EUROPEANIZATION BY RULE OF LAW IMPLEMENTATION IN THE WESTERN BALKANS

Edited by Marko Kmezić
This book has been prepared in the framework of the Regional Research Promotion Programme in the Western Balkans implemented by University of Fribourg upon a mandate of the Swiss Agency for Development and Cooperation at the Federal Department of Foreign Affairs.

The views expressed in this book are those of the authors and do not necessarily represent opinions of the Swiss Agency for Development and Cooperation and the University of Fribourg.

Published by: Institute for Democracy SOCIETAS CIVILIS Skopje
February 2014
CONTENTS

Acknowledgments........................................................................................................................................7

Acronyms..................................................................................................................................................8

PART ONE
Chapter 1
Europeanization by Rule of Law Implementation in South East Europe...........................................11

Chapter 2
Literature Review on Europeanization and Rule of Law.................................................................37

PART TWO
Chapter 3 - Democratic Transition, Rule of Law and Europeanization: Limited Progress in Bosnia and Herzegovina..............................................................63

Chapter 4 - Rule of Law Reforms within Kosovo’s European Integration Process: Progress and Remaining Challenges.............................................................................91

Chapter 5
Europeanization by Rule of Law Implementation in the Western Balkans: Republic of Macedonia. The EU’s Effect in Promoting an Efficient and Independent Macedonian Judiciary.............................................................................135

Chapter 6
Approximation of Membership as an Impetus for Rule of Law Implementation.............................159

Chapter 7
The Rule of Law in EU Enlargement Policy - Impact and Obstacles in Serbia...............................183

PART THREE

Chapter 8 - Scope, Depth and Limits of Europeanization by Rule of Law Implementation in the Western Balkans: Conclusions......................................................213

Bibliography.............................................................................................................................................263

List of contributors..................................................................................................................................297
Acknowledgements

The editor and all the authors of this volume are greatly indebted to the Swiss Agency for Development and Cooperation and the Interfaculty Institute for Central and Eastern Europe at the University of Fribourg, which has generously supported the work on the Europeanization by Rule of Law Implementation for close to two years through its Regional Research Promotion Programme. We are particularly grateful for the support of the Regional Research Promotion Programme team: Nicolas Hayoz, Jasmina Opardija, Ann Killer, Jan Kreuels, Delia Imboden and Aleksandra Dimova Manchevska. In addition, we are thankful to the various officials, scholars, and friends both within and outside the Western Balkans region with whom we have met and who have assisted us in our research: Arolda Elbasani, Dimitry Kochenov, Tomasz Milej, Ardit Memeti, Stiven Blockmans, and Erwan Fuere. They are of course in no way responsible for our account and our conclusions. Sara Barbieri has done a magnificent job in guiding the outcome of this work through the editorial and production stages. Thanks also to Amer Kapetanović for kindly allowing us the use of his photograph for the cover page of the book. Finally, most of all, I would personally like to thank Florian Bieber for his extremely helpful comments on chapters of this work, and Joseph Marko for his invaluable guidance and support during the research and initial drafting process of this study. Their thought-provoking and questioning observations and constructive suggestions were critical to improving the structure, substance and essence of this book.

Graz, 

Marko Knezić

December 2013
# ACRONYMS

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<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ABA/Ceeli</td>
<td>American Bar Association / Central and East-European Legal Initiative</td>
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<td>BD</td>
<td>Brčko District</td>
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<td>BiH</td>
<td>Bosnia and Herzegovina</td>
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<td>CARDS</td>
<td>Community Assistance for Reconstruction Development and Stabilisation</td>
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<td>CF</td>
<td>Constitutional Framework</td>
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<td>CMS</td>
<td>The Case Management System</td>
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<td>CSDP</td>
<td>Common Security and Defense Policy</td>
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<td>DJA</td>
<td>Department of Judicial Administration</td>
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<td>DOJ</td>
<td>Department of Justice</td>
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<td>DPS</td>
<td>Democratic Party of Socialists of Montenegro</td>
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<td>EAR</td>
<td>European Agency for Reconstruction</td>
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<td>EC</td>
<td>European Commission</td>
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<td>ECHR</td>
<td>European Court for Human Rights</td>
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<td>EPAP</td>
<td>European Partnership Action Plan</td>
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<td>EPD</td>
<td>Enhanced Permanent Dialogue</td>
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<td>ESPD</td>
<td>European Security and Defense Policy</td>
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<td>FBiH</td>
<td>Federation of BiH</td>
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<td>FRY</td>
<td>Federal Republic of Yugoslavia</td>
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<td>HJPC</td>
<td>High Judicial and Prosecutorial Council</td>
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<td>IA</td>
<td>Interim Agreement on trade and trade-related matters</td>
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<td>ICO</td>
<td>International Civilian Office</td>
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<td>ICR</td>
<td>International Civilian Representative</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for Former Yugoslavia</td>
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<td>Instrument for Pre-Accession</td>
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<td>ISG</td>
<td>International Steering Group</td>
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<td>JHA</td>
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<td>Joint Rule of Law Coordination Board</td>
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<td>JSRS</td>
<td>Justice Sector Reform Strategy</td>
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<td>KJC</td>
<td>Kosovo Judicial Council</td>
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<td>Acronym</td>
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<tr>
<td>KJI</td>
<td>Kosovo Judicial Institute</td>
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<td>KPC</td>
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<td>MOJ</td>
<td>Ministry of Justice</td>
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<td>MPS</td>
<td>Ministry of Public Services</td>
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<td>NGO</td>
<td>Non-governmental organization</td>
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<td>NPI</td>
<td>National Programme for the Integration</td>
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<td>ODC</td>
<td>Office of Disciplinary Council</td>
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<td>ODP</td>
<td>Office of the Disciplinary Prosecutor</td>
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<td>OHR</td>
<td>Office of the High Representative</td>
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<td>OSCE</td>
<td>Organization for Security and Cooperation in Europe</td>
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<td>PARiM</td>
<td>Public Administration Reform in Montenegro</td>
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<td>RS</td>
<td>Republika Srpska</td>
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<td>SAA</td>
<td>Stabilization Association Agreement</td>
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<td>SAP</td>
<td>Stabilization Association Process</td>
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<td>SAPD</td>
<td>Stabilization Association Process Dialogue</td>
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<td>SEE</td>
<td>South Eastern Europe</td>
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<td>SFRY</td>
<td>Socialist Federal Republic of Yugoslavia</td>
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<td>SNS</td>
<td>Serbian Progressive Party</td>
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<td>SPRK</td>
<td>Special Prosecution Office of the Republic of Kosovo</td>
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<td>SPS</td>
<td>Socialist Party of Serbia</td>
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<td>SRSG</td>
<td>Special Representative Secretary General</td>
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<td>TAIEX</td>
<td>Technical Assistance and Information Exchange</td>
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<td>TL</td>
<td>Treaty of Lisbon</td>
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<td>UNMIK</td>
<td>United Nations Mission in Kosovo</td>
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<td>UNSCR</td>
<td>United Nations Security Council Resolution</td>
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<td>WBCs</td>
<td>Western Balkan countries</td>
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Europeanization by Rule of Law Implementation in South East Europe

Marko Kmezić

1. Introduction

Strengthening of the rule of law and the accession to the European Union (EU) have been fraught with difficulties in the Western Balkans (WB) for over 20 years. In line with previous scholarship on “Europeanization,” we understand this phenomenon as a politically driven process, i.e. as a way in which EU institutions, rules and policy-making processes impact the legal systems, institutional mechanisms and creation of collective cultural identity in non-EU member states. Hence, the research question this book attempts to answer remains the same: Whether and what kind of influence the EU institutions have on the implementation of the rule of law in the WB.

Although there is no uniform EU standard regarding the rule of law, we observe that the rule of law as a constitutional principle and institutional mechanism in legal textbooks’ descriptions is quite different from practical requirements with regard to the conceptualization and operationalization of benchmarks for monitoring processes in the Stabilization and Association Process (SAP). Namely, during the monitoring process of the (potential) candidate countries’ compliance with the Copenhagen conditionality criteria related to the effective rule of law and democracy principle, the EU Commission tests and criticizes the “effectiveness” of rule of law in the judiciary. Bearing this in mind, the central focus of this volume is the reform of the judiciary in five case study

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1 See in particular U. Sedelmeier. 2006 “Europeanization in New Member and Candidate States,” Living Reviews in European Governance 1(3); and U. Sedelmeier. 2011. “Europeanization in New Member and Candidate States,” Living Reviews in European Governance 6(1).
countries: Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, and Serbia. More specifically, this study scrutinizes the institutional reform carried out in the judicial sector by means of content analysis of legal rules and administrative regulations adopted for this purpose, as well as their implementation. Furthermore, this book tests whether the EU Commission uses a double standard or whether a coherent framework of analysis is created and used in the monitoring process by making use of the benchmarks of independence, responsibility, efficiency, and effectiveness.

From this basic analytical framework, a subset of more concrete research questions follows: what are the EU requirements developed in the monitoring process? Which organizational-institutional reforms have been made? Which gate-keeper elites have resisted these reforms? Who (critical civil society actors) has supported these reforms? What have been the effects and how did they change over the last decade with regard to independence, responsibility, efficiency, and effectiveness benchmarks? By focusing specifically on the area of judiciary, the main findings of this book are:

a) comprehensive normative and empirical analysis of the judiciaries in five case study countries;

b) specification of the conditionality criteria for EU accession in the field of the rule of law; and

c) policy recommendations for future institutional settings in the WB countries.

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2 At this point the author would like to introduce several terminological clarifications, chiefly for the use of the term Western Balkans. Namely, most international scholars, and in recent years even domestic authors, have chosen to follow the lead of the European Union, which since 1999 has considered the geographical region of Southeastern Europe to be composed of two parts. The first subgroup is composed of four EU members – Greece, Slovenia, Bulgaria and Romania. The other subgroup consists of the four initial successor states to the former Yugoslavia, plus newly independent Montenegro and Kosovo, together with Albania. These states are dubbed the Western Balkans simply due to their geographical location to the west of Bulgaria and Romania. Some authors contest the term Western Balkans for several reasons. First, it is often used as pejorative synonym for violence and ethnic hatred; second, the difference between the Western Balkans and the rest of the Southeast Europe is not so pronounced beyond the European Union enlargement context; and finally, to bring in more confusion, EU member states, Slovenia and Croatia, are located on the western frontier of the Western Balkans. Acknowledging the aforementioned arguments, the author proposes the use of the term Western Balkans contextually, and only for the purpose of this research, since it includes all the countries under the scrutiny. This, however, is not the only open terminological issue. The official EU documents use the term Former Yugoslav Republic of Macedonia. The author will employ the term Macedonia, unless citing an official EU document. Similarly, Kosova is the preferred usage by local authorities, but this research will use the term Kosovo, which is more frequently used in English-language sources.
1.1. Processes of Transition in South East Europe

South Eastern Europe (SEE) lags behind other European states in consolidation of democracy and the accession to the EU. While three countries, Romania and Bulgaria in 2007 as laggards of the 2004 enlargement, and Croatia in 2013, joined the EU, the remainder of the region remains excluded with no foreseeable accession date in sight. In addition to the dual political and economic transformation from communist rule and a planned economy to democracy and market liberalism, most countries of SEE, in particular the successor states of former Yugoslavia, are weak states with dysfunctional institutions, notwithstanding the considerable diversity among these states. Furthermore, the transformation in former Yugoslavia was shaped by state dissolution and the legacy of violent conflict, including the need for a long period of reconstruction and reconciliation. These multiple challenges are crucial to explaining the delay in the EU integration process in the Western Balkan countries (WBCs). The EU sought to account for these particularities with the Stabilization and Association Process.

However, in spite of the fact that the SAP was launched already a decade ago, the WBCs must still be characterized as weak states with severely ethnically divided societies. After losing the momentum of change gained after the democratic revolution in Serbia and the second democratic revolution in Croatia in 2000, the current situation can best be described as the “consolidation of unconsolidated democracies.” Although seemingly liberal democratic SEE governments strongly identify themselves with the EU, they often remain overshadowed by the high number of formal and informal economic and political elites that continue to control the state in an effort to preserve their private economic interests and grip over political power. The reconciliation after the violent conflicts of the 1990s is still not fully achieved, while a climate of revenge, fear and hatred still drives decisions of the political elites and, more importantly, the attitudes of common people. Bilateral relationships, particularly between Serbia and Kosovo and Macedonia and Greece, remain overburdened by historical legacies, and threaten to

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export tension to the level of regional cooperation as well. While the dynamics of the EU integrations seem to announce a new phase in regional relations, relapse into the doctrine of the ethnically pure state and ethnic extremism is all but impossible.

Moreover, Bosnia-Herzegovina and Kosovo—notwithstanding the latter’s declaration of independence in 2008—remain internationally administered territories.5 Macedonia managed to avoid a full-scale war and to reduce inter-ethnic tensions with the mostly successful implementation of the Ohrid Framework Agreement of 2001, but the political system is not fully consolidated,6 while the countries’ Euro-Atlantic integration is consistently vetoed by Greece due to the mutual name issue dispute. Serbia, after the dissolution of the common state with Montenegro in 2006 and Kosovo’s declaration of independence in 2008,7 is currently led by reformed Milošević allies turned pro-European, while its political elites are searching for a way to escape the dilemmas over state- and nationhood issues. Having gained independence in 2006, Montenegro has nearly completed the state-building processes. However, the country’s newly achieved independence did not result in a swift resolution of key challenges Montenegro still faces today, in particular weak governance and the widely perceived corruption in the polity.8 Albania did not take part in the violent ex-Yugoslav wars and therefore had an easier path towards democratic consolidation than the countries analyzed above, but it has nonetheless undergone a very slow democratic and economic transition and is still hampered by the internal political polarization of the ruling elites, the dominant influence of informal centres of power, and high levels of corruption throughout all branches of government.9


Romania\textsuperscript{10} and Bulgaria\textsuperscript{11} did not have to cope with violent state dissolution like that seen by the former Socialist Federal Republic of Yugoslavia (SFRY) and, consequently, did not have to undergo a phase of reconstruction and reconciliation and experienced fewer challenges to democratic consolidation processes. Instead, these two countries were finally successful in their legal and institutional reform efforts and joined the European Union with the accession in 2007, which completed the EU’s fifth enlargement. However, despite the far-reaching reforms enacted in preparation for EU membership, Bulgaria and Romania still have some way to go in the adaptation of their legal systems to guarantee an effective system of rule of law. To ensure that these reform efforts continue beyond accession, the Commission has established a package of transitional measures within the Cooperation and Verification Mechanism to ensure the smooth integration of Bulgaria and Romania.\textsuperscript{12} Hence, both countries are still subject to a specific post-accession monitoring system. Finally, Croatia managed to consolidate its democracy after the second democratic ‘revolution’ in 2000, but was delayed multiple times in the accession process, first by insufficient cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), and later due to an unresolved border dispute with Slovenia.\textsuperscript{13} Finally, in July 2013, Croatia became the twenty-eighth member state of the EU as the second country from the former Yugoslavia to enter the EU, and the first country after Greece to join the Union in a single country enlargement. Croatia managed to avoid the post-accession monitoring instruments concerning the rule of law imposed by the EU on Bulgaria and Romania. Bearing in mind the experience from the 2007 enlargement, the EU took a more austere negotiating position with Croatia on closing Chapters 23 and 24 pertaining to ‘Judiciary and Fundamental Rights,’ and ‘Justice, Freedom and Security,’ respectively. While one could argue that Croatia escaped the post-accession monitoring because it was forced to do a better job than Bulgaria and Romania of implementing the effective rule of law, the fact is that the EU officials became aware of the “questionable effects of the Cooperation and Verification Mechanism,”\textsuperscript{14} and therefore decided to rely more on “soft pressure” to ensure the effective implementation of the rule of law in Croatia.

\textsuperscript{12} For more details on Cooperation and Verification Mechanism see in F. Trauner. 2011. The Europeanization of the Western Balkans (Manchester: Manchester University Press).
This shows that not only EU candidate countries, but even the EU member states did not manage to resolve all the problems with regard to a functioning system of rule of law, which places the rule of law implementation in the SEE high on the agenda of future legal and political science research interest. What particularly struck us, and what also presents the driving impetus for the research behind this publication, is the fact that despite constantly growing EU efforts in promoting the democratic rule of law in the SEE,\textsuperscript{15} the dynamics of international impact, and particularly the causal impact of international instruments on domestic outcomes, remains a highly under-theorized and under-researched area.\textsuperscript{16} In deciding to confront these complex issues, we are aware that we could not provide definitive answers to all of them, and we have chosen to analyze the experience of the EU’s transformative engagement in the candidate countries taking part in the SAP within the field of reform of the judiciary.

1.2. Rule of Law and the Judicial Reform Sector as Essential Elements of the EU’s Conditionality Strategy

Democratic consolidation is intimately linked with the effectiveness of rule of law, but, at the same time, the concepts of democracy and rule of law are not identical. This can be seen from the different historical development of the English common law tradition on the one hand, and continental European civil law traditions on the other.\textsuperscript{17} However, as Kochenov describes for the Eastern enlargement process, “the structure and substance of the Copenhagen-related documents does not make any distinction between the assessment of democracy and the Rule of Law. In the course of the pre-accession, the Commission opted for fusing their assessment,”\textsuperscript{18} with the effect that it gained political maneuvering space for more specific policy prescriptions in the process. Moreover, rule of law as a constitutional


\textsuperscript{16} In conclusion of his Europeanization review essay, Sedelmeier calls precisely for the causal impact of international instruments on domestic outcomes to be addressed in future research dealing with this topic; see U. Sedelmeier, Europeanization in New Member and Candidate States, cit.

\textsuperscript{17} A number of theoretically informed studies have debated the rule of law concept dilemma; for example, see T. Fleiner, L. R. Basta. 2009. Constitutional Democracy in a Multicultural and Globalized World (Berlin, Heidelberg: Springer); L. Pech. 2009. “The Rule of Law as a Constitutional Principle of the European Union,” Jean Monnet Working Paper 04/09.

principle and institutional mechanism in legal textbooks’ descriptions is quite different from practical requirements with regard to the conceptualization and operationalization of benchmarks for monitoring processes in the SAP, as can be seen from applied research. Nevertheless, the most recent “Enlargement Strategy and Main Challenges 2012-2013” in the Communication from the Commission to the European Parliament and the Council spells out that “Strengthening the rule of law and democratic governance is central to the enlargement process [...]” and that “[...] [t]he lessons learnt from previous enlargements highlight the importance of an increased focus on these areas and further improving the quality of the process.” Moreover, the European Commissioner for Enlargement, Štefan Füle, when presenting the Enlargement Strategy in 2010, underscored that “the EU expects a convincing track record in the fulfillment of these benchmarks, in particular regarding judiciary and fundamental rights. Accession negotiations do not simply involve ticking boxes about legislative approximation. Countries must build a credible track record of reform and implementation, in particular in the area of rule of law.”

In conclusion, despite the fact that academic scholarship and democratic politics agree on rule of law as a legitimizing principle for the exercise of state authority, there is no uniform “European standard” for institution-building or monitoring activities by the EU in this area. Moreover, empirical research investigating the EU’s “transformative power” with regard to the effectiveness of rule of law and judicial sector reform is only in its infancy, which means that comprehensive, comparative and interdisciplinary research with a strong focus on rule of law is still missing. This is precisely the gap this book attempts to close.

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22 This concept was developed in H. Grabbe. 2006. The EU’s Transformative Power: Europeanization through Conditionality in Central and Eastern Europe (London: Palgrave Macmillan).
1.3. “Europeanization”

‘Europeanization’ is the key concept in the exploration of the impact that EU integration had on democratic consolidation in Central and Eastern Europe. Democratic consolidation, including the establishment of an effective system of rule of law as part of the more general ‘top-down’ process of ‘Europeanization,’ however, does not only affect the old and new members of the EU. The concern of a third generation of scholars of EU integration is the evaluation of the influence of EU institutions, rules and policy-making processes and their impact on the laws, institutions and identities of third countries. Therefore the study of EU external relations is not only understood as a foreign policy approach in the context of international relations, but also as a form of “governance export”24 and “norm diffusion.”25

Seen from this perspective, the assessment of institutional and policy changes is directly related to the political, economic, and societal features that define different phases of post-communist transformation, so that in practice “revolution, reform and Europeanization […] come together or conflict with each other in the formulation of public policy.”26 Due to their interrelatedness and complexity, these processes cannot be treated as an appendix to the legal approach of European studies, but have to be studied with regard to “broader theories of social change”27 and with an interdisciplinary methodological approach.

27 Ivi.
2. Conceptualization and Operationalization of the Research Problem

2.1. The Analytical Framework

In line with previous scholarship on ‘Europeanization,’ we understand this phenomenon as a politically driven process by which EU institutions, rules and policy-making processes impact the legal systems, institutional mechanisms and collective identity formation of non-EU member states. Hence, the central research focus with regard to a multifactor analysis remains the same for this book: the existence and kind of influence the EU institutions is taken as the independent variable, so that the EU institutions and the countries of South East Europe selected for comparative purposes —namely Bosnia-Herzegovina, which has concluded a Stabilization and Association Agreement; Kosovo, which is a potential EU candidate; Macedonia, which is enjoying candidate status but also experiencing serious problems in the stability of its institutions; Montenegro, which is currently in the phase of accession negotiations; and Serbia, which is set to open its accession negotiations in January 2014— form the basic units of analysis. From this basic analytical framework, a subset of more concrete research questions follows: How much pressure has been put by EU institutions on domestic political elites? Which incentives are given? Under which conditions are EU rules adopted? How and when does ‘formal change’ through legal transposition of the EU Acquis Communautaire onto national legal systems, i.e. rule adoption, not only mean lip-service to EU requirements, but also trigger rule implementation and norm socialization, i.e. behavioral changes?

In contrast to the previous ‘southern enlargement,’ when Greece, Spain and Portugal became full members on the basis of a feeling of ‘solidarity’ with those countries’ efforts to stabilize new democratic regimes, the well-known Copenhagen and Madrid Council’s criteria from the early 1990s linked accession and membership in the EU to ‘political’ conditionality as concerns the stability of institutions guaranteeing democracy, rule of law, and protection of human and minority rights. These criteria are seen both as legal principles stemming from EU primary law, but also as core values of the European Union and prerequisites in the formation of a post-national European identity. In addition, the ability to fulfill the obligations of membership by implementation of the EU legal order, i.e. the Acquis Communautaire, is basically seen —in legal discourses— as a “technical” conditionality requirement.

28 U. Sedelmeier, Europeanization in New Member and Candidate States. cit; and U. Sedelmeier, Europeanization in New Member and Candidate States, cit.
However, when examining the specific strategies and instruments used by the EU and posing the question which of them are most effective, as this project seeks to do, it becomes obvious that rule adoption and the implementation of the Acquis Communautaire is not only a technical matter, but a highly political affair. The Acquis is not only a formal body of law, but a “framework in which shared policies and values are established and through which they are implemented.”30 Since—with regard to our unit of analysis—non-EU member states’ elites have no say in the formulation and decision-making process of EU institutions, and due to the asymmetric power the EU exercises through the Copenhagen/Madrid conditionality in rule transfer, not only has the EU been characterized as an “imperial hegemons”31 or a “cooperative empire,”32 but the question has arisen of why—with the exception of Montenegro—political and economic elites in the countries of concern for our research should give in to external pressure, if membership as the main incentive is uncertain or attainable only in a more distant future?33 One of the main foci of this research project is thus to explore which strategies and conditions can facilitate the effectiveness of the Europeanization process within the SAP. Must “membership conditionality,” if it is no longer fully credible, simply be supplemented by a more short-term oriented “policy conditionality,”34 as Trauner recommends? Or does this approach remain trapped in the logic of intergovernmental negotiations following from a “realist” international relations approach?

This question again raises a more theoretical problem. Several scholars—based on March/Olsen’s seminal distinction of the “logic of consequentiality” versus the “logic of appropriateness”35—have already created a theoretical framework with two analytically distinct approaches, namely “rationalist institutionalism” and “constructivist institutionalism.”36 Rationalist institutionalism, based on “cost-benefit calculations”37 by

30 A. Magen, Transformative Engagement Through Law, cit.: 363.
31 Ivi.
both EU institutions and domestic elites, will thus deal with particular questions, such as the “normative clarity” of EU demands, which is a special problem in the field of rule of law as mentioned above, and the credibility of conditionality in general. Several scholars have already observed from studying previous enlargements that the Acquis as a strategic instrument remains exclusively in the hands of the EU institutions, and that this allows “strategic content adjustment” with regard to the “scope, determinacy, and flexibility” of the Acquis, resulting in the accusation on the part of these scholars that the EU practices a strategic game of conditionality stretching or “moving the goal posts.”

This suggestion will, of course, play into the hands of domestic “gatekeeper elites” who are not interested in quick EU membership, such as economic elites who are content with a quick profit-maximizing logic against EU rules enforcing more competition, or political elites, both in power and opposition, who will avoid rule adoption and implementation if they fear negative consequences for their support in the next elections.

Constructivist institutionalism, based on the “logic of appropriateness,” deals with the process of “norm socialization,” in which domestic elites and populations at large internalize EU norms which they regard as legitimate. The constructivist approach regards the use of ‘soft instruments’ as of primary importance in order to persuade and to socialize domestic elites. Following from the “logic of appropriateness” we thus set up the hypothesis that rule transfer can be effective only if domestic elites and populations ‘identify’ with the EU and are thus open to “norm socialization” through persuasion and norm internalization.

Hence, the EU’s impact depends on the resonance between EU demands and domestic rules. However, whether or not EU rules will be successful in redefining the interests and identities of domestic actors engaged in a social learning process depends on a number of independent variables, including the persistence of the legacy of communist rule, the price of the adjustment cost, and the role of the local elites. This is also highlighted by recent explorative research on the ex-Yugoslav republics.

Based on a literature review of domestic sources, Džihić/Segert hypothesize that the

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38 O. March, The Logic of Appropriateness, cit.
problems of “enclave democracies” or “electoral authoritarianism” in some of the ex-Yugoslav republics remain persistent not only as a result of ongoing ethno-nationalist mobilization of the population by interwoven economic and political elites interested in the preservation of political power for their private economic interests, but also because of the (wrong) perception that external support is the key for the solution to overcome “frozen democratic consolidation” in those countries. They argue that not only both actors, the EU institutions and the domestic elites, but also populations are trapped in “unrealistic expectations, hegemonial interests, wrong perceptions and mimicry on both sides.” In conclusion, they require from future research on “Europeanization” in the WBCs to take the “cardinal problem” into account that external support for democracy and rule of law promotion is not seen as “politically neutral” by both elites and the population at large, so that Europeanization might end up in “cultural alienation” instead of an internalization of “European values.”

Seen from these perspectives and against previous hypotheses, we conclude for our analytical framework that rationalist and constructivist institutionalism do not necessarily exclude each other, but are not necessarily complementary either. But this has not yet been empirically tested in a comprehensive and comparative way.

2.2. Reconceptualization of the “Spiral Theory”

Hence, we will first of all re-conceptualize the dichotomy of “rationalist” and “constructivist” institutionalism by reframing the political processes within a comprehensive analytical framework for the assessment of the “dialectics” of these two logics for the entire process of rule transfer, rule adoption, rule implementation and norm socialization, leading to political and social change. We will therefore make use of the “spiral theory,” originally elaborated by Risse, Ropp and Sikkink for the analysis of human rights compliance, as well as their differentiation of “phases” in order to elaborate more detailed research questions and hypotheses for the identification of the interplay between the logic of consequentiality and the logic of appropriateness, or, in other words: When and how will “rational” interests based on cost-benefit calculations be transformed into “common” values and attitudes; i.e., when and how will intergovernmental “bargaining,” based on the perception of different interests

42 Ibidem, 62.
according to the logic of a zero-sum game, be transformed into “negotiations” in preparation for EU membership based on the perception of a common goal, thereby transcending the “us versus them” feeling as a prerequisite for norm socialization by Europeanization?

Graph 1.1: Europeanization Theory

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We observe that the interests of political and economic elites as possible “veto” players and units of analysis is under-researched. Previous studies clearly demonstrate that the EU has almost no “leverage” if regime change through democratic consolidation or ‘revolutions’ is not successful, because illiberal elites have come into power through democratic elections (Slovakia under Meciar, Croatia under Tuđman), resulting in a situation in which they and the winners of privatization form a “predatory elite” that has to fear the application of, for instance, EU competition law and restrictions on state aid. Hence, the EU methodology applied by a “top-down dynamic focusing on intergovernmental bargaining, [...] including the legalistic, technocratic approach to promote reforms” and accompanied by regular monitoring, financial and technical assistance and the development of socialization through technical committees, twinning, and selective participation in EU programs may have its limits, depending on the phases from bargaining to norm internalization.

2.3. Research Operationalization

Rule of law and the judicial sector reform as important elements of the “Europeanization” process are highlighted by recent reports on the negotiations for the accession of the Republic of Croatia to the EU. As Turkalj argues, Chapter 23 on ‘Judiciary and Fundamental Rights’ is considered to be “crucial” for the outcome of the entire negotiation process, in particular with regard to the benchmarks for the opening of Chapter 23 contained in a letter of the Presidency of EU. However, as can be seen from these documents, rule of law and judicial sector reform remain vaguely defined concepts due to “the lack of a coherent theory of judicial independence, and the difficulty to

49 A. Magen, Transformative Engagement Through Law, cit.: 388.
measure the performance of the judicial system,” as has been observed with regard to the monitoring activities in the Eastern enlargement process.

This is the reason for the purposes of this research we have made use of a comprehensive set of “benchmarks” already elaborated on behalf of EuropeAid by Joseph Marko et al. for the operationalization of our normative and empirical analyses, namely political, economic and ethnic challenges to judicial independence stemming from the establishment of such new institutions as “High Judicial Councils” whose members are appointed by parliaments and/or the executive, the low level of salaries paid in the judiciary, or proportional ethnic representation (where applicable) even in the judiciary, which raises challenges for the notion of “fair trial” that have not been empirically studied so far. Secondly, independence must be balanced with accountability against the danger of a “government des judges.” Thirdly, independence and accountability are of no effect if judges and prosecutors are not efficient and effective. Hence, capacity-building in the judicial sector and the effectiveness of its institutional mechanisms are functions that have to be studied both from a normative and an empirical perspective.

Acknowledging various issues included in the Justice and Home Affairs (JHA) policies of the EU, from asylum and border control to the fight against corruption and organized crime, this book does not deal with the effect of EU policies in this sector covered by Chapter 24, but focuses on the normative and empirical analysis of the effective functioning of the judiciary in five case study countries.

More specifically, the multinational and interdisciplinary research team has studied the institutional reform carried out in the judicial sector through a content analysis of legal rules and administrative regulations adopted for this purpose, and their implementation. Therefore, the more detailed research questions addressed in this book are:

1) What EU requirements are developed in the monitoring process?
2) Which organizational-institutional reforms have been made?
3) Which gate-keeper elites resisted these reforms?

51 Ivi.
52 A. Mungiu-Pippidi, The EU as a Transformation Agent. Lessons Learned from governance reforms in East Central Europe, cit.
53 Re-enforcement of the Rule of Law. Division of Competences and Interrelations between Courts, Prosecutors, the Police, Executive and the Legislative Powers in the Western Balkans Countries (2004).
4) Who (critical civil society actors) supported these reforms?

5) What have been the effects and how did they change over the last decade with regard to independence, responsibility, efficiency, and effectiveness benchmarks?

The investigation of the state of the judiciary is based on an analysis of the institutional reforms thus far performed in the five case study countries. Particular focus is given to newly established institutions such as the High Judicial Councils, with the goal to assess whether they really provide political independence to the judiciary. This task has been executed through an empirical study based on semi-structured interviews with representatives of the judiciary, government employees and relevant domestic experts (legal scholars, NGO representatives, journalists, international organizations representatives), as well as a review of media reporting. With regard to accountability, researchers empirically tested whether the judicial institutions are effective in this matter, again with a special focus on the newly established institutions and their role in maintaining accountability in working habits. The analysis of the training of judges organized by OSCE and expert NGOs (such as the Belgrade and Sarajevo Human Rights Centers) in terms of capacity building helped us to determine the efficiency of the judicial institutions in the SEE. Special focus is given to the effectiveness of the newly established Judicial Academies throughout the region, which are founded and entirely financed by the EU Commission. Finally, the effectiveness of the judiciary is assessed through an analysis of the legal and institutional reforms of, for instance, civil procedure in order to shorten the length of civil law suits, as well as through an assessment of the work of the newly established ‘special’ courts (labor courts, administrative courts etc.) and chambers (war crimes chamber, organized crime chamber etc.).

Based on such a comprehensive comparative study of the judicial sector reform in the selected countries, we will finally be able to identify the possible “misfit” between the criteria established in the EU monitoring process, and the laws adopted by the parliaments of EU (potential) candidate countries on the one hand, and the effectiveness of the judiciaries, on the other. The analysis of these “misfits” will also enable us to critically assess not only the endogenous factors favoring or preventing the reform of the judicial sector, but also the “dynamic” rule setting in the EU monitoring process.

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and whether incomprehensibility, vagueness and the establishment of *ad hoc* new requirements is part of the problem rather than the solution.

In addition, we observed causal links through “process tracing”\(^{56}\) not only with regard to the aspect of “leverage,” but also of “linkages:” Which learning processes take place through participation in twinning-procedures, and, as far as the civil society sector is concerned, the establishment of strong networks of transnational society?

This book looks into the institutional changes in the judiciary of SEE countries from 2000 until the present. The year 2000 in SEE was marked by the collapse of Slobodan Milošević’s authoritarian regime in Serbia and Montenegro, and the ‘second’ democratic revolution through general elections in Croatia. These events provided the path for the democratic consolidation and economic reform of the region based on a commitment of all relevant political actors to EU integration. Furthermore, at the same time the EU launched its new Western Balkans policy based on the Stabilisation and Association Process, which offered the countries of region the ‘perspective’ of eventual EU membership. By taking the whole thirteen years into account, the research elaborated in this publication will hopefully be able to critically answer the question of whether and how this process can be more effective in the future.

### 2.4. Research Methods

With regard to the methods used, the entire book is based on a “neo-institutional approach,” which attempts to overcome the separation of research by EU legal scholars, lawyers, and political scientists and to re-integrate the different aspects of legal and political analyses through the logic of “functional interdependence.”\(^{57}\) Hence, the normative and empirical analyses have used the same written documents, i.e. legally binding and non-binding EU law, ‘soft law,’ declarations, etc., while applying their respective methods of description, analysis and interpretation not only to texts, but also to the empirical results of research. In addition, qualitative empirical analysis required not only the identification of all relevant texts, but also actors through explorative expert

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interviews and in-depth interviews with these actors to test the research hypotheses following from the framework of the re-conceptualized spiral theory for Europeanization. The empirical analyses of Europeanization are elaborated by in-depth interviews based on a semi-structured questionnaire, with representative samples comprised of a total of 52 representatives of the political elites, economic elites, and rule-of-law enforcement officers of the respective countries of concern.

With regard to the comparative method applied, to begin with we made a selection of countries according to their status in the EU accession process. Bearing this in mind, we were able to identify with more precision the independent variables in the pre-accession processes. Hence, our sample for comparison includes a selection of countries according to their status in the accession process, namely (1) Bosnia-Herzegovina, which have signed Stabilization and Association Agreements, but also have serious problems with state institutions’ stability due to the unresolved statehood and nationality issues; (2) Kosovo, as a potential candidate country; (3) Macedonia, which is a candidate for EU accession but with no date set for commencing accession negotiations; (4) Montenegro as a candidate country in the process of accession negotiations; and (5) Serbia, which is enjoying candidate status with January 2014 set for the opening of accession negotiations. By going beyond enlargement in our choice of countries and examining the interaction between EU strategies of transformative engagement and domestic dynamics in Bosnia–Herzegovina, Kosovo, Macedonia, Montenegro, and Serbia, we will be able to draw more general conclusions about the mechanism and limitations of EU influence on domestic change than would be possible by focusing on a single case study country.

Table 1.1: Case study countries

<table>
<thead>
<tr>
<th>Category</th>
<th>Case Study Country</th>
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<tbody>
<tr>
<td>SAA country</td>
<td>Bosnia-Herzegovina</td>
</tr>
<tr>
<td>Potential candidate country</td>
<td>Kosovo</td>
</tr>
<tr>
<td>Candidate county without date</td>
<td>Macedonia</td>
</tr>
<tr>
<td>Negotiating candidate</td>
<td>Montenegro</td>
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<tr>
<td>Candidate country with date</td>
<td>Serbia</td>
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During the process of selection of our case study countries, we identified those states that are subject to some type of EU transformative engagement strategy in the pre-accession phase of enlargement. We did not, however, exclude countries that can be characterized as non-consolidated democracies, namely, Bosnia-Herzegovina, which is still under “international” control by a High Representative who is politically responsible to an international “Peace Implementation Council” and regularly reports to the UN Secretary General on “progress” in the implementation of the Dayton Peace Agreement.\(^\text{58}\) Almost the same holds true for Kosovo, which has been under “international territorial administration” since 1999 following UN-Security Council Resolution 1244. Despite Kosovo’s having unilaterally declared independence in 2008\(^\text{59}\) and adopted a constitution,\(^\text{60}\) international supervisory mechanisms such as the United Nations Mission in Kosovo (UNMIK), under the leadership of the Special Representative of the Secretary General (SRSG), and the European Union Rule of Law Mission (EULEX) are still in place and exercise full monitoring powers. Without having to clarify the “statehood question”\(^\text{61}\) from the perspective of public international law, it is, however, of special interest for our research to study the role of the EU in an internationally administered framework both in Bosnia-Herzegovina and under UNMIK and, in particular, the role of the EULEX mission since 2008, in order to gain more knowledge of problems facing the development of policy strategies for rule of law promotion and lessons to be learned for other conflict areas with no prospect of membership, such as the Caucasus and the European Neighborhood Policy (ENP). Finally, our study focuses on hard cases where problems of the legacy of post-communism and nationalist fractures entrench strong veto players in the domestic system, which poses equal challenges to the rule of law reforms promoted by the EU.

