary, but they are not the solely documents that point to critical problems. Numerous studies and research projects only confirm the worrying trends. A study by USAID Justice Project on BiH – Diagnostic Analysis of the Integrity of the Judiciary Sector in BiH and Potential Risk of Corruption and Unethical Conduct in the Judiciary from 2015 (*USAID Justice Project in BiH*, 2015), an EU funded expert report on Rule of Law Issues in BiH¹ from 2019 (*Expert Report on Rule of Law Issues in Bosnia and Herzegovina*, 2019) and most recent study published by the Open Society Fund in Bosnia and Herzegovina (OSF) from 2021 titled "*Blindfolding Justice in Bosnia and Herzegovina? State of Capture of Bosnia and Herzegovina's Judiciary and Public Prosecution*" (Blagovčanin et al., 2021) point to dramatic developments in this area.

In addition, for many years the level of public trust in the judiciary in BiH has been consistently low and further diminishing the independence of judges and prosecutors. While the data on the level of public trust reflect worrying trends regionally (*Balkan Public Barometer 2021 Public Opinion*, 2021, p. 130), the judiciary in BiH appears to be one of the least accessible (54% citizens find it poorly accessible) and costliest (67%). Public confidence has taken a steady decline course since 2015 (Blagovčanin et al., 2021, p. 87), culminating with recent media reports on only 19% of public trust in judiciary in BiH (Sandić-Hadžihasanović, 2020). Along with the obvious loss of credibility of judiciary

1) Known also as the so-called "Priebe report" after its key author Reinhard Priebe, European Commission expert.



that these data reflect, it is also important to take into serious consideration the indirect consequences – lack of public trust makes judges and prosecutors more vulnerable to the political pressure, as well as to the pressure within the judicial hierarchy.

“In addition, for many years the level of public trust in the judiciary in BiH has been consistently low and further diminishing the independence of judges and prosecutors.”

The above problems create a vicious cycle making it hard to prioritise the reforms needed. Although numerous reforms would be both essential and urgent, there are those among them that take the precedence, simply because they can help create the environment for more demanding structural reforms. The latter namely concern strengthening independence, especially the financial independence of the judiciary, reintroducing ethics and integrity into the appointment and career advancement, as well as giving a serious consideration to the restructuring of the High Judicial and Prosecutorial Council.

“The latter namely concern strengthening independence, especially the financial independence of the judiciary, reintroducing ethics and integrity into the appointment and career advancement, as well as giving a serious consideration to the restructuring of the High Judicial and Prosecutorial Council.”

Financial Independence

Independence is the opposite of the current state of capture that many identify in BiH, including the area of judiciary (Blagovčanin et al., 2021, p. 17). Financial independence is a vital aspect of the overall judiciary independence and according to the Opinion No. 10 of the Consultative Council of European Judges (CCJE) from 2007, it can only be truly independent if it is provided with separate budget and administered by a body independent from the executive. CCJE further elaborates that “although the funding of courts is part of the State budget, such funding should not be subject to

political fluctuations. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence. The arrangements for parliamentary adoption of the judicial budget should include a procedure that takes into account the opinions of the judiciary“ (Consultative Council of European Judges, 2007).

In BiH judiciary is financed from 14 different sources mirroring the administrative-territorial organisation of the country. Each level of the judiciary system is financed from the budget of that particular administrative level – state, entity and cantonal budgets. Such extreme fragmentation of the financing system is a problem *per se*.

“In BiH judiciary is financed from 14 different sources mirroring the administrative-territorial organisation of the country.”

The procedures in place are the same for all the budget beneficiaries. While courts and prosecutor offices prepare the budget proposals and submit them to the local ministries of finance or justice, they are approved first by the local governments and then ultimately by the local parliaments². Budgets of courts and prosecutorial offices are an integral part of the budget of their respective level of governments and there are no specific procedures which would allow financial autonomy. In addition to that, in the entity Federation of BiH, the cantonal and municipal courts and prosecutorial offices are funded by cantonal budgets, even though most decisions regarding their budget come from entity or state level. Consequently, the above-mentioned funding mechanisms may influence the judiciary and its work in the same way as of any other budget beneficiaries. Institutions approving the budget are in a position to influence the judiciary. The OSF publication stresses a lack of trust between the

2) The judiciary in Brčko District is an exception as the Judicial Commission of the District proposes budget to the District Assembly. The Mayor or the District's Finance Directorate may not modify the budget proposal submitted by the Judicial Commission.



judiciary and the executive; as a general perception prevails that planning and allocation of budgets are not based on objective criteria but on informal, even personal relations between the responsible persons in the judiciary and the executive (Blagovčanin et al., 2021, p. 23).