Secondly, the comparative method also helps to identify and to specify the independent variables both in the normative and empirical analyses. First, we want to identify the “misfit”\(^\text{62}\) between EU law, the laws adopted by the parliaments of (potential) candidate countries and the rule implementation by executives and judiciaries, which shall be achieved by content analysis of legal rules, administrative regulations and deci-

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\(^{58}\) F. Bieber, Bosnia and Herzegovina since 1990, cit.: 311-328.


\(^{62}\) Falkner 2003 and 2009.
sions. By comparing “vetos” and “veto players” in the different phases of the norm socialization process also from the empirical level, we can finally see when, how and why the “logic of consequences” gives way to a “logic of appropriateness” or might be reversed again, so that neither “norm socialization” at the domestic level, nor “learning processes” on the side of the EU take place.

3. State of Research in the Field of Study

One of the basic functions of the EU is to provide rules and mechanisms to regulate the behavior of public and private actors across integrated policy areas. In this context, Europeanization is understood as the domestic impact of European governance in the EU member states. Ladrech defined the Europeanization process as “reorienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organizational logic of national politics and policy making.” However, as discussed earlier, this “top-down” process of “Europeanization” is affecting not only the old and new members of the EU, but also third countries, and in particular (potential) EU candidate countries. Our research falls within the scope of concern of a third generation of scholars of EU integration, whose principal interest is the inquiry into the alignment of EU (potential) candidate countries’ legislation, policies, and institutions with the EU rules codified in the *Acquis Communautaire*.

The EU’s impact on the rule of law norm socialization in third countries depends on the “resonance” between EU demands and domestic rules. Previous research with regard to CEECs has already established the strong legacy of communist rule, in particular in the administrative sphere, and the high adjustment costs, meaning that domestic cultural understanding and informal institutions are key mediating factors determining whether domestic actors engage in a social learning process in which EU rules (might) redefine their interests and identities. The mushrooming literature on the Europeanization of EU candidate countries confirms that conditionality has indeed

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played a significant role in the EU integration process, as it has successfully induced top-down pressure on candidates. Second, empirical findings show that although the *Acquis Communautaire* is at the core of Europeanization in candidate countries, the “goals and contents of Europeanization are of a more general character.”65 This particularly relates to the core goals of Europeanization, such as stability, security, democratization, rule of law etc. Third, other instruments for promoting EU norms, such as socialization of domestic elites and persuasion, do not appear to have been “consistent and effective substitutes for political accession conditionality, even if they are described as unique EU strategies.”66 Fourth, the literature confirms that only the credible prospect of membership appears to be a valid incentive for Europeanizing impact in candidate countries. Finally, the Europeanization literature concludes that the “EU’s impact is differential across countries and issues,”67 and therefore is unable to provide all-out recommendations for the use of Europeanization in future waves of enlargement. This is precisely why our research focuses on the empirical research investigating the EU’s influence with regard to the effectiveness of rule of law and judicial sector reform, which until now has remained a highly under-researched area,68 to which we hope to contribute by comprehensive, comparative and interdisciplinary study.

### 4. Book Structure

The book is organized in three parts. Besides the introduction, Part I provides overview of the existing literature on Europeanization with specific focus on its effect on the rule of law. Part II attempts to provide accurate and up-to-date normative and empirical analysis of the state of judiciary reforms in Bosnia – Herzegovina, Kosovo, Macedonia, Montenegro, and Serbia. Part III, which only contains one chapter, offers answers to the question of the success of the Europeanization by rule of law implementation in the SEE in the form of a comprehensive conclusion chapter, as well as policy recommendations intended to address the shortcomings in judiciary reform in SEE observed during the

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research that led to this book, as well as ideas for how the EU could enhance its influence in the rule of law promotion during the accession phase.

Part II of this book explores the reform of the judiciary in five case study countries. This is timely, given the apparent problematic surrounding the effective rule of law in the region addressed in the process of European integrations. As mentioned earlier, rule of law norm socialization in SEE remains understudied and undertheorized. The rich and diverse insights in Part I may in due course contribute to the understanding and conceptualization of this phenomenon in the Western Balkans region.

Adnan Kadribašić provides an insightful analysis of the structural reset of the judiciary in Bosnia–Herzegovina from the end of the 1990s armed conflict in the country until today. International presence in Bosnia–Herzegovina began as early as the global conflict management efforts in the early 1990s. This makes it difficult to differentiate between the influence of the Stabilization and Association Process, on the one hand, and, on the other, the pressure of other international actors in the process of judiciary reform in the country. To overcome the troubles stemming from the interplay of a myriad of international stakeholders, Kadribasic has in his research developed the distinction of different phases of the EU’s influence on judicial reforms. This chapter shows that even intermediate steps towards full EU membership, such as the signing of the SAA, create immediate positive momentum in accepting EU rule of law conditionality. Bearing in mind the years Bosnia–Herzegovina will spend in the EU’s waiting room, the author raises the question of what interim steps the EU could consider in an effort to boost further reforms in the rule of law field.

Chapter two of Part I describes the struggle for an independent judiciary in Kosovo, a country currently placed at the bottom of the EU integrations. The author provides a normative and empirical distinction between pre-independence and post-independence phases of the rule of law implementation, since Kosovo declared its Constitution, thus establishing an independent judiciary and appropriate institutional setting, only after 2008. Similarly to the situation in Bosnia-Herzegovina, international interference in Kosovo’s legal and judicial systems after the conflict remains prevalent. In this regard, the author raises the question of the efficiency of the EULEX mission in Kosovo, particularly bearing in mind recent criticism made by the European Commission of political interference within the judiciary, despite the safeguards for the independence of the judicial branch established within the recently adopted legislative framework.
The third chapter in Part I, written by Vladimir Misev, continues to focus on the institutional reform of judiciary, with Macedonia as its case study country. This chapter differentiates between the EU’s role in the initiation and implementation of judicial reform in Macedonia. Bearing in mind the Greek–Macedonian name dispute, which has effectively blocked Macedonia’s EU integrations for almost a whole decade, it is observed that the EU, together with other international organizations, had a crucial role in the commencement of judiciary reform, but since the blockade of the countries’ accession to the EU has lost much of its influence over the process. That is, since the Macedonian EU membership perspective has become distant and uncertain, the EU’s influence over domestic processes has lost its strength.

Adaleta Bibežić and Marko Kmezić’s study on judicial reform in Montenegro portrays the judicial reform in the first of the selected five case study countries to officially embark on the EU accession negotiations. This chapter describes the analytical assessment of Montenegro’s performance in the rule of law implementation conducted during the EU negotiations. The authors note the recurrent problem of vagueness of rule of law definitions in the accession chapters, whereas most of the benchmarks related to the judiciary reform remain political criteria rather than the hard Acquis.

Finally, Sanja Kmezić and Marko Kmezić’s chapter makes a very strong argument, using Serbia as their case study, to support the claim that legacies of the past act as enduring obstacles against Europeanization. They describe how the judiciary still suffers from the long period of instrumentalization and erosion of professionalism which peaked in the final years of Slobodan Milošević’s rule. The authors present various National Judicial Strategies applied after the democratic revolution; this is followed by the systematic scrutiny of the implementation of constitutional and other legal solutions aiming to reform the Serbian judiciary. They conclude that the lack of clarity of EU demands as well as the lack of credibility in the EU promise for membership impede the EU conditionality strategy from exporting its rule of law standards to Serbia. However, the observed legitimization of the EU rule of law demands among Serbian citizens creates a fertile ground for the Union to implement other mechanisms for rule transfer, namely socialization and persuasion.

In Part III of the book Marko Kmezić concludes the scope, depth and limitations of the Europeanization by rule of law implementation in the Western Balkans. The author concludes that the accession process generates unique, broad-based and long term support for the
establishment of the rule of law in the (potential) candidate states. However, at the same time he observes number of shortcomings and wrong assumptions in EU’s rule of law export to the candidate states and offers specific recommendations in order to foster the process.

5. The Innovative Character and Broader Impact of the Book

First, the traditional top-down approach in Europeanization studies has in many cases underestimated the “constructivist institutionalist approach,” and as Sedelmeier argued already in 2006,69 it is exactly this approach that we hope will bring good results in the study of (potential) candidate countries. But, as he argues, this needs more conceptualization efforts, which we hope to have provided with this research project. Trauner’s distinction between “membership conditionality” and “policy conditionality”70 is thus only one possible further element for the more comprehensive analytical framework we want to work on. Our re-conceptualization of the “spiral theory,” the selection of countries for comparison and the elaboration of a comprehensive framework of analysis trying to overcome the theoretical dichotomies will thus provide new innovative ground.

Secondly, while there are a number of single case studies, no comprehensive and comparative empirical studies exist so far to test pre-accession monitoring of and compliance with the rule of law implementation in SEE, and/or to analyze the different roles that various gate-keeper elites play. In addition, the reform of the rule-of-law sector has generally been neglected and has not been the object of comprehensive research to date. From the perspective of applied research, the project thus intends not just to advance scholarship on this topic, but also to have an impact on the policy strategy for the accession processes in the Western Balkans beyond the “wait-and-see”71 approach pursued by EU institutions today.

69 See again in U. Sedelmeier, Europeanization in New Member and Candidate States, cit.
70 F. Trauner, From membership conditionality to policy conditionality; EU external governance in South Eastern Europe, cit.
71 Preoccupied with its internal affairs, the EU seemed to lose interest in keeping the promise of a European future for the Western Balkans. As a result it started to lose credibility and influence in a region that experienced the risk of sliding back towards instability. Criticism of the EU’s “wait-and-see” approach to the Western Balkans was therefore addressed by academics in J. Marko. 2009. “A Response to the Interview with Michael Leigh, Director – General of the European Commission,” Journal of Southeastern Europe 33(1); H. Grabbe, G. Knaus, and D. Korski. 2010. “Beyond Wait- and- see: The Way Forward for EU Balkan Policy,” European Council on Foreign Relations.
Thirdly, the entire project, based on a “neo-institutional” approach, will strengthen interdisciplinary research in the study of the EU. By drawing on research methodology from political science and law, it is our intent to help to overcome the gap between scholars of EU law and comparative constitutional law on the one hand, and political science on the other.

Finally, we believe that our study on how to strengthen rule of law in transition societies and weak or failed states will have a broader implication for EU foreign policy not only in the sphere of democratization, but also for sustainable economic development. In this regard, this book may be of interest also for other international institutions, such as the World Bank or UNDP’s economic research and strategies’ development in the fight against poverty. Secondly, with this publication we also hope to be able to make a political impact not only on the EU’s future enlargement and conditionality policies, but also the New Neighborhood Policy.
Literature Review on Europeanization and Rule of Law

Marko Kmezić

1. Introduction

This literature review will consider a recent strain of literature that does not only look at the instruments and the degree of EU impact on domestic politics and policies, but also analyzes how this impact takes place and how compliance with the EU norms can be induced.1 Since the main interest of this review is the EU’s influence over the

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candidate states, it is of particular importance to analyze lessons learned from studies on the effectiveness of conditionality with regard to Central and Eastern European Countries (CEEC) and their recent EU accession processes. Finally, particular attention will be dedicated to the EU impact on the rule of law norms diffusion in the course of the current EU integrations in the Southeast European countries (SEE).

The aim of the literature review is to explore and assess the causal mechanisms that determined and/or influenced the domestic dynamics in CEEC and SEE in the context of the European integration and European Union enlargement process. Even in the case of the CEEC, academics have identified “[o]ne of the persistent fears in the European Union […] that the accession countries will be unable to catch up with the prevailing practices of constitutionalism and the rule of law that supposedly ground the common tradition of Europe.”2 This is why Tamvaki describes characteristics of a “socialization process” through which Western Europe diffuses its shared beliefs and institutional practices to the “untrained” East.3

Scholars have identified a variety of important factors shaping the CEEC post-communist transitions, such as initial conditions, institutional choices, timing and sequencing of reforms, communication and quality of policies, the strengths of state apparatus, ethnic composition, geographic proximity to the West and external support. However, a sustainable set of causal relations between these factors is still missing. Domestic factors matter, but so do cultural and historical legacies, as well as external pressures. There is a high degree of interplay between internal and external factors affecting transitions in Eastern Europe on the way towards European accession.

The assessment of institutional and policy changes is directly related to the political, economic, and societal features that define different phases of post-communist transformations. Theoretically, the “return to Europe,” the democratization process, and the establishment of a functional market economy represented the main objectives of the CEEC embarked on transition. In practice, “Revolution, Reform and Europeanization […] come together or conflict in the formulation of public policy in East Central European countries.”4 Due to the complexity of these processes, accession of the East European new member countries should not be treated as an appendix to the legal approach of European studies, but “needs to anchor itself in broader theories of social change.”5

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2 A. Sajo, op. cit.: 175.
3 D. Tamvaki, op. cit.
4 A. Mungiu-Pippidi, op. cit.: 5.
5 Ivi.
The survey of the existing literature on the SEE and CEEC’s EU accession can be divided into three sections, situated at the intersection of comparative politics and international relations. The first approach regards the literature on post-communism and the impact of external actors on domestic politics. The second part concerns the international institutions literature in international relations, seeking to explain how international institutions can have an impact on domestic politics through norms transmission, underscoring the nature of EU compliance. The third part presents the current picture of the Europeanization process and the literature that deals with EU conditionality and socialization in general, as well as its impact on norm socialization, in particular. Within the last strand of reviewed literature, special focus will be given to empirical findings in the sphere of the rule of law.

2. Post-Communist Transition

The literature on post-communist transition underscores the differences and similarities that emerged in the post-communist world, which eventually evolved from nine states in 1989 to sixteen in 2013. It is not surprising that the former Soviet Republics followed different trajectories from the CEECs and, by 1995, the political systems of the former communist region ranged from liberal democracy to rigid authoritarianism.\(^6\) Also, the variation among the CEECs was striking, varying from liberal democracy in countries like Poland and Hungary, to authoritarianism with totalitarian accents and even war in the Former Yugoslavia.\(^7\) The significant divergence in regime types among the post-communist countries is due to the different quality of political elites and the inherited communist conditions. In the circumstances of limited political competition, the illiberal elites had the possibility to concentrate power and suppress rival groups by using a populist discourse\(^8\) and by exploiting the lack of strong opposition and civil

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society. Scholars have developed explanations for the variation of political outcomes that are obvious after 1989, namely the configuration of political elites at the moment of regime change,\(^9\) the outcome of the first democratic elections and the quality of political competition.\(^10\) The lack of political competition facilitates the rent-seeking strategies promoted by the new elites, which due to the lack of ‘substitutes’ fix the rules of transition and sacrifice full reform for becoming the short-term winners of partial reform. Instead, the presence of real political competition at the moment of regime change facilitates economic reform and the democratization process. By looking at the relationship between the quality of political competition due to inherited legacies, the democratization process and economic reform, this theoretical framework reconsiders the existing literature on post-communism from the perspective of the role played by political elites in accelerating or slowing down the democratization process.

### 3. Normsocialization by International Institutions

The presence of international factors may create the facilitating conditions for turning democratic revolutions into illiberal democracies and the latter into more liberal democracies. According to Vachudova, “international actors can play an important role in either tightening or loosening the grip of polity of elites that seek to perpetuate illiberal democracy.”\(^11\) The literature on international institutions considers these institutions as consisting not only of formal rules, but also of informal procedures and norms that can shape interests and constrain activities.\(^12\) Regarding their influence on domestic politics, international institutions can produce a change in domestic opportunities, beliefs, structures and expectations through the use of incentives, such as financial aid, expertise, training, monitoring and conditionality. The recent literature in the field has paid much attention to the process by which international norms can play a decisive role in changing domestic politics.\(^13\) Thus, international norms serve in order to guide state behaviour and

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\(^10\) M. S. Fish, op. cit.; M. A. Vachudova, op. cit.

\(^11\) M. A. Vachudova, op. cit: 5.

\(^12\) R. H. Linden, P. Cernoch, R. W. Clark and A. Freyberg-Inan (eds), op. cit.

shape agendas from which the political elites choose specific policies, while international organizations serve as “nannies.”14 After having established the norms, the international institutions usually seek to spread the benefits of their expertise and act as channels of transmission of norms and models of positive political behaviour.15 International norms can become institutionalized at the domestic level if they can infuse beliefs and values within the state, or if they become enhanced through the standard operation of a bureaucratic agency.16 The process of compliance requires the state of conformity of a specific actor with a norm and constitutes the extent to which agents act in accordance with the conditions prescribed by the international organizations. The mechanisms that the international institutions can use for achieving domestic compliance are coercion, external incentives and socialization. Among the external incentives mechanisms, conditionality is the most widespread in Europe. Checkel identified three aspects of European conditionality: a) pre-conditions as policy actions agreed upon during the negotiations between an international institution and a national government that must be undertaken before the former approves credits or formally grants membership, b) actions like performance criteria or legal requirements and c) policy provisions that specify additional commitments contained in the overall agreement.17 Further, Linden concludes that “international organizations propagate a norm and pursue a policy of conditionality – compliance and internalization are rewarded with material support, institutional association, and, ultimately, membership in the exclusive organizations of the West; non-compliance is punished by reduction or withdrawal of support and rejection of association and membership.”18

Extensive literature review has shown that most of studies of international organisations’ impact on CEEC have focused on the organizations themselves, while there are only few empirical studies of how changes in East Europe demonstrate the effect of international factors.19 Volumes aiming to bring these tracks together do all begin with the scientific assumption that there is an impact on the new democracies of Eastern

14 R. H. Linden, P. Cernoch, R. W. Clark and A. Freyberg-Inan (eds), op. cit.
18 R. H. Linden, P. Cernoch, R. W. Clark and A. Freyberg-Inan (eds), op. cit.: 19.
Europe steaming from their associations with their “objects desire”20 - international, particularly European pan-organizations. Authors have raised the following questions: have CEEC had to act certain ways, develop certain institutions and implement certain laws? What leverage did the international organizations have to get what they wanted? What difference did the decision to join make in these countries’ political institutions, legal order, and legal institutions? Investigating norms and their impact, researchers have focused on the nature of implementing norms, differentiating clearly set norms (i.e. norms set out by a European Council in 1993 and more explicitly in the EU’s Agenda 2000 criteria in 1997), from non-explicit norms, where expectations of political or economic behavior of the CEEC were not spelled out.

Explaining the mechanisms of conformity with international norms, Linden concludes that “in situations where there were norms and models [...] in virtually all cases the main incentive dangled before the new democracies was membership.”21 However, this does not hold true for financial organizations and, to a lesser extent, the EU, which has used the promise of funds as a second powerful mechanism. “These were typically dispensed with ‘conditionality,’ that is, on the basis of behaviour that met or promised to meet certain criteria.”22 A third mechanism used by the international organizations in the CEEC has been more political and rhetorical, and has involved bargaining and negotiating marked by the disparity between negotiating partners.23 Eventually, the East European countries had to show to all of the international organizations how they would behave as members, which means adopting and implementing legislation. When assessing the impact that norm socialization has had on the CEEC, authors have asked, more than a decade after the fall of communist regimes, about the contribution of norms baked up by various forms of incentives. Although most of the authors point to significant legal or institutional changes in the CEEC,24 the question is whether actual policies favoured by the international organizations have been put in place. Here the answer is more mixed, as Freyberg-Inan points out that the EU itself has noted that Romanian compliance has been inconsistent and ineffective. Also, Sissenich reports on sluggish creation of new institutions and implementation of EU social policies in Poland and Hungary.25

20 R. H. Linden, P. Cernoch, R. W. Clark and A. Freyberg-Inan (eds), op. cit.
21 Ibidem: 369.
22 Ivi.
24 R. H. Linden, P. Cernoch, R. W. Clark and A. Freyberg-Inan (eds), op. cit.
25 Ivi.
rescu notes uneven implementation in the area of access to information across the region.26 According to Linden this have all provided a picture overall “[...] closer to that of institutional imitation than one of thorough policy transposition”.27 Jakoby calls this “responding to ceremonial myths as a substitute for the kind of real implementation which their underdeveloped public administrations cannot deliver.”28 As for the CEEC, Linden sees three possible explanations for such inconsistency in implementation.29 First, he explains the difficult task of adjusting to multiple international organizations’ mandates in the light of CEEC sovereignty regained from Soviet dominance, and in situations where new governments faced the contradictory desires of their populations for “greater control of their destinies, at last, but also a rapid ‘return to Europe’.”30 The second problem lies in the “nannies’” expectation of the CEEC to comply with the norms even before being allowed to join the organizations. Finally, the last problem lies in the political elites, whose political futures depended on making progress toward “joining Europe,” or at least on giving that appearance.31

4. Europeanization

Finally, the literature on European integration and enlargement will be discussed by exploring CEEC/SEE compliance at the EU level. Starting from the assumption that the EU entails greater transformations of domestic institutions and policy-making than any other international organization, we will review the benefits combined with the requirements for joining the EU and see why most authors speak of the EU’s “unprecedented transformative power.”32 Using the ‘stick and carrot’ method and asserting that underperformance leads to disqualification, the EU’s active leverage, characterized by asymmetric interdependence, enforcement and meritocracy, works through the pre-accession process. The literature review has confirmed the extremely important and strong links between enlargement

27 Ibidem: 374.
29 R. H. Linden, P. Cernoch, R. W. Clark and A. Freyberg-Inan (eds), op. cit.
30 Ibidem: 374.
31 Ibidem.
32 H. Grabbe. The EU's Transformative Power: Europeanization through Conditionality in Central and Eastern Europe, cit.
and norm socialization in CEEC/SEE, since the extension of EU membership to these countries is in fact a process of Europeization: a massive export of EU norms.33

But let us start from the beginning. One of the basic functions of the EU is to provide rules and mechanisms to regulate the behavior of public and private actors across integrated policy areas. In this context, Europeization is understood as the domestic impact of European governance in the EU member states. Ladrech defined the Europeization process as “reorienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organizational logic of national politics and policy making.”34 Radaelli broadened the notion of Europeization to create the most precise and useful definition to date:

Europeanization consists of processes of (a) construction (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, ‘ways of doing things’ and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and subnational) discourse, identities, political structures and public policies.35

Thus, Europeization can be perceived as a permanent two-level political interaction in which member states are both contributors to and products of EU integration.36 It is important to stress the change in the logic of political behavior as a useful way to distinguish Europeization effects from the many other processes of transitional change in the post-communist political context. While a vast body of literature treats the impact of European integration and “European governance” on the EU member states,37 few

studies have expanded the scope of Europeanization discourse to the “quasi-member states,” namely the countries of the European Economic Area (EEA) and the European Free Trade Area (EFTA).38

Only since the 1990s have EU scholars begun to look beyond the formal borders of the EU to study the impact of European governance on external actors. Schimmelfennig explains this shift of scientific interest as a consequence of a threefold development in the history of European integration.39 First, the size and attractiveness of the deepened and expanded EU internal market accorded the EU considerable power to shape economic and public policy among its trading partners. Second, the EU embarked on an Eastern enlargement that was unprecedented not only in terms of the number of acceding states, but also regarding intrusiveness and potential “EU transformative power.”40 Finally, the EU has designed institutional arrangements for states that are not eligible to apply for EU membership, namely the Barcelona process for the Mediterranean countries in 1995 and the European Neighborhood Policy (ENP) for the Eastern European countries not part of the Stabilization and Association Program (SAP), as well as Middle Eastern and Northern African countries. At its core, through this Europeanization beyond its borders, the EU had begun to promote “the external projection of internal solutions.”41

The principal interest of the current literature review is the inquiry into the alignment of EU (potential) candidate countries’ legislation, policies, and institutions with the EU rules codified in the Acquis Communautaire. We shall address the existing literature in the following subsection.

40 See in H. Grabbe, The EU’s Transformative Power: Europeanization through Conditionality in Central and Eastern Europe, cit.
5. Europeanization of the Candidate Countries

The enlargement policy of the European Union is widely recognized as one of the most powerful instruments of the EU’s foreign policy. It is said to have considerably contributed to the political transformation process by promoting democratic consolidation, the rule of law, respect for human rights and the protection of minority rights. The study of Europeanization of candidate states for EU membership falls within the third developmental phase in European integration scholarship. Namely, Europeanization is recognized as the key concept in the exploration of the impact which EU integration had on democratic consolidation in CEEC and still has in the SEE. Democratic consolidation, including the establishment of an effective system of rule of law as part of the more general ‘top-down’ process of ‘Europeanization,’ however, does not only affect the old and new members of the EU. The EU began to use the attractiveness of its membership incentive for the post-communist countries in the 1990s to promote a broad range of political and economic criteria through its enlargement policy; now, the concern of a third generation of scholars of EU integration has been the evaluation of “the influence of EU institutions, rules and policy-making processes and their impact on the laws, institutions and identities [..] also of third countries.” Therefore the study of EU external relations is not only understood as a foreign policy approach in the context of international relations, but also as a form of “governance export”43 and norm diffusion44 - thus leading to the creation of the Europeanization of candidate countries as a separate field of the Europeanization agenda.

Within the context of the 2004/2007 enlargements, the study of the Europeanization of the new member states developed as an important temporal addition of this research area. While initial studies of the EU’s impact during the early years of membership were primarily a subfield of the analysis of the Europeanization of the member states, contemporary literature began to treat the Europeanization of new EU member states as

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an extension of studies of candidate countries by testing the impact of policy and polity changes also in the post-accession stage.

Seen from this perspective, the scholarly assessment of institutional and policy changes in (potential) candidate states is directly related to the political, economic, and societal features that define different phases of post-communist transformations processes. Due to their interrelatedness and complexity, these processes cannot be treated as an appendix to the legal approach of European studies, but have to be studied with regard to “broader theories of social change”\(^{46}\) and with an interdisciplinary methodological approach.

Europeanization in candidate countries occurs in a different manner than in those occurring in EU member states.\(^{47}\) Namely, the EU-candidate relationship is one of obvious “asymmetry of interdependence.”\(^{48}\) On one side the EU has the benefits of trade, aid and finally accession to offer, while by contrast, given their tiny economic size, candidate countries have little to offer to the EU. Also, the candidate countries, or at least their political elites, show a strong desire to join the EU, which decreases their bargaining power. In sum, this allows the EU to set the rules that through the process of Europeanization shape the public policy making in the candidate countries. How prevalent asymmetry of interdependence is can best be observed from the fact that during the accession process candidates may even accept an outcome that is blatantly contrary to their interests. Grabbe presents at least two case studies where the EU used its conditions to exercise influence to achieve an outcome which was against the interest of the CEE countries during their pre-2004 accession negotiations. The first is the agreement on a transition period of up to seven years before citizens of new member-states could work freely anywhere in the 15 existing member states. The second example is the EU request that the applicants should implement its border policies prior to accession, but without any reciprocal commitments that the existing member-states would remove frontier controls with the new members immediately after enlargement. In both cases, Grabbe found that the candidates agreed to an EU position that explicitly denied them the benefits accorded to existing members on

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\(^{46}\) A. Mungiu-Pippidi, op. cit: 5.


\(^{48}\) See in H. Grabbe, The EU’s Transformative Power: Europeanization through Conditionality in Central and Eastern Europe, cit.
accession.\textsuperscript{49} In this regard, the study of Europeanization reflects conclusions of studies on international negotiations suggesting that negotiators can behave in ways that seem not accord with their interests, but that are explicable through rationalist framework.\textsuperscript{50}

The main task of authors interested in Europeanization in candidate states is to establish "under what conditions are the EU's attempts to influence candidate countries effective?"\textsuperscript{51} Sedelmeier distinguishes between two parts of this question: an empirical assessment of the extent to which the EU has a domestic impact, and an analysis of what factors account for this impact (or the lack thereof). Therefore, a recent strain of the literature on the Europeanization of candidate states does not only look at the instruments and the degree of EU impact on domestic politics and policies, but also analyzes how this impact takes place and how compliance with the EU norms can be induced.\textsuperscript{52}

Based on the extent and the nature of the EU’s impact on domestic policies in the candidate countries, Schimmelfenning and Sedelmeier distinguish between EU-driven and domestic-driven Europeanization.\textsuperscript{53} For example, Jacoby describes health care reform in the post-communist CEEC as a process during which EU norms were used as “approximate templates” without an evident causal link to the EU’s attempts to exert influence.\textsuperscript{54} Bearing this in mind, the rest of this literature review will nevertheless scrutinize only EU-influenced domestic developments in the candidate countries.

\textsuperscript{49} H. Grabbe, The EU’s Transformative Power: Europeanization through Conditionality in Central and Eastern Europe, cit.
\textsuperscript{51} U. Sedelmeier, Europeanization in new member and candidate states, cit.
\textsuperscript{54} W. Jacoby, op. cit.
6. Theoretical Perspectives of the Europeanization of EU Candidate Countries

Theoretical perspectives employed in the studies of Europeanization specify mechanisms of EU impact “as building blocks for a theory of Europeanization.”\textsuperscript{55} Volumes of reviewed literature on Europeanization in candidate states can be seen as arriving at two principal explanations about why candidate countries adjust to the EU norms. Several scholars –based on March/Olsen’s seminal distinction of the ‘logic of consequentiality’ versus the ‘logic of appropriateness’\textsuperscript{56}– have already created a theoretical framework with two analytically distinct approaches, namely ‘rationalist institutionalism’ and ‘constructivist institutionalism.’\textsuperscript{57} Rationalist institutionalism, based on “cost-benefit calculations”\textsuperscript{58} by both EU institutions and domestic elites, will thus deal with particular questions such as the ‘normative clarity’\textsuperscript{59} of EU demands, which is a special problem in the field of rule of law, as mentioned above, and the credibility of conditionality in general. Several scholars have already observed from studying previous enlargements that the Acquis as strategic instrument remains exclusively in the hands of the EU institutions, and that this allows “strategic content adjustment” with regard to the “scope, determinacy, and flexibility” of the Acquis, resulting in the accusation on the part of these scholars that the EU practices a strategic game of conditionality, stretching or “moving the goal posts.”\textsuperscript{60} This suggestion will, of course, play into the hands of domestic ‘gatekeeper elites’\textsuperscript{61} who are not interested in quick EU membership, such as economic elites, who are content with a quick profit-maximizing logic against EU rules enforcing more competition, or political elites, both ruling and in opposition, who will avoid rule adoption and implementation if they fear negative consequences for their support in the next elections.

Constructivist institutionalism, based on the “logic of appropriateness,” deals with the process of “norm socialization,” in which domestic elites and populations at large

\textsuperscript{55} F. Schimmelfennig, Europeanization beyond Europe, cit.: 6.
\textsuperscript{57} See in particular U. Sedelmeier, Europeanization in New Member and Candidate States, cit.
\textsuperscript{58} F. Schimmelfenning and U. Sedelmeier (eds), The Europeanization of Central and Eastern Europe, cit.: 9.
\textsuperscript{60} I borrow this phrase from D. Kochenov, op. cit.;
internalize EU norms which they regard as legitimate. Following from the “logic of appropriateness” rule, transfer can be effective only if domestic elites and populations “identify” with the EU and are thus open to “norm socialization” through persuasion and norm internalization.

7. Models and Mechanisms of EU Impact in Candidate States

In this section we will outline models and mechanisms that are at the disposal of the EU during the process of Europeanization in candidate countries. For the purposes of this review we use the term ‘mechanism’ to indicate potential means of influence without pre-judging the impact each of them had in practice.

Our model typology is created in accordance to the previously elaborated dichotomy of institutional logics: the ‘logic of consequences,’ which assumes actors choose the behavioral option that maximizes their utility under the circumstances, and the ‘logic of appropriateness,’ which provides that actors choose the behavior that is appropriate according to their social role in a given situation.62 According to the former, Europeanization can be driven by the EU through sanctions and rewards (“carrot and stick”) that influence the “cost-benefit calculations” of the candidate country. The impact of these “external incentives” increases with the size of the benefits, of which EU membership is the largest, and the clarity and credibility of EU conditions. The latter, however, suggest that the EU may induce behavioral change in candidate countries by “social learning,” in cases where domestic elites consider the change legitimate. Finally, Schimmelfenning introduces an additional, third model, according to which “states turn to the EU” as a consequence of “dissatisfaction with the domestic status quo.”63 Under this ‘lesson-drawing model,’ candidate countries adopt EU norms either based on the institutional logic of consequences or the logic of appropriateness.

Apparently all of the aforementioned models of Europeanization tend to overlap and thereby direct our attention towards conditionality and socialization as the two fundamental mechanisms of EU impact that are compared in most of the expert lite-

62 F. Schimmelfennig, Europeanization beyond Europe, cit.
63 Ibidem: 7.
Alternatively, Grabbe’s fivefold mechanism systematization is often applied to (1) models, (2) aid and technical assistance, (3) benchmarking and monitoring, (4) advice and twinning, and (5) gate keeping. However, as we shall describe, these are also subsumed under the conditionality – socialization typology.

**Conditionality**

The predominant mechanism for the Europeanization of candidate countries is conditionality. The EU’s main activities within this mechanism consist of “setting conditions for membership, monitoring candidates’ progress in compliance, and granting or withholding the reward accordingly.” EU conditionality mainly follows a strategy of reinforcement by reward, which means that the EU pays the reward to governments that comply with their demands, and alternatively withholds the reward from those that do not. The most powerful conditionality tool with any candidate country is ‘gate keeping’ during the different phases of the EU accession process – particularly achieving candidate status and starting negotiations. In this regard, the EU has developed the whole system of the accession process in forms of structural advancement in negotiations based on meeting specific political and economic conditions. Here is a rough progression of stages in the accession process which the SEE states are meeting today:

- Privileged trade access and additional aid;
- Signing and implementing of the Stabilization and Association Agreements (enhanced form of association agreement);
- Granting of candidate status;
- Opening of accession negotiations;
- Opening and closing of 35 chapters;
- Signing of the accession treaty;

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65 H. Grabbe, The EU’s Transformative Power: Europeanization through Conditionality in Central and Eastern Europe, cit.

- Ratification of the accession treaty by national parliaments and the European Parliament;
- Accessing to the EU as a full member.

Clearly membership is the biggest reward the EU has to offer to the candidate countries, albeit an often distant reward on a rocky road toward accession. This is why the use of intermediary rewards is unusually important as part of the conditionality mechanism. Some examples of intermediary rewards include offers of market access, enhanced financial aid, progress to the next accession phase, or the banning of the visa regime with the candidate country on the condition that they meet the EU’s demands.

Since the conditionality is part of the cost–benefit calculations, it is necessary to account for the dependant variables which might gain more strategic weight for the target government than the membership reward. We differentiate factors that influence the effectiveness of conditionality between those related to the EU and others related to domestic actors in target countries. There are four factors relating to the effectiveness of the conditionality on the side of the EU: (a) the determinacy of the conditions, (b) the size and speed of rewards, (c) the credibility of threats and promises, and (d) the size of adoption costs. Schimmelfenning and Sedelmeier used these four factors to derive an hypothesis about the effectiveness of the rule transfer in conditionality.67

A number of studies consider the clarity and credibility of EU demands as an important factor increasing the likelihood of effectiveness.68 By clarity is understood the idea that the candidates need to know precisely what they are expected to do if they decide to comply with the EU conditions. Particular traps for uncertainty may be found in the ever-growing body of EU law, or absence of single EU model in many policy areas. The credibility of the EU promise is twofold: namely the candidates must be assured that they will receive promised rewards after complying with the EU demands, but at the same time they need to know that they will be rewarded only after complying with those demands. Thus, “credibility depends on a consistent, merit-based application of

conditionality by the EU." The credibility of conditionality is also linked to the ability of the EU to monitor the rule adoption process, which is why the EU has in recent years made serious investments in its monitoring capacity. Finally, Levitsky and Way (2006) suggest that the asymmetrical bargaining power and sizeable incentives need to be firmly linked with another strong international power (Western Europe and the United States), and civil society (NGO, media) in the candidate country in order for conditionality to be effective.70

Additionally, rationalist institutionalists specify a number of dependant variable factors on the domestic level that influence the EU’s conditionality impact. Based on the argument that the EU’s influence works through empowering domestic actors that benefit from EU legislation, Levitsky and Way suggest that the EU’s influence would be enhanced by support of domestic allies in the candidate countries.71 Furthermore, Levitsky and Way argue that the adjustment costs for target governments must not be too high. Some examples for the latter argument are the EU’s demand for the civilian control over the military in Turkey, or EU demands of Serbia regarding the Kosovo’s independence. Should Turkish or Serbian governments calculate that the adaptation cost of complying with the EU demands in these examples is greater than the benefit of the EU reward, it is likely that Europeanization will fail or at best suffer a significant setback. Given that the EU norms need to be socialized by the domestic government, it is self-evident that the effectiveness of the conditionality depends on the preferences of the government and those of potential ‘veto elites.’ Schimmelfennig and Sedelmeier have constructed the adoption cost hypothesis so that “the likelihood of rule adoption decreases with the number of veto players incurring net adoption costs (opportunity costs, welfare and power losses) from compliance.”72 This means that the low number of veto players is a key facilitating factor. The number of actors opposed to the EU’s conditions is likely to increase in matters that are connected to strong institutional legacies.73 Finally, the likelihood of compliance to the EU demands does not only depend on adjustment costs, but may sometimes be lessened by the low density of administrative capacities in target country.74

69 U. Sedelmeier, Europeanization in new member and candidate states, cit.
71 Ivi.
73 J. Hughes, G. Sasse and C. Gordon, op. cit.
Socialization

Constructivism or sociological institutionalism suggests, as mentioned earlier, ‘soft’ mechanisms for the EU’s domestic impact — socialization and persuasion. These are direct mechanisms of Europeanization based on the logic of appropriateness. According to this logic, candidate countries are motivated by ‘internalized identities, values, and norms [so that] among alternative courses of action they choose the (most) appropriate or legitimate one.’\(^\text{75}\) Rather than directly manipulating or indirectly affecting the cost-benefit calculations of the candidate countries, the EU teaches them the principles and rules of EU governance. Europeanization in this case works when the domestic actors are convinced of the legitimacy and appropriateness of EU demands. Sedelmeier identified a number of facilitating factors that increase the likelihood that socialization and persuasion will be effective. Since the candidate country does not take part in setting the conditions and making the rules, but is rather asked for unilateral adjustment, Sedelmeier argues that EU “legitimacy [would be] increased if it used soft tactics rather than overt pressure, and with a ‘low density of EU demands,’ which allows domestic actors to engage in relatively unpressured learning.”\(^\text{76}\) Furthermore, EU demands are more likely to be perceived as legitimate if they are part of the Acquis Communautaire, and if they are not more burdensome than for the existing member states.\(^\text{77}\) Finally, rule adoption will be facilitated in the case of resonance between traditional domestic rules and EU norms.

The Lesson-drawing Model

Despite the fact that Schimmelfennig rightly observes that other models of EU impact are best seen as varieties that work “more indirectly and/or transnationally” than conditionality and socialization, this study considers it useful to provide analysis of the lesson-drawing model.\(^\text{78}\) The distinctiveness of this model lies in the fact that it works without EU incentives or persuasion. Namely, based on dissatisfaction with the domestic status quo, policy-makers in the candidate country review existing rules and/or policies in the EU and operationalize their transferability in the domestic context. During the CEEC accession process, candidate countries often engaged in anticipatory adjustment to EU policies, thus adopting norms and practices before they were conditioned to do so. In the first years of post-

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\(^{75}\) F. Schimmelfennig and U. Sedelmeier (eds), The Europeanization of Central and Eastern Europe, cit.

\(^{76}\) U. Sedelmeier, Europeanization in new member and candidate states, cit.


\(^{78}\) F. Schimmelfennig, Europeanization beyond Europe, cit.
communist transition, CEEC governments frequently made reference to EU economic models and regulatory policies even before EU required conformity. In the later phase of accession, following the 11 September terrorist attacks in New York and Washington, several leading accession candidates adopted plans for closer cooperation with EU police and intelligence services that went beyond official accession requirements. Whether a state draws lessons from EU rules depend on rule transferability and the number of veto players.

8. What role for Legacies

The Europeanization of CEEC is beyond doubt one of the success stories of EU foreign policy. However, political developments in SEE over the past years raise serious concerns about the effectiveness of the EU’s mechanisms of influence, and particularly the use of conditionality in the present wave of enlargement. The main argument employed by Freyburg and Richter (2010) is that in countries characterized by legacies of ethnic conflict, incentive-based instruments only trigger democratic change if national identity does not run counter to EU requirements; otherwise they will “‘block’ compliance by framing it as inappropriate action.”

This is why it comes as a surprise that the Europeanization literature has devoted very limited attention to the role of historical legacies during the process of EU integration. This neglect comes as a greater surprise bearing in mind that the transition literature discussed earlier had already established legacies as seminal for the explanation of post-communist transformation.

First, this study will conceptualize legacies in the field of post-communist and transitional studies. At the broadest level, legacies can be defined as “inherited aspects of the past relevant to the present.” Nevertheless, which of the number of legacies exactly might be connected to the outcome of the process of Europeanization remains the subject of individual country empirical analysis, and as such, is beyond the scope of this review.

Among the scarce literature dealing with the problem of legacies, we have identified Freyburg and Richter, who argue that “national identity” plays a crucial role as a “filter
by sorting out whether governmental action is to be based on cost-benefit calculations [...] or in accordance with socially constructed and accepted identities, rules and practices.”\(^83\) The main hypothesis employed in their study suggests that explanations of non-compliance with membership criteria focusing on political adaptation cost are “shortsighted” and need to be complemented by “national identity as a prior causal factor;”\(^84\) The authors empirically demonstrate their argument by taking the example of media reform and prosecution of war crimes in Croatia, for which they have established strong links to the national identity. At the end they are able to confirm that when a state’s national identity contradicts conditional external incentives, the state will not comply with such conditions, or will do so inconsistently and sluggishly.

Alternatively, Cirtautas and Schimmelfennig analyze the influence of historical legacies of the accession countries and the relationship between East and West on the Europeanization process.\(^85\) This study does not rule out the significance of external factors, be they conditionality or socialization, but it does substantiate the importance of addressing legacy-based domestic conditions. Pop Eleches concludes “that historical legacies need to be taken seriously not only because of their own intrinsic importance in post-communist democratization but also because our understanding of alternative explanations has to be embedded in the complicated reality of the region’s intertwined historical legacies.”\(^86\) While it remains difficult to accurately predict which legacies matter most, it can be concluded that “fundamental cultural predispositions play an important role in democratization and, possibly, shape the relationship between [candidate] countries and the EU as well.”\(^87\)

Finally, the lack of absorption capacity on the side of domestic administration also needs to be addressed from the historical legacies perspectives. Namely, administrative and technical capacities, budgetary constraints, and levels of societal mobilization in interplay with unfavorable historic legacies can influence compliance with EU demands. Moreover, legacies constitute obstacles in compliance even in cases where the candidate countries remain dedicated to socializing EU norms.

84 Ibidem: 264.
85 A. M. Cirtautas and F. Schimmelfennig, Europeanization Before and After Accession: Conditionality, Legacies and Compliance, cit.
87 F. Schimmelfennig and H. Scholtz, Legacies and Leverage: EU Political Conditionality and Democracy Promotion in Historical Perspective, cit: 457.
Hence the EU’s impact depends on the ‘resonance’ between EU demands and domestic rules. Previous research with regard to CEECs has already established the strong legacy of communist rule, in particular in the administrative sphere and the high adjustment costs, so that the domestic cultural understanding and informal institutions are key mediating factors in determining whether domestic actors engage in a social learning process in which EU rules (might) redefine their interests and identities.\textsuperscript{88} This is also highlighted by recent explorative research on the ex-Yugoslav republics. Based on a literature review of domestic sources, Džihić/Segert hypothesize that the problems of “enclave democracies” or “electoral authoritarinanism” in some of the ex-Yugoslav republics remain persistent, not only as a result of ongoing ethno-nationalist mobilization of the population through interwoven economic and political elites interested in the preservation of political power for their private economic interests, but also because of the (wrong) perception that external support is the key for overcoming the “frozen democratic consolidation” in those countries.\textsuperscript{89} They argue that both actors, EU institutions and domestic elites, and also populations are trapped in “unrealistic expectations, hegemonial interests, wrong perceptions and mimicry on both sides.”\textsuperscript{90} In conclusion, they require of future research on ‘Europeanization’ in the WBCs that it take the “cardinal problem” –that external support for democracy and rule of law promotion is not seen as “politically neutral” by either elites or the population at large—into account, so that Europeanization might result “cultural alienation” instead of internalization of “European values.”\textsuperscript{91}

To conclude the discussion of the role of legacies, it can be said that they “do matter but in a variety of complex ways that do not lend themselves to a single, dominant explanatory formula.”\textsuperscript{92} Although Schimmelfennig and Scholtz conclude that “with the proper precautions, such as later accession dates and the use of proper safeguard clauses and post-accession monitoring, the EU can adjust to weaker legacies in aspiring

\textsuperscript{90} Ivi.
\textsuperscript{91} Ivi.
\textsuperscript{92} A. M. Cirtautas and F. Schimmelfennig, Europeanization Before and After Accession: Conditionality, Legacies and Compliance, cit.: 439.
member states,” the EU does not have a functional mechanism under which EU conditionality can be genuinely effective in the case of “legacies as deep conditions.” As one of the potential solutions for this particular problem, it is worth mentioning the concept of ‘invention of tradition,’ first developed by Hobsbawm and Ranger in 1983 in their historic-anthropological analysis of the attempts by the nineteenth century Welsh, Scottish and African radical movements to develop counter-traditions to the origins of imperial rituals. Based on the positive example of Slovenian political elites that have constructed national identity compatible with EU membership, Cirtautas and Schimmelfennig suggest that “political actors can construct ‘usable’ pasts deployable for various purposes, including legitimating or challenging the ‘return to Europe.’”

9. Empirical Findings: EU Impact on Candidate Countries

Before proceeding to the empirical findings related to Europeanization by rule of law, this study will attempt to provide conclusions from the empirical analysis of the strain of literature dedicated to general Europeanization in the process of accession. The mushrooming literature on the Europeanization of EU candidate countries confirms that conditionality has indeed played a significant role in the EU integration process, as it has successfully induced top-down pressure on candidates. Second, empirical findings show that although the Acquis Communautaire is at the core of Europeanization in candidate countries, the “goals and contents of Europeanization are of a more general character.” This particularly relates to the core goals of Europeanization, such as stability, security, democratization, rule of law etc. Third, other instruments for promoting EU norms, such as socialization of domestic elites and persuasion, do not appear to have been “consistent and effective substitutes for political accession conditionality, even if they are described as unique EU strategies.” Fourth, the literature confirms that only the credible prospect of membership appears to be a valid incentive for Europeanizing impact in candidate

93 F. Schimmelfennig and H. Scholtz, Legacies and Leverage: EU Political Conditionality and Democracy Promotion in Historical Perspective, cit.: 477.
94 A. M. Cirtautas and F. Schimmelfennig, Europeanization Before and After Accession: Conditionality, Legacies and Compliance, cit.: 431.
96 A. M. Cirtautas and F. Schimmelfennig, Europeanization Before and After Accession: Conditionality, Legacies and Compliance, cit.: 431.
97 F. Schimmelfennig, Europeanization beyond Europe, cit.: 22.
countries. Finally, the Europeanization literature concludes that the “EU’s impact is differential across countries and issues”\textsuperscript{98} and therefore is unable to provide all-out recommendations for the use of Europeanization in future waves of enlargement.

In the light of their findings, academics openly debate about the future perspectives of Europeanization after membership. Namely, once the candidates have joined the EU, they have already received the benefits of membership, and can no longer be induced to comply with EU norms with conditional incentives. The main concern is that EU norms formally transposed into national legislation will not be fully or reliably implemented.\textsuperscript{99} However, the absence of conditionality need not necessarily result in the stagnation of norm socialization processes. In the area of Acquis new member states are subjected to the same non-compliance (infringement) procedures as the old member states, or even private litigation in national courts. Also Article 7 of the TEU gives the EU the power to sanction and even exclude countries that violate its fundamental democratic values. However, at this phase of the Europeanization process, academics find it too early to analyze the implementation of EU norms, and instead focus on the formal, legislative and institutional adoption of the EU rules.\textsuperscript{100}

\textit{Empirical Findings on Europeanization by Rule of Law}

Just over two decades ago, following the fall of the Berlin Wall, it seemed that the Western ideals of freedom, democracy and individual rights would spread unperturbedly throughout the world, thus leading to “the end of history.”\textsuperscript{101} Nevertheless, an array of nationalist, ethnic, religious, and political conflict, economic crisis, terrorism and war soon dissolved the triumphalist confidence of the 1990s.\textsuperscript{102} New global conflict lines emerged and deepened the prior overarching confrontation between communist countries and the West. Amidst the new uncertainties caused by the differences between North and South or East and West, between Islamic and Christian countries, between liberal and non-liberal communities, between the dominance of global corporations and

\textsuperscript{98} U. Sedelmeier, Europeanization in new member and candidate states, cit.: 11
\textsuperscript{99} R. H. Linden, P. Cernoch, R. W. Clark and A. Freyberg-Inan (eds), op. cit.; F. Schimmelfenning and U. Sedelmeier (eds), The Europeanization of Central and Eastern Europe, cit.; D. Kochenov, op. cit.; H. Grabbe, The EU’s Transformative Power: Europeanization through Conditionality in Central and Eastern Europe, cit.
\textsuperscript{100} F. Schimmelfenning and U. Sedelmeier (eds), The Europeanization of Central and Eastern Europe, cit.
third world countries, and other global conflicts, there is widespread agreement on “one point alone: that the rule of law is good for everyone.”

Following these global trends, and based on the need to transform post-communist CEEC, since the 2004 enlargement compliance with the fundamental liberal democratic rules of the EU has been the formal precondition for entering into accession negotiations with the EU, while “the negotiations [have been] mainly a process of rule transfer.” Democratic conditionality has led to the process of transition of the CEECs, where there are a couple of main conclusions arising from the academics’ findings. First, if domestic adoption costs were moderate for governments, a credible promise of membership was incentive enough to engage in norm socialization processes. A clear illustration of this conclusion is how Turkey’s entrenched political institutions began to change rather quickly once the prospect of membership became credible. Second, EU norms and policies are generally transferred in a top-down mode to the external states. In their relations with candidate countries the EU mainly relies on intergovernmental bargaining, while privileging central governments and charging them with implementing EU norms.

Democratic consolidation is intimately linked with the effectiveness of the rule of law. But, at the same time, the concepts of democracy and rule of law are not identical, as can be seen from the different historic developments in the English common law tradition, on the one hand, and continental European civil law traditions, on the other. However, as Kochenov describes for the Eastern enlargement process, “the structure and substance of the Copenhagen-related documents does not make any distinction between the assessment of democracy and the Rule of Law. In the course of the pre-accession, the Commission opted for fusing their assessment,” with the effect that it gained political maneuvering space for more specific policy prescriptions in the process. Moreover, rule of law as a constitutional principle and institutional mechanism in legal textbook descriptions is quite different from practical requirements with regard to the conceptualization and operationalization of benchmarks for monitoring processes in the

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103 Ivi.
104 F. Schimmelfenning and U. Sedelmeier (eds), The Europeanization of Central and Eastern Europe, cit.: 221.
105 Ibidem.
106 H. Grabbe, The EU’s Transformative Power: Europeanization through Conditionality in Central and Eastern Europe, cit.
108 D. Kochenov, op. cit.: 46.
SAP, as can be seen from applied research. Namely, the SAP stresses the importance of strengthening the rule of law, and in particular the judiciary reform for overall progress in the SAP.

Rule of law and judicial sector reform as important element of the ‘Europeanization’ process are again highlighted by recent reports on negotiations for the accession of the Republic of Croatia to the EU. As Turkalj argues, chapter 23 on “Judiciary and Fundamental Rights” is considered “crucial for the outcome of the entire negotiation process,” in particular with regard to “the benchmarks for the opening of Chapter 23 contained in a letter of the Presidency of EU.” However, as can be seen from these documents, “rule of law” and judicial sector reform remain vaguely defined concepts, due to “the lack of a coherent theory of judicial independence, and the difficulty to measure the performance of the judicial system,” as has been observed with regard to the monitoring activities in the Eastern enlargement process.

Bearing in mind the topic of the research project, Europeanization through Rule of Law Implementation in the WB, and the variety of issues included in the Justice and Home Affairs (JHA) policies of the EU, ranging from asylum and border control to the fight against corruption and organized crime, the final part of this review will deal with the effect of EU policies in this sector covered by Chapter 24, but with exclusive focus on empirical findings in the rule of law, and more precisely in the reform of the judiciary.

Sedelmeier distinguishes between three types of Europeanization impact, namely impact on polity, politics, and policies. This study focus on the first dimension of EU influence, which usually scrutinizes the impact on the national executive. While the EU’s impact on democracy and political rights has become “a well-established subfield of research,” research on Europeanization of the judiciary in candidate countries remains rare. Zubek and Goetz assert in their study that the EU had a strong impact on the state institutions of CEEC – executives, legislatures and judiciaries. The impact

111 A. Mungiu-Pippidi, op. cit.
112 U. Sedelmeier, Europeanization in new member and candidate states, cit.
113 Ibidem: 17.
on the judiciary is described as the result of the functional pressures arising from the need to formulate a negotiating position with the EU, rather than from a deliberate attempt by the EU to change its structure. The reform of state institutions requires centralized hierarchical coordination within the target government in order to meet the high requirements of the negotiation process. An interesting observation is made by Dimitrova and Toshkov, who noted far-reaching changes of national executives and judiciaries’ organizational structures during the accession negotiations.\(^\text{115}\) Such changes are in direct connection with the change of governments in the candidate countries. Finally, Piana confirms that EU pressure had an impact on the governance of the court in Poland, the Czech Republic and Hungary.\(^\text{116}\) Nevertheless, due to the absence of a clear institutional model by the EU, the outcomes of the judiciary reform across these countries “reflect the pre-existing distribution of power in the domestic actor constellation.”\(^\text{117}\)

In conclusion, despite the fact that academic scholarship and democratic politics agree on rule of law as a legitimizing principle for the exercise of state authority, there is no uniform “European standard” for institution building or for EU monitoring activities in this area.\(^\text{118}\) Moreover, empirical research investigating the EU’s “transformative power”\(^\text{119}\) with regard to the effectiveness of rule of law and judicial sector reform is only in its infancy,\(^\text{120}\) while for the SEE there is no research available, so that comprehensive, comparative and interdisciplinary research with a strong focus on rule of law is still missing.

\(^\text{117}\) U. Sedelmeier, Europeanization in new member and candidate states, cit.: 19.
\(^\text{118}\) D. Kochenov, op. cit.
\(^\text{119}\) H. Grabbe, The EU’s Transformative Power: Europeanization through Conditionality in Central and Eastern Europe, cit.
PART TWO

Democratic Transition, Rule of Law and Europeanization: Limited Progress in Bosnia and Herzegovina

Adnan Kadribašić

1. Introduction

Bosnia and Herzegovina faced a devastating war from 1992-1995. The conflict did not come to an end until the international community stepped in and negotiated the General Framework Agreement for Peace in Bosnia and Herzegovina¹ (also known as the Dayton Agreement).

The Dayton Agreement put one of the main prerogatives of any state—the administration of justice—into the hands of the two entities and one district (the Entities and the Brčko District),² leaving the state institutions without any responsibilities in establishing the judicial system. Today BiH is a state with four quite separate legal systems, and these judiciaries rarely meet at the central level, except for a very few and extraordinary procedural matters. If we also take into consideration that one of the entities was divided into cantons in 1995, there were a total of 13 different judicial systems.

Looking at developments in the 1990s, there is no doubt that from an enlargement perspective Bosnia and Herzegovina can be considered a special case. The conflict in the country has been a test ground for an attempt at a comprehensive approach towards conflict management. Also, in the integration process more focus needed to be placed on state and institution building as a precondition for effective rule of law. It is important to understand the main stages of the involvement of the EU in Bosnia and Herzegovina and how they have strongly influenced the role of EU integrations in the country.

¹ The General Framework Agreement for Peace in Bosnia and Herzegovina.
² The status of Brčko District was not agreed upon in Dayton but in the subsequent arbitration process.
The role of the European Union in the processes of Europeanization of (potential) candidate countries in the enlargement process is evident in the sense that it is difficult to deny the clear impact the EU has had in the process of enlargement and accession on social and political relations in the new EU member states.

The European Union has invested a great deal of effort to establish itself as an international actor and not just as an economic union, primarily through foreign policy emphasizing the importance of democratization, human rights and the rule of law. One of the most important instruments used by the EU to promote these values is conditionality.

Europeanization forms an integral part of the strategy of expansion and is a powerful instrument that can influence reforms and changes in countries striving toward integration. At the same time, EU conditionality is also an instrument with limited effect on democratization and Europeanization.

In this context, this chapter focuses on conditionality as one of the dominant and most developed approach of the European Union and tries to analyse which reforms in the area of rule of law have been made as a result of this instrument. The chapter will study whether the EU institutions had influence, and of what kind, on implementation of the rule of law in Bosnia and Herzegovina. From this basic analytical framework, a subset of more concrete research questions follows: what are the EU requirements developed in the monitoring process? Which organizational-institutional reforms have been made? Which gate-keeper elites resisted these reforms? Who (critical civil society actors) supported these reforms? What have the effects been and how have they changed over the last decade with regard to benchmarks of independence, responsibility, efficiency, and effectiveness?

In an attempt to answer all of these questions, this study will be divided into four parts. This first part will briefly analyze the theoretical context of EU conditionality in the area of rule of law. The second part will analyze the specific context in Bosnia and Herzegovina and the different approaches the EU had to adapt to this context through condition setting. In the third part, this study will look at the overall reform process and the current situation, and will be based on legislative analysis complemented with the results of semi-structured dialogues. The fourth and concluding part will focus on the main lessons learned and will try to make some recommendations for future EU conditionality in Bosnia and Herzegovina.
2. EU Integrations Context

Based on the conclusions of the 2003 Thessaloniki European Council meeting, all the WB countries have received a reaffirmed prospect of EU membership once they fulfill the necessary conditions. The EU incentives formed the basis of a strong conditionality policy which the EU used to press for democratic reforms and to monitor compliance with its core political values.3

One could define EU enlargement conditionality as an exchange between the EU and a candidate country in which the EU offers the candidate a (realistic) prospect of EU membership, if the candidate implements a wide range of (EU-driven) domestic reforms. The so called carrot and stick approach of conditionality involves the withdrawal of the benefits of accession and halting or slowing down the process, if candidate states’ governments fail to progress with reforms.4 As Schimmelfennig and Sedelmeier argue, “the dominant logic underpinning EU conditionality is a bargaining strategy of reinforcement by reward, under which the EU provides external incentives for a target government to comply with its conditions.”5

The issue of conditions in each of the phases is addressed by the Union through a combination of political, economic, legal, administrative, and institutional criteria, while additional criteria can be set in respect to individual (potential) candidate countries.6 When setting up the criteria to be met at the very beginning of their integration process in 1997, the General Affairs Council laid down the criteria that the European Commission must use when examining the level of compliance.7

EU conditionality in Bosnia and Herzegovina is a comprehensive process of institution building and creation of a democratic and stable “political community” as part of the post-war reconstruction. In the case of Europeanization in Bosnia and Herzegovina, the

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6 For research in regard to the conditionality in respect of the Western Balkans countries, see more in S. Blockmans. 2008. Tough Love: The European Union’s Relations with the Western Balkans (The Hague: TMC Asser Press).

7 General Affairs Council. 29 April 1997. Conclusions on the principle of conditionality governing the development of the European Union’s relations with certain countries of South-East Europe (Bull: EU 4-1997: points 1.4.67 and 2.2.1).
EU capitalises on its authoritative/asymmetrical position vis-à-vis the WB states, who are eager to become part of, or closely affiliated with, the EU. In theory, the prospect of European integration provides a long-term and coherent perspective, encourages domestic ownership and institutional development, supports stability and regional cooperation, and softens nationalist identities.

So far, the EU has established several strategic tools through which it attempts to press the process of institutional adjustment to EU standards and values.

Overall, EU conditionality in Bosnia is established by the following tools:

1. the general Copenhagen criteria –political, economic and Acquis-related– applied to all candidate and potential candidate countries;
2. the 1997 Regional Approach and the 1999 SAP;
3. country-specific conditions to be met before entering the SAA negotiation phase and conditions arising out of the SAAs and the CARDS framework;
4. conditions related to individual projects and the granting of aid, grants or loans;
5. conditions that arise out of the Dayton peace agreement.

3. Approach to Europeanization in the Area of Rule of Law in Bosnia and Herzegovina

Looking at the recent history of Bosnia and Herzegovina and the turbulent changes that took place, the European Union had to develop a tailor-made Europeanization by rule of law approach. The judiciary had to go through a structural reset due to the situation immediately after the conflict. In this process, the EU wasn’t the only driving force behind these changes, and other organizations (OHR, OSCE and Council of Europe, just to mention a few) also participated in the externalization of the reform processes in the country. For these two reasons it is quite difficult to differentiate which reforms in the field of rule of law are direct outcomes of the conditions set in the SAP, which were

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9 Ibidem.
necessities of the post-conflict reconstruction or which were influenced (and/or imposed) by other external actors. Therefore, I will concentrate only on the conditionality that the EU has been using in the area of justice and home affairs, and I will explain the interplay that the other organizations have had in this process.

BiH’s first step in the monitoring process came in early 2000, when work began on a “Road Map” in 18 priority reform steps. The first conditions set in the Road Map regarding the rule of law could hardly be considered to be benchmarks for judicial independence in the monitoring process, primarily since they spoke of values and not goals. Preliminary conditions focusing mostly on the most pressing issues at that point were set and considered mostly the process for establishing new rule of law mechanisms11 and those which considered allocation of “sufficient funding for the Constitutional Court of BiH.” The Road Map was “substantially completed” in September 2002, and at that stage the Commission initiated work on the Feasibility Study. In March 2003 a questionnaire covering all sectors relevant to a future SAA was given to the BiH Directorate for European Integration.

When the European Commission approved a “Feasibility Study assessing the readiness of Bosnia and Herzegovina”12 as a step forward to opening negotiations for a Stabilization and Association Agreement, the first tangible rule of law conditions were set.

Conditions set in this Study considered the building of the rule of law by setting conditions in the field of independence of the judiciary, i.e. by adopting legislation establishing a single High Judicial and Prosecutorial Council (HJPC), and effectiveness seen in providing appropriate staff and funding for the State Court.

The 2004 European Partnership with Bosnia and Herzegovina13 reaffirmed the condition concerning the establishment of the HJPC and asked for appropriate staff and funding for the State Court as short-term conditions, and the functioning of these institutions as medium-term priorities. Its short-term priorities coincide to a large extent with those identified in the 2003 Feasibility Study. In May 2005, Bosnia and Herzegovina adopted an action plan addressing the European Partnership priorities.

The 2005 Progress Report started to pay attention to more substantive rule of law indicators. It looked at the reselection process of judges and prosecutors, the indepen-

11 “[...] implement law on State Border Service; approve and implement laws on judicial and prosecutorial service in the Federation and law on court and judicial service in the RS.” Steps to be taken by Bosnia and Herzegovina to Prepare for a Launch of a Feasibility Study, March 2000.
12 The study concludes that negotiations should start once BiH has made progress on sixteen key priorities, Feasibility Study assessing the readiness of Bosnia and Herzegovina, European Commission, 2003.
dence of the judiciary and the establishment of the HJPC. It also looked at other indicators of independence, such as the salaries of the judges, the establishment of the training centres and the budgetary process. As for efficiency and effectiveness, the Report looked at the infrastructure and equipment of the courts and the backlog of cases.

Ever since 2005, these indicators of rule of law have been repeated in subsequent Progress Reports in the pre-SAA period. That is why we could consider the 2005 Progress Report as a baseline report as all other reports have focused on progress made or regressions since then.

A more strategic approach to justice was adopted when the Strategy for Development of the Justice Sector was enacted. The 2008 European Partnership with Bosnia and Herzegovina\(^\text{14}\) noted again the issue of the backlog of cases, but also recognized the adoption of the Strategy for development of the judicial sector as a short-term priority and its implementation as the medium-term priority.

With the signing of the Stabilization and Association Agreement\(^\text{15}\) on 16 June 2008, the EU and Bosnia and Herzegovina entered a new phase of negotiations. The 2008 Progress Report\(^\text{16}\) noted positive changes and progress in improving the judicial system. It welcomed the adoption of the “National Strategy for Development of the Justice Sector,”\(^\text{17}\) which aims to further strengthen the independence, accountability, efficiency, professionalism and harmonization of the judicial system. However, looking at the next three Progress Reports (2009, 2010 and 2011), the positive momentum seemed to be lost. Limited progress on judicial reform has continued to be reported.

A stronger initiative in the field of rule of law was established with the newly established mechanism of the European Commission called the “Structured Dialogue on Justice.” The Structured Dialogue for Bosnia and Herzegovina was launched by Commissioner Fuele in June 2011. The Structured Dialogue aims to assist Bosnia and Herzegovina in the consolidation of the rule of law and the establishment of an independent, effective, impartial and accountable judicial system across the whole coun-

\(^{14}\) 2008/211/EC: Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC.


\(^{17}\) National Strategy for Development of the Justice Sector in BiH for 2008-2012.
try. The Structured Dialogue was also a response to yet another referendum threat made by the Prime minister of Republika Srpska. This was announced on the eve on discussions about whether or not the foreign judges and prosecutors’ mandates should be extended.

The Structured Dialogue is a newly-established mechanism, and BiH is the first enlargement country to benefit from the new methodology. The idea for the Dialogue stemmed from the commitment of the European Commission to advance structured relations on the rule of law with potential candidates, even prior to the entry into force of the Stabilisation and Association Agreement. The EU-BiH Structured Dialogue on Justice is carried out in the framework of the Stabilisation and Association Process. This mechanism could be considered to be a “demining exercise” which aims to prepare the country for negotiations after the SAA has been signed. It is designed to overcome the stalemate in the stabilization and association process.

The Head of the Delegation of the European Union to Bosnia and Herzegovina/EU Special Representative Ambassador Peter Sorensen presented the new mechanism as “a double opportunity for Bosnia and Herzegovina.” It is one of the mechanisms for the revision of legislation and functioning of the institutions in the Enlargement countries. A full list of indicators in the field of the independence, impartiality, professionalism and efficiency of the judiciary was asked for in a set of technical questions made by the EC. Quite direct recommendations were made to Bosnia and Herzegovina in three sets of preliminary recommendations from the European Commission. It would be good also to consider the state of this dialogue today, i.e. what has been achieved since 2011 in practice.

Finally, we can divide the Europeanization process in BiH into three different parts when it comes to the necessary judicial reforms: the post-conflict humanitarian efforts, the pre-Europeanization and the Limited Europeanization. These three periods offer insight into the different conditions and progress made toward them, and can be broken down into the table below.

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Table 3.1

<table>
<thead>
<tr>
<th>No.</th>
<th>Period</th>
<th>Name of the stage</th>
<th>Main events and conditions</th>
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<tbody>
<tr>
<td>1.</td>
<td>1991-2000</td>
<td>Post-war Stabilisation</td>
<td>ROAD MAP FOR BOSNIA AND HERZEGOVINA</td>
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<td>• Allocate sufficient funding for the Constitutional Court of BiH</td>
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<td>• Approve and implement laws on judicial and prosecutorial service in the Federation and law on court</td>
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<td>and judicial service in the RS</td>
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<tr>
<td>2.</td>
<td>2001-2004</td>
<td>Enlargement perspective</td>
<td>FEASIBILITY STUDY ASSESSING BIH’S CAPACITY TO IMPLEMENT A FUTURE SAA</td>
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<td></td>
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<td>• Making the judiciary more effective by adopting legislation establishing a single High Judicial and Prosecutorial Council.</td>
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<td>• Providing appropriate staff and funding for the State Court</td>
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<td>• Training for judicial and prosecutorial staff throughout BiH</td>
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<td>3.</td>
<td>2005-2008</td>
<td>Pre-SAA period</td>
<td>SAA NEGOTIATIONS BETWEEN THE EU AND BIH ARE OFFICIALLY LAUNCHED</td>
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<td></td>
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<td>• High Judicial and Prosecutorial Council needs to properly function</td>
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<td>• Progress in dealing with the backlog of cases before the courts</td>
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<td>• Address the fragmentation of the judicial system</td>
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<td>• Adopt strategy for development of the judicial sector</td>
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<td>4.</td>
<td>2009-2011</td>
<td>SAA period</td>
<td>STABILISATION AND ASSOCIATION AGREEMENT WITH BOSNIA AND HERZEGOVINA IS SIGNED</td>
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<td></td>
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<td>• Limited Progress Reported on the Strategy for development of the judicial sector</td>
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<td>5.</td>
<td>2011 -</td>
<td>Structured dialogue and High Level Meetings</td>
<td>STRUCTURED DIALOGUE ON JUSTICE INITIATED</td>
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<td></td>
<td>• A constructive attitude to the need for a comprehensive reform of the judiciary</td>
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<td></td>
<td>• Concrete conditions in the area of Rule of Law</td>
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4. The Justice Sector Reform Strategy: Progress and Stagnation

The evidence for the export of EU rule of law norms could be divided in two parts: the pre-SAA period and the post-SAA period. This differentiation is necessary because there was one significant change that has influenced the approach to Europeanization. Namely, the adoption of the Justice Sector Reform Strategy (JSRS) was seen as one of the benchmarks that have significantly influenced the approach of the EU toward the assessment of the rule of law in Bosnia and Herzegovina. The Strategy has developed activities in all rule of law segments and the EU has decided to focus its monitoring and also support toward the implementation of the Strategy. One of the two most significant examples of the pre-Strategy developments in the area of the rule of law was the establishment of the HJPC and the Court of BiH. The establishment of both institutions was a requirement in the Functional Review and in the 2004 Progress Report.19

The 2005 Progress Report welcomed the establishment of the HJPC and concluded that “initial problems related to the funding of the HJPC and the State-level courts have been solved,”20 and the 2006 Progress Report even concluded that the “State Court, the Prosecutor’s Office and the High Judicial and Prosecutorial Council have performed their duties well.”21

JSRS was seen as one of the most significant successes in the area of rule of law conditioned by the EU. Before the adoption of the Strategy, many were sceptical that the development of a national justice sector strategy was possible – at least one that was agreed upon by all of the members of the fragmented judiciary. The Minister of Justice of BiH declared that the “development of the Justice Sector Reform Strategy was the critical step in bringing the BiH justice sector institutions together for the first time” and that “the strategy also helps BiH move closer to EU accession.”22 It is difficult to assess how much EU conditionality has influenced the main stakeholders to adopt this strategy, but the adoption was seen as one of the last remaining conditions for the signing of the SAA. Following the adoption of the Strategy on June 16 2008, the Stabilization and Association Agreement and the Interim Agreement on trade and trade-related issues were signed.

22 Mr. Barisa Colak, Minister of Justice of BiH at the occasion of the adoption of the Strategy.
The overall objective of the JSRS is to create a joint framework of reform for justice sector institutions in BiH that sets out agreed priorities for the future development of the sector as a whole, as well as realistic actions for reform. The JSRS sets out priorities for reform for the five year period, 2008 – 2012. The strategy identifies the vision for the justice sector:

An efficient, effective and coordinated justice system in BiH that is accountable to all BiH citizens and is fully aligned with EU standards and best practices, guaranteeing the rule of quotation.23

It also identifies five key areas, or pillars, of reform:

• Judicial system;
• Execution of criminal sanctions;
• Access to justice;
• Support to the economic sector;
• Coordinated, well managed and accountable sector.

After the adoption of the Declaration on the establishment of the Conference of Ministers of Justice BiH, the President of the HJPC and the President of Judicial Commission of BD established the instrument planned with the “Strategy for Monitoring and Evaluation of its Action Plan.” The Declaration established the Ministerial Conference, which ensures coordinated monitoring of the most important reform activities, which are of common interest for the justice sector, and harmonized resolution of those questions, as well as exchange of experiences and better utilization of domestic and other potentials. This was seen to be a necessary body in such a fragmented judicial system.

All further EU efforts in the area of the rule of law have been based on supporting the implementation of the Strategy, and this implementation was seen as one of the main indicators of the progress made in the area of rule of law. The 2008 Progress Report24 welcomed the adoption of the Strategy and recognised that it aims to further strengthen the independence, accountability, efficiency, professionalism and harmonisation of the judicial system. However, in the following two years the implementation of the Strategy was evaluated as minimal. It seemed that the political climate necessary to adopt the Strategy had disappeared.

23 Justice Sector Reform Strategy of Bosnia and Herzegovina 2008 - 2012, Ministry Of Justice, Sarajevo, June 2008: 5.
Immediately after the adoption of the Strategy, political elites openly challenged the independence of the judiciary. This criticism was most overt by the Prime Minister of one of the BiH entities, Republika Srpska, following an official investigation conducted by the Prosecutor of BiH against him and a few other highly positioned members of the Republika Srpska government. He suggested that the Court and Prosecutor’s office were biased against the Republika Srpska and were under the influence of the international community in the country. This created a climate in which all members of the Parliamentary Assembly of BiH elected from the territory of Republika Srpska continued to accuse the members of judiciary of ethnic bias, questioning the role of international prosecutors still working in the Prosecutor of BiH. This strongly influenced the implementation of the Strategy and its Action plan for 2009. Only 29.45% of the planned activities had been implemented, and a further 38% partially implemented, by the end of 2011.

The 2009 Progress Report recognised that the fact that the authorities of Republika Srpska have increasingly questioned the legality, jurisdiction and competences of the state-level police and judicial agencies to operate in their territory is a serious cause for concern.

No progress was made in 2010 in 2011, and Progress Reports continued to note “limited progress” and assessed the implementation of the Strategy as minimal. Nevertheless, during 2009 and 2010, the EU continued to support the implementation of the Strategy. The limited progress seemed not to influence the granting of incentives since during these two years IPA funds amounting to 12 million euro were approved for the implementation of the Strategy. A similar amount was approved for projects implemented during 2011. With the launch of the EU Bosnia and Herzegovina Structured Dialogue on Justice, a new momentum seems to have been gained.

Members of the judiciary have been informed about this process and all have expressed their optimism towards this process. The fact that a Judicial Committee for the Structured Dialogue was established was welcomed. The fact that the members of this Committee are prominent judges and prosecutors was seen as a unique opportunity for these professionals to influence further developments in this field. The conclusions made by the Committee in areas already discussed already serves as guidance in practice.

Today we can find a number of signs of the export of EU rule of law standards in Bosnia and Herzegovina. Progress made can be attributed to the conditionality of the EU but also is a part of the interplay with other international organisations in BiH. Still, most of these changes were largely influenced by the rule of law standards that exist in EU member states.

Subsequent sections will explore the progress made in the areas of:

- Independence (High Judicial and Prosecutorial Council: A safeguard of independence);
- Fragmentation (A challenge for legal certainty: Fragmentation of the judicial sector);
- Accountability (Accountability of judges and prosecutors);
- Effectiveness (Effectiveness and efficiency of judges and prosecutors);
- Professionalization (Education of judges and prosecutors).

These chapters will look at the structural challenges, progress made and the socialization of new rule of law standards by the judges and prosecutors.


There is a uniform approach to the guarantees of independence of the judiciary in the legal system of Bosnia and Herzegovina. Although this principle is scattered in different pieces of legislation the independence of the judiciary in BiH today is guaranteed through the institutional independence of the judiciary, ensuring the necessary resources, financial security, and irrevocability and immunity of judges, but also through the independence of each individual judge in making judicial decisions based on facts and in accordance with the law, without any limitations or influence. The individual independence of judges in BiH is manifested through judicial status (the permanence of judicial functions), their autonomy in particular cases, the methods of election to a judicial function, career, etc.

In a forest of legislation regulating the work of the judiciary, the most significant progress was made when the single body specifically created in BiH to consolidate and strengthen the independence of the judiciary is the HJPC started functioning. This body was established in 2004 by an “Agreement on Transfer of Certain Entities’ Responsibilities” signed by the Prime Ministers of the Federation and the Republika Srpska.
and the Minister for Justice of BiH. The corresponding Law on the HJPC was then adopted by the Parliamentary Assembly of BiH pursuant to Article IV 4. a) of the Constitution of BiH. The HJPC today is the institutional safeguard of the independence of the members of judiciary in BiH, and can be considered one of the most successfully implemented EU rule of law standards.