“Institutions approving the budget are in a position to influence the judiciary.”

The High Judicial and Prosecutorial Council of Bosnia and Herzegovina has an advisory role in the budgeting process and cannot influence the amount of funding approved for the judicial institutions. Also, its overall and financial competences compared to similar judiciary institutions in the region and throughout Europe appear to be most limited (Blagovčanin et al., 2021, p. 22).

While the budget allocated to the judiciary continuously rises (European Commission Staff, 2020, p. 20), a large discrepancy remains between the required budget estimated by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, which would provide the minimum required for the functioning and the actual budget approved.

Anomalies within the High Judicial and Prosecutorial Council of Bosnia and Herzegovina

“Not only that no progress has been achieved in the meantime, but the obstruction of the justice reform from political actors and from within the judiciary further deteriorates the functioning of the judiciary.”

As a self-regulatory body of the judiciary, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC), has a central role in guaranteeing independence, accountability and credibility of the judiciary. The Analytical Report of the European Commission recognises that the constitutional and legal framework governing the judiciary is incomplete and does not provide sufficient

guarantees of independence, accountability and efficiency. The authorities of BiH are tasked with adopting the revised Law on the HJPC in order to better regulate the appointment, appraisal and disciplinary procedures of members of the judiciary, and provide appropriate legal remedies against final decisions of the HJPC, in line with European standards (European Commission Staff, 2020, p. 16). It is also one of the key conditions (the Opinion key priority 6 out of 14) that the country needs to meet in order to acquire an EU membership candidate status (European Commission, 2019, p. 15). Not only that no progress has been achieved in the meantime, but the obstruction of the justice reform from political actors and from within the judiciary further deteriorates the functioning of the judiciary.

One of the most recent expert reviews, the so-called “Priebe Report” clearly identified that the HJPC has itself become part of the problem (*Expert Report on Rule of Law Issues in Bosnia and Herzegovina*, 2019). The Report stressed the blunt miscarriages of justice that have become apparent due to lack of leadership capacity, allegations of politicization and conflicts of interest, inefficient organisation, insufficient outreach and transparency, as well as the institution’s failure to implement reforms. The corruption allegations against the then HJPC President Milan Tegeltija³ and alleged manipulations of appointments and disciplinary procedures were also part of the Report. The seriousness of the allegations, the reactions of the then president as well as the shocking unanimous support for his actions by the HJPC members were recognised as additional damage to the reputation of the institution.

3) The affair called “Potkivanje/The Shoeing” (Greasing) from 2019 was uncovered by the Žurnal which released the video of the conversation Milan Tegeltija had with the suspended police officer Milan Pandža and a businessman from Velika Kladuša Nermin Alešević. They are talking about a court case in Sarajevo and Pandža is heard asking Alešević for money meant for Tegeltija. Tegeltija was treated as witness in this case and the HJPC interpretation of the case resulted in *de facto* impunity for their president.



While the former president of the HJPC Tegeltija⁴ is not the only prominent judiciary member embroiled in numerous affairs, his are illustrative of the many anomalies in the work of the HJPC. Eventually, he resigned under great public and pressure from the international community in BiH in December 2020 after media released a leaked audio-recording which featured Tegeltija discussing tactics of appointment to the post of a judge to a sister of a former HJPC member, also a judge. The affairs continued and anomalies remained.

His telling affairs pointed to numerous legal, as well as ethical and credibility issues, such as the relations between the HJPC and the Office of Disciplinary Counsel (ODC). The significant influence exerted by the HJPC on the work of the ODC calls into question its independence. The role of the HJPC in disciplinary proceedings needs to be reduced, and in the first instance disciplinary proceedings should be executed by reputable jurists who are not members of the HJPC. The ODC needs full institutional, financial and personal independence.