The HJPC has broad powers in relation to the judiciary at all levels of government, including the appointment and disciplining of judges and prosecutors. The relevant law sets out strict eligibility criteria for appointment to the bench, including a detailed application process, detailed disclosure of personal interests, interviews, investigations, etc. Members of the Council generally represent the ethnic structure of the country, with six Bosniacs, five Serbs, three Croats, and one from the group of others, and with five female members. Of the 15 members, two are selected by members of the House of Representatives, of the Parliamentary Assembly of BiH and of the Council of Ministers of BiH; two are selected by the Bar Chambers of the Entities; five or six by prosecutors, and five or six by judges.

All members of the judiciary (judges, prosecutors and expert advisors) are appointed by the HJPC as the sole competent body for the appointment of judges and prosecutors. In a country with such a fragmented judiciary this represents the first time that there has existed a body with the task of ensuring the maintenance of an independent, impartial and professional judiciary, and of ensuring the provision of a professional and efficient court system and prosecutorial service. Before the HJPC was established, the appointment of judges and prosecutors was in the mandate of the legislative and executive bodies, which could then influence the independence of judges and prosecutors.

The vacant positions are published in the three most circulated daily newspapers and in the Official Gazette of Bosnia and Herzegovina. The short listed candidates who fulfil the formal requirements for the announced call undergo an interview, after which the rank list is forwarded to the Council. The decision of the Council is published in the

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28 Agreement on Transfer of Certain Entities’ Responsibilities through Establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Republika Srpska government, the Federation of BiH government and the Council of Ministers of Bosnia and Herzegovina, Sarajevo, March 2004.
29 According to the Preamble of the Constitution of BiH “Bosniacs, Croats, and Serbs, as constituent peoples (along with Others)” make the ethnic structure of the BiH.
30 The quota for all ethnic and gender representation is regulated by Article 4.4. of the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Official Gazette of BiH 25/04 and 93/05.
Official Gazette. If we take into account the fact that only two members of the HJPC are appointed by other branches of government, we can conclude that there is a general independence from political parties achieved in the selection process.

The Law on the HJPC stipulates that the Council will implement relevant constitutional provisions regarding the equal rights and participation of all constituent people and “others” including gender representation. This provision is generally implemented and ethnicity is taken into account when the final decision is made. According to the data available in the Technical information document presented in the Structural dialogue by the Council of Ministers of BiH, the proportions from the 1991 census are fully followed at the state level courts, while at the entities they are generally followed. Women represent over 56.75% of judges and 48.5% of prosecutors, which is in line with the threshold of 40% defined by the Law on Gender Equality in BiH.

Most of the judges and prosecutors interviewed welcome the establishment of the HJPC and its performance over the eight years of its existence. They all have assessed its work positively and they have expressed the view that the HJPC has helped increase the institutional and individual independence of the judiciary. The HJPC is clearly seen as one of the EU standards in the area of rule of law, as its establishment is perceived as a case of successful transposition of EU standards. This was also confirmed in the “Opinion of the Venice Commission,” which concluded that it “is obvious that in practice the HJPC has played an extremely important role in strengthening the independence of the judiciary and in furthering contacts and co-operation among judges and prosecutors.”

32 Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina. Article 43.2. Official Gazette of BiH 25/04 and 93/05.
33 Here the reference is made to the constitutions of the two BiH’s entities. Both the Constitution of Federation of BiH (Article 17a) and the Constitution of Republika Srpska (Amendment LXVII) stipulate that “Constituent peoples and Others shall be proportionately represented in all courts according to the 1991 census until Annex 7 (Agreement on Refugees and Displaced Persons) is fully implemented.”
34 Most probably relates to the provisions of the Law on Gender Equality in BiH – unified text. Official Gazette of BiH 32/10.
Members of the judiciary have found that the introduction of more transparent selection criteria has helped the overall independence of the judiciary. They have also expressed their support for all of the HJPC’s activities to modernise the judiciary, and especially for the support they receive from the experts working in this institution when it comes to the case management software. All of them agree that the HJPC has started to play the role of the main generator of positive reforms of the judiciary.

Some reservations have been expressed regarding the composition of the HJPC. Although none have questioned its institutional independence, 36 members of the judiciary have pointed out the fact that there are the same number of judges and prosecutors, which means that a judge or a prosecutor could be appointed without having any of the votes by his/her peers. Some even mentioned an intention expressed by the Ministry of Justice of BiH to propose the division of the Council into two parts: The High Judicial Council and the High Prosecutorial Council.

Some judges and prosecutors have also mentioned the fact that in some cases the qualifications of judges and prosecutors are not the prevailing criteria when the decision is made. This is due to the fact that the Law allows for the Council to implement “Constitutional provisions regulating the equal rights and representation of constituent peoples and others.”

The HJPC makes a selection from the list of successful candidates and can even opt not to select any person from the list, not merely the first, if members of constituent peoples are not represented according to the last census. This is perceived as quite frustrating by some interviewees, who have expressed that they never know whether to apply to a vacant position, “because you never know which constituent people is under-represented.”

However, in addition to these reservations, members of the judiciary have expressed their disagreement with one recent idea to change the tasks of the HJPC proposed by political leaders. Namely, one part of the Agreement on programme-project cooperation in legislative and executive authorities from 2012 to 2014 between the members of the political parties currently in government includes the idea of allowing the entity legislative bodies to appoint prosecutors.38

36 Since only two out of fifteen members are selected by the Parliamentary Assembly and two additional members are selected by the entity Bar Chambers.
37 The Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina. Article 43.2. Official Gazette of BiH 25/04 and 93/05.
38 M. Dodik. 1 November 2012. “Parliaments will appoint chief prosecutors and they will appoint their deputies, which includes responsibility to Parliament for one’s operations,” Srna.
Judges and prosecutors expressed their concern that this would be a significant step backwards when it comes to independence, and that it would annul all of the progress made. The Delegation of the EU also reacted to this agreement and declared that “the perspective for reform of this institution shall be rigorously assessed against the backdrop of the relevant EU standards” and that “the competent BiH authorities and institutions shall guarantee a technical revision of the law that does not undermine the functioning of the HJPC.”

The HJPC made a press statement in which it declared that “it is completely devoted and is actively working on executing recommendations of ‘Structural Dialogue on the judiciary between BiH and EU’.” These latest developments are just another example of how the political gatekeepers still jeopardize the progress made in the area of rule of law, but, at the same time, the uniform reaction of the judiciary is a sign that they have already adapted to the new standards of independence.

When we look at the salaries of the judges, they are currently 3 times higher than the average salary in Bosnia and Herzegovina. This ratio is higher than the Council of Europe average. However, both judges and prosecutors complain that the level of salaries is not adjusted to the level of inflation and that there has been no increase to the salaries since 2006, when it was 4.5 times higher. According to the laws on salaries, salaries for judges and prosecutors will not increase until the average monthly net salary in BiH calculated for the calendar year reaches or exceeds the amount of 800.00 KM. Starting from the year after the average salary reaches or exceeds this amount, the basic monthly salary will be annually corrected by the percentage of increase in the average net monthly salary in BiH.

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41 Which is 2.5 higher than the average salary according to The European Commission for the Efficiency of Justice.
42 The Law on Salaries for Judges and Prosecutors in Judicial Institutions of BiH, the Law on Salaries and Allowances for Judges and Prosecutors in FBiH, the Law on Salaries and Allowances in RS and the Law on Salaries and Allowances for Judges and Prosecutors in BD.
6. A Challenge for Legal Certainty:
Fragmentation of the Judicial Sector

The complexity of BiH is mirrored in the fragmentation of its judicial and prosecutorial system. There are currently four judicial systems in the territory of BiH, namely the judicial systems of BiH, of the Federation of BiH, of Republika Srpska and of the Brčko District. The judicial system is regulated by four different laws. The prosecutorial sector is regulated by 15 different laws on the establishment, structure and functioning of the 15 prosecutorial offices.

At the level of BiH, there is the Constitutional Court of BiH, the Court of BiH and the Prosecutor’s Office of BiH. In the Federation of BiH (Federation of BiH) there is the Constitutional Court of the Federation of BiH, the Supreme Court of the Federation of BiH, the Federation of BiH Prosecutor’s Office, the municipal and cantonal courts and the cantonal prosecutor’s offices. In Republika Srpska there are the courts of general and of special jurisdiction. The courts of general jurisdiction comprise basic courts, district courts and the Supreme Court of the Republika Srpska. The courts of special jurisdiction are the district commercial courts and the Higher Commercial Court. Brčko District has the Appellate and the Basic Court and the Prosecutor’s Office of Brčko District.

In the Federation of BiH there are 10 cantonal laws on the Prosecutor’s Offices, which have established 10 prosecutor’s offices at the cantonal level. The Law on the Prosecutor’s Office of the Federation of BiH has established the Federation of BiH Prosecutor’s Office. Just recently a new initiative was formulated to adopt a single law on prosecutors for the territory of the Federation of BiH which was also welcomed during the Second Meeting of the Structured Dialogue. In Republika Srpska there is the Law on the prosecutor’s offices in Republika Srpska, which has established five District prosecutor’s offices and the Prosecutor’s Office of Republika Srpska. The Law on the

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43 In the Federation of BiH alone the prosecutorial sector is regulated by 11 different laws. There is an initiative to adopt a single Law, with a view to guarantee a harmonization throughout Federation of BiH.
44 The Law on the Prosecutor’s Office of Federation of BiH. Official Gazette of Federation of BiH 19/03.
46 Law on the prosecutor’s offices in Republika Srpska. Official Gazette of Republika Srpska 55/2, 85/03 and 37/06.
Prosecutor’s Office of Brčko District\textsuperscript{47} has established the Prosecutor’s Office of Brčko District.

One of the problems identified by the judges and prosecutors is the fact that this fragmentation has led to the existence of several legal systems in one country. Bosnia and Herzegovina, unlike other federal states, has not developed a core of unified legislation; instead, the four different legal systems (state level, entity level and Brčko District) have over time developed their own legal systems. The four systems are autonomous in making legislation, and they are autonomous in development of both procedural and substantive law. Autonomy or the lack of subordination is also reflected in the interpretation of this law, which could lead to the fact that even identical provisions might be interpreted differently. What was also noted as missing is a single Supreme Court of Bosnia and Herzegovina,\textsuperscript{48} which could establish a uniform interpretation of law in the country and thus contribute to legal certainty.

The Court of BiH has no appellate jurisdiction over the cases deliberated by other courts in the country and cannot play this role.

Generally, judges and prosecutors had a problem in identifying which laws were not harmonised, but also pointed to the fact that even the criminal and criminal procedure law are not harmonised. There are some examples of acts that are designated as crimes in one Entity and as misdemeanours in another Entity, or that are defined as crimes by the Criminal Code of BiH and not by lower level codes. Also mentioned was the fact that courts at different levels also lack a uniform approach when deciding which criminal law to apply in war crimes.\textsuperscript{49} This situation, where different legal systems exist in one country, was seen as a problem of coherence of rule of law and as undermining legal certainty.

Several initiatives were identified in the past which aimed at unifying the legal system, but there was a problem in identifying who was behind these initiatives. Only with the adoption of the JSRS have these initiative perceived as formalised but not institutionalised. Generally, the cooperation amongst different level or different territory judiciaries has been assessed as poor. The training sessions or conferences were seen as the only venue for exchanging information.

\textsuperscript{47} The Law on the Prosecutor’s Office of Brčko District. Official Gazette of Brčko District 19/07.
\textsuperscript{48} The Court of Bosnia and Herzegovina has no appellate jurisdiction over decisions made by any entity Court and the Constitutional Court of BiH has only limited competencies to review decision made by entity courts.
\textsuperscript{49} The Court of BiH applies the Criminal Code of BiH, while the courts in entities are inclined to apply the Criminal Code of the Socialist Federal Republic of Yugoslavia.
The first set of preliminary recommendations from the European Commission issued after the Structured Dialogue in June 2011\textsuperscript{50} recommended that relevant authorities assess the state of their current coordination and cooperation in the implementation of the JSRS. To assess this situation, the European Commission (EC) requested that the Venice Commission receive a request for an opinion on 19 October 2011 on the question of “How the judicial framework, the division of powers and the existing co-ordination mechanisms affect legal certainty and the independence of the judiciary in Bosnia and Herzegovina.”\textsuperscript{51}

The Venice Commission issued an Opinion recognising the importance of the role of supreme judicial bodies in ensuring legal certainty and made recommendations with two models for how this situation could be improved.\textsuperscript{52} The first model called for the creation of a Supreme Court of BiH and the second for the establishment of a common or joint body composed of representatives of existing high judicial institutions at the state and the entity level.\textsuperscript{53}

The second proposal was perceived as more feasible at this point by the members of the judiciary, in particular because the first proposal would be subjected to amendments of the Constitution. This proposal was also reiterated in the recommendations from the European Commission after the third meeting of the Structured Dialogue,\textsuperscript{54} when it tasked the HJPC to explore and recommend possible options for institutionalising the format of regular consultations between the highest judicial instances on the matter of harmonisation of the case law.

\textsuperscript{52} Opinion on Legal Certainty and Independence of Judiciary in Bosnia and Herzegovina of 16 June 2012 (648/2011), cit.
\textsuperscript{53} Most probably representatives from the supreme courts of the two Entities, with appropriate representation of the Appellate Court of the Brčko District and the Court of BiH.
7. Accountability of Judges and Prosecutors

The Law on the HJPC has defined the disciplinary procedure against judges and prosecutors. Judges and prosecutors, and all holders of the judicial function may be liable for disciplinary offenses prescribed by the Law on the HJPC. Disciplinary proceedings initiated Office of the Disciplinary Prosecutor (ODP),\(^{55}\) and the proceedings are held in front of the First instance and the Appellate Disciplinary Commission. Both Commissions are appointed by President of the HJPC. Disciplinary proceedings are conducted under the rules of court procedure. Disciplinary proceedings are regulated by the Law on the HJPC\(^ {56}\) and the Rules of Procedure of the HJPC.\(^ {57}\)

The ODP receives and reviews complaints about the actions of judges and prosecutors or initiates proceedings *ex officio*. If misconduct is found, or there are reasonable grounds to believe that the judge or the prosecutor had made a disciplinary offense, the ODP will launch a detailed investigation of the facts and circumstances. The ODP is open to individuals and forms for lodging complaints are available in all languages in use in BiH as well as English; complaints can also be lodged though an online form.

If an investigation reveals that there is evidence to confirm the allegations of misconduct against a judge or prosecutor, the ODP will initiate disciplinary proceedings before the Commission by filing a disciplinary complaint. After filing a complaint, the ODP can offer the accused a joint agreement for the establishment of disciplinary responsibility for the committed disciplinary offenses, which must to be evaluated and approved by the Commission.

Disciplinary Committees (First Instance and Appeal) make final decisions in disciplinary proceedings. Once initiated, disciplinary proceedings can last up to a year, depending on the complexity and the total number of disciplinary cases under consideration by the Committee in the period.

During the disciplinary proceedings, the ODP may request that the judge or prosecutor be suspended from any active duties pending disciplinary proceedings. Suspension is required in any case where the judge or prosecutor is in custody. From 2007 to

\(^{55}\) Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina. Article 64. Official Gazette of BiH 25/04 and 93/05.

\(^{56}\) Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina. Chapter VI. Official Gazette of BiH 25/04 and 93/05.

\(^{57}\) Rules of Procedure of the HJPC. Chapter III. High Judicial and Prosecutorial Council of Bosnia and Herzegovina.
2011, some 1200 complaints were received on a yearly basis by the ODP. Most of them were dismissed and a total of 80 disciplinary measures were issued over this period. A total of 6 judges were dismissed as a measure of disciplinary sanction.

Judges and prosecutors are appointed to indefinite mandate or until they turn 70. When a judge or prosecutor has reached the age for mandatory retirement, his mandate is terminated automatically, but the final decision on the termination of the mandate is made by the HJPC. This decision is delivered to the judge or prosecutor to whom it refers, and also must be submitted to the court or prosecutor’s office where he served as appointee and to the competent Ministry of Justice. The decision on termination of the mandate must be published in the “Official Gazette of BiH” before the procedure for appointment of new judges can be prosecutors initiated.

The Law on the HJPC has defined when a mandate for a judge or a prosecutor can be terminated. A judge or prosecutor can be dismissed from office if it is proved on the basis of medical documentation that s/he has permanently lost the working capacity to perform the necessary duties. Request for dismissal of a judge or prosecutor on this basis must be submitted to the Council in writing. However, in practice to this date there have not been proceedings for the removal of the duties of a judge or prosecutor because of permanent incapacity to perform his or her duties.

Additionally, the codes of ethics for judges and prosecutors deal with fundamental standards of ethical conduct in Bosnia and Herzegovina. The purpose of these codes is to assist judges and prosecutors when faced with ethical and professional dilemmas, as well as to help the executive and legislative authorities and the public better understand and support the judiciary. They deal with 5 key principles: independence, impartiality, equality, integrity and professionalism.

58 EU-Bosnia and Herzegovina SAP Structured Dialogue on Justice. Technical information requested by the EC. July 2011
60 Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina. Chapter IX. Official Gazette of BiH 25/04 and 93/05.
8. Effectiveness and Efficiency of Judges and Prosecutors

The provisions of the Law on Courts of FBiH, the Law on Courts of RS, and the Law on Courts of BD require that the performance of all judges and presidents of courts be subject to regular annual assessment covering all aspects of judicial work, including the court president. The Law on the Court of BiH does not regulate the question of evaluation of judges.

Evaluation of the judicial office holders is carried out at least annually in accordance with the criteria established by the HJPC. Evaluation of the performance of judges is made by the court president, and evaluation of performance of the court president by the president of the immediate higher court. The evaluation covers all aspects of judicial work, including quantity and quality, as well as commitment, which includes promptness in work, professionalism and attitude towards work and the performance of judicial duties. The quantity of a judge’s performance on the basis of the number of cases that the judge completed during the year compared to the minimum number of cases that should be completed - the minimum annual case quota. Case quotas are determined by the HJPC. The quality of judicial performance is expressed through the percentage of revoked decisions per legal remedy.

The Law on the Prosecutor’s Office of BiH, the Entity laws on the prosecutor’s offices, the Law on the Prosecutor’s Office of BD, and cantonal laws on the prosecutor’s offices do not prescribe the obligation of performance evaluation of chief prosecutors and prosecutors. However, in accordance with its responsibilities, the HJPC has established criteria for prosecutorial evaluation, which are applied to the performance evaluation of the chief district and cantonal prosecutors.

According to the aforementioned criteria, the chief prosecutor evaluates the work of the deputy chief prosecutor and the prosecutors, while the Chief Prosecutor in RS, or the Chief Prosecutor of FBiH, evaluate the performance of the chief prosecutor of the district and the cantonal prosecutor’s offices. The effectiveness of the judiciary has been recognised as a major rule of law issue by the European Commission. Bosnia and Herzegovina has made some efforts to reduce the backlog of court cases. The Backlog

62 The Law on Courts of FBiH. Official Gazette of FBiH 38/05, 22/06, 63/10 and 72/10.
64 The Law on Courts of BD. Official Gazette of BD 19/07 and 20/07.
Reduction Project, formalized by the signing of a memorandum of understanding in January 2008, was seen as a positive step in the Progress Report.

Still, the backlog of cases remains a major problem for the judiciary in Bosnia and Herzegovina. A total backlog of about 1.9 million cases was recorded at the end of 2007 (including approximately 1.2 million cases of unpaid utility bills). Every progress report has paid significant attention to this problem, and each European partnership for BiH has made it a short-term priority. The Case Management System allows the HJPC to monitor the effectiveness of the judiciary according to the Guidelines on court statistics of the European Commission for the Efficiency of Justice. The average time necessary to complete a criminal case is 135 days; for administrative cases it is 401 days, and for civil cases up to 489 days.66

The goal of the Backlog Reduction Project was to identify a mechanism for reducing the backlog, focusing mainly on utility cases. The working group which was established identified the following mechanisms:

- Electronic submission of proposals for the execution and processing of "utility" cases;
- Reducing the backlog of cases in the Canton of Sarajevo;
- Improvement of the service of judicial executorial officers;
- Improving methods of delivery of judicial documents.

According to the HJPC, the main reason for the existing backlog is the number of judges and legal advisors. According to the Law, the HJPC is responsible for monitoring and assessing the optimal number of judges and prosecutors. In 2008, the HJPC suggested an increase of 55 new judges and 160 additional posts to be included in the systematization and budgets for courts. As reported in 2011, however, due to budgetary restrictions only 22 new judges were employed (or 10,20% of the proposed number).

The main reasons (identified by the judges) for the existence of the backlog are the insufficient number of judges and administrative staff, a large influx of new cases, the backlog from previous years as well as the backlog created by merging the courts after the 2003 reform, the frequent absence of judges (usually sick leave), the unavailability of

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65 Decisions on working groups on backlog of cases. 19 June 2008.
66 EU-Bosnia and Herzegovina SAP Structured Dialogue on Justice. Technical information requested by the EC. cit.
the parties, delay of hearings (at the request of the parties or for purposes of testimony), insufficient involvement of judges in the old cases, inadequate legal provisions, and other reasons, such as the lack of material resources, obsolete equipment, etc.).

The most visible EU-funded project reported by judges and prosecutors was the informatization of the judiciary in Bosnia and Herzegovina and the reconstruction of the judicial premises. They identified it as a part of the effectiveness and transparency process. They made clear that it took them some time to adapt to the new procedures but came to welcome the computerization of the process. They have identified improvements in the time necessary for admission and processing of documents, but have also commended the time necessary to obtain information that is now only few clicks away. This was also identified as an important factor in providing access to information for the public and clients, because today this information can be provided without going through piles of documents.

The Case Management System (CMS) was also hailed as one of the new tools. Judges and prosecutors noted that before the introduction of the CMS they had to keep track of most of the procedural dates (detention expiration, hearings etc) in their notebooks, and that the chance of making a mistake was greater. Today, schedules in the CMS are personalised and enable both judges and prosecutors to keep track of their agendas and to perform more efficiently. Prosecutors also found an advantage in CMS, because they can now find a database of registered offenders and can easily determine if a person has been indicted for more than one felony. A priority for the next phase should be to link CMS with the database of the police, which is planned by the HJPC.

Respondents also mentioned that the system of automatic assigning of the cases to judges is a significant improvement, especially since the departments in the courts have been abolished. The CMS takes into account both the legal specialization and the workload of judges when assigning the cases, which is a good way to get the best judge for a particular case.
9. Education of Judges and Prosecutors

As part of the overall judicial reform aiming to increase effectiveness, two institutions for the education of judges and prosecutors in Bosnia and Herzegovina were created. The Law on the Judicial and Prosecutorial Training Centre in the Federation of BiH and the Law on Judicial and Prosecutorial Training Centre in Republika Srpska regulate issues of the establishment, status and activities of these institutions, as well as other issues of importance to the work of the centres.

The Judicial and Prosecutorial Training Centre of the Federation of BiH and the Judicial and Prosecutorial Training Centre of Republika Srpska, in cooperation with and under the supervision of the HJPC, organize continuous training for appointed judges and prosecutors, as well as initial training for persons wishing to engage in the profession of judge or prosecutor. The Centres award annual certificates on the completion of any advanced professional training requirements.

Centres deliver custom-tailored training (a flexible combination of centralised and decentralized training) for the judiciary in BiH covering all areas of law and other disciplines relevant to the practice of judges and prosecutors, such as society, economy as well as relevant developments in other areas. Judges and prosecutors are provided with classes in interpreting and applying substantive and procedural laws, ethics standards for judges and prosecutors, the latest scientific and professional achievements in the field of law, judicial and prosecutorial practice in other countries, and other areas determined by the Governing Board. Vocational training is compulsory for all judges and prosecutors.

The Centres, under the supervision of the HJPC, develop curriculum and conduct classes for vocational development, guaranteeing that judges and prosecutors maintain and expand their knowledge in the fields of technique, culture and social relations necessary to perform their functions.

According to the Initial and Continuous Judicial and Prosecutorial Training Mid-Term Strategic Plan for 2012-2015, which has been approved by the HJPC, the overall goal of both JPTCs in BiH is to provide training that contributes to a more professional judiciary capable of...
responding to the challenges of a rapidly developing legal environment and possessing the ability to adjust to evolving European requirements in the legal/judicial field.

The JPTCs have focused on how to disseminate European ideas concerning interaction with the parties, alternative measures of dispute settlement, and practical skills in European human rights standards, as well as on increasing the use of the European Convention on Human Rights in legal proceedings in Bosnia and Herzegovina. Having that in mind, 22 training modules were developed by the two JPTCs under the supervision of the HJPC in the framework of the CARDS project.

Both judges and prosecutors welcome all the training sessions organised by the JPTCs and the training materials provided by the centres. In particular, they singled out the modules including case law relevant for the sessions, including the case law of relevant European courts, in particular the case law of the European Court on Human Rights. Specific training courses for judges in new areas, such as company law, cybercrime, financial crime, legal drafting, etc., are regularly included in the training curricula of the training centres and represent continuing training for judges and prosecutors. The training that they evaluate to be most necessary relates to changes in the legislation and in particular legislation which is being harmonised with Acquis Communautaire, because they anticipate that this is an area where they will have the greatest problems in implementation.

10. Conclusion

Since the violent conflict ended in 1995, the judiciary in Bosnia and Herzegovina has undergone structural changes and has started the transformation towards a system based on the rule of law. There is clear evidence that there is willingness amongst the interviewed stakeholders to adapt the legal system to EU requirements in order to advance on the path to integration. Bosnia and Herzegovina has introduced legal guarantees for independence and has introduced new mechanisms to monitor the independence, efficiency, accountability and effectiveness of the judiciary. New institutional safeguards have been introduced to secure the proper implementation of these standards, most notably the High Judicial and Prosecutorial Council and the Judicial and Prosecutorial Training centres.

The eagerness of the political elites to advance towards EU integration has had an enormous influence on these processes. Requirements set in the first stages of EU integrations
were high and have resulted in significant changes. The fact that at certain points the EU requirements were adopted with support from other international organisations present in the country had a significant impact. Interplay between the organisations and the EU has yielded results in the area of rule of law and has stepped up the association progress of Bosnia and Herzegovina. This is certainly the case with the “Bonn powers” of the Office of the High Representative, which have been frequently used to impose changes in the judiciary. The use of these powers brought forth significant changes for which it would have been hard to build consensus among local stakeholders.

At the same time, this support has conflicted with the very essence of the Europeanization process, which is based on the willingness of local stakeholders to adapt to EU standards and local ownership. The EU does not consider the support as conflicting with Europeanization, but has requested evidence from BiH authorities that the powers are generally declining in relevance and that their use occurs ever less within core SAA areas. The aim was to replace the “push” of the Bonn Powers with the “pull” of European (and euro-Atlantic) institutions.

The signing of the Stabilisation and Association Agreement with Bosnia and Herzegovina is a milestone in the Europeanization process. One of the main conditions was the adoption of the National JSRS, which was also one of the last conditions fulfilled prior to the signing of the SAA. In a fragmented legal and judicial system, such as is the case in BiH, the adoption of a National Strategy was not imagined possible. But a clear condition set by the EU and the public support for changes necessary to advance to EU integrations proved to be crucial for the decision makers in adopting this document.

However, after the signing of the SAA, the positive momentum in the progress in the area of rule of law that characterized the pre-SAA period seemed to be gone. In the subsequent years (2009-2011) progress in the implementation of the Strategy was characterized as limited, and this period could be described as one of limited Europeanization. But even in this period the EU continued to financially support the implementation of the judicial reforms and failed to withhold the reward, which maintained the status quo.

The political elite could be blamed for such developments, but there is little evidence that this opposition to reforms was based on resistance to the introduction of rule of law standards. In a legal system where the state institutions have limited competency with a legacy of conflict, the decision-making process is also linked to the processes of
power sharing and reconciliation. Also, the gradual shift from the “push” of the Bonn Powers to the “pull” of European institutions has not been free of problems. The re-institutionalization of local ownership has enabled local gatekeepers, including those in the area of rule of law, to reassess the imposed decisions, and where convenient to compare them with the EU conditions set in this process. This process has showed that socialization of the changes made still has a long way to go. However, it is important to note that the professionals working in the judiciary perceive changes as positive and their opposition to the proposals of the political elite is a clear sign of socialization amongst the professionals.

In such an environment, the EU had to adapt its approach to Bosnia and Herzegovina, because no progress had been reported after the signing of the SAA. The new mechanism of the Structured Dialogue, employed for the first time in any potential candidate country, has managed to move the status of Europeanization from limited to progressive.

Looking generally at the conditionality the EU has employed in BiH, one can note that in cases where conditions were straight forward and the reward was obvious, reforms required by conditions were much more easily made. Again, it is quite hard to find evidence as to whether the “pull” of the EU will be enough to continue to be as efficient as the “pull” of the “Bonn powers.”

The introduction of new mechanisms, as well of high-level meetings, is a good sign that the EU has identified who the main gatekeepers are and that it is willing to negotiate with them to ensure progress is made. It will therefore be crucial to continue to monitor these developments if Bosnia and Herzegovina is to advance to EU integration. Much more effort will be necessary to influence the political elite to decide to invest more financial and human capital in this process, as once the negotiations begin much more is expected to be required from local stakeholders.
Rule of Law Reforms within Kosovo’s European Integration Process: Progress and Remaining Challenges

1. Introduction

This chapter has been prepared within the framework of the *Europeanization through Rule of Law Implementation in the Western Balkans* project. Its primary purpose is to present and elaborate the effectiveness of the “Europeanization” of Kosovo through the implementation of rule of law reforms.

For this purpose, the chapter is divided into two main sections: a) the Rule of Law in Kosovo – Progress and Challenges and b) the European Integration process and its Impact in the Rule of Law Reforms in Kosovo.

The first section primarily addresses the state of affairs of the rule of law situation in Kosovo, briefly discussing the history of rule of law reforms, Constitutional and legislative safeguards, progress achieved as well as the significant challenges that remain. The second section intends to analyze the effectiveness of rule of law reforms in Kosovo in connection with the European Integration process, focusing on the context of the European Integration and the conditions that determine the effectiveness of the European Union’s “export” of its rule of law values. More importantly, this section briefly elaborates the assistance the European Union has provided to the rule of law reforms in Kosovo to date and intends to evaluate its efficiency.

To serve this latter purpose, during November 2012, a series of semi-structured interviews were held with officials involved in the rule of law reforms in Kosovo. The sample of the interviews conducted in Kosovo included judges, prosecutors, lawyers, law
professors, civil society activists and representatives of key justice sector institutions in Kosovo, such as the Kosovo Judicial Council (KJC), the Ministry of Justice (MOJ) and the Kosovo Judicial Institute (KJI).

The primary purpose of these semi-structured interviews was to gain an understanding of whether the EU requirements imposed in the monitoring process for the rule of law reforms in Kosovo can be properly identified by the local counterparts. In addition, they serve as a tool for assessing whether the progress made in the rule of law areas can be effectively attributed to the EU’s influence. Finally, it was also important to determine whether “conditionality” and financial and technical assistance tools are more effective in accelerating the rule of law reforms in the country.

The chapter ends with few key conclusions, emphasizing a current key momentum in the rule of law reforms that can be used to improve the efficiency and the impact the EU has in supporting rule of law reforms in Kosovo.

2. The Rule of Law in Kosovo – Progress and Challenges

2.1. Background - the Legacy of the Past

Kosovo’s current legal and justice systems and the challenges facing them are a reflection of several key periods in its recent history. All these periods have an impact on the current challenges Kosovo faces in terms of rule of law in general and independence of the judiciary in particular. These key periods include the period as part of Yugoslavia, the period between the suspension of autonomy in 1989 until the conflict in 1999, and the period during the United Nations Interim Administration Mission in Kosovo (UNMIK) as per the United Nations Security Council Resolution (UNSCR) 1244 until the declaration of independence in February 2008. All of these periods have in common a significant influence of the executive branch over the judiciary, although at varying levels and under various conditions and circumstances. This has generally led to the establishment of a mindset of subordination to the executive branch, as well as to challenges to the establishment and implementation of a concept of an independent judiciary.

The period after the suspension of the Kosovo autonomy (1989-1999) in particular has had a tremendous impact on the quality of legal education and consequently on the quality of the legal profession. Unable to work for the government institutions, most legal professionals oriented their practice toward being attorneys, while the profession
of judges and prosecutors was almost not practiced at all by Kosovo Albanians during this period. These ten years of parallel systems in Kosovo, including in the area of education, continue to have consequences for the quality of judges and prosecutors as well as other legal professions in Kosovo.

Furthermore, the consequences of the 1999 conflict were severe for the rule of law in Kosovo. Population movements, ethnic conflict, transactions with and disputes over property, and the loss and/or destruction of a significant part of cadastral records still present significant challenges for the judicial system. In addition, the consequences of the conflict are still an obstacle for the establishment of a multi-ethnic judiciary in Kosovo, as most Serbs refuse to participate in the Kosovo system. Immediately after the conflict, this led to the establishment of parallel Serb structures in Kosovo, including Courts and Prosecution Offices, which in the north of Kosovo are still operational. The situation in Northern Kosovo is particularly challenging. The Courts and Prosecution Offices in the North almost do not function at all, causing serious problems with access to justice. It is a matter of debate how much, if at all, Kosovo extends its sovereignty to its northern municipalities. Some efforts have been made by the Kosovo Government to extend its control to the North, and while some results have been achieved, serious problems remain causing tremendous impediments to the rule of law implementation in Kosovo. The first serious efforts to resolve this situation were marked with the beginning of the EU-facilitated high-level political dialogue between Belgrade and Pristina, almost after 12 years of international administration in Kosovo.

Overall, the first significant steps towards establishing an independent judicial system in Kosovo were marked by the adoption of the Kosovo Constitution after the declaration of independence in 2008. The Kosovo Constitution includes strong provisions for the protection of the independence of the judicial branch. While this is an important step forward and a milestone towards the establishment of an independent judicial branch, due to the legacy of the past, as well as various other challenges that prevail in Kosovo today, serious implementation obstacles remain.

The Kosovo Constitution is the cornerstone of the independent judicial branch. Nevertheless, even prior to the entrance into force of the Kosovo Constitution, despite heavy

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2 The Dialogue and its proceedings will be elaborated in more detail starting from part 5 of this paper.
3 The challenges that Kosovo faces in terms of rule of law throughout the last decade will be elaborated starting from part 4 of the paper.
executive influence over the judiciary during the UNMIK administration, some efforts were made to reform and strengthen the rule of law in Kosovo in general and the judicial branch in particular. These efforts and their impact will be briefly elaborated below.

2.2. Pre-independence Efforts to Reform the Judiciary

The Security Council approved the UNSCR 1244 in 1999 and an international civilian administration, known as UNMIK and headed by the United Nations Special Representative of the Secretary-General (SRSG), was established in Kosovo. A Constitutional Framework (CF) for the Provisional Self-Government in Kosovo was adopted in 2001. The CF, among others, regulated the judicial system in Kosovo. The provisions related to the justice system referred to the independence of the courts, but they did not refer to the independence of the authority that administers the judicial system. Instead, based on the CF, the SRSG maintained all substantial powers in all areas in Kosovo, including the authority to “oversee the Provisional Institutions of Self-Government, its officials and its agencies, and to take appropriate measures whenever their actions are inconsistent with UNSCR 1244 or the CF.” The CF also established a Special Chamber of the Supreme Court on Constitutional Matters, which was responsible to deal with the compatibility of laws with the CF, but it did not establish a Constitutional Court. Kosovo’s judicial system in principle continued to remain under the authority of the executive branch.

Throughout the UNMIK administration, the Kosovo judicial system was organized and shared between the UNMIK Department of Justice (DOJ) and the Department of Judicial Administration (DJA) within the Ministry of Public Services (MPS), both under the executive branch. A Kosovo Judicial and Prosecutorial Council (KJPC), composed of nine members, was also established and its members were appointed by the SRSG. The KJPC served as an advisory body to the SRSG only, mainly on matters related to judicial appointment, removal, and discipline.

A gradual transition of power to the local institutions began in 2003, when UNMIK articulated the policy of “standards before status,” through which it decided that Kosovo’s

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5 Ibidem. Chapter 12.
6 Ibidem. Chapter 9, Section 4.11.
8 Constitutional Framework for Provisional Self-Government in Kosovo, cit., Chapter 9, Section 4.8. See also On the Establishment of the Kosovo Judicial and Prosecutorial Council. UNMIK/REG/2001/8, cit.
status would not be addressed until Kosovo had met standards of good governance, including specific standards in the rule of law area. However, as Kosovo progressed towards fulfillment of these standards, UNMIK gradually transferred more competencies to the Kosovo institutions. As a result, at the end of 2005, both a Ministry of Justice (MOJ) and a Kosovo Judicial Council (KJC) were established. MOJ was established with very limited competences. It was mainly responsible for developing policies within the scope of its responsibilities, for facilitating and preparing legislation in the field of justice, including public prosecution, and for developing and implementing a prosecutorial policy for the Office of the Public Prosecutor of Kosovo. Administration of the judiciary and the courts was specifically excluded from the competencies of the Ministry. On the other hand, the KJC replaced the KJPC as an independent body, but still remained under the authority of the SRSG. The KJC was mainly responsible for setting policy and promulgating rules and guidelines for the judiciary and the courts, including recruitment, training, appointment, evaluation, promotion, transfer and discipline of both judges and lay judges, judicial and non-judicial personnel. In addition, the KJC was also the authority for regulating prosecutorial issues in the same field, until the Kosovo Prosecutorial Council (KPC) was established. The Council was composed of eleven members, of whom seven were judges and four non-judges.

Finally, during 2005, discussions to reform the judiciary began. The first initiative related to this reform was the drafting of four key pieces of legislation for the judiciary - the Law on Courts, the Law on KJC, the Law on Prosecution, and the Law on KPC. The main purpose of this reform was to address the challenges facing the judicial system, but in particular to reorganize the judicial system in a more efficient manner. The drafting of these four pieces of legislation was a challenge, particularly when it was caught by the political status determination process by the end of 2006. These laws were only approved two years after the declaration of independence, in 2010, after almost five years of continuous revisions and discussions.