“Apparently, there is insufficient clarity what constitutes a disciplinary offence.”

The Tegeltija affairs also pointed to the important issue of ethics, that has received little attention in relevant regulations concerning the judiciary.

4) Currently, an adviser to the Bosnia and Herzegovina Presidency member Milorad Dodik known for brutal public campaigns against the credibility and threats to the judiciary. Not only that Milan Tegeltija strongly supports Dodik's hateful rhetoric but, according to his tweets, he complements it by elaborating Dodik's statements and offering a quasi-legal interpretations and his own ultra-nationalist and anti-Western views. Both Dodik and Tegeltija extensively use hate speech, deny genocide in Srebrenica, and subscribe to conspiracy theories about international plot against Serbs. In June 2021, Tegeltija expressed his frustration with the implementation of the European Court of Human Rights (ECHR) from 2019 and consequent removal of an Orthodox church built at a garden of a Bosniak returnee to Konjevic Polje, despite the fact that during his mandate as the head of the HJCP he had appeared to be engaged in its implementation. Both Dodik and Tegeltija decried the outlawing of genocide denial introduced by the move of the outgoing High Representative in BiH Valentin Inzko in July 2021.

Apparently, there is insufficient clarity what constitutes a disciplinary offence. While ethical codes for judges and prosecutors contain general provisions on incompatibility and refraining from inappropriate connections, political engagement, political preferences and affiliations, neither the ethical codes nor the guidelines for the prevention of conflict of interest elaborate on the issue of inappropriate contacts within and outside the judiciary and do not reflect the real-life ethical challenges of members of the judiciary in BiH. As the parameters of inappropriate contacts beyond the obvious ones remain poorly elaborated, especially for a comparatively small jurisdiction such as BiH, and the professional culture is poorly developed, so it happens that the “frequent socializing with local or high-level political figures is almost certain to raise, in the minds of others, the suspicion that the judge is susceptible to undue influence in the discharge of his or her duties (Sandić-Hadžihasanović, 2020).” The professional judicial community, on the other hand, hardly ever reacts to media reports on inappropriate meetings and contacts between members of the judiciary and politicians and economic elites; they triggered almost no reaction within the professional community of judges and prosecutors and their professional associations. That was also the case in one of Tegeltija's affairs when he attended a political meeting held on 20 February 2020 and organised, absurdly, with a view to discussing strategies for weakening the authority and influence of the Constitutional Court of Bosnia and Herzegovina⁵.

5) The then President of the HJPC Milan Tegeltija attended a political meeting organised by Serb member of BiH Presidency Milorad Dodik in February 2020. Dodik gathered all high level officials in state-level institutions from Republic Srpska promoting his proposal for a Law on the Election of Judges of the Constitutional Court of BiH, replacing foreign judges with domestic ones. Tegeltija attended the meeting and stated at the press conference held on the occasion that he comes from Republic Srpska and acts primarily as its representative in the HJPC, as do, as he claimed, all other judicial officials from the Republic Srpska. The international community in BiH strongly condemned his behaviour and made clear that all state-level representatives should be held accountable to citizens,



As it is not always easy to distinguish undue influence and a basic lack of capacity or inadequate staff of judicial institutions, the issues of the HJPC's composition, the appointment procedures of its members, their accountability and the HJPC's limited capacity to address pressing issues, most specifically the questions of integrity of its members, grow more important.

Conclusion

Considering the cumulative impact of a number of dominantly political factors that influence judiciary, coupled with the internal mechanisms of undue influence, it is obvious that the current state of affairs of the judiciary in BiH cannot be satisfactory neither for the EU that sees the rule of law as one of its fundamentals, nor for the citizens of Bosnia and Herzegovina who perceive the judiciary as poorly accessible, costly and not trust-worthy. The vicious cycle of many related problems makes it very hard to prioritise, as many reports and studies indicate. Regardless of the optics, many of them recommend important steps that could be taken in order to create the appropriate environment for more dramatic reforms – the establishment of a full financial independence of judiciary, reaffirmation of disciplinary and ethical standards that could restore the public trust, could lead to a more comprehensive reform and restructuring of the HJCP itself.

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not political parties, especially judicial officials who must be independent from political interests.

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