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2.3. Post-Independence – Kosovo Constitution

After two years of status negotiations led by the United Nations Special Envoy, Marti Ahtisaari, in March 2007, two documents were released for the public - the Report of the Special Envoy of the Secretary General on Kosovo’s Future Status and the Comprehensive Proposal for the Kosovo Status Settlement. The first paved the way for the determination of Kosovo’s political status, while the second presented the basis for Kosovo’s new Constitutional and legislative order. After a series of negotiations, Kosovo declared independence on February 17, 2008. The Kosovo Assembly had already issued a declaration accepting and committing to the full implementation of the Comprehensive Proposal, adding that the provisions contained in it would be legally binding upon Kosovo and thus be incorporated into the Kosovo Constitution. Kosovo approved its Constitution on April 9, 2008, and it entered into force on June 15, 2008.

The Comprehensive Proposal and the Kosovo Constitution established an International Civilian Representative (ICR) in Kosovo with the final authority regarding interpretation of the civilian aspects of the Comprehensive Proposal. More importantly for the rule of law in Kosovo, the Comprehensive Proposal envisaged the establishment of a European Security and Defense Policy (ESDP) Rule of Law Mission in Kosovo (EULEX). The aim of the Mission is to assist Kosovo authorities in further developing and strengthening an independent judiciary, police and customs service in line with the European best practices. The Mission has basically two sets of powers - mentoring, monitoring and advising in the area of the rule of law, and certain executive powers with respect to the judiciary, police, customs and correctional services.

Nevertheless, this structure was in place only until September 2012, when the International Steering Group (ISG) announced the “end of supervised independence” for Kosovo and the Kosovo Assembly adopted constitutional amendments to reflect this development. As a result, the mandate of the International Civilian Office (ICO) and the ICR ended in September 2012. However, the mandate of EULEX to carry out its executive and other functions was extended until June 2014. Currently, the Kosovo Government is

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12 Kosovo Assembly Declaration. 5 April 2007. Available at: <http://www.assembly-kosova.org/?cid=2,100>.
13 Constitution of Republic of Kosovo. Article 146. Available at: <http://www.kuvendikosoves.org/common/docs/Constitution%20of%20the%20Republic%20of%20Kosovo.pdf>.
discussing an exit strategy for EULEX and a plan to take over the EULEX competencies post June 2014. On June 2013, the Assembly of Kosovo adopted a Resolution, through which it requires the Government of Kosovo to submit to the Assembly of Kosovo by the beginning of September, a transitional plan on ending the mandate of EULEX by June 15, 2014.  

Otherwise, the Kosovo Constitution is the cornerstone of the independent judicial branch. The Constitution declares Kosovo a democratic republic based on the principle of separation of powers and checks and balances among them. The Constitution establishes an independent judiciary and an independent prosecution to be led by the KJC and Kosovo Prosecutorial Council (KPC), respectively, and establishes a Constitutional Court as the highest independent authority to protect the constitutionality of laws and to serve as the final interpreter of the Constitution. The supremacy of the Constitution is guaranteed above all laws and other legal acts. This is particularly important in Kosovo because of the lack of clarity related to the applicable legislation.

The Constitution provides that the KJC is to ensure the independence and impartiality of the judicial system. It is responsible for ensuring that the Kosovo courts are independent, professional and impartial and fully reflect the multi-ethnic nature of Kosovo, including the principles of gender equality. The KJC is responsible, among other things, for recruiting, proposing candidates for appointment, reappointment to judicial office, transfer, discipline, judicial inspections, judicial administration and for developing and overseeing the budget of the judiciary. The Constitution does not determine the regular Court structure. This is regulated by the Law on Courts.

The organizational structure of the Courts was completely reformed by the Law on Courts and as of January 2013, this new structure includes seven Basic Courts, a Court of Appeals and a Supreme Court. The Basic Courts have first instance jurisdiction in the Republic of Kosovo and are organized to include several branches in order to ensure better access to

18 Laws applicable in Kosovo include laws applicable prior to the suspension of autonomy in 1989, provided that they are not discriminatory; the UNMIK regulations; the Kosovo Assembly Laws and a series international instruments provided for in the Kosovo Constitution.
20 Ibidem. Articles 104.2 and 104.3.
justice for all citizens of Kosovo.\textsuperscript{23} All Basic Courts consist of a department of serious crimes, a general department and a department for minors. The Basic Court in Pristina includes two additional departments with Kosovo wide jurisdiction, one for commercial and one for administrative matters.\textsuperscript{24} The Court of Appeals is established as a second instance Court and in its organizational structure reflects the departments established within the first instance Basic Courts.\textsuperscript{25} The Supreme Court is the highest judicial authority. It includes a Special Chamber for disputes arising from the Kosovo Privatization Agency (KPA).\textsuperscript{26}

On the prosecution side, the State Prosecutor is an independent and impartial institution according to the Constitution.\textsuperscript{27} The Constitution also provides for an independent KPC which is responsible to ensure the independence, professionalism, impartiality and multi-ethnic character of the prosecution service in Kosovo, including the principles of gender equality.\textsuperscript{28} The KPC is responsible, among other things, for the recruitment, proposal, promotion, transfer, reappointment and disciplining of prosecutors.\textsuperscript{29} Similar to the Court system, the organizational structure and competencies of the State Prosecutor are not determined by the Constitution but regulated by law instead.\textsuperscript{30} The organizational structure of the Prosecutorial Office follows the organizational structure established for the Courts.\textsuperscript{31} Basic Prosecution Offices are organized into general, serious crimes and minor departments. The Appellate Prosecution Office consists of general and serious crimes departments. The Office of the State Prosecutor is the highest prosecutorial body.\textsuperscript{32}

In addition, the Special Prosecution Office of the Republic of Kosovo (SPRK) was established as a specialized prosecutorial office operating within the Office of the State Prosecutor of Kosovo.\textsuperscript{33} The competencies of the SPRK are reserved for the most serious crimes.\textsuperscript{34} The SPRK consists of ten local and five EULEX prosecutors. The Head of the SPRK is an EULEX Prosecutor.

\begin{itemize}
  \item \textsuperscript{23} Ibidem. Article 10.
  \item \textsuperscript{24} Ibidem. Article 12.
  \item \textsuperscript{25} Ibidem. Article 20.
  \item \textsuperscript{26} Ibidem. Article 21.2
  \item \textsuperscript{27} Constituion of the Republic of Kosovo, cit. Article 109.
  \item \textsuperscript{28} Ibidem. Article 110.
  \item \textsuperscript{29} Ivi.
  \item \textsuperscript{31} Ibidem. Article 11.
  \item \textsuperscript{32} Ibidem. Article 14.
  \item \textsuperscript{34} Ibidem. Article 5.
\end{itemize}
More importantly, the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors regulates the jurisdiction and competences of EULEX judges for both criminal and civil proceedings.\(^{35}\) In terms of criminal proceedings, the EULEX judges have the jurisdiction and competence over any case investigated or prosecuted by the SPRK.\(^{36}\) The Law further defines the circumstances under which EULEX Judges and Prosecutors can be assigned to any case, in any stage of a criminal proceeding, when it is considered necessary to ensure the proper administration of justice. EULEX Judges and Prosecutors are however required to cooperate with and monitor, mentor and advise the Kosovo Judges and Prosecutors.\(^{37}\)

Finally, the Constitution establishes a Constitutional Court as the final judicial authority for the interpretation of the Constitution.\(^{38}\) Decisions of the Constitutional Court are final and are above the laws or other legal acts.\(^{39}\)

The Constitution contains specific provisions for representation of minority communities in the judicial system.\(^{40}\) While the organization, functioning and jurisdiction of the Courts are deferred to regulation by law, the Constitution establishes strict requirements in terms of minority community representation in the judicial system. In terms of the Supreme Court, the Constitution requires at least 15% but no fewer than three judges from the communities that are not in the majority in Kosovo.\(^{41}\) The same requirement applies to any Courts in Kosovo with appellate jurisdiction, with the minimum two judges required from the minority communities.\(^{42}\) Overall, the Constitution also requires that the composition of the judiciary, both at the central and local levels, reflect the ethnic diversity of Kosovo and internationally recognized principles of gender equality.\(^{43}\) All these and other relevant Constitutional provisions related to the integration of the minority communities into the Kosovo judiciary are further strengthened by other specific provisions included in the Law on Courts, Law on KJC, Law on Prosecutors and Law on KPC.


\(^{36}\) Ibidem. Article 3.1.

\(^{37}\) Ibidem. Article 2.4.

\(^{38}\) Constitution of the Republic of Kosovo, cit. Article 4.6 and 112.

\(^{39}\) Ibidem. Article 116.


\(^{41}\) Ibidem. Article 103.4.

\(^{42}\) Ibidem. Article 103.6.

\(^{43}\) Ibidem, Article 104, 108, 109, 110.
Finally, the Constitution and the respective laws allocate limited powers to the executive as it pertains to the judicial branch. Both the President of Kosovo as well as the Government have some limited competence in this field.

The powers of the President of Kosovo related to the judicial branch are limited to the appointment and dismissal of the President of the Supreme Court, judges, lay judges, Chief Prosecutor, prosecutors and judges of the Constitutional Court based on proposals from KJC, KPC and the Assembly of Kosovo.44

On the other hand, the Government of Kosovo, through the Ministry of Justice, has the power to draft all laws that fall in the field of the judiciary. In addition, the Government makes proposals to the Assembly for adopting the budget of the judicial branch.45 Finally, the Government guides and oversees the work of administrative bodies in Kosovo, which includes the staff working in the judicial system, as they are all regulated by the Kosovo Law on Civil Service.46

2.4. Safeguards and Remaining Challenges

2.4.1. Constitutional and Legal Safeguards for the Independence, Accountability, Professionalism and Efficiency of the Justice System

As briefly discussed earlier in the paper, the Constitution and the relevant laws on the judicial system provide for significant milestones towards an independent, accountable, professional and effective judicial branch.

The independence and impartiality of the Courts and the State Prosecutor is guaranteed by the Constitution and the Laws on Courts and on State Prosecutor.47 The independence of both Judicial and Prosecutorial Councils is guaranteed further by the Law on KJC and the Law on KPC.48 Independence and impartiality is further regulated and protected by Constitutional and legal provisions related to the recruitment, qualifications and appointments of judges and prosecutors. All legal provisions regarding required qualifications, recruitment procedures and the appointment process are generally designed and tailored to guarantee an independent, impartial, professional and inclusive justice system.

44 Ibidem, Articles 84.15 to 84.19.
45 Ibidem, Article 93.
46 Ivi.
47 Law on Courts. No.03/L-199, cit. Article 3; Law on the State Prosecutor. No. 03/L-225, cit.
The recruitment of Judges and Prosecutors is done by the respective Councils through an open, competitive and transparent process. The Councils are also required to give preference to minority communities among equally qualified candidates.\(^49\) The candidates that fulfill the criteria for Judges and Prosecutors are submitted by the respective Councils to the President of the Republic for appointment.\(^50\) If the President of Kosovo refuses to appoint or reappoint any candidate, then the President provides written reasons for the refusal to the Councils within sixty days. The Councils may propose another candidate or may present the refused candidate to the President one additional time together with a written justification, at which point the President must appoint the proposed judge and/or prosecutor.\(^51\) However, these provisions have been considered unconstitutional by many who consider that the President is mandated to only formally appoint Judges and Prosecutors proposed by the KJC or KPC and has no right to return candidates and/or refuse appointments. This debate continues to date.

A separate process is established for the selection and appointment of the Constitutional Court judges.\(^52\) The selection process is handled by a Special Committee established within the Assembly, which then proposes the candidates for the Constitutional Court Judges to the President of Kosovo for formal appointment.\(^53\)

The same principles of constitutional and legal protection generally apply to accountability. The Constitution and the respective laws include provisions to ensure that the judges and prosecutors are held accountable for their work. The duties and responsibilities of both the KJC and KPC include promulgating the “Code of Professional Ethics for the Councils’ members, judges and prosecutors and their employees.”\(^54\) In addition, both Councils establish rules and regulations governing the performance evaluations of all prosecutors, judges and lay judges.\(^55\) The KJC and KPC also have both

\(^{49}\) Law on Kosovo Judicial Council 03/L-233. cit; Law on Kosovo Prosecutorial Council 03/L-224, cit. Article 17 and Article 18.

\(^{50}\) Constitution of the Republic of Kosovo, cit. Article 104; Kosovo Judicial Council 03/L-233. Article 18 and Article 19; Law on Kosovo Prosecutorial Council 03/L-224, cit.; furthermore, the criteria to qualify for appointment for Judges are outlined in Articles 26, 27 and 28 of the Law on Courts, while the criteria to qualify for appointment for Prosecutors are outlined in Articles 19 and 20 of the Law on the State Prosecutor.

\(^{51}\) Kosovo Judicial Council 03/L-233, cit. Article 18.2 and Article 19.2; Law on Kosovo Prosecutorial Council 03/L-224, cit.

\(^{52}\) The criteria to quality for appointment for constitutional court judges are outlined in Article 113 of the Constitution of Kosovo and Article 4 of the Law on the Constitutional Court.

\(^{53}\) Constitution of the Republic of Kosovo, cit. Article 114.2.

\(^{54}\) Kosovo Judicial Council 03/L-233, cit. Article 4; Law on Kosovo Prosecutorial Council 03/L-224, cit.

\(^{55}\) Kosovo Judicial Council 03/L-233, cit. Article 19; Law on Kosovo Prosecutorial Council 03/L-224, cit. Article 21.
established Judicial and Prosecutorial Performance Units which focus on assessing the work of the Courts and Prosecution Offices. In addition, an Office of the Disciplinary Prosecutor was established as a separate and independent body that serves both the KJC and the KPC. This Office is responsible for investigating judges and prosecutors when there is a reasonable basis to believe that misconduct has occurred, and for making recommendations and presenting the evidence supporting disciplinary action to the respective Disciplinary Committees.

Furthermore, the competence and professionalism of judges and prosecutors is a crucial factor determining their independence. The Law on Courts and the Law on Prosecutors requires that judges and prosecutors be engaged in continuing legal education consistent with the regulations promulgated by KJC and KPC. Both Councils, in coordination with the KJI, the main institution responsible for training within the judicial system, determine policies and standards for training for judges and prosecutors, candidates for judges and prosecutors and the other judicial and prosecutorial staff.

Finally, protections for an efficient justice system are included in both Law on Courts and the Law on the State Prosecutor. The Law on Courts requires the courts to function in an efficient manner to ensure the prompt resolution of cases. In addition, it guarantees the right to a fair trial within a reasonable timeframe. The same applies to the office of the State Prosecutor, which is legally required to exercise its functions in an efficient and effective manner and in compliance with the Constitution, applicable laws and internationally recognized principles of non-discrimination, human rights and fundamental freedoms.

However, while the Constitution and the relevant laws generally, although with exceptions, provide for significant protections for the independence, accountability, professionalism and efficiency of the judicial branch, Kosovo’s main challenges in terms of rule of law in general and the independence of the judicial branch in particular are a result of the

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56 Law on Kosovo Judicial Council 03/L-233, cit. Article 29, 30; Law on Kosovo Prosecutorial Council 03/L-224, cit. Article 15, 16.
57 Law on Kosovo Judicial Council 03/L-233, cit. Chapter VII; Law on Kosovo Prosecutorial Council 03/L-224, cit. Chapter VI.
58 Law on Kosovo Judicial Council 03/L-233, cit. Article 45; Law on Kosovo Prosecutorial Council 03/L-224, cit. Article 35.
59 Law on Courts 03/L-199, cit. Article 34; Law on the State Prosecutor 03/L-225, cit. and Article 24.
61 Law on Courts 03/L-199, cit. Article 7.
62 Law on the State Prosecutor 03/L-225, cit. Article 6.
difficulties in implementing this legislative framework. The independence, accountability and efficiency and effectiveness of the judicial system are significantly challenged by lack of resources, proper management, capacity, infrastructure and even political will.

2.4.2. Remaining Challenges

The weak systems for the implementation of legislation and lack of appropriate enforcement mechanisms are continuously referred to as the most significant obstacles to the establishment of a rule of law environment in Kosovo in general and an independent judicial branch in particular. This is confirmed by various international and local studies and analysis, including EC Progress Reports. While there seems to be agreement among the relevant international and local stakeholders that the legislation is of generally good quality, there is also agreement that even when this legislation is implemented, it is done so with many challenges and difficulties. Among the primary challenges related to implementation appear to be lack of familiarity with ever changing laws; lack of secondary legislation and even administrative procedures in order to implement these laws; and lack of cooperation and exchange of information among various institutions in order to implement the legal requirements. An example of this last challenge is the inappropriate cooperation mechanisms between Courts and Banks on enforcing Court decision against bank accounts.

In addition, political interference in judicial proceedings is not a new phenomenon and is of serious concern, despite the difficulties involved in proving it. In fact, European Commission’s Progress Reports, as well as many other studies of international organizations, have mentioned this political interference as one of the main challenges to strengthening the rule of law in Kosovo.

Generally, the laws are appropriate and include protections against such external interference in judicial proceedings. Mechanisms such as inspection units and disciplinary mechanisms to handle such situations when evidence exists are also established. Nevertheless, interference is primarily a result of strong family and community connections and is very difficult to prove, and though the daily newspapers have continuously raised this issue, they have provided only anecdotal data. Having said this, there are also cases where the institutional arrangements have proven to be prone to improper influence. An example of this is the system for appointment of judges and prosecutors. The formal appointment competencies of the President of Kosovo were often used as a direct in-
fluence in the elimination of certain names for appointment. The rejection of candidates for appointment by an acting President without any justification was noted as a particular concern even in the European Commission’s 2010 Progress Report.63

Organized crime and corruption are prevalent, and despite the declarations of the Government, the Judiciary as well as EULEX concerning their commitment to fight these phenomena, very little progress has been achieved. This is a reflection of both lack of capacity and lack of political will. The lack of capacity has been mainly explained with reference to the problems of securing and handling evidence. However, lack of progress in combating high-level organized crime and corruption has been perceived as lack of political will on the part of the Kosovo Government. There are no high-level Government officials judged for corruption for example, despite the widespread recognition by various international and local reports that corruption levels in Kosovo are very serious. On the other hand, EULEX has not shown more concrete results either, despite the fact that a couple of investigations against high-level Government officials are currently ongoing.

The challenges in combating corruption have also been assigned to the professionalism of Judges, Prosecutors and their staff. The competence and professionalism of many of the sitting judges and prosecutors is still significantly affected by the poor but improving quality of legal education as well as by the ten years of interruption in formal schooling and legal careers during the 90s.64 The quality of the written judicial decisions is also widely criticized as reflecting poor analytical, research and writing skills by various international reports and assessments. The fact that the judicial decisions are not reasoned well leaves room for potential misconduct and corruption. The Constitutional Court’s decisions, however, are comprehensive and well-reasoned.

These shortcomings are gradually being addressed by many efforts to improve the quality of legal education in Kosovo, as well as by continuous efforts to strengthen and increase the capacity building efforts for trainings of judges and prosecutors and judicial personnel.

In this respect, during 2011, the Ministry of Justice started a consultation process to develop and implement plans for the development of a law establishing a judicial Academy in Kosovo with the aim of bringing together under the auspices of one organization the training of all legal professionals.

As concerns efficiency, the allocation of resources to the judicial branch is a challenge. The judiciary is continuously allocated around 1% of the Kosovo Budget. In addition, the allocation of budget as well as the budget development and adoption process are among the weakest links of the independent judiciary. While the KJC is independent in proposing and managing its budget, the budget adoption process, which includes both the government and the assembly, leaves significant room for influence and even revisions of the initially submitted proposals by the KJC and KPC. An exception to this is the adoption process for the Constitutional Court budget, although this is fraught with problems and tendencies for interference as well.

The management of the overall judicial system also leaves room for significant improvement. The Presidents of the courts and the court administrators lack sufficient experience in management. In addition, judges in general lack sufficient human resource support in fulfilling their duties. Furthermore, in terms of staffing, the budget allocated for the judicial and prosecutorial system cannot be managed independently, as all non-judicial staff fall under the government system for civil servants. In practice, this means that the courts do not have the independence to determine for themselves the number and the type of positions they deem necessary without the approval of the executive branch.

Infrastructure is another serious obstacle. Courts and prosecutorial offices are substandard at best. Most courts are overcrowded. Most have only one courtroom. As a result, in practice most trials are held in the judges’ offices. Although the Law on Courts guarantees that court proceedings are open to the public and the media, in practice, the right to a public hearing is continuously violated as a result of these conditions. The construction of a new Palace of Justice has started with support from the European Commission and is expected to address some of these obstacles in the near future.

Case management is another problem. Court cases are generally tracked manually. The implementation of the Case Management Information System supported by the European Commission has been full of difficulties, including outdated computers and limited capacities within the Court system to use and implement the system. The system is therefore not operational yet.

Finally, and on a very important note, an issue that seriously damages the delivery of justice and seriously damages the credibility of the overall justice system in Kosovo is the

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66 Kosovo Judicial Council 03/L-233, cit. Article 15; Law on Kosovo Prosecutorial Council 03/L-224, cit. and Article 13.
caseload management and the backlog of cases pending in the Courts for many years. According to statistics published by the KJC, there are a total of 200,000 pending cases in the system and 107,000 executions of judgments pending as of the end of 2011.67

Lengthy delays and procedural shortcomings in the execution of civil and criminal judgments significantly undermine the efficiency of the Kosovo justice system.68 This also leads to a continuously growing backlog of cases. The main factors contributing to this serious issue include but are not limited to legislative and procedural obstacles, management and efficiency, and coordination inefficiencies, as well as a lack of sufficient resources allocated to the problem. Despite the fact that KJC recognizes the importance of this issue and despite the fact that it has adopted a “National Backlog Reduction Strategy” which has already achieved some results, the system for the enforcement of judgments remains deficient.

The situation that the courts face with large caseload and backlogs directly contradicts the International Human Rights Standards, including those that are directly applicable in Kosovo. This issue has also been addressed and criticized in the European Commission Progress Reports several times.69

The Government and the Judiciary recognize that serious reforms need to be supported in order to address this matter. As a result, the Government has drafted several pieces of legislation that develop extra-judicial mechanisms that may eventually and gradually release the Court system from this increasing burden.

For example, in 2007, the Assembly of Kosovo adopted Laws on Arbitration and Mediation.70 In addition, in 2008, the Assembly adopted a Law on the Notary that regulates the functioning of the notary as a public activity in Kosovo.71 In 2009, the government started another amendment process for the Law on execution procedures with the purpose of improving the system for enforcement of judgments, in particular in terms of length of procedures and efficiency of proceedings, as well as with the purpose of establishing a bailiff system. The law was adopted in December 2012 and the new system for enforcement of judgments will enter into force in January 2014.

70 Assembly of the Republic of Kosovo. Law on Arbitration 02/L-75; Assembly of the Republic of Kosovo. Law on Mediation 03/L-057. Available at: <http://www.assembly-kosova.org/?cid=2,191>.
Finally, and on a very important note, Kosovo’s declaration of independence has led to new challenges to establishing a multi-ethnic judiciary. Immediately after the declaration of independence, ethnic Serb judges working for UNMIK were ordered by the Serbian Government to discontinue their work in the Kosovo courts and were invited back into the Serbian judiciary.

Since that time, judicial personnel from the Serb community remain under-represented in the Kosovo justice system, despite the fact that the Kosovo Constitution and the relevant laws guarantee significant representation of Serbs in the judicial bodies. Although at least 15% of the judicial seats at the Supreme and Appellate Court levels are assigned for minority communities according to the Constitution, based on the 2011 KJC Report, 5.67% of the judicial positions represent minority communities, and only 2.43% of them are from the Serb community.72

Furthermore, another very important challenge in Kosovo is the extension of the rule of law structures to the North. The Courts in the North are almost not accessible for local judges and prosecutors following the events after the declaration of independence in 2008.73 The Mitrovica Minor Offences Court, Municipal Court, District Court, and Municipal and District Public Prosecution Offices all operate from the premises of the Vushtrri Municipal Court located in the southern part of Mitrovica municipality. The Court in the North is currently administered by the EULEX judges, prosecutors and international and local administrative staff. The deployment of EULEX judges and prosecutors brought limited improvements to the functioning of the justice system in the Mitrovica region, allowing some of the most serious cases to be dealt with.74 Nevertheless, in practice the functioning of the justice system in the northern part of Kosovo is significantly challenged.

The first serious attempts to address this situation have been marked by the EU-facilitated high-level political dialogue between Pristina and Belgrade that started in the last quarter of 2012. The status of Northern Kosovo was at the heart of this Dialogue,

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73 Following Kosovo’s declaration of independence, civil unrest forced the closure of the courthouse housing the District, Municipal, and Minor Offenses Courts. Protestors demanded a return to the Serbian court system and occupied the courthouse on March 14, 2008. They were arrested by UNMIK and KFOR personnel. Immediately following the onset of unrest, the Albanian judges of the Mitrovica courts were prevented by police for security reasons from crossing the bridge into Northern Mitrovica and thus kept from working. To date, the court remains closed to most regular proceedings.
which led to the first Agreement between Pristina and Belgrade on April, followed by
an Implementation Plan of the same adopted by the end of May 2013. While concrete
results and outcomes from this Agreement are yet to be seen in the field, this Agreement
is the most important one reached in Kosovo affecting the operations of the Northern
municipalities since after the conflict. In addition, for the first time both parties appear
to be willing to make all efforts to implement the Agreement in exchange for progress
towards the European integration process.

In fact, the prospect of European integration has been the key incentive behind
many difficult reforms in the justice sector in Kosovo, in particular after the declaration
of independence. The determination of Kosovo’s political status was the main focus
for many years in Kosovo and attention was devoted primarily to those reforms that
were identified as conditions for progress towards a status resolution. With the political
status mainly behind, the European integration process is the main driver of progress in
addressing the many serious challenges in the justice sector today.

3. The European Integration Process and its Impact
in the Rule of Law Reforms in Kosovo

3.1. The Context of European Integration
Kosovo has been part of the European integration process since the Stabilization
Association Process (SAP) process began for the Western Balkans. Kosovo was included
in the framework of the Stabilization Association Process with the Thessaloniki Summit
in 2003, while a concrete prospect for Kosovo was proclaimed with the European Co-
mission (EC) Communication “A European Future for Kosovo” in 2005.75

In June 2004, the European Council endorsed the European Partnership for Kosovo,
the first instrument determining the key short- and medium-term priorities to be ad-
dressed by Kosovo institutions on its European integration path. The Government of
Kosovo responded by adopting the first European Partnership Action Plan (EPAP). The EU
set out further reform priorities for Kosovo in the European Partnership of 18 February

75 Commission of the European Communities. Communication from the Commission. A European Future
for Kosovo (Brussels: 20.04.2005). Available at:
2008. Correspondingly, the EPAP has been updated several times since then, with the latest update being in December 2011.

Between 2003 and 2009, the main instrument for political dialogue between the Government of Kosovo and the EC was the “Stabilization Association Tracking Mechanism” - a special mechanism set up to adjust to Kosovo’s status questions until its declaration of independence in 2008. More than a year after the declaration of independence, in November 2009, this process was graduated to the Stabilization Association Process Dialogue (SAPD) based on the EC Communication to the European Council and Parliament “Kosovo – Fulfillment of the European Perspective.”

Nevertheless, despite a series of declarations by the EU structures that Kosovo has a clear prospect of European integration, Kosovo is currently the only country of the Western Balkans that does not have contractual relations with the EU. Nor does Kosovo benefit from visa liberalization. The adoption of EU’s Kosovo ‘status neutral’ position, as a result of the lack of consensus among the EU member states regarding Kosovo’s statehood question, has caused serious questions and difficulties in Kosovo’s progress towards the EU. Only 22 EU Member States have recognized Kosovo’s independence so far. The absence of an agreed-upon position concerning Kosovo’s status creates difficulties for Kosovo both in terms of regional cooperation as well as the European integration process.

In an effort to address these challenges, the EU initiated the process of a “technical dialogue” between the Governments of Serbia and Kosovo in March 2011. The Dialogue was also described in terms of “conditionality” towards the European integration process for both countries.


79 Having said this, the October 2012 Communication on a Feasibility Study for a Stabilization and Association Agreement with Kosovo, for the first time confirms that an SAA can be concluded between the EU and Kosovo even in a situation where EU Member States maintain different views on its political status.

80 In this regard, in order to facilitate Kosovo’s participation in regional forums in particular, the EU mediated an agreement between Serbia and Kosovo early in 2012. Based on the agreement reached, the word “Republic” will not appear next to the name Kosovo in international and regional forums. Instead, a footnote will refer to Security Council Resolution 1244 and the ruling of the International Court of Justice saying that Kosovo’s declaration of independence in 2008 was in compliance with international law.
Within a year of “technical discussions,” agreements were reached in several “technical areas,” including but not limited to integrated border management, freedom of movement, provision of cadastral records and recognition of university degrees, Kosovo’s customs documents and civil registries.81

A very important agreement reached in February 2012 concerns the representation of Kosovo in regional cooperation.82 The arrangement allows Kosovo to sign new regional agreements and to participate in regional organizations and meetings, provided the name of Kosovo is followed by a footnote which refers to both UNSC 1244 and the International Court of Justice (ICJ) Opinion on the Kosovo Declaration of Independence. Difficult and not very popular decisions such as this one were reached under the strong incentives and conditionality of the EU, which in exchange for progress and compromise, promised Serbia “candidate status” and Kosovo the “initiation of the feasibility study on a Stabilization and Association Agreement.” While these agreements have been reached, their implementation leaves much room for improvement.

Consequently, in its Conclusions of October 2012, the European Council reiterated its full support for the Pristina-Belgrade Dialogue and assessed the progress positively in general.83 The Council reemphasized however that the Dialogue and the implementation of the agreements reached through it would be of crucial importance for both parties as they take further steps towards fulfilling their prospect of integration into the EU. The Council reaffirmed Serbia’s prospect for the status of candidate country and reaffirmed that Kosovo would benefit from the perspective of “eventual visa liberalization” once all conditions are met, in particular emphasizing that more progress was necessary in the area of justice, freedom and security as well as cooperation with EULEX.

The Communication from the Commission to the European Parliament and the Council on Enlargement Strategy and Main Challenges 2012-2013 also notes the limited progress on the implementation of these agreements and calls for further progress to be achieved as a matter of urgency.84 Nevertheless, despite problems with the imple-


82 Previously Kosovo was represented at regional meetings by the United Nations Mission in Kosovo (UNMIK), which had been established by UN Security Council Resolution 1244 following the war of 1999.


mentation of these agreements, Serbia received EU candidate status in March 2012 and the Commission adopted a Communication on a Feasibility Study for a Stabilization and Association Agreement with Kosovo in October 2012.

Despite the fact that some progress was achieved through the so-called “technical dialogue,” the most difficult problems between Serbia and Kosovo, in particular as pertains to the North, remained largely unaddressed and unresolved. As a result, the EU started another process—the high-level EU-facilitated Belgrade-Pristina Political Dialogue that began in October 2012.

At the heart of the Dialogue was the intention to find a solution for the dispute over Northern Kosovo, which is practically governed by the Serb Community, while also starting a process of “gradual normalization” of relations between Serbia and Kosovo in exchange for progress towards European Union integration.

This Dialogue included negotiating solutions for some of the most difficult rule of law problems in Northern Kosovo, the addressing of which has been continuously set aside until now, such as the disbanding of the judicial parallel structures in the North, the re-activation of the Mitrovica Court, the integration of the police into the Kosovo Police Force, as well as the application of Kosovo’s laws in the North.

Another important development occurred on October 2012, when the Commission adopted a Communication on a Feasibility Study for a Stabilization and Association Agreement with Kosovo, which for the first time confirms that an SAA can be concluded between the EU and Kosovo in a situation where EU Member States maintain different views on its political status.85 The study also assesses whether Kosovo is ready to negotiate and subsequently implement a SAA. It identifies priority issues to be addressed before negotiations can start and priority areas that Kosovo would need to address to be able to meet its obligations under an SAA.

Very importantly, the Feasibility Report focuses on and addresses the legal aspects of signing an SAA with Kosovo in a situation where not all its member states have recognized Kosovo as an independent country. While the Feasibility Study concludes that there are no legal obstacles to signing a SAA with Kosovo and that this is possible based on Article 218 Treaty on the Functioning of the EU (TFEU), it also notes that this does

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not constitute “recognition of Kosovo by the Union as an independent state nor does it constitute recognition by individual Member States of Kosovo.”

The Feasibility Study also examines whether the political and economic development of Kosovo would allow it to undertake the extensive obligations of an SAA. In this respect, the Feasibility Study emphasizes that further progress is dependent on implementing in good faith all agreements reached between Belgrade and Pristina to date, and it makes progress towards an SAA conditional upon concrete results in the rule of law, particularly in areas such as organized crime, corruption, supporting implementation of the mandate of EULEX and implementation of judicial reform, among others.

The Council of the European Union, in its December 2012 Conclusions on Enlargement and Stabilization and Association Process, clearly emphasized that improving the relations between Serbia and Kosovo is necessary for progress towards the European integration process. The normalization of relations between Kosovo and Serbia is clearly outlined as a condition for Serbia’s accession negotiations with the EU and for Kosovo’s opening of negotiations for an SAA, decisions to be potentially taken by the European Council based on the opinion of the Commission sometime in spring 2013. In addition, in Kosovo’s case the opening of the SAA negotiations is also conditional upon further progress in the area of rule of law, cooperation with EULEX, the fight against organized crime and corruption. Basically, further progress towards the European Union integration agenda was clearly conditioned on progress and the ability of both Pristina and Belgrade’s to make difficult decisions under the auspices of the EU-facilitated Political Dialogue. In the case of Kosovo, finding a solution for the North is of outmost importance, as it would both offer concrete progress towards the European integration process after a long time, and it would also for the first time offer the prospect of starting to address some of the key rule of law obstacles in Kosovo that result from difficulties in the North.

3.2. The April Deal

The first Agreement on the principles governing the normalization of relations between Pristina and Belgrade resulting from the EU-Facilitated High Level Political Dialogue was reached on April 19, 2013. It is a short agreement, defining only the key principles and leaving many implementation questions undefined and unresolved. It primarily

focuses on the establishment of the Association/Community of Serb majority municipalities; the police force; the justice sector and elections.

More specifically and most importantly, the Agreement establishes an Association/Community of Serb Majority municipalities in Kosovo. The Agreement provides that its dissolution would only be possible by the decision of the participating municipalities themselves. Legal and Constitutional guarantees in this respect are also required by the Agreement. The Association/Community is equipped with full competencies in the area of economic development, education, health, urban and rural planning and other competencies as delegated by the central authorities. Finally, the Association/Community is foreseen to have a role at the Central level, a role which is not properly defined by the Agreement itself.

On the other hand, the Agreement addresses the integration of the Serb community into the Kosovo Police Force. The Agreement clarifies that there shall be only one Police Force called the Kosovo Police. It also mandates that all Police Officers in the Northern Kosovo will be integrated in the Kosovo Police framework and that despite the current practice that Serb Police Officers receive double salaries -from the Kosovo Government and Serb Government, respectively- the Serb Police Officers once integrated within the Kosovo Police Service will receive salaries only from the Kosovo Government. In addition, the Agreement also requires that there be a special Police Regional Commander for the four northern Serb majority municipalities (Northern Mitrovica, Zvecan, Zubin Potok, and Leposavic). This position is to be held by a Serb nominated by the Kosovo Ministry of Internal Affairs, from a list provided by the Association/Community of the Serb Municipalities. As in all other cases, the composition of the Kosovo Police structures in the North is to reflect the ethnic composition of the respective municipalities.

As it pertains to the justice sector, the Agreement mandates that all judicial authorities must be integrated and operate within the Kosovo legal framework. More importantly, it mandates that the Appellate Court in Pristina establishes a Panel composed of majority Serb Judges “to deal with all Kosovo Serb Majority municipalities.” This Panel will be sitting permanently in the Mitrovica District Court building in the Northern Mitrovica.

Finally, the Agreement adds that municipal elections will be organized in the northern municipalities during 2013 with the facilitation of the Organization for Security and Cooperation in Europe (OSCE) and in accordance with the Kosovo law and international standards.
On April 22, the Kosovo Assembly adopted a Resolution supporting the Agreement reached with Serbia. This was certainly a controversial Assembly session followed by significant criticism for the Agreement in particular by the opposition party, Vetevendosje. The same party challenged the constitutionality of the Agreement to the Kosovo Constitutional Court. The outcome of the Constitutional Court review of this claim is expected during the first week of September 2013.

As it pertains to its implementation, the Agreement required an Implementation Plan and a timeframe by April 2013, responsible for which would be an Implementation Committee facilitated by the EU. Finally, through this Agreement, both sides agreed that they will not block each other’s progress toward the European Union.

The two key things that were clear from the provisions related to the justice sector, were that a separate branch of the Appellate Court needed to be established in North and that the Serb judicial personnel were to be gradually incorporated into the Kosovo judicial structures. This was certainly very good news as it started addressing for the first time the non-functioning of the justice sector and almost complete lack of operations of the Courts in the North severely limiting access to justice, among others. Nevertheless, implementation wise, many things were unclear, in particular as it relates to the establishment of the Appellate Court Panel in the North and its jurisdiction.

While the Kosovo Law on Courts allows the for the possibility to establish “Departments” and “Divisions” within the Court of Appeals, the Agreement empowers this new structure to deal with cases coming from all Kosovo Serb majority municipalities and not only the Northern ones. This, if nothing else, requires a major jurisdictional change. Further, the composition of the Appellate Court currently requires at least 15% of the total seats but not fewer than ten seats from the minority communities. If all “Serb related” cases are going to be heard in the North, how does this impact the composition of the Appellate Court in Pristina, needs to be analyzed and determined. Is there still a need to keep a multi-ethnic Appellate Court or should all the Serb Community Judges in the Appellate Court be assigned to its Northern “Panel,” thus significantly affecting the multi-ethnic concept building the Kosovo justice system? Finally, a determination needs to be made on how to handle the caseload involving inter-ethnic parties. It is unclear how the appellate jurisdiction will be resolved in cases when parties come from different communities.
The Implementation Plan adopted by the end of May 2013 did not go too far in clarifying all these questions. As it pertains to the justice sector, the Implementation Plan calls for the establishment of a Working Group to be responsible for devising a detailed plan for the integration of Serbian judicial authorities into the Kosovo structures. This process is to be supported by EULEX. The Government of Serbia is expected to provide information on the number of its judicial personnel employed in Kosovo who have expressed an interest in joining the Kosovo structures. This was however conditioned with the adoption of the Law on Amnesty by the Kosovo Assembly. More importantly, the Implementation Plan requires that by the end of 2013, all Serb Court premises in Kosovo will be closed and all personnel will be integrated into Kosovo structures. While this Working Group has been meeting continuously in Brussels since the adoption of the Implementation Plan, the outcomes of their proceedings have not been made publicly available. In general, the proceedings of these Workings Groups have been characterized by lack of transparency and communication.

Otherwise, leaving the justice sector aside, the same Implementation Plan addresses issues related to the adjustment of legal framework; the Association/Community; police; municipal elections and other general provisions.

As it pertains to the legal framework issues, the Implementation Plan required both sides to enact all necessary legal changes for the implementation of the Agreement, including the Law on Amnesty by June 2013.

As it pertains to the establishment of the Association/Community, the Implementation Plan required the establishment of a Management Team composed of representatives of both parties, which is to be in charge for preparing the establishment of the Association/Community post local government elections planned for November 2013.

As it pertains to the Police, the work was foreseen to start by the end of May through the establishment of another Working Group, which would draft detailed plans for the integration of the Serb Community into the Kosovo structures. The Government of Serbia was expected to start all the necessary procedures to cease the payment of salaries and support the incorporation of its employees into the Kosovo police force structures. This process is to be supported by EULEX. Based on this Implementation Plan, Serbia is expected to start closing its security offices in Kosovo by June, 2013. These offices were expected to fully close by July 2013 and by the end of the year, all members of the Serbian security structures would be integrated and their salaries be paid exclusively from the Kosovo budget.
Finally, through this Implementation Plan, both sides committed to fully implement all agreements reached throughout the so called “technical dialogue” between March 2011 and October 2012.

As it appears from the Implementation Plan, the Law on Amnesty was at the heart of the implementation of the Agreement. This Law is designed to help integrate the community in Serb-run Northern Kosovo by ensuring that Serbs cannot be prosecuted for any past crimes related to the resistance against the Pristina authorities. This Law attracted serious disagreement and dissatisfaction among the citizens of Kosovo and the civil society and as a result of serious public pressure, the Law failed to get adopted initially by the Kosovo Assembly. Nevertheless, the international community urged and pressured the Kosovo Assembly as well as the Government to adopt the Law, while Serbia threatened to reconsider the Agreement on normalizing relations if the Law was not approved. As a result, the Kosovo Assembly eventually approved the Amnesty Law. The opposition party, “Vetevendosje” and a few individual Assembly members opposed the Law and used their right to challenge this Assembly act to the Constitutional Court of Kosovo questioning its constitutionality. The outcome of the Constitutional Court review is expected during the first week of September 2013.

While a lot remains to be seen in terms of concrete results from this Agreement, the deal reached on April 2013 is crucial for both, Kosovo and Serbia as well as the Serb Community in the North of Kosovo. This marks the first Agreement between the two parties since after the conflict and starts the process of “normalization of relations” between the two. More importantly, it is the first serious effort to address the problems of the Serbs in the North and start an integration process of the same. Needless to say that this was a very difficult deal on both sides and was reached only under the strong pressure of the EU and clear rewards in exchange. The promise was kept and based on the European Council Conclusions of June 2013, a decision was made to open accession negotiations with Serbia. Based on the Conclusion, the first intergovernmental conference will be held in January 2014 at the very latest. In addition, the Decisions authorizing the opening of negotiations on a Stabilization and Association Agreement between the European Union and Kosovo were also adopted.

This is a very important momentum which requires the EU to seriously engage in supporting the parties to implement the Agreement as a next step. With the prospect of

concrete progress towards an SAA and potential visa liberalization in exchange, there is momentum that could seriously accelerate the rule of law reforms and “export” EU rule of law values to Kosovo.

This is very important since, as this paper further elaborates, while the rule of law reforms have been continuously referred to as a priority in Kosovo by the EU and many other important international partners, the EU conditionality has not necessarily been effectively used in order to result in major progress in addressing some of the most difficult rule of law problems in Kosovo. The Agreement reached with Serbia and the EU decision authorizing the opening of negotiations on a SAA with Kosovo, might provide the basis for the beginning of a new relationship between Kosovo and the EU.

3.3. European Union “Export” of Rule of Law Values

The prospect of European integration has opened a new and important chapter for the reform of the Kosovo judiciary, providing serious incentives for continuous efforts to progress in addressing the obstacles. On the other hand, by committing to the integration of the Westerns Balkans into the European Union structures through the Stabilization and Association process, the European Union itself has strengthened its efforts for the “Europeanization” of the region by starting a process to “export” its values.88

Various studies in this area indicate that this is done primarily through technical and financial assistance promoting and facilitating reforms in the area of rule of law, but also through the use of “conditionality” in order to influence reforms in the countries that are part of the European Integration process. The latter primarily means the offer of positive incentives, with the ultimate incentive being EU membership, as a reward for countries who meet the EU’s demands to adopt certain rules. Nevertheless, as the Paper further discusses, conditionality is not always uniform and/or homogeneous.89

The “Europeanization” of candidate and potential candidate countries as a result of EU influence is the subject of numerous studies, among which is one conducted by Ulrich Sedelmeier, “Europeanization in new members and candidate states,” albeit in the context of the Central and Eastern European Countries (CEEC).90 The author, among other things, analyses the extent and the nature of the EU’s impact, as well as

88 U. Sedelmeier. 12 February 2011. “Europeanization in new member and candidate states,” Living Reviews in European Governance 6(1) (London School of Economics & Political Science). Available at: <http://www.lse.ac.uk/people/u.sedelmeier@lse.ac.uk/>.
89 Ibidem.
90 Ibidem.
the conditions and factors that determine the effectiveness of EU influence in countries progressing towards membership. The study identifies elements such as “determinacy of conditions,” the “size and speed” of rewards, the “credibility of conditions” as well as the “size of adoption costs” as key elements increasing the impact and effectiveness of conditionality.

Similarly, another study conducted by Frank Schimmelfennig and Ulrich Sedelmeier concludes that rule transfer from the EU to the CEECs and the variation of its effectiveness are dependent, among other things, on the credibility of EU conditionality and the domestic costs of rule adoption.91

Based on the above, the “determinacy of conditions” helps governments to know exactly what they have to do to get the rewards. This helps clarify the exact conditions that have to be fulfilled in exchange for the reward. The “determinacy” decreases the possibility for various interpretations on both sides of the meaning of the conditions and the reward.

The “size and speed of rewards,” on the other hand, is a crucial factor in analyzing the efficiency of conditionality. The bigger the size of the reward and the closer the prospect of its implementation, the more successful is the implementation of the condition. Equally, based on these studies, the longer the temporal distance to the payment of reward, the lower the incentive to comply. The ultimate reward of EU membership is the most sizeable benefit for candidate and potential candidate countries, but sometimes the payment of this reward is distant. Therefore, the use of intermediate rewards, such as concrete progress towards integration and even financial assistance, is important. Sedelmeier particularly focuses on this problem by addressing questions related to “Europeanization” without a credible EU membership perspective.92

The “credibility of conditionality” is the third set of relevant factors, and it has to do primarily with withholding rewards in case of non-compliance and delivering the reward in case of adoption of a certain rule. Thus, credibility depends on a consistent, merit-based application of conditionality by the EU.93 As a result, the credibility of conditionality is also linked to the ability of the EU to monitor effectively the fulfillment of its requirements.

91 Frank Schimmelfennig and Ulrich Sedelmeier also focus on these questions in their study. See F. Schimmelfennig and U. Sedelmeier, Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe. Available at: <http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/research%20groups/1/teamB-reader/Schimmelfennig%26Sedelmeier_Governance%27by%27Conditionality.pdf>.
93 Ibidem: 12.
Finally, the "capabilities and costs" of the country or its respective institution subject to conditionality is crucial. The adoption costs have to be taken into account and be reasonable.

What most of these elements have in common is clarity and certainty. For the effects of conditionality to be maximized, the conditions and the rewards need to be as clear as possible, the timing needs to be clearly determined and the practice should be able to show that rewards are delivered or withheld depending on the fulfillment of the set conditionality. The less clear and certain these elements are, the less effect is to be expected. Nevertheless, uncertainty is common, and it primarily arises from internal conflict within the European Union about the application of conditionality and the respective reward.94

Now, while these common denominators for maximizing the effects of EU conditionality are drawn from studies of the most recent EU enlargements, their application is also valid for the countries of the Stabilization and Association process. Depending on their stage in the integration process, the degree of their application in terms of conditionality varies. The application of these conditions is the least valid for the case of Kosovo, particularly for one primary reason: uncertainty.

Uncertainty in the case of Kosovo stems primarily from the lack of a common European Union position related to the question of Kosovo’s status and the lack of any credible or concrete timeline for progress towards its integration in the European Union. The first time that concrete rewards – the prospect of negotiating an SAA – were clearly promised in exchange of fulfilling a condition – progress in the Dialogue with Serbia– was within the auspices of the EU-facilitated Pristina-Belgrade Dialogue. It worked. Both Kosovo and Serbia agreed to a very difficult deal in April 2013 in exchange of concrete progress towards the EU integration. Otherwise, although Kosovo is part of the Stabilization and Association process and the Commission has several times expressed the clear prospect of Kosovo’s joining the EU, Kosovo is the last country of the Western Balkans in terms of progress towards integration, with not even a contractual relationship with EU yet and, until very recently, with an unclear prospect on whether an SAA was even possible for Kosovo under its political circumstances, in particular in light of the EU’s lack of unified position on Kosovo’s political status. Overall, the prospect of joining the EU is so uncertain in terms of timing that the incentives for reform are less credible, despite Kosovo’s formal commitment to fulfill the criteria and conditions necessary on its path towards the European Union.

94 Ivi.
Having said this, other elements discussed above, such as “determinacy of conditions,” “size and speed of the rewards” and the “credibility of conditions,” have not been consistently applied, if at all, in the efforts for the “Europeanization” of Kosovo. There has generally been no official link between the condition and the reward and no clarity on the type of reward. Furthermore, at least until very recently, no intermediate rewards were applied, with the main reward remaining the prospect of EU membership. With the credible prospect of membership decades away, despite a strong consensus and commitment within the Kosovo Institutions and among its people to join the European Union, the progress in implementing difficult reforms has generally been slow.

Quite the contrary, Kosovo’s strongest incentives to comply with EU requirements have been a result of the Kosovo political status determination process and not the European Integration process. Kosovo Institutions have responded more effectively to “conditionality” the closer the status determination process was. In terms of EU conditionality, the example is the Dialogue with Belgrade. A very difficult deal was reached in April under the auspices of the EU-Facilitated Political Dialogue only in exchange for a concrete progress towards European integration. Both examples indicate that the clearer, more concrete and closer the reward, the stronger the incentive to comply with conditionality.

This is equally valid for Kosovo’s difficult reforms in the area of rule of law, which may risk losing momentum unless the conditions for reform and the respective rewards are clearly determined and outlined. This is particularly important for the implementation of the reforms agreed upon through the April Agreement. Unless the EU conditionality is clear and concrete rewards offered in exchange, the implementation of the Agreement risk losing momentum, putting at risk very important rule of law reforms in Kosovo.

A recent report by the European Court of Auditors confirms this perspective by emphasizing that the Commission could have made more use of policy dialogue and conditionality to strengthen the rule of law, and it strongly recommends that the Council and the Commission ensure that their policy dialogues with Kosovo focus particularly on strengthening the rule of law and are linked to concrete incentives and priority conditions.\textsuperscript{95}

Otherwise, the technical and financial assistance provided to Kosovo by the European Union in the area of rule of law has been tremendous. This assistance has led to

\textsuperscript{95} European Court of Auditors. 2012. European Union Assistance to Kosovo related to Rule of Law (Special Report no. 18). Available at: <http://eca.europa.eu/portal/pls/portal/docs/1/17764743.PDF>.
significant results and to very important progress in certain areas. However, the overall opinion, including the findings of the abovementioned European Court of Auditors report, suggests that the results could have been much better and the remaining challenges fewer, if the “Europeanization” efforts and the use of “conditionality” had been more effectively applied.

3.4. European Union Support for and Monitoring of the Rule of Law Reforms in Kosovo

The EU and its member states have played an important role in the reconstruction and development of Kosovo. The EU is the largest donor providing assistance to Kosovo. Just between 2007 and 2011, the EU provided 679.94 million euro for rule of law reforms in Kosovo through EULEX, the Instrument for Pre-Accession (IPA) and the Instrument for Stability. This amount totals 56% of the overall EU assistance to Kosovo during this period.96

The EU assistance is coordinated through the EU Office in Kosovo/European Union Special Representative (EUSR), EULEX and the EU Member State representations in Kosovo in cases of bilateral assistance.97 The EU Office plays a crucial role in supporting Kosovo on the path towards European Union integration. The EUSR offers advice and support to the Government of Kosovo in the political process and provides overall coordination for the EU presences in Kosovo. Finally, most EU Member States have their own bilateral programs through which they provide assistance to Kosovo.

The amount of the assistance as well as the presence of various European structures in Kosovo presents a coordination challenge. Both the European structures themselves as well as the Kosovo government through the Ministry of European Integration have established various coordination mechanisms in order to maximize the efficiency of the assistance provided in the area of rule of law. In 2008 EULEX established a Joint Rule of Law Coordination Board (JRCB) with the Kosovo authorities, co-chaired by the EULEX Head of Mission and the Deputy Prime Minister of Kosovo. The EUSR is also mandated to strengthen the coordination of EU support in Kosovo. The Government of Kosovo, on the other hand, has established a Donor Coordination structure led by the Ministry of European Integration, which includes a Rule of Law sector working group.

96 Ibidem.
97 Following the entry into force of the Lisbon Treaty, the European Commission Liaison Office, jointly with the EUSR mandate, became the European Union Office in Kosovo. Before becoming one Office, the European Commission Liaison Office has been functioning since September 2004, and the EUSR since 2008.
and three relevant sub-working groups. A National Council for EU Integration, chaired by the President, as well as a Task Force for European Integration, led by the Ministry of European Integration, were also established.

However, despite the existence of several coordination forums, the coordination between the European Commission rule of law projects in Kosovo, on the one hand, and the EULEX monitoring, mentoring and advice actions, on the other, leaves significant room for improvement. In addition, the capacity of the Government of Kosovo to effectively participate and contribute to the effective coordination of rule of law assistance has been limited despite the gradual improvements. The recent European Court of Auditors addresses these problems concerning the effectiveness of EU assistance from the perspective of the clear definition of objectives and coordination mechanisms, in particular between the European Union Office and EULEX. It analyzes and proposes solutions for a number of weaknesses it identifies in this respect. The report particularly recommends that the Council and Commission need to ensure that rule of law priorities and objectives for Kosovo are linked to concrete benchmarks against which progress can be assessed.

Another area where effectiveness needs to be increased is the relationship between monitoring reports and the implementation of their recommendations. In this respect, the European Partnerships and the corresponding Action Plans are the key planning documents, while the European Commission Progress Reports remain the key monitoring tools. The 2012 EPAP is the key planning document, which aims to address key short- and medium-term challenges and priorities as identified by the European Partnership 2008. In order to strengthen the monitoring mechanisms, the Ministry of European Integration launched and functionalized an EPAP monitoring and reporting system in 2010. Nevertheless, the main monitoring tool for the implementation and progress of the rule of law reforms in Kosovo remains the European Commission Progress Reports.

The EU assistance to Kosovo is in principle conditional on the progress in meeting priorities set out in the European Partnership. However, the Partnership contains as many as 79 priorities on the rule of law alone. EPAP 2012 contains a total of 261 actions, of which 62 actions are set forth for the political criteria, including in the area of rule of law. Managing the implementation of all EPAP priorities and holding the responsible institutions accountable for their implementation has been a challenge. Furthermore, the Partnership priorities and the Action Plan’s corresponding actions are not necessarily consistently reflected in the priorities of the Government institutions

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or in the programming of the other donors. The European Commission technical assistance programs include conditions, but these are not necessarily linked to the direct contribution toward fulfilling the EPAP Actions or broader policy concerns. Moreover, the Partnership has not been updated since 2008.

On another note, the European Commission Progress Reports are taken seriously by the Kosovo Government and they are an incentive to accelerate the reform processes. However, while their recommendations are taken seriously, they are not necessarily effectively translated into priority reform actions by the relevant government bodies. This is not necessarily a reflection of lack of will so much as it is a reflection of weak capacity and lack of coordination.

In this respect, an analysis of the progress reports since 2008 reflects that while progress has been made in the area of rule law, the key challenges are continuously repeated as weaknesses since 2008.99

Since the Progress Report of 2008, the Assembly of Kosovo adopted the Constitution of the Republic of Kosovo, which is widely recognized as a Constitution containing strong provisions for the protection of human and minority community rights. In general, progress was continuously noted in the adoption of and the quality of laws. The Progress Reports indicate most progress in the judicial sector during 2009 and 2010. This progress is mainly attributed to the adoption of the Laws on Courts, the Kosovo Judicial Council, the Kosovo Prosecutorial Council and Prosecution as well as the introduction of a new salary system for judges and prosecutors. As contributing to this end should also be counted the successful completion of the re-appointment process for judges and prosecutors, as well as the establishment of the Constitutional Court and the effective implementation of its decisions.

However, as mentioned in the previous sections of this paper, weak systems for implementation of legislation were continuously referred to in the European Commission Progress Reports. The efficiency of the Court proceedings and the backlog of cases are also continuously mentioned as a weakness. The court system challenges from a human resource and organizational perspective were also mentioned in several progress reports. Furthermore, the KJC’s non-properly functioning disciplinary systems, the lack of implementation of the KJC’s Judicial Audit Unit recommendations, an almost non-functioning case management system, the lack of effective cooperation between police and public prosecution, and significant problems with witness protection were also continuously

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referred to as weaknesses in the EC Progress Reports. Finally, even more difficult problems such as the integration of the Serb community into the justice system, political interference in judicial proceedings, the effective prosecution of cases, corruption and the fight against organized crime, and the lack of any effective functioning of the rule of law in Northern Kosovo remain key obstacles for the progress of the rule of law in Kosovo. The results of the implementation of the April Agreement between Pristina and Belgrade remain to be seen.

While the Kosovo Government and the European Commission technical assistance programs have certainly incorporated these challenges into their priorities and programming, EU “conditionality” has not been sufficiently effective in order to accelerate the necessary progress or address the weaknesses continuously referred to in the EC Progress Reports.

The EU has recognized this and as such has proposed the launch of the Structured Dialogue on the Rule of Law, which was announced by the publication of the 2011-2012 Enlargement Strategy at the end of 2011. The Structured Dialogue started on 30 May 2012. This structure includes high-level rule of law meetings and discussions focused on the main rule of law priorities for Kosovo and aims at regularly assessing Kosovo’s progress on three issues in particular: the judiciary, the fight against organized crime, and the fight against corruption.

While concrete results remain to be seen, the Structured Dialogue on Rule of Law could be an important tool for maximizing the effects of the reforms as well as accelerating their pace. This, followed by the prospect of visa liberalization and the prospect of an SAA, would provide for a crucial opportunity to further prioritize rule of law reforms in Kosovo and to strengthen the coordination and monitoring mechanisms necessary to maximize their implementation, sustainability and progress.


3.5. The Efficiency of the European Union’s Support for Rule of Law Reforms

3.5.1. Perceptions of the Relevant Stakeholders on the Effectiveness of the Rule of Law Reforms

The same conclusions are supported by the perceptions of the relevant stakeholders on the effectiveness of the Rule of Law reforms in Kosovo. As mentioned earlier in this paper, in order to get an understanding on how the EU rule of law criteria and assistance are understood and perceived by the beneficiaries and relevant stakeholders, a series of semi-structured interviews were held. The primary purpose of these semi-structured interviews was to get an understanding of whether the EU requirements imposed in the monitoring process for the rule of law reforms in Kosovo can be accurately identified by the local counterparts and whether the progress made in the rule of law areas can be effectively attributed to the EU’s influence and assistance. In addition, determining whether “conditionality” and financial and technical assistance tools are effective in accelerating the rule of law reforms in country was also important.

When asked to identify the EU conditions in monitoring the judicial reform in Kosovo, most respondents reflected a lack of comprehensive knowledge on the EU conditions as well as the monitoring processes. Most did identify a few conditions, however, such as laws that are required to progress on the judicial reform. Most showed an understanding of general principles, such as the independence of the judiciary and separation of powers. However, respondents referred to EU standards and best practices, while not reflecting an understanding of any specifics or differences between best practices and EU conditions in the area of judicial reform.

Judges and prosecutors generally had difficulties in defining what EU requirements were imposed in the monitoring process. Further, most stated that in their view, there were no specific criteria but rather general best European and international practices that apply to judicial reform in Kosovo.

There are respondents, mainly those coming from academia, that specifically identified the efficiency, accountability, impartiality and independence of the judicial branch, implementation of laws, commitment to fight organized crime and corruption, cooperation

102 Interviews were held with Municipal Court judges, Supreme Court judges, Kosovo Judicial Council officials, Kosovo Judicial Institute officials, Ministry of Justice officials, Faculty of Law, and Council of Europe, among others.
with EULEX, prevention of trafficking in human beings and improving international legal cooperation as the main EU conditions to progress in the area of judicial reform.

When asked whether the respondents could refer to any evidence of practical effects of EU assistance and/or its impact on the rule of law reforms in Kosovo, most could not identify any. They all referred to a gradual tendency towards incorporation of the rule of law principles and gradual progress made in the rule of law field, while continuously emphasizing that challenges remained. In terms of concrete examples of evidence for progress in the area of rule of law, most referred to the quality of laws drafted with the participation and support of the EU, while emphasizing that the implementation of laws is particularly problematic. The only other specific examples included EU support for improving the prisons system in Kosovo as well as the construction of the Palace of Justice. However, significant criticism was focused on the effectiveness of the prosecution of cases and other areas where EULEX has significant competence and influence. Most considered that while EULEX is viewed as better than UNMIK, it leaves a lot to be desired in terms of its vision, organization, functioning and results.

Interestingly, despite the fact that the EU is the largest donor in Kosovo, some of the respondents reflected difficulty in identifying and/or distinguishing among the efforts of the EU to support the rule of law reforms and those of other donors and actors. Confusion particularly persists in identifying assistance provided by the EU structures and those of the Council of Europe.

In terms of the EU mechanisms used to support the furtherance of the rule of law reforms in Kosovo, most respondents said that the EU’s influence is a result of the technical and financial assistance, and very few reflected an understanding of the concept of “conditionality.”

As far as any resistance towards the implementation of rule of law reforms in Kosovo is concerned, the respondents confirmed that generally there is strong government and public support for the European integration process in Kosovo, and as a result strong support for the implementation of the EU-mandated reforms. As such, in the respondent’s view, there are very few elites that resist these reforms intentionally. However, there are two categories identified that could represent obstacles to an accelerated pace of reforms. On one hand, despite public statements, certain categories of political elites are believed to cause delays and resist the reforms, in particular those related to combating corruption and organized crime. On the other hand, there are technical staff and civil
servants throughout the government structures that do not necessarily have an agenda, but simply do not have the skills and the motivation to efficiently participate in or support the reform processes.

Most respondents considered that the efficiency of the EU-led reforms in Kosovo would be improved if consultation and inclusiveness increased. There was a perception that the EU reforms are sometimes imposed in short periods of time and without necessary consultation. In addition, there was a perception that there are contradictory messages coming from various EU structures and representatives. Lack of coordination among European partners themselves was mentioned as a factor that undermines the effectiveness of the assistance. According to some respondents, the strategic plans were not properly coordinated and above all there was no vision for the direction of the rule of law reforms in Kosovo.

Furthermore, the perception is that EU “conditionality” is not properly used. The “conditionality” that is commonly used in rule of law reforms in Kosovo is in the form of applied pressure to achieve quick results that are not necessarily sustainable. “Conditionality” at the political level, in terms of rule of law reforms, is hardly ever efficiently used, despite the fact that some evidence of effective use of conditionality was noted during the Pristina-Belgrade Technical Dialogue as well as the EU-facilitated high-level political dialogue more recently.

Overall, respondents recognized the importance of EU assistance and its contribution to the rule of law reforms in Kosovo. Nevertheless, very few could identify any concrete examples of specific EU contribution towards strengthening the rule of law in Kosovo. They all recognized that there is gradual progress but that many challenges remained. There was generally a perception that EULEX is not as effective as it should be and that much remained to be desired in terms of EULEX support for prosecution of cases and combating corruption and organized crime. Finally, the overall perception led to the conclusion that EU “conditionality” is not properly used and/or tailored in order to maximize the effects of rule of law reforms in Kosovo.

No respondents referred to planning tools such as the European Partnership and/or the European Partnership Action Plans. A few did mention the importance of the progress reports, however.

Generally, there is a consensus that EU support for Kosovo is tremendous and that the EU has made an important contribution to the rule of law reforms in Kosovo. However, there
seems to be lack of clarity as to which are the EU criteria for progress in the area of rule of law and how the EU monitors this process. Overall, there seemed to be a need for more clarity about which are the key requirements and criteria to move further in strengthening the rule of law in Kosovo. A comprehensive system of conditions, incentives and rewards was seen as key to the efficiency of the implementation of rule of law reforms.

These perceptions are largely confirmed by the European Court of Auditors, referred to several times in this Paper, which assessed the effectiveness of the EU Assistance to Kosovo related to Rule of Law. The report generally found that EU assistance to Kosovo in the field of the rule of law has not been sufficiently effective. It concluded that while significant progress has been made, significant challenges remain, particularly with regard to the fight against organized crime and corruption, above all in the north of Kosovo. The report also adds that while judicial sector assistance has been “useful,” the judiciary continues to suffer from political interference, inefficiency and a lack of transparency and enforcement. The report confirms that almost no progress has been made in establishing the rule of law in the North of Kosovo.

The European Court of Auditors report comes at a good time for the rule of law reforms in Kosovo. The identification of problems and in particular its strong recommendations that the policy dialogue and conditionality should be more efficiently used in order to accelerate the rule of law reforms in Kosovo, coupled with the launch of the Structured Dialogue for Rule of Law and the prospect of the visa liberalization process and an SAA, create important momentum for the rule of law reforms in Kosovo and effective improvements related to planning, monitoring, implementation and coordination.

More importantly, the EU-facilitated high-level political dialogue between Pristina and Belgrade has clearly opened the prospect of Kosovo’s concrete progress towards the European Union in exchange for progress towards the “normalization” of the relationship with Belgrade. The political Agreement reached under the auspices of this Dialogue did not only open the prospect of Kosovo’s starting negotiations for an SAA and thus marking the first concrete steps towards the European integration process, but by starting to address the status of the Kosovo North, it paves the way for serious rule of law reforms in this region and Kosovo overall.

Finally, negotiations for an SAA could provide a very useful and efficient tool for the EU to use to effectively influence concrete progress in implementing rule of law reforms in Kosovo.

103 European Court of Auditors. 2012. European Union Assistance to Kosovo related to Rule of Law (Special Report no. 18), cit.
reforms and addressing the many rule of law challenges in Kosovo. Having said this, the conditions and the rewards need to be as clear as possible, the timing needs to be clearly determined and the practice should be able to show that rewards are delivered or withheld depending on the fulfillment of the set conditionality. The closer the prospect of concrete progress towards European Integration, the more effective the EU “conditionality” will be, and as such the EU technical and financial assistance provided to Kosovo will be able to maximize its impact.

4. Conclusions – “Europeanization” through Rule of Law Reforms

Kosovo’s current legal and justice systems and the challenges they face are a reflection of several key periods in its recent history. The period under former Yugoslavia, the period between the suspension of autonomy in 1989 until the conflict in 1999, and the period during the UNMIK administration until the declaration of independence in 2008 all have in common a significant influence of the executive over the judiciary, although at varying levels and varying conditions. This has generally led to an establishment of a mindset of subordination to the executive branch and led to challenges related to the establishment of and implementation of a concept of an independent judiciary. Furthermore, the consequences of the 1999 conflict have been tremendous for the rule of law in Kosovo. These consequences still challenge the establishment of a multi-ethnic judiciary, in particular in the northern part of Kosovo.

Significant efforts to reform the Kosovo judicial system began after the establishment of the International Administration in Kosovo in 1999. Tremendous financial and technical assistance was provided in order to establish and increase the capacity of key institutions in the justice sector. The gradual transfer of competencies, in particular with the establishment of the KJC in 2005, marked important progress towards the establishment of an independent judiciary. Nevertheless, in principle, very important competencies related to the judicial branch remained under the authority of international administration, contradicting as such the principle of the separation of powers and of the independence of the judicial branch.

The first important steps towards establishing an independent judicial system in Kosovo are taken after the declaration of independence in 2008. The Kosovo Constitution and
the relevant laws related to the justice system provide for significant protections for the independence, accountability, professionalism and efficiency of the judicial branch. Despite some problems, in general the legislative framework is sound and provides important safeguards for the independence of the judicial branch. Kosovo’s main challenges, in terms of the rule of law in general and the independence of the judicial branch in particular, are a result of the difficulties in implementing this legislative framework.

The weak systems for the implementation of legislation and lack of appropriate enforcement mechanisms are continuously referred to as the most significant obstacles to the establishment of a rule of law environment in Kosovo in general and an independent judicial branch in particular. While there seems to be agreement among the relevant international and local stakeholders that the legislation is of generally good quality, there is also agreement that even when this legislation is implemented, it faces many challenges and difficulties. Primary challenges related to the implementation of laws include but are not limited to the lack of familiarity with ever-changing laws, the lack of secondary legislation and even administrative procedures in order to implement these laws, and the lack of cooperation and exchange of information among various institutions in order to implement the legal requirements. In addition, the efficiency and effectiveness of the judicial system is significantly challenged by the lack of resources, proper management, capacity, infrastructure, and even political will.

The situation in Northern Kosovo is particularly difficult. The first serious attempts to address this situation have been marked by the EU-facilitated high-level political dialogue between Pristina and Belgrade that started in the last quarter of 2012. The status of Northern Kosovo was at the heart of this Dialogue, which led to the first Agreement between Pristina and Belgrade on April, followed by an Implementation Plan of the same adopted by the end of May 2013. While concrete results and outcomes from this Agreement are yet to be seen on the field, this Agreement is the most important one reached in Kosovo affecting the operations of the Northern municipalities since after the conflict. In addition, for the first time both parties appear to be willing to make all efforts to implement the Agreement in exchange for progress towards the European integration process.

In fact, the prospect of European integration has been the key incentive behind many difficult reforms in the justice sector in Kosovo, in particular after the declaration of independence. The determination of Kosovo’s political status was the main focus for many years in Kosovo and attention was devoted primarily to those reforms that were
identified as conditions for progress towards a status resolution. With the political status mainly behind, the European integration process is the main driver for progress in addressing many serious challenges in the justice sector today. However, the relationship between the EU’s conditions and Kosovo’s response to them needs to be analyzed in terms of efficiency and concrete impact.

Studies focused on questions of the effectiveness of EU conditionality identify a few important elements that if applied consistently maximize the effectiveness of the desired reforms. These studies refer to key elements such as “determinacy of conditions,” the “size and speed of rewards,” the “credibility of conditions” as well as the “size of adoption costs,” as important for increasing the impact of conditionality.

While these common denominators for maximizing the effects of the EU conditionality are drawn from studies of the most recent EU enlargements, their application is also valid for the countries participating in the Stabilization and Association process. Depending on these countries’ stage in the integration process, the degree of the application of these elements varies. Their application is the least valid for the case of Kosovo, however, particularly because of one primary reason: uncertainty.

Uncertainty in the case of Kosovo stems primarily from the lack of a common European Union position related to the question of Kosovo’s status and the lack of any credible or concrete timeline for progress towards its integration in the European Union. The first time that concrete rewards—the prospect of negotiating an SAA—were clearly promised in exchange of fulfilling a condition—progress in the Dialogue with Serbia—was within the auspices of the EU-facilitated Pristina-Belgrade Dialogue. It worked. Both Kosovo and Serbia agreed to a very difficult deal in April 2013 in exchange of concrete progress towards the EU integration. Otherwise, although Kosovo is part of the Stabilization and Association process and the Commission has several times expressed the clear prospect of Kosovo’s joining the EU, Kosovo is the last country of the Western Balkans in terms of progress towards integration, with not even a contractual relationship with EU yet and, until very recently, with an unclear prospect on whether an SAA was even possible for Kosovo under its political circumstances, in particular in light of the EU’s lack of unified position on Kosovo’s political status. Overall, the prospect of joining the EU is so uncertain in terms of timing that the incentives for reform are less credible, despite Kosovo’s formal commitment to fulfill the criteria and conditions necessary on its path towards the European Union.
Having said this, other elements discussed above such as “determinacy of conditions,” “size and speed of the rewards” and the “credibility of conditions” have not been consistently applied either, if at all, in efforts toward the “Europeanization” of Kosovo. There has generally been no concrete link between the condition and the reward and no clarity as to the type of reward. Further, at least until very recently, no concrete intermediate rewards were applied, with the main reward remaining the prospect of EU membership. As mentioned earlier, with the prospect of membership decades away, despite a strong consensus and commitment within the Kosovo Institutions and among its people to join the European Union, progress in implementing difficult reforms has generally been slow. A recent European Court of Auditors Report confirms these challenges related to the effectiveness of EU assistance to Kosovo. The report particularly emphasizes that the Commission should use the policy dialogue and conditionality more effectively in order to strengthen the rule of law reforms in Kosovo.

It should be emphasized that Kosovo’s strongest incentives to comply with EU and international requirements have been a result of the Kosovo political status determination process. Kosovo Institutions have responded more effectively to “conditionality” the closer the status determination process was. In terms of EU conditionality, the example is the Dialogue with Belgrade. A very difficult deal was reach in April under the auspices of the EU-Facilitated Political Dialogue only in exchange for a concrete progress towards European integration. Both examples indicate that the clearer, more concrete and closer the reward, the stronger the incentive to comply with conditionality.

The EU-facilitated high-level political dialogue between Pristina and Belgrade has for the first time clearly opened the prospect of Kosovo’s concrete progress towards the European Union, in exchange for progress towards the “normalization” of the relationship with Belgrade. The political Agreement reached under the auspices of this Dialogue did only open the prospect of Kosovo’s starting negotiations for an SAA and thus marking the first concrete steps towards the European integration process, but by starting to address the status of the Kosovo North, it paves the way for serious rule of law reforms in this region and Kosovo overall.

As a result, negotiations for an SAA could provide a very useful and efficient tool for the EU to use to effectively influence concrete progress in implementing rule of law reforms and addressing the many rule of law challenges in Kosovo. This is particularly important for the implementation of the reforms agreed upon through the April Agree-
ment. Unless the EU conditionality is clear and concrete rewards offered in exchange, the implementation of the Agreement risk losing momentum, putting at risk very important rule of law reforms in Kosovo. The conditions and the rewards need to be as clear as possible, the timing needs to be clearly determined and the practice should be able to show that rewards are delivered or withheld depending on the fulfillment of the set conditionality. The closer the prospect of concrete progress towards European Integration, the more effective the EU “conditionality” will be, and as such the EU technical and financial assistance provided to Kosovo will be able to maximize its impact.
Europeanization by Rule of Law Implementation in the Western Balkans: Republic of Macedonia. The EU’s Effect in Promoting an Efficient and Independent Macedonian Judiciary

Vladimir Misev

1. Introduction

Macedonia became an independent state in 1991, and in the same year the country adopted its first democratic constitution, which established the principle of rule of law as a fundamental value. Ten years later, Macedonia was the first country from the Western Balkans to sign a Stabilization and Association Agreement (SAA) with the European Union (EU), and in 2005 it became a candidate for EU membership. Despite the fact that it has been a candidate country since 2005, accession negation talks have not taken place yet, though Macedonia continues to “nurture” close relations with the EU. This is done through alternative and unique cooperation mechanisms, such as the High Level Accession Dialogue (HLAD). Concurrently, the country continues to implement a number of institutional reforms for strengthening the rule of law framework. A crucial element of these changes is the judicial reform, which was launched in 2004. This paper attempts to carry out an in-depth inquiry into the initiation, implementation and effects of the reform. The role of the EU in the reform in the field of the judiciary, as well as that of other international actors, will be assessed in the following pages.

A total of fifteen in-depth interviews were conducted in September and November 2012, with a sample of informed stakeholders from various national and international institutions. Additionally, secondary sources of data were utilized, especially regarding the effects of the reform on the issues of effectiveness and independence of the third branch of government. The first section of the paper gives a short overview of the Macedonian Europeanization process and the implications of the policy of conditionality towards rule of law reforms. Further sections discuss the EU’s involvement in the commencement and later phases of the Macedonian judicial reform (sections 2 and 3); the effectiveness of the policy of conditionality in the Macedonian case (section 4); the role of other international actors besides the EU (section 5); and the overall success of the reform since 2004 (section 6).

2. EU Conditionality and Rule of Law Reforms in Macedonia

Following one year of negotiations between Macedonia and EU, and in the midst of a hostile internal conflict between the country’s armed forces and the Albanian National Liberation Army, in 2001 the Republic of Macedonia was the first from the Western Balkan countries to sign a Stabilization and Association Agreement (SAA) with the EU. Due to extensive international brokerage from the EU, NATO and the US, the armed conflict was halted by the so-called Ohrid Framework Agreement signed by the four largest political parties at that time. One obvious incentive that was used in later phases of the conflict resolution was constant reference to the prospect of EU membership for Macedonia.

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2 The sample included: a member of the Macedonian Parliament; a judge in the Supreme Court; senior employees at the Academy for judges and public prosecutors, the Administrative Court, the Ministry of Justice and the Secretariat of European Affairs (SEA); a member of the Council of Public Prosecutors; a legal expert and a former state advisor at SEA; a teaching assistant at the Faculty of Law in Skopje; a professional attorney; an expert on EU law; employees at the EU delegation in Macedonia and USAID; and members of civil society organizations that monitor the judicial reforms. All interviewed respondents were responsive and offered various views on the issues raised.


4 Parties which represented the Macedonian side were: the Social-Democratic Party of Macedonia (SDSM) and VMRO-DPMNE, while the Democratic Party of the Albanians and the Party for Democratic Prosperity represented the Albanian block.
The obligations that Macedonia accepted through the SAA launched a structural process of Europeanization of the Macedonian institutions, legal system and policies.

The term Europeanization in this paper is understood as a policy-driven process through which the EU rules and policy making, as well as EU institutions, affect and reform the national institutions and legal systems through different forms and mechanisms. According to Grabbe, the mechanisms of Europeanization for the Central and Eastern European countries include the following segments: adoption of the Acquis Communautaire and harmonization with EU regulations; financial and technical assistance; benchmarking and monitoring process; advisory assistance to the candidate countries and the twinning process; and gatekeeping through access to different stages in the accession process, particularly achieving candidate status and starting negotiations. Contextually, Macedonia has launched a process of harmonization with the Acquis Communautaire with the signing of the SAA back in 2001; has relied heavily on European financial, technical and advice assistance in the past ten years; has accepted the benchmarking and monitoring process as a prime reference for its own evaluation in the accession process; and, lastly, achieved the status of a EU candidate country in 2005, which remains Macedonia’s highest achievement in the EU accession process.

A different, so-called governance approach to Europeanization was developed by Schimmelfennig and Sedelmeier. In their view, EU governance takes place both within the policy making of the EU and in the EU’s external relations with non-member states. The external dimension of the EU’s governance predominantly consists of the transfer of EU rules to non-member states, whilst the main mechanism supporting the process is the policy of conditionality based on “reinforcement by reward, under which the EU provides external incentives for a target government to comply with its conditions.” The basic logic behind this action is to provide a push for states in a situation when the EU lacks coercive mechanisms except for its normative power.

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6 Another achievement of greater significance for Macedonia’s integration into the EU happened on 19 December 2009, when citizens of Macedonia were granted visa liberalization by the countries in the Schengen area.


8 Ibidem: 670.

The EU’s external governance and approach to potential member states is greatly reliant on its ability to provide a suitable incentive for compliance on the part of the governments. The success of the EU’s external policy is mainly dependent on the success of its conditionality principle to counter-balance the costs of rule adoption as a constraint to the process. The effectiveness of the rule transfer can be explained through “the external incentives model and in particular with the credibility of EU conditionality and the domestic costs of adoption.”

The principle of the rule of law represents a “dominant organizational paradigm of modern constitutional law in all the EU Member States and has gained unanimous recognition, since the end of the Cold War, as one of the foundational principles on which all European constitutional systems must be based.” The application of the principle of the rule of law is especially important for the transition countries in the Western Balkans as stipulated in the Copenhagen document, where in the criteria for membership clear reference is made to the existence of effective implementation of the rule of law and functioning of democratic institutions. Therefore, the independent and efficient functioning of the judiciary is one of the most important elements of the rule of law on which the EU puts particular emphasis in the enlargement process. The “Enlargement Strategy and Main Challenges 2011-2012,” presented in the Communication from the EU Commission to the European Parliament and the Council, addresses the process of strengthening the rule of law, especially in the field of the judiciary, as one of the crucial challenges for most of the countries in the enlargement process. Therefore, the EU Commission concludes, the issues related to the rule of law need to be addressed at an early stage of the accession process.

Macedonia became an EU candidate country in 2005; however, due to the name issue that the country has with Greece, it has still not been invited to open accession talks. The SAA signed by Macedonia contains a specific chapter on Justice and Home Affairs (JHA), in which the main steps for achieving effective rule of law are set. While granting candidate status was considered a recognition of the important progress made by the country, particularly regarding inter-ethnic relations, the absence of opening or

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10 F. Schimmelfennig and U. Sedelmeier, op. cit.: 671.
setting a date for membership negotiations reflects serious weaknesses in the country’s integration into the EU. Moreover, the name issue became an additional, or, according to many scholars and politicians, the only condition for the start of the negotiations with the Union. Both the Union and Member State representatives continue to appeal for resolution of the name issue in order to start the negotiations in the future.\textsuperscript{14} The start of the High Level Accession Dialogue (HLAD) between the Republic of Macedonia and the EU in March 2012 was perceived as a step forward in the EU integration process.\textsuperscript{15} However, according to the European Commission, “the dialogue should give us leverage to engage them [Macedonian officials] at a time when we cannot proceed officially with the screening and negotiations.”\textsuperscript{16} The HLAD also sets targets regarding the Rule of Law and Fundamental Rights. Moreover, it foresees a “technical dialogue” with the Commission on Chapters 23 and 24.

The first serious step in the reform of the rule of law was made in 2004, when the Government adopted a Judicial Reform Strategy, along with the Action Plan for its implementation for the period 2004-2007.\textsuperscript{17} The two key areas of the judicial reform provided within the Strategy were strengthening the independence of the judiciary and increasing its efficiency. The anticipated reform encompassed substantial structural reform, legislative reform and procedural reforms. The structural reform covered the relations between specific institutions, including their internal organization and competences. Constitutional modifications followed, which provided the basis for an independent judiciary. These actions were conditioned with the Macedonian achievement of candidate status in 2005.

In the period between 2005 and 2012, a number of laws and by-laws related to judicial reform in Macedonia were enacted, mostly arising from the implementation of the Strategy and the Constitutional changes. Judicial procedures were simplified and new institutions, such as new administrative courts and a training academy, were created.

\textsuperscript{14} See, for example, the statement of the German Chancellor, Ms. Merkel, given on 14.02.2012 in Berlin. Retrieved on 08.01.2012. Available at: <http://www.time.mk/read/4ad1772a64/b5f9850c2b/index.html>.


\textsuperscript{17} A new strategy was adopted in 2009 that represents a further effort toward achieving the goals of the first strategy and mostly consists of changes and amendments of the laws adopted with the first strategy.
The creation of new institutions reduced the burden of the courts, which since 1995 have functioned as non-specialized courts. In regard to judicial independence, the influence of the legislative and executive branches was seemingly reduced when the election of judges and public prosecutors was removed from the hands of the Parliament and specialized bodies were appointed: the Council of Judges and the Council of Public Prosecutors. In the further phases of the reform process, clear procedures for appointment based on the merit principle were adopted and the Academy for Judges and Public Prosecutors was created, as well as the Administrative Court and Higher Administrative Court.

3. The EU’s Role in the Initiation of the Judicial Reform

As mentioned above, the Macedonian judicial reform began with the adoption of the Strategy on the Reform of the Judicial System by the Government in November 2004 (hereafter to be referred to as the Strategy). The Strategy launched a reform process that tackled two key areas where major weaknesses were identified: strengthening the independence of the judiciary and increasing its effectiveness. The general goal of the Strategy was to build a “functional and efficient justice system based on European legal standards.” Overburdened courts, slow procedures, unorganized case management, obsolete and inefficient equipment, insufficiently skilled human resources, the lack of criteria for financing courts and the public prosecution, the lack of continuous education for judges and public prosecutors and inadequate constitutional solutions for the selection of judges and public prosecutors were some of the most pressing problems identified. The EU strongly supported the process of drafting and the text of the Strategy by providing law experts from EU member states to participated in the entire process, which was monitored by the European Commission.

The first step of the legal reform involved the adoption of eleven amendments to the Constitution in 2005. The procedure for selection of members of the Judicial Council was reformed, and currently the majority of members are elected by the judges themselves.

19 Ibidem: 4.
20 The interviewed senior employee at the Ministry of Justice stated that certain consent by the Commission was needed for the text of the Strategy and the developed objectives and targets.
Before the amendments, the Parliament was responsible for the appointment of the members of the Council, which was seen as a “breach” in the constitutionally guaranteed principle of the separation of powers. Since 2005, the Judicial Council has consisted of fifteen members (previously seven): eight are elected by the judges; three are elected by the Assembly; two are proposed by the President of the Republic (from the ranks of University law professors, lawyers and prominent jurists) and elected by the Assembly; and two are ex-officio members (the President of the Supreme Court and the Minister of Justice). The mandate of the elected members of the Judicial Council is six years, with the right to one re-election. Membership in the Judicial Council is incompatible with membership in political parties or with other public posts.

Among others, some of the responsibilities of the Judicial Council are the election and dismissal of judges; the nomination of judges and Presidents of Courts; the termination of a judge’s office; monitoring and assessing the work of judges and courts; deciding on the disciplinary accountability of judges; revoking the immunity of judges; and proposing two judges for the Constitutional Court. The Judicial Council also gives consent for the detention of judges, and it is assured that a judge cannot be held responsible for a given opinion in the process of rendering a court decision.

With the changes of 2005, the State Public Prosecutor is elected by the Assembly, with the prior consent by the Council of Public Prosecutors, for a six-year mandate with the right to re-election. Public prosecutors are elected and dismissed by the Council of Public Prosecutors. The post of public prosecutor is incompatible with membership in a political party or with a post in other public office. The transfer of election and dismissal of judges and public prosecutors into the hands of specialized bodies (the councils) significantly contributed to the independence of the judiciary.

The amendments intervened in administrative procedure as well. The right for administrative bodies to impose sanctions and the right to appeal were introduced. These changes had an impact on the issue of the effectiveness of the judiciary, given the preliminary considerations spelled out in the Strategy. With this solution, the possibility was opened for the resolution of administrative disputes beyond the framework of regular courts, as it was believed that this would reduce the overall backlog of pending cases, which in 2006 stood at 937,756 pending cases.\textsuperscript{22}

One year later, several laws were enacted that supported the constitutional amendments from 2005. The new Law on Courts\textsuperscript{23} introduced a fourth court of appeal, based in Gostivar (in addition to the Courts of Appeal in Skopje, Bitola and Shtip).\textsuperscript{24} Also, specialized departments for cases of organized crime were introduced in five Basic Courts. The new Law on Administrative Disputes\textsuperscript{25} introduced the Administrative Court with the goal of removing the burden of administrative disputes from the Supreme Court, which had previously been responsible for these cases.\textsuperscript{26}

The Law on the Academy for the Training of Judges and Prosecutors\textsuperscript{27} introduced the Academy with the goal of promoting a merit-based career system for judges and prosecutors. It was anticipated that the introduction of the Academy would contribute to the professional and non-political selection of judges.

In relation to these legislative changes, the EC Progress Report of 2006 assessed that “overall, the constitutional and legal framework for an independent and efficient judiciary is largely in place.”\textsuperscript{28} The drafting of the Strategy and the first steps of reform have been coordinated with the EU, and Macedonia’s efforts were clearly acknowledged when the country received candidate status. The onset of the judicial reform was an important condition for Macedonia set by the EU Commission. As a former State Advisor at the Secretary for European Affairs in the Government stated during the interview:

“The Commission, being advised by then-recent Central and Eastern European experience regarding the 2004 enlargement, decided to treat the issue of the judiciary in the earliest stage possible. It was taken into account that in some countries which were well advanced in the accession process the judiciary was still a problem, and therefore, the decision to treat the judiciary in the earlier stages in the accession process was quite visible in the Macedonian case.”\textsuperscript{29}

\textsuperscript{24} The structure of the Macedonian judicial system is characterized by three tiers consisting of basic courts, courts of appeal and the Supreme Court.
\textsuperscript{26} The EC Progress Report from 2006 states that during 2006 80% of all cases opened by the Supreme Court were of an administrative nature.
\textsuperscript{29} Excerpt from an interview with the former state advisor at the Secretariat for European Affairs (13.11.2012).
A member of the Macedonian Parliament recalled the adoption of the Constitutional amendments in 2005 as “one of the most important criteria for achieving the candidate status, something that the EC had a strong position about.”\textsuperscript{30} However, the overall perception among interviewed respondents is that, while the reform of the judiciary represents a milestone in the Europeanization of the country, it cannot be qualified as most important for the achievement of candidate status. The implementation of the Ohrid Framework Agreement (OFA) was referred to as the most important condition contributing to candidacy: “the message from the EC was clear: ‘the road to Brussels leads through Ohrid,’ and this was well understood by the Macedonian side.”\textsuperscript{31} The interviewed respondents continuously reiterated the EU’s positive application of the principle of conditionality in the event of the initiation of the Macedonian judicial reform in 2004-
2005 (the adoption of the Strategy and the Constitutional amendments). The overall perception among the respondents was that such a sensitive issue was not certain to “pass” if the candidacy status had not been “on the table.”\textsuperscript{32}

In conclusion, the strong role of the EU in the initiation of the Macedonian judicial reforms primarily relied on a successful application of the policy of conditionality. However, in the light of the significance of inter-ethnic relations in the Macedonian political and social landscape, it should be noted that candidate status was not solely granted for the initiation and implementation of the reforms in the judiciary, but that other issues, such as the implementation of the OFA, were of greater importance.

4. The EU’s Role in Implementation of the Judicial Reform

As previously noted, the reform of the judicial system in Macedonia encompassed three types of processes: substantive law reform, procedural law reform and structural reform. These reforms altered the substance of the existing legal framework, which determined the processes inside the judiciary and the institutional setup, including relations between the judicial institutions. The effects have been wide-reaching, as the election and appointment of judges and public prosecutors was altered in favor of grea-

\textsuperscript{30} Interview with a member of Macedonian Parliament (03.12.2012)
\textsuperscript{31} Interview with former State Advisor at the Secretariat for European Affairs (13.11.2012).
\textsuperscript{32} Some of the respondents viewed the issue of reforms as “sensitive” due to the fact that directly involved stakeholders, such as judges and prosecutors, represent a rather conservative “force” which can directly undermine reform efforts.
ter independence; the civil, administrative and criminal laws were reformed to tackle the large backlog of cases within the system; new institutions were created; and procedures were simplified.

Nevertheless, beyond reforms in the legislation, on the practical side the Macedonian judicial reform underwent ups and downs from the start, visible in various delays in implementing the initial plans. The reformed Judicial Council was operational as of January 2007, but functioned with ten members (out of fifteen) until October, when four more members were appointed. The last member was only appointed at the end of 2007.

Due to lack of political consensus in the Parliament, the appointment of the Public Prosecutor was also a stumbling block between the political parties. This left the office of the State Public Prosecutor vacant for four months during 2007. The Council of Public Prosecutors was also established after a delay, at the end of 2007. The law provides that the Council be composed of eleven members with a four-year mandate that can be renewed once. (Six members are elected from the prosecutors’ themselves, three from the Parliamentary Assembly and two are ex-officio members: the Minister of Justice and the State Public Prosecutor). The members of the Council elect the President of the Council with a two-year mandate, which is un-renewable. The Council elects and dismisses the public prosecutors, who have indefinite mandates. The Parliament appointed the last remaining three members from the first composition in August 2008.

The involvement and the role of the Minister of Justice in the Judicial Council and the Public Prosecutors’ Council has been criticized by both the EU and domestic actors. The arrangement that provides for the presence of the Minister was considered as harming the Councils’ independence of the executive government. As a result of this criticism, especially that of the EU, the voting rights of the Minister of Justice in the Judicial Council and his ex-officio role in the council of Public Prosecutors were finally abolished in 2011, in an attempt to strengthen the independence of both bodies.

Also, the chairmanship of the Court Budget Council was assumed by the President of the Judicial Council in 2009, and this was considered a step towards the independence of the branch. In 2010, the Law on Court Budget was amended to gradually increase the state funding of courts, from 0.4% to 0.8% of GDP, by 2015.

The Administrative Court and the Court of Appeal in Gostivar were established and began functioning in 2008. The Public Prosecution Office in Gostivar was also established in 2009. The Administrative Court decides on appeals of decisions of misdemeanor commissions in the administrative bodies. The High Administrative Court was established and became operational in 2011, with jurisdiction over appeals from the Administrative Court. The creation of these new court bodies, such as the two Administrative Courts, which aimed to clear the backlog of administrative cases in the Supreme Court, was intended to increase the efficiency of the system.

Another important institution set up during the reform process was the Academy for Training of Judges and Prosecutors, which began organizing continuous training for judges and prosecutors and initial training for future judges and prosecutors in 2007. The first candidates graduated in January 2009. By 2012, 80 candidates had completed the initial training, which consists of theoretical and practical parts. Of these candidates, 56 have been appointed as judges or prosecutors, while 24 have yet to be appointed.

According to almost all interlocutors, EU institutions had considerable influence over the reform processes, providing advice and expertise, but also financial means to support the reforms. The EU’s expertise and financial assistance has been especially conspicuous regarding the creation of new institutions, most notably the Administrative Court and the Academy of Judges and Public Prosecutors. These two institutions received significant financial and technical assistance through the Instrument for Pre-Accession Assistance (IPA). The interviewees from both institutions classified the EU assistance through the IPA as instrumental, stressing its core importance for the proper functioning of the institutions, something that cannot be neglected when discussing their overall success. Moreover, the Academy was also supported by the EU in the further phases of its strengthening through financial assistance in the creation of regional training centers, an e-training module and the strengthening of its IT infrastructure.

In addition to financial assistance, the creation of these institutions was supported by expertise in developing adequate models that would be functional in the domestic context. The cooperation with the EU continued in the following years through the

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36 In 2007, 1.1 million euro were allocated for strengthening the capacities of the Administrative Court and for support of the reform of the administrative procedure, and in 2008, 0.7 million euro were allocated for support of the capacities of the Academy for the training of judges and prosecutors (for the establishment of e-learning and decentralized training). More information available at: <http://ec.europa.eu/enlargement>.

37 Interview with a senior employee from the Academy for Training of Judges and Prosecutors (29.11.2012).
TAIEX\textsuperscript{38} and the Twinning program\textsuperscript{39} in which Macedonia participated, which aimed at assisting pre-accession countries through the exchange of expertise and sharing of best practices. The members of these two institutions regularly participated in such activities, and the Academy regularly facilitates events for the exchange of experience and knowledge among judges, public prosecutors and associates and their counterparts from EU member states.

In an attempt to illustrate the role of the EU in the formation of these new institutions, a member of the Council of Public Prosecutors emphasized "that regarding the Administrative court, the EU gave us directions, gave us the experience we did not have in relation to the establishment of administrative courts," while regarding the Academy "the EU directed us that there is a need for specific and ongoing education, in addition to the basic requirements for the election and appointment of judges and public prosecutors."\textsuperscript{40} Similarly, other respondents saw the EU influence as part of a consultative process, having in mind that "there can be no ideal and unique recipe (for institutional and organizational reforms), there is no Acquis that would impose some form or institution;" instead, the best practices of the member states are utilized, which means that expertise is of considerable importance in the process. On the financial side, constant support in the implementation of the reform was derived either from the IPA funds or bilateral donations from EU member states.\textsuperscript{41}

In all, EU institutions and member states have had a considerable role in the set up and implementation of the Macedonian judicial reform in all its phases. This role is mainly perceived as a process of financial, expert and/or technical assistance, especially visible in the process of creation of the new institutions, the Academy and the Administrative Court, which constitute one of the main pillars of the reform.

\textsuperscript{38} TAIEX (Technical Assistance and Information Exchange Instrument) supports EU partner countries (candidates, potential candidates and EU neighboring countries) to approximate, apply and enforce EU legislation. Through TAIEX, key national stakeholders benefit from technical assistance and expert advice on transposition of EU legislation, as well as training and peer assistance from member states, exchange of information, etc. More information available at: <http://ec.europa.eu/enlargement/taiex/what-is-taiex/index_en.htm>.

\textsuperscript{39} Twinning is an instrument that facilitates cooperation between public administrations of the EU member states and the partner countries through expert missions, trainings and awareness raising visits. The aim of the Twinning program is to support the transposition, implementation and enforcement of the EU legislation. More information available at: <http://ec.europa.eu/enlargement/tenders/twinning/index_en.htm>.

\textsuperscript{40} Interview with a member of the Council of Public Prosecutors (13.11.2012).

\textsuperscript{41} Interview with a former State Advisor at the Secretariat for European Affairs (13.11.2012).
5. Perceptions of the Effectiveness of EU Conditionality in the Field of Judicial Reforms

In the previous chapters, the conditionality principle was discussed within the theoretical framework of Schimmelfennig and Sedelmeier’s approach, which defines it as “reinforcement by reward, under which the EU provides external incentives for a target government to comply with its conditions.” The costs of the adoption of the legislation are central to this model, and conditionality can only be successful if it manages to counterbalance those costs. Wide-reaching reforms can present a higher cost; therefore, the Macedonian reform of the judiciary system requires the strong determination by all involved stakeholders at the national level, not just state institutions but also individual judges, prosecutors and others involved. Moreover, significant financial support is needed during the reform process.

The EU supported reforms in the Macedonian judiciary by several means. First, the progress of the country in the accession and integration process as such is the strongest incentive that the EU has employed in encouraging judicial reform. Therefore, the adoption of the constitutional amendments was directly related to the Macedonian achievement of candidate status in 2005. However, recently the incentive of progress in the accession process has been weakened as a result of the lag in Macedonia’s accession process. Besides advancement in the accession process, the EU has supported the reforms by financial means (the Academy and the Administrative Court are two institutions central to the reform that have been heavily dependent on the EU’s financial help in their establishment) and expert advice in many aspects.

The overall perception among the interviewed respondents is that EU conditionality is a quite visible and successfully employed instrument in the field of judicial reforms in Macedonia, though its power is contested and disputed among those respondents. Conditionality currently “fails to function” in the Macedonian case, bearing in mind the blockade in the accession process in the recent period.44

Comparatively, most respondents assessed EU conditionality as successful when the judicial reform was initiated, and when a suitable ‘carrot’ was provided in the form

42 F. Schimmelfennig and U. Sedelmeier, op. cit.: 670.
43 During the interview with a senior employee at the Secretariat for European Affairs, it was stated that the European Commission would have a greater opportunity to influence the reform of the judiciary if Macedonia were to start the accession negotiations; otherwise the country will remain in a status-quo situation (as has been the case in the past few years).
44 Interview with a teaching assistant at the Faculty of Law (28.11.2012).
of candidacy status. The respondents did not present the same opinion of the later phases of the reform process, pointing out that the accession process has been halted since the first EC recommendation for the start of negotiations. Consequently, the EU's conditionality fails, because nothing of greater importance has been offered in exchange by the EU. An illustrative statement was given by the Head of the Department of Justice, Freedom and Security in SEA, who stated that:

Conditionality is more effective if you have a final result. Visa liberalization had many conditions but we knew the direction in which to strive, and it was easier to gain political support and to mobilize the administrative capacities [...]. The EC will have greater opportunities to influence the reform of the judiciary if we receive a membership invitation than if the process remains in a status quo, as it has in the last few years.45

However, there are still some indicators that the power of EU conditionality has not vanished completely. The senior employee from the Administrative Court, when asked whether the institution was somehow pressured after it was characterized in the EC Progress Report from 2010 as inefficient, replied,

I think that the criticism pushed the other institutions of the state, because very soon after the Report, the Judicial Council decided to increase the number of judges which had already been specified. I cannot claim, however, that it is the criticism that was decisive, but there was certainly a coincidence. The main objection in the EC Report is that the Administrative Court has not accomplished the purpose for which it was established.46

In conclusion, the initiation of the reform process was mainly perceived as coupled with the EU's reliance on the principle of conditionality. The political criteria for membership developed through the Copenhagen Document can be seen as successfully utilized in the Macedonian case in the event of the initiation of the reform process. On the other hand, the overall perception is that the success of EU conditionality has failed

45 Excerpt from an interview with a senior employee at the Secretariat for European Affairs (SEA) (12.11.2012).
46 Interview with a senior employee at the Administrative Court (15.11.2012).
in the past few years (i.e. during the implementation of the reform), as Macedonian accession is ‘blocked’ at the EU level. As one of the respondents concluded:

I see the usage of conditionality, first and foremost, as advancement in the integration process and how we are affected by it, whether or not we are financially assisted, etc. There I perceive the usage of conditionality. However, if the process is blocked by other political issues, we cannot be certain that it will be effective.47

6. Perceptions of the Role of Other International Actors in the Implementation of the Judicial Reform

The EU is one of the international stakeholders that give support to the reforms in the Macedonian judiciary. A range of actors, among them USAID, the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE) and the World Bank, have played a pro-active role during the reform process in the judiciary. These actors coordinated their actions among themselves, with the government and with the EU.

In the period 2002-2014, USAID is coordinating three projects in the field of judicial reform, with investments of up to 24 million USD. The first project was directed at the modernization of court infrastructure (2002-2007),48 the second at the implementation of the reformed legal framework (2007-2011),49 and the third is directed at strengthening the role of the judiciary in the separation of powers (2011-2014).50 In this whole period, USAID invested in technical and expert assistance regarding the creation of a legal framework; technical assistance for the Ministry of Justice; improvement of the spatial capacity of courts; trainings for judges, prosecutors and staff; the Automatic Budget Management System (ABMS); the process of implementation of laws (expertise, assistance with bylaws and secondary legislation); the Automated Court Case Management Information System (ACCMIS); increasing citizen participation in reform, etc. The Automated Court Case Management System (ACCMIS) has been used in all courts in the Republic since 2009. Since

47 Excerpt from an interview with a teaching assistant at the Faculty of Law (28.11.2012).
48 For more info about the project see <http://macedonia.usaid.gov/en/sectors/democracy/court_modernization.html>.
49 For more info about the project see <http://macedonia.usaid.gov/en/sectors/democracy/jrip.html>.
50 For more info about the project see <http://macedonia.usaid.gov/en/sectors/democracy/JS.html>.
2010, the random allocation of cases has been operational in all courts with the goal of achieving impartiality. The ACCMIS system also provides better transparency, as the publishing of decisions by courts has been effected through the system. This project has been completely financed by USAID.

USAID often coordinates with EU and other international donors, with the goal of avoiding overlap of activities in the field of judicial reform. This coordination has been multilateral or bilateral, depending on the needs and the issue in question. Regarding the introduction of the ACCMIS system, USAID closely cooperated with the World Bank, which invested in some aspects of the project. Secondly, concerning EU-USAID consultation activities, it was agreed that the EU would support the building of capacities at the Administrative court and the Academy, while USAID would remain ‘out’ of this process. The first case is an example of direct cooperation between two foreign donors, while the second shows rational coordination with the goal of avoiding overlap.51

Accordingly, the beneficiary institutions also coordinate for more efficient utilization of foreign assistance. This coordination is organized by the SEA and within the units in the ministries responsible for the coordination of foreign aid in bilateral or multilateral ad-hoc meetings. The SEA takes the role of a ‘steering’ institution when there is need, though in practice the ministries can also initiate their own coordination.

The Academy for the Training of Judges and Prosecutors enjoys an especially fruitful cooperation with a wide range of international actors. The Council of Europe supports the current training for specialization of judges and prosecutors; USAID supported the initiation of trainings for judicial and prosecutor staff (something which the Academy lacked financial means and capacity to implement, as the interviewed senior official from the Academy emphasized); the OSCE supported training regarding the reform in the criminal procedure. The Academy in particular cooperated with UNICEF, UNDP, UNDOC and the World Bank (in 2008 63% of the budget of the Academy was funded by foreign donors).52 The existence of such cooperation on the part of the Academy with nearly all foreign actors can be attributed to its importance within the judicial system, especially for assuring independence and professionalism.

In sum, there are several international actors in addition to the EU that exercise influence over the Macedonian judicial reforms. They mostly contribute through donations

51 Interview with senior employee at USAID (09.11.2012).
and expertise, and they are also involved in the sharing of experience and practices between Macedonian judges, prosecutors and staff with their foreign counterparts. Of all of these actors, USAID has had the greatest investment from 2002 onwards. The other actors, such as the Council of Europe, OSCE and the World Bank, are perceived as less influential because of their smaller financial contributions to the reform activities.

7. Perceptions of the Success of the Reform Process

7.1. Evaluating efficiency

One of the goals of the reform process initiated in 2004 was improvement of the efficiency of the judiciary. In practice, this meant organizing the work of the courts, which were overburdened with a serious backlog of pending cases, in an efficient manner. A glance at the data of pending cases for the period 2008-2011 shows that the backlog of cases has indeed been gradually reduced overall, though the Basic Courts and the Courts of Appeal have made the greatest progress in this regard. The newly formed Administrative Court has increased the backlog of pending cases in the same period, which is also the case for the Supreme Court. The data presented in the annual reports of the Council are fragmented, and the reports are not structured in the same manner from one year to the next. We have made an attempt to structure as much as possible the reports in order to use the data to provide a simple overview of the direction of the issue of the workload and the pending cases within the Macedonian judiciary.

Table 5.1: Basic Courts (cases)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number</th>
<th>From the previous year</th>
<th>New</th>
<th>Resolved</th>
<th>Remaining</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>1.681.594</td>
<td>1.097.595</td>
<td>588.487</td>
<td>745.110</td>
<td>936.565</td>
</tr>
<tr>
<td>2009</td>
<td>1.539.876</td>
<td>922.875</td>
<td>617.952</td>
<td>600.476</td>
<td>939.418</td>
</tr>
<tr>
<td>2010</td>
<td>1.574.316</td>
<td>940.149</td>
<td>634.167</td>
<td>919.182</td>
<td>655.134</td>
</tr>
<tr>
<td>2011</td>
<td>1.158.829</td>
<td>651.364</td>
<td>507.465</td>
<td>858.283</td>
<td>300.546</td>
</tr>
<tr>
<td>2012</td>
<td>563.241</td>
<td>198.527</td>
<td>364.714</td>
<td>388.703</td>
<td>174.538</td>
</tr>
</tbody>
</table>

Source: Annual Reports of the Judicial Council (2008-2012)
### Table 5.2: Courts of Appeal (cases)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number</th>
<th>From the previous year</th>
<th>New</th>
<th>Resolved</th>
<th>Remaining</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>41.901</td>
<td>3.700</td>
<td>38.210</td>
<td>35.621</td>
<td>6.280</td>
</tr>
<tr>
<td>2009</td>
<td>49.325</td>
<td>6.186</td>
<td>43.017</td>
<td>40.533</td>
<td>8.792</td>
</tr>
<tr>
<td>2010</td>
<td>45.998</td>
<td>8.805</td>
<td>37.193</td>
<td>38.477</td>
<td>7.521</td>
</tr>
<tr>
<td>2011</td>
<td>47.618</td>
<td>7.520</td>
<td>40.098</td>
<td>40.348</td>
<td>7.270</td>
</tr>
<tr>
<td>2012</td>
<td>47.838</td>
<td>7.775</td>
<td>40.063</td>
<td>41.744</td>
<td>6.094</td>
</tr>
</tbody>
</table>

*Source: Annual Reports of the Judicial Council (2008-2012)*

### Table 5.3: Supreme Court (cases)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number</th>
<th>From the previous year</th>
<th>New</th>
<th>Resolved</th>
<th>Remaining</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>4.166</td>
<td>1.612</td>
<td>2.544</td>
<td>2.821</td>
<td>1.335</td>
</tr>
<tr>
<td>2009</td>
<td>3.147</td>
<td>1.270</td>
<td>1.877</td>
<td>2.168</td>
<td>978</td>
</tr>
<tr>
<td>2010</td>
<td>5.408</td>
<td>1.194</td>
<td>4.214</td>
<td>4.571</td>
<td>2.037</td>
</tr>
<tr>
<td>2011</td>
<td>8.318</td>
<td>2.409</td>
<td>5.909</td>
<td>4.311</td>
<td>4.007</td>
</tr>
<tr>
<td>2012</td>
<td>8.079</td>
<td>3.289</td>
<td>4.790</td>
<td>5.848</td>
<td>2.231</td>
</tr>
</tbody>
</table>

*Source: Annual Reports of the Judicial Council (2008-2012)*

### Table 5.4: Administrative Court (cases)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number</th>
<th>From the previous year</th>
<th>New</th>
<th>Resolved</th>
<th>Remaining</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>14.301</td>
<td>5.804</td>
<td>8.497</td>
<td>5.147</td>
<td>9.154</td>
</tr>
</tbody>
</table>

*Source: Annual Reports of the Judicial Council (2008-2012)*
The overall opinion among the interviewees is that significant progress has been visible; however, it can be concluded that the level of success is disputable. According to the tables, there is a certain decrease in the backlog of cases, and cases are resolved faster as a result of the introduction of enforcement agents, notaries and mediators who are responsible for part of the civic cases. Nevertheless, the issue has been problematized due to its financial impact; thus, the reduction of cases is also a subject to the more expensive access to justice since the introduction of the new institutions.53

A side effect of the need for fast resolution of cases is the violation of human rights in some of the cases. According to a civil society activist who closely monitors the work of the judiciary, “in criminal cases especially, it happens so that everyone is in a hurry, but those cases are sometimes very complicated and cannot be resolved so quickly. In those situations we have a problem with human rights protection within the court procedure.”54

Additionally, some of the respondents reported that the push for efficiency, measured through the quantitative evaluation of their work, often results in increased pressure on the judges. Often, according to them, they can be confronted with unrealistic standards, and for this reason the quality of their work is affected.55

On the positive side, as some of the respondents stated, the new practices and institutions have initial deficiencies, and this should not be ad-hoc criticized, but more time should be given. The interviewed member of the Supreme Court opined that “in terms of all parameters, we are well in front of all WB countries. We should rather discuss needs, not weaknesses. The laws that are adopted once are not eternal. The most important issue is to have a general consensus on the direction of the process, and it is good that we have it here.”56

7.2. Evaluating independence

The interviewed respondents were asked to evaluate the level of independence of the judiciary. The success of this parameter was more heavily contested in comparison to the parameter of efficiency. The overall opinion is that some progress has been visible, due to the Constitutional and legal amendments that placed the election of judges and

53 Interview with a member of Macedonian Parliament (03.12.2012).
54 Interview with a member of an NGO (31.10.2012).
55 Interview with a judge in the Supreme court (29.11.2012).
56 Ivi.
prosecutors in the hands of independent bodies rather than the Parliament. However, the overall perception among the interviewees is that the judiciary is still politicized and in the hands of the political parties. As one NGO member stated in discussing the election and appointment of judges through the Judicial Council:

We are now [after the amendments] in a situation where seven people [instead of sixty] decide on the election and appointment of judges, which in the Macedonian context is very ‘dangerous.’ This model of election is imported from other Eastern European countries, but an additional problem is that the Ministry of Finance holds the Judicial Council on a financial ‘tight rope.’ In this way, independence cannot be provided.57

A survey from 2009, conducted among 421 (out of 650) judges in Macedonia, showed that almost half of all judges face external pressures in their work (43%).58 Asked about the sources of pressure, 19% of the surveyed judges pointed to the representatives of the executive branch of government, who to a large extent attempt to influence the work of judges. Every seventh judge surveyed thinks that judges face pressure from the political parties to a large extent (14%), while 5% of respondents said that judges are to a large extent pressured by judges of a higher rank.

Asked whether the judges are independent while presiding and adjudicating, nearly a quarter of all surveyed judges disagree (23% of the judges). While a large majority of judges believe that this is not the case, the fact that nearly every fourth judge thinks that judges do not act independently casts doubt over the independence of the “third branch.”

Finally, a large majority of surveyed judges, 66%, disagree that the Judicial Council successfully looks after protection of the independence of the judiciary, and an additional 66% disagree that the Judicial Council is an independent body. Regarding the election of members of the Judicial Council, a large majority (70%) of the judges believe that the election is biased. A comparative analysis of two field surveys conducted in 2009 and 2012 found that Macedonian citizens have not perceived significant improvement in the functioning of the judiciary in the three-year period.59

57 Interview with a member of an NGO (31.10.2012).
59 Institute for Democracy “Societas Civilis” – Skopje and Institute for political research – Skopje (IPIS). Istrazhuvanje sprovedeno na sudite, sudskata administracija i javnosta za evaluacija na sudskiot system i reformate vo sudstvoto vo Republika Makedonija (Komparativna analiza 2009-2012) (Skopje: 2012).
Some respondents questioned the will among political elites to provide conditions for independence of the judiciary. The lack of finances and the lack of administrative capacities, which are yet again dependent upon adequate financial means, were identified as the most important problems, especially for the new institutions. In relation to this, political will was indicated as the main limiting factor. Some respondents went so far as to claim that the judiciary is often used as a tool for dealing with political opponents and is a field of corrupt practices. With such responses, it appears that citizen trust in the judiciary has completely failed. In support of this view, some respondents provided examples of various cases where “express carrier advancements” took place both within the judiciary and the prosecutors’ offices.

The main problem, according to some interlocutors, is that “the country did not manage to create conditions for the judiciary to act freely. The Judicial Council missed an important point which is to build its own integrity.” The issue of lack of professional integrity among judges and prosecutors in relation to their independence from other branches of government was discussed by nearly all respondents.

In this context, the interviewed member from the Public Prosecutors’ Council proposed that the issue be addressed by creating an “ethical code which would assist prosecutors and judges so they can raise their personal independence and personal integrity. If we have strong persons as judges and prosecutors, there are no obstacles for us to adopt right decisions.” Regarding the legislation governing the disciplining and dismissal of judges, the EU Commission HLAD Spring Report noted that it “needs to be made more precise and predictable and the proportionality of its application by the Judicial Council needs to be ensured.”

60 Interview with member of Macedonian Parliament (03.12.2012).
61 Interview with member of the Public Prosecutors’ Council (13.11.2012).
### Table 5.5: Termination of Judicial Office

<table>
<thead>
<tr>
<th>Year</th>
<th>All bases</th>
<th>Incompetence and negligence</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>12</td>
<td>2</td>
</tr>
<tr>
<td>2008</td>
<td>34</td>
<td>7</td>
</tr>
<tr>
<td>2009</td>
<td>30</td>
<td>11</td>
</tr>
<tr>
<td>2010</td>
<td>10</td>
<td>2</td>
</tr>
<tr>
<td>2011</td>
<td>27</td>
<td>6</td>
</tr>
<tr>
<td>2012</td>
<td>51</td>
<td>4</td>
</tr>
<tr>
<td>Total</td>
<td>164</td>
<td>32</td>
</tr>
</tbody>
</table>


Thus, it seems that the overall perception of respondents is that the problem of the independence of the judiciary is two-fold. First, the lack of political will in the elites, irrespective of ethnic or ideological orientation, and second, the lack of professional integrity among judges and prosecutors. Efficiency is perceived as more successfully achieved than independence, though the success of both parameters is seen as facing various deficiencies. All of these findings support the notion that judicial reform is still incomplete, and that more effort is needed on the part of all stakeholders involved.

### 8. Conclusions

The aim of this paper has been to provide an assessment of the judicial reform in the Republic of Macedonia and the EU’s involvement in the process.

The EU has been an important factor in the reform process. The underlying perception among respondents is that the EU was very influential in the initial phase of the reform process, beginning in 2004. This influence derived from the EU’s principle of conditionality, in which a suitable ‘carrot’ was employed in support of the reform process: candidacy status for the country. The EU’s usage of conditionality was overall viewed as successful by most of the interviewed respondents in the initiation of reform, but it was noted that the force of conditionality has decreased during the later phases of the reform. Some of the interviewed respondents believe that achieving the start of

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63 Bases for termination include retirement, at office holder’s own request, due to death, due to election on another public post due to incompetence or negligence.
negotiations for EU membership for Macedonia could considerably “boost” the judicial reform. The last Spring Report of the EU Commission on the High Level Accession Dialogue noted, regarding “the efficiency of the justice system,” that “courts at all levels maintained a positive clearance rate in 2012, meaning that the majority were able to process as many cases as they received, or more.” However, the report points out the issue of the absence of a long-term strategy that would ensure the correct distribution of human resources within the justice system.64

The assessment of the reforms was accomplished through the measurement of the two parameters set by the strategy for reform of the judiciary, the independence and the efficiency of the judicial system. The overall conclusion and shared perception among most of the interviewed respondents is that the reform has yet to achieve its goals. They consider that both the independence and the efficiency of the judicial system have somewhat improved, though they still suffer from major weaknesses. If we have to make a comparison between the parameters, we can easily conclude that efficiency has been better achieved than independence. Even though the overall backlog of cases has been reduced, a more comprehensive analysis reveals that the Basic Courts and the Courts of Appeal have seriously managed to reduce that backlog, whereas the Supreme Court and the newly formed Administrative Court have increased the number of pending cases since their establishment. This indicates that the overall efficiency of the system has yet to be improved at all levels and in all procedures (this is especially true regarding the administrative procedure). Better organization of the procedure and quantitative targets developed by the Judicial Council has worked positively on the backlog of cases in the Basic Courts and in the Courts of Appeal. Also, the introduction of enforcement agents, notaries and mediators, who are responsible for part of the civic cases, worked positively for the reduction of the backlog in the courts from the lower tiers. The interviews revealed an additional concern: the drive for efficiency may negatively affect citizens, as access to justice has become more expensive. Some interviews problematized the drive for quantitative efficiency, claiming that the protection of human rights in the court procedure has been hampered as a result.

Regarding independence, impartiality and professionalism, despite the Constitutional and legal modifications, the system is perceived as being politicized and heavily dependent on the other two branches of government. Almost all interviewed respondents agreed

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64 EU Commission HLAD Spring Report, cit.
with this statement. The survey of judges confirms that the executive government and the political parties are primary sources of interference in the judicial system. Moreover, the Judicial Council is seen as a body that is not fully capable of protecting the integrity of judges. On the other hand, the establishment of the Academy for the Training of Judges and Public Prosecutors has considerably contributed to the development of professionalism. Nonetheless, not all graduates from the Academy are recruited to office, a situation that hampers the goal for which this educational body was created.

The European Commission mainly supported the later phases of the reforms (after 2006) through financial and technical assistance and expert advice. Many of the stakeholder institutions have direct contacts and cooperation with the EU institutions in support of reform activities. The Academy and the Administrative Court, as new institutions in the judicial system, have been heavily supported by the EU’s financial instruments.

Alongside the EU, there are several other international actors that have had a considerable influence on the Macedonian judicial reforms. The American Government, through USAID, has invested heavily in several aspects of the reform, most notably the introduction of the ACCMIS system and the improvement of court infrastructure. Other regional actors, such as the Council of Europe and the OSCE seem to be less influential, due to their smaller financial resources, but by no means unimportant, especially when providing technical and expert advice.

There is no comprehensive national strategy currently in place to target current deficiencies and answer to the targets set out in the HLAD process. This is very important in the light of the outlined challenges. Given past practice and current developments, we may expect that the EU will remain an important factor for the success of the Macedonian reform process. The EU’s influence will depend on the instruments employed. It seems that if Macedonia advances in the accession process, reforms will be considerably encouraged. In the absence of such a possibility, the drive for reforms will have to come from the national institutions and other involved stakeholders.

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65 The EU Commission HLAD Spring Report notes regarding independence that as of January 2013 all newly appointed first instance judges must be graduates of the Academy for Judges and Prosecutors, following entry into force of amendments to the Law on Courts, reinforcing the principle of professionalism and merit-based recruitment.

66 The Automated Court Case Management Information System became operational in all 33 of Macedonia’s courts in 2010, replacing manual case processing and enabling courts to become more efficient and transparent. In order to generate reliable data on the length of the proceedings, the number of old cases and the enforcement of judgments, new software will be created and became operational in 2013, which will complement the ACCMIS system.
Approximation of Membership as an Impetus for Rule of Law Implementation

Adaleta Bibežić/Marko Kmezić

1. Introduction

One of the most widespread problems of transitional processes in Montenegro is the quality of the judiciary. Delays and surprising decisions, along with a high level of formalism, are often mentioned even in European Commission (EC) monitoring reports. The focus of this research study will therefore be the reform of the judiciary in Montenegro. Namely, we propose to study the institutional reform carried out in the judicial sector within the process of the European integration of Montenegro. Special interest will be devoted to the influence that the European Union (EU) has had on the change of attitudes in the implementation of the rule of law.

However, the “rule of law” and judicial sector reform remain vaguely defined concepts due to “the lack of a coherent theory of judicial independence, and the difficulty to measure the performance of the judicial system,” as has been observed with regard to monitoring activities in the 2004 and 2007 enlargements. We will thus make use of a comprehensive set of “benchmarks” already elaborated on behalf of EuropeAid by

Marko et.al. for the operationalization of our normative and empirical analyses. We understand that the independence and accountability of judiciary benchmarks make little sense if law enforcement bodies are incompetent. By professional competence of judicial servants, we understand that they must have sound judgment, professional erudition, and the skill to prosecute or render judgments efficiently in accordance with the law. Hence, capacity-building in the judicial sector and the effectiveness of its institutional mechanisms are functions that have to be studied both from a normative and an empirical perspective. The investigation of judiciary benchmarks will also be based on an analysis of the historical legacies and institutional reforms thus far performed. We will also highlight the role of the newly established Judicial Academy with the goal of critically assessing whether it substantively provides professional competence to judges. More precisely, we will investigate whether the Judicial Academy is able to eradicate the features of Socialist legal education employed by the law faculties in South Eastern Europe (SEE), which has throughout the decades been marked by rigid, authoritarian and formalistic training, state-maintained control over the curriculum, and an almost complete absence of analytical study of case law.

The methodology employed in this study is based primarily on an in-depth analytical scrutiny of the EU Progress Reports; normative analysis in the field of judicial reform, considering especially the curriculum and content of teaching at the Judicial Academies; and empirical study based on interviews with representatives of the judiciary, relevant domestic experts (legal scholars, NGO representatives, journalists, and representatives of international organizations), and EU officials.

Based on such a comprehensive case study of judicial reform, we will be able to identify the possible behavioral change in the application of the rule of law in Montenegro. The analysis of the possible disjunction between the EU’s demands and the performance of Montenegro’s judicial institutions will also enable us to critically assess the endogenous factors favoring or preventing the reform of the judicial sector. We will thus focus precisely on the following set of questions: Do EU institutions have influence on implementation of the rule of law in Montenegro, and, if so, influence of what kind? Which organizational-institutional reforms have been made as a result of this influence? What are the EU requirements developed in the monitoring process? Which gate-keeper

See in Europe Aid Cooperation Report. 2004. Reinforcement of the Rule of Law, Division of Competences and Interrelations between Courts, Prosecutors, the Police, the Executive and Legislative Powers in the Western Balkans Countries.
elites resisted these reforms? Who, among critical civil society actors, supported these reforms? What have been the effects of EU’s influence on judiciary over the last decade with regard to independence, responsibility, efficiency, and effectiveness benchmarks? In an attempt to answer all of these questions, this study will be divided into four five parts. The first part will analyse the establishment of EU rule of law criteria; the second part will scrutinize the legacy of the communist rule as enduring obstacle for the judiciary reform; part three will lay out the results of normative and empirical analysis of the judiciary reform in Montenegro along the lines of independence, accountability and effectiveness; and finally in the concluding section we will try to establish the influence and mechanisms of EU influence on the rule of law implementation in Montenegro, as well as its limits.

2. Context

Following a referendum, the Montenegrin parliament made a formal declaration of independence on 5 June 2006, thus heralding the re-emergence of Montenegro as a sovereign state. In its declaration of independence, the Montenegrin parliament has “[…] [c]onfirmed as [Montenegro’s] strategic priority an accelerated integration into the European Union, and its determination to continue to efficiently fulfil the conditions and requirements included in the Copenhagen criteria and the Stabilisation and Association Process.” However, Montenegro’s path towards the EU commenced well before independence. Following the decisions of the 2003 Thessaloniki meeting of the European Council, in April 2005 the European Commission adopted a Feasibility Report which concluded that the state union of Serbia and Montenegro is prepared to negotiate a Stabilisation and Association Agreement (SAA) with the EU. Negotiations for the SAA with Serbia and Montenegro were launched in October 2005. Acknowledging the specific situation within the State Union marked by differences in the economies of its constituent units, the European Union adopted a unique twin-track approach for Serbia and Montenegro’s accession processes. Essentially, the twin-track approach meant that the fulfilment of the economic criteria for EU membership for Serbia and Montenegro were to be monitored separately. In the context of the Stabilisation and Association Process (SAP), Serbia and Montenegro jointly addressed the political cri-
teria, while negotiating the economic conditionality requirements individually. The EU officially recognized Montenegro on 12 June 2006, at the same time reaffirming the European perspective for the Western Balkans (WB) region on the basis of the SAP. The EU Council declared its will to develop further relations with Montenegro as a sovereign, independent state, and on 24 July it adopted a new mandate in order to continue negotiating separately with Montenegro on a SAA. Negotiations commenced on September 2006 based on the previously achieved results in the SAA negotiations with the former state union. On 15 March 2007, the SAA was initialed in Podgorica; it was officially signed on 15 October 2007. Three years after, on 1 May 2010, the SAA entered into force. Montenegro applied to join the EU on 15 December 2008, and it was granted EU candidacy on 17 December 2010. Finally, on 29 Jun 2012, Montenegro commenced its accession negotiations with the EU.

Beyond a doubt, EU integration remains a cornerstone of the Montenegro government’s foreign and domestic policy, and on its path to accession Montenegro has committed to judiciary reform as part of the Copenhagen conditionality related to rule of law. The 2012 European Commission Progress Report observes that the judiciary in Montenegro still has to demonstrate its independence, accountability and efficiency, particularly by producing convincing results in terms of final decisions in politically sensitive cases of corruption and organized crime.

3. EU Standards on the judiciary

As already mentioned, rule of law and reform of the judicial sector remain vaguely defined concepts due to the difficulty in measuring the performance of the judicial system. The EU standards on judiciary are based on The Lisbon Treaty provisions, the EU Charter of Fundamental Rights (the Charter), the Venice Commission code of conducts, and Article 6 under the European Court for Human Rights (ECHR) Jurisprudence.

Judiciary sector regulation was until recently under the Justice and Home Affairs (JHA) pillar within the exclusive competence of member states. Since the Treaty of Lisbon, the judiciary has become a shared competence under the scope of work of the European Commission competence. Although the Lisbon Treaty made the Charter a legally binding document, and despite the fact that Article 6 has a crucial role in developing and strengthening the national judiciary, in increasing its reasonableness and
predictability, and, above all, in securing fundamental human rights, the very concept of common European judiciary still remains unclear.5 Bearing in mind that the member states have different legal traditions distinguished mainly by continental and Anglo-Saxon legal culture, the first step for the European Commission regarding judiciary reform in the context of EU accession is to prepare a roadmap of minimal standards that applicant countries would need to meet.

Acknowledging the fact that the justice sector is in need of about continuous reform, the EU officials understand that in a follow-up to the feedback from the monitoring process the stakeholders may develop additional country-tailored criteria.6 Nevertheless, the starting point to which all applicant countries need to comply is based on an “independent and efficient justice system with accountable and professional judges.”7 A key element for the establishment of such system, according to the EU, lies in the system according to which judges are appointed, which needs to be based on clearly established criteria and a transparent procedure. The external independence of judges is viewed as especially important, particularly in regard to the traditional division of government between it and the executive branch. Accountability should be fostered by the implementation of appropriate disciplinary measures based on objective criteria, while professional competence should be secured though the establishment of judicial training centers and random allocation of court cases. In addition, the EC will focus on the establishment of complete court statistics as one of the key measurement tools regarding the reform of the judiciary. Specifically, the EU shall require in the process of negotiations provision of court statistics, despite the fact that statistics on certain types of crime are often too technical and misleading, of little use for proper analysis regarding the impact on suppression of crime. Even so, these statistics will be used to measure the efficiency of the reform of the judiciary in the (potential) candidate countries.

Finally, the EC will re-introduce the regional approach in discussing benchmarks for achieving standards in the Judiciary.8 In such a way, countries will be incited to cooperate and show their achievements to their counterparts, rather than being targeted through national programs. Therefore, more regional programs regarding standards in judiciary shall be proposed for further financing.

6 Interview with senior EU official (Graz: 2012).
7 Ivi.
8 Ivi.
4. The Legacy of the Past

Montenegro shares the legal tradition of the rest of the WB countries, including strong influences from the French Code Civil and the Austro-Hungarian Empire. During the communist era, informal communist party and strong executive branch influences on the judiciary were common, although perhaps less obvious than in some other socialist systems in the region. Towards the end of its existence, by the end of 1980s, the Yugoslav judicial system had undergone profound transformation from arbitrary application of “revolutionary justice” by uneducated staff to a professionalized apparatus that has carried out its duties in a modern and complex environment. Nevertheless, in practice, political interference had been extremely pronounced throughout the entire history of Communist Yugoslavia, and the judiciary remained an integral component of the communist power structure.9 Despite the impressive constitutional provisions that provided guarantees for judicial independence, judges could not function without regard to the communist party’s fundamental political values, or without regard to the “socio-political system, or above this system.”10 “In a society such as the Yugoslav society today [writes Trajkovic in 1984] the relationship between politics and the judiciary is extremely important. Although not a political office, the judiciary is ‘the most political institution’ because it implements and applies the law which is in fact a concentrated expression of politics.”11

The main factors limiting normative guarantees for the independence of the judiciary remained the political considerations for the election and re-election of judges. First, legislative assemblies, in cooperation with the Communist Party, played an important role in the recruitment of future judges. Evaluations concerning the “moral-political suitability” in the selection and re-election of judges enabled party members considerable influence over judicial bureaucracy. Membership in the party was effectively a condition for election. A comprehensive study conducted in 1979 with respect to 8000 judges and other judicial officers indicated that 87,2% of the judges were members of the League of Communists, while the percentage was even higher among employees of the public prosecutor’s

While party interference in judicial matters operated in a rather subtle and indirect manner, one of the most political pressures exerted on the judiciary came from the prosecutorial branch of the judicial system. Another problematic issue was the high level of politicization of the constitutional courts system, which exercised “a special quasi-political role through their powers to review the constitutionality of laws”. It can be concluded that Yugoslav judges were subjected to a complex and subtle “interplay of professional, bureaucratic, political, and other influences,” which have successfully prevented them from meeting the standards of acceptable political non-conformism in performing judicial service. Existing principles of separation of powers and the independence of judiciary were neglected when “higher state interests” were concerned, and without a doubt the law was in these cases instrumentalized by politics.

Finally, we observe another problem that remains common for most post-Communist countries, where, excepting constitutional courts, the majority of courts “continued in their formalist reading of the law” rather than performing their assumed transitional role. Legal academics in these countries also attempted to approach the new laws in a textualist way. Poorly supported by their education, judges often sought a way out of more difficult legal cases by disposing of the case based on purely formalistic grounds. In this way, the simplified version of textual positivism and the ideology of bound judicial decision-making were able to survive the process of judicial reform. Legacies of communist legal culture, although without direct connection to the former political system, thus remain alive and continue to influence contemporary legal thought in most post-Communist legal orders. Consequently, the application of EU law in new member states and candidate countries -which are obliged to gradually harmonize internal norms with EU law- is an unprecedented challenge for the post-communist judiciary. In order to bring about the Acquis Communautaire in its full meaning, judges must not consider mere “limited law” of the texts of harmonizing legislation, but also the texts of European directives, considering their reasoning and rationale; European Court of Justice Jurisprudence; and case law of the EU member states.

The introduction of the multi-party political system meant the evaporation of the formal one-party grip of ideology over the judicial sector. Nevertheless, this did not mean

16 Ivi.
the end of political interference in the administration of justice. Practically, the regime in Montenegro never lost continuity with the communist elite, since the winner of the first pluralistic elections held in 1990 was the League of Communists of Montenegro. In 1991 the League was renamed the Democratic Party of Socialists of Montenegro (DPS) and has, despite fractionalization, ever since been the ruling political party in Montenegro.

After the breakup of the SFR Yugoslavia, Montenegro has been since 1992 part of the Federal Republic of Yugoslavia (FRY). Each of the constituent federal units had its own constitution, as well as a court system that included a supreme court and a constitutional court. Furthermore, the separate federal system included a Federal Court and Federal Constitutional Court. Under the FRY Constitution, each republic was subject to both federal and its own republic legislation and authorities. The 1992 Federal Constitution maintained the judicial bodies already in existence, particularly the Federal Court and Federal Constitutional Court. Article 12 provided the principle of separation of powers. The Federal Court acted as a court of the highest instance, deciding on appeals against rulings by courts of the member republics in cases concerning enforcement of federal statutes, and also decided on conflicts of jurisdiction between courts of two member republics (Article 108). Judges of the Federal Court were appointed and dismissed by the Federal Assembly for nine-year terms. The Federal Court determined the guaranteed immunity of one of its justices, while dismissal before the expiration of a mandate was possible if the judge “perform[ed] his judicial duties in an incompetent or unconscientious manner” (Article 110). Besides the application of legal remedies as provided for in the federal statute in matters within the jurisdiction of the Federal Court, the Federal Public Prosecutor was entitled to give mandatory instructions to public prosecutors in the member republics and could take over cases of criminal prosecution in matters in which the criminal offenses and other penal offenses were established by federal statute (Article 111). The Federal Constitutional Court ruled on conformity of the constitutions, statutes and other laws and regulations of member republics with the FRY Constitution (Article 124). The same rules and procedures applied as for the election and dismissal of judges of the Federal Court.

Political tensions between Montenegrin and Serbian political elites simmered during political and administrative changes, which consequently influenced transformations

17 From 1991 to 1998, under Momir Bulatović the party endorsed union and close relations with Serbia. In 1998, Bulatović was ousted as leader when its present leader Milo Đukanović took over, advocating distancing Montenegro from Serbia, and finally independence.

within the judicial system. In 2000 the Government of Montenegro introduced a Project on Reform of the Judicial System in Montenegro. During the Project cycle from 2000 to 2005, the main goals of reform of the judicial sector were to 1) accept new organizational, material and procedural laws as a normative background; 2) implement the newly accepted laws; 3) enhance professional development of the judicial office holders; and 4) establish special institutions and develop the judicial information system. The underlying goal was to harmonize the procedures of the judicial institutions with the procedures of EU law and other relevant international institutions. The most apparent result of this first phase of the judicial reform in Montenegro was the adoption of more than twenty laws, inter alia: Law on Courts, Law on State Prosecutor, Criminal Code, Criminal Procedure Code, Law on Civil Procedure, Law on Executive Procedure, Amendments to the Law on Execution of Penal Sanctions, Law on Witness Protection, Law on Court Experts, Law on Notaries, Law on Mediation, etc. Simultaneously, efforts were made to provide continuous education for holders of judicial power with the establishment of the Centre for Training of Judges of the Republic of Montenegro. The main goal of the Centre was to provide training to judges on new laws and regulations and modern methods for judicial functions. Besides judges, the Centre offered its services to lawyers, prosecutors, expert witnesses and other judicial servants. In this early phase of the judiciary reform, numerous international organizations assisted the effort led by the Montenegrin Ministry of Justice, such as the Council of Europe, the Organization for Security and Co-operation in Europe, USAid, the Open Fund Society, etc. However, the greatest assistance came from the EU through the European Agency for Reconstruction, which financed the implementation of the Public Administration Reform in Montenegro (PARiM), aimed at institutional and legal consolidation of the administrative system, consistent implementation of laws and other legal regulations, and stimulation and training of civil servants for better and legally based work within the administrative system. Nevertheless, the implementation of the Project on Reform of the Judicial System was hampered at the time by efforts invested in achieving the country’s independence.

20 The European Agency for Reconstruction operated between 2000 to 2008 as the EU’s main reconstruction arm in war-damaged Kosovo, and later expanded to Serbia, Montenegro and the former Yugoslav Republic of Macedonia. The Agency’s work was part of the wider Stabilization and Association Process for the Western Balkans region. The Agency’s emphasis has evolved from post-conflict reconstruction efforts to programmes aimed at strengthening central and local administration and the reform of the police and the judiciary, as well as public finances and the agricultural, transport and energy sectors.
5. Government Strategy for the Reform of Judiciary

Montenegro’s interim position between full and effective membership in a joint state with Serbia and its own full independence, and in particular the constitutional constraints imposed during the final years of the FRY and the State Union of Serbia and Montenegro, resulted in decreased efforts to reform the judiciary. Only with the 2006 declaration of independence were the preconditions met for the radical and profound changes in all areas of social life, particularly that of the judiciary. Bearing this in mind, in 2007 the Government of Montenegro adopted the five-year Strategy for the Reform of the Judiciary.21

The five-year Strategy was complemented by an Action Plan and corresponding budget to implement the Strategy for the Reform of the Judiciary, with the motive to enhance the efficiency of the judicial bodies and bolster their independent and autonomous position in the overall system of power, but also in order to comply with the EU conditions for Montenegro’s European and Euro-Atlantic integrations. The development of the Strategy involved participation of representatives of judicial bodies and representatives of international organizations, particularly experts from the Council of Europe under the framework of the CARDS-funded projects for the development of the judiciary. Four strategic goals were set in the Strategy:

- Enhancing the independence and autonomy of the judiciary;
- Enhancing the efficiency of the judiciary;
- Enhancing the accessibility of judicial bodies, that is, access to justice;
- Enhancing public trust in the judiciary;

As a prerequisite for the achievement of these strategic goals, the document stated that the judiciary should be independent, autonomous and functional; accessible to all persons; fair to and respectful of all persons; effective, efficient and open; ready to act in compliance with the Constitution, law and international instruments, abiding by the principle of the rule of law; unbiased, unprejudiced and consistent in providing equal legal protection to all parties; actively engaged in encouraging alternative means of dispute settlement; ready to respond to the changing needs of the community in a timely and high-quality manner; committed to the fight against crime and ready to efficiently cooperate with other authorities in achieving this goal. According to the Stra-

The judicial institutions responsible for the attainment of the set strategic goals are the Ministry of Justice, the Supreme Court, the Supreme State Prosecutor, the Judicial Council and the Prosecutorial Council.

Nevertheless, it is important to mention that although Montenegro’s status had fundamentally changed the rhetoric that characterized the period between 1997 and 2006, constitutional debate has continued despite the new reality. As the issue of status had been formally resolved, “antagonisms between the political parties which comprised the competing pre-referendum blocs continued into the post-independence” period. These disagreements particularly manifested during ethnic and linguistic constitutional debates throughout 2007. Once formally ratified and adopted in October 2007, the Constitution paved the way for continuation of the judicial reform process.

5.1. Benchmarks on Independence, Accountability, Professional Competence and Effectiveness

The Rule of law is introduced in the Article 1 of the Constitution that defines Montenegro as “a civil, democratic, ecological and the state of social justice, based on the rule of law.” Article 11 implies the traditional regulation of power following the principle of the division of powers into the legislative, executive and judicial, wherein the judicial power shall be exercised by the courts, and constitutionality and legality shall be protected by the Constitutional Court. The provisions on the judiciary in the Constitution are gathered in Part 3, which treats the organization of powers, and more precisely in Articles 118 to 128. Article 118 explicitly guarantees the autonomy and independence of courts and states that the court shall rule on the basis of the Constitution, laws and confirmed and published international agreements. Apart from regular judges, the Constitution also envisages lay-judges’ participation in the trials in cases stipulated by the law. Among other principles of judiciary, the Constitution has prohibited the establishment of court marshal and extraordinary courts.

The independence of judges is confirmed in Article 121, which stipulates that judicial service shall be permanent and that the duties of a judge shall cease at his/her own

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request, when s/he fulfills the age requirements for pension or if the judge has been sentenced to an unconditional imprisonment sentence. The transfer of a judge against his or her will is only possible by decision of the Judicial Council in case of restructuring the courts. Furthermore, pursuant to Article 122, judges enjoy functional immunity and shall not be held responsible for the expressed opinion or vote at the time of adoption of the decision of the court, while in proceedings initiated because of a criminal offense made in the performance of judicial duty, the judge shall not be detained without the approval of the Judicial Council.

While the Constitution does not determine the network of courts structure, it does stipulate the Supreme Court as the highest court in Montenegro, which secures a unified enforcement of laws by the courts. The President of the Supreme Court is elected and dismissed from duty by the Parliament at the joint proposal of the President of Montenegro, the Speaker of the Parliament and the Prime Minister (Article 124).

Under Article 125, judges and presidents of the courts are no longer elected and dismissed by the Parliament, but instead are appointed by the Judicial Council. The Judicial Council is an autonomous and independent authority that according to Article 126 secures the autonomy and independence of the courts and the judges. The Judicial Council has ten members: the minister of justice and the President of the Supreme Court, who also serves as the President of the Council, are ex officio members; four members are judges elected by the Conference of Judges; two are members of the Parliament elected by the Parliament itself, one by the majority and one by the opposition; and two are selected by the President of the Republic from among “renowned lawyers” (Article 127). Overall, the composition of the Judicial Council ensures a good balance between the judiciary and political power. The Constitution (Article 128) supplies an exhaustive list of responsibilities of the Judicial Council, as it provides that the Council shall elect and dismiss from duty judges, Presidents of courts and lay judges; establish the cessation of the judicial duty; determine the number of judges and lay judges in a court; deliberate on the activity report of the court, as well as applications and complaints regarding the work of court, and articulate a position with regard to them; decide on the immunity of judges; propose to the Government the amount of funds for the work of courts; and perform other duties stipulated by the law.

A separate chapter of the Constitution is devoted to the State Prosecution. Although the State Prosecution was stipulated as a unique and independent state autho-
rity responsible for the prosecution of perpetrators of criminal offenses and other pun-
ishable acts who are prosecuted ex officio, and although the Constitution even pro-
vides that the institution of the Prosecutorial Council shall ensure the independence of
state prosecutorial service and state prosecutors, the very fact that the Supreme State
Prosecutor and state prosecutors (Article 135) and the Prosecutorial Council (Article 136)
are appointed and dismissed from duty by the Parliament without qualified majority
diminishes the independence of this institution. Moreover, the Venice Commission has
criticized the Constitution for not limiting the grounds upon which the Supreme State
Prosecutor and the other prosecutors may be removed from office.25

The implementation of the constitutional articles pertaining to the judiciary required
adoption of appropriate laws, bylaws, and regulations, as well as the development of new
institutional mechanisms and increased attention dedicated to the training and education
of all stakeholders in judicial institutions. The most important laws adopted include the Law
on Courts,26 the Law on the Judicial Council,27 the Law on the State Prosecutor’s Office,28
and the Law on Education in Judicial Bodies,29 which will be scrutinized in more detail.

The Law on Courts regulates the establishment, organization and jurisdiction of
courts, conditions for selection of judges and lay judges, court structure, judicial admini-
stration and other issues of importance for the proper and timely functioning of the
courts. Article 3 of the Law reiterates the independence of courts by declaring that the
judge shall decide “individually and independently” while “[n]o one is allowed to in-
fluence the judge in the exercise of judicial functions.” Article 14 stipulates the court
system in Montenegro as a three-tier court system comprising fifteen basic courts, two
high courts, an Appellate Court and a Supreme Court. It also includes two commercial
courts, an administrative court, and the Constitutional Court. Although initial steps have
been taken to rationalize the court network, Montenegro remains one of the countries
with the highest number of basic courts, judges, prosecutors and administrative staff

and 39/2011.
28 The Parliament of the Republic of Montenegro. Law on State Prosecutor’s Office. Official Gazette of
the Republic of Montenegro 69/2003; Official Gazette of Montenegro 40/2008 and 38/11.
29 The Parliament of Montenegro. Law on Education in Judicial Bodies. Official Gazette of the Republic
per capita in Europe. Chapter III concerns the requirements for the election of judges and disciplinary responsibility; however, the procedure for the election and dismissal of judges was deleted during the latest amendment of the Law on Courts, as it is now in the competence of the Judicial Council instead of the Parliament. General conditions for election to the position of judge include citizenship, law degree and successful completion of the bar exam (Article 31); Article 32 additionally stipulates years of work experience in the legal profession. The Ministry of Justice, through the authorized officer, supervises the courts in relation to the organization of work in the courts, including the handling of petitions and complaints; the work of the Judicial Council on the tasks related to case administration; and other matters related to the proper functioning and operation of the judicial administration (Article 106). Funding for the courts is provided in a separate section of the budget based on the proposal prepared by the Judicial Council.

According to the Law on the Judicial Council, the Judicial Council of Montenegro is responsible for ensuring the independence, accountability, responsibility and competence of the judiciary. As explained above, the 2007 Constitution for the first time introduced the institution of the Judicial Council and made it responsible for the appointment, promotion, disciplinary sanction, and dismissal of judges. As the Constitution did not provide for the composition of the Judicial Council to be independent from the political elites, and in particular following the criticism expressed by the Venice Commission, it was expected that the election of its members would be regulated in more detail in lower legal acts. Chapter II of the Law regulates the election and dismissal of the members of the Judicial Council. The Council is composed of ten members, whereof five are elected and dismissed from among the judges by the Judges Conference, which is composed of all Montenegrin judges and court presidents. The Minister of Justice sits as ex officio member in the Council, while the Parliament nominates two deputies. In addition, the Council includes outside representation consisting of distinguished lawyers or by law professors. The President of Montenegro prepares a list of at least four eminent jurists for the election of members of the Judicial Council and delivers it for the opinion of the Supreme Court. However, the Law does not provide that the opinion of the Supreme Court is binding, which effectively leaves the door open to the President’s influence over the work of the Council.

Article 23 stipulates competence of the Judicial Council, in addition to the responsibilities stipulated in the Constitution, to 1) investigate complaints about judges; 2) de-
cide on the disciplinary responsibility of judges; 3) give opinions on draft regulations in the field of justice; 4) provide implementation, sustainability and uniformity of the Judicial Information system; 5) implement education and training related to the judicial function in cooperation with the Prosecutorial Council; 7) investigate complaints against judges; and 8) propose the number of judges and other employees in the courts, etc.

Chapter IV of the Law on the Judicial Council provides in-depth procedures for the election, promotion and transfer of judges. In addition to the general conditions for election stipulated in the Law on Courts, the Judicial Council takes into account the following skills of candidates for the first election of a judge: professional knowledge, work experience and performance; capacity as judged through academic written works and other professional activities; professional ability based on previous career results, including participation in organized forms of training; work capability and capacity to analyze legal problems; ability to perform impartially, conscientiously, diligently, decisively, and responsibly the duties of the office for which he or she is being considered; communication abilities; relations with colleagues, conduct out of office, integrity and reputation; and managerial experience and qualifications, in relation to the positions of court president. The decision on appointment is made by the Judicial Council after an interview with the candidate. The Law differentiates between two types of judges’ assignment. Judges may be assigned by the Judicial Council to perform judicial service, with their consent, at another court for a period of up to six months during a calendar year in the event that regular performance of duties in the court to which the judge is being assigned have been called into question due to the disqualification of a judge or his/her inability to attend to his/her duties or due to other justified reasons (Article 30). A judge may only be the subject of a temporary or permanent assignment without his consent in case of the reorganization of court structure. The Judicial Council decides about the cessation of the judge’s function based on the reasons stipulated in the Constitution and other legal acts. Finally, the Judicial Council decides on the immunity of judges in cases when a competent court finds that there are reasons for the judge to be detained (Article 47).

The Law on the State Prosecutor’s Office regulates the establishment, organization, jurisdiction and other issues of significance for the work of the State Prosecutor’s Office, as well as issues of significance for the work of the Special Prosecutor for Suppression of Organized Crime, Corruption, Terrorism and War Crimes. Article 3 guarantees the immunity
and professional independence of the Public Prosecutor: “nobody shall influence the State Prosecutor in the exercise of his/her office.” The organization of the State Prosecutor’s Office resembles the three-tier court structure, in that it is composed of The Chief State Prosecutor, High State Prosecutor and Basic State Prosecutor. Its jurisdiction is to “perform the tasks of prosecution of perpetrators of criminal offences and other punishable offences prosecuted ex officio, file legal remedies falling within its jurisdiction and perform other affairs as prescribed by law” (Article 17). General and special conditions and the procedure for the appointment of the State Prosecutor and the Deputy follow those established above for the judges. The mandate of the State Prosecutor or Deputy is stipulated in Article 50 to cease at the expiry of the term of office, on resignation, on meeting the requirements for retirement, on cessation of citizenship, if he/she becomes a member of political party bodies, if he/she exercises a representative and other public office or a professional activity incompatible with the prosecutorial office, or if an unsuspended prison sentence has been imposed against him/her. The Prosecutors’ Council notifies the Assembly without delay that the conditions for termination of office of a State Prosecutor have been fulfilled. Should the Assembly not reach a decision on the cessation of the office of the State Prosecutor within 30 days of the receipt of the notification, it shall be deemed that the office of the State Prosecutor has ceased upon the expiry of such time period. The State Prosecutor or Deputy State Prosecutor shall be removed from office if sentenced to a criminal offence which renders him or her unfit for exercise of the prosecutorial office, in case of exercising the prosecutorial office unprofessionally or in an unconscionable manner, in case permanent loss of the ability to exercise the office, if he or she fails to achieve positive results when directing activities through which the State Prosecutor office is being exercised, if he or she fails to initiate procedures for the removal or disciplinary proceedings of the State Prosecutor or Deputy despite being so authorized, or if he/she suffers a disciplinary measure twice in the course of his/her term of office. An unsubstantiated initiative for removal of the State Prosecutor or Deputy may be submitted by the Chief State Prosecutor, at least three members of the Prosecutors’ Council, a Disciplinary Committee, the High State Prosecutor for removal of his/her Deputy and the Basic State Prosecutor, the Basic State Prosecutor for removal of his/her Deputy, or the Minister of Justice for the removal of the Chief State Prosecutor (Article 52). An initiative for removal is submitted to the Prosecutors’ Council which, if it finds grounds to conduct the procedure, sets up the Commission for examination of conditions for the removal from
office. Upon collecting information and evidence relevant for determining whether or not the initiative is founded, the Commission delivers its Opinion to the Prosecutors’ Council, which passes the decision and notifies the Assembly about it. The Assembly delivers the decision on removal from office to the State Prosecutor who has been removed from office, to the Prosecutors Council and to the Ministry of Justice.

The Law on the Public Prosecutor’s Office establishes a Department for Suppression of Organized Crime, Corruption, Terrorism and War Crimes headed by the Special Prosecutor. The Special Prosecutor has within the limits of his/her competence the same rights and duties as a State Prosecutor.

Rather than in a separate law, Chapter VII of the Law on Public Prosecutor’s Office provides for the competences, composition, election and cessation of mandate in the Prosecutors’ Council. According to the Article 83 the Prosecutors Council 1) define the proposal for appointment and removal from office of State Prosecutor, 2) determine the number of Deputy State Prosecutors, 3) conduct the proceedings for establishing the disciplinary responsibility of State Prosecutors and their Deputies, 4) ensure the training of prosecutors and deputy prosecutors in cooperation with the Judicial Council, 5) establish the proposal for the budget line intended for the financing of the work of the State Prosecutor’s Office and the Prosecutors Council, 6) give opinions on draft laws and secondary legislation in the field of justice and initiate enactment of relevant laws and other regulations in this field, 7) ensure implementation, sustainability and uniformity of the Judicial Information System as it relates to the prosecutor’s offices, and perform other duties provided by law. The Prosecutors Council is chaired by the Chief State Prosecutor by virtue of his/her office and has ten additional members: six chosen from amongst the State Prosecutors and their Deputies; one from amongst the professors of the State Law Faculty in Podgorica; two from amongst renowned lawyers in Montenegro at the proposal of the President of Montenegro, having obtained a prior non-binding opinion of the Protector of Human Rights and Freedoms; and one representative of the Ministry of Justice.

As one of the goals of the Strategy for Reform of the Judiciary was set to be the professional development of holders of judicial office, it is important to analyze at this point the 2006 Law on Education in Judicial Bodies. This Law specifies the manner and forms of initial and in-service training of judiciary officials, as well as persons preparing themselves for the performance of a judiciary office. The objective of the training is to acquire, maintain and improve the knowledge, capacities and skills of judiciary officials,
in order to facilitate autonomous, independent, unbiased, professional and efficient performance of their office in accordance with ethical standards of the profession. Article 4 stipulates it as a “right and obligation” of judiciary officials to undergo further professional training. Judiciary training is conducted within the Judicial Training Center, which is a special organizational unit of the Supreme Court. Besides initial and in-service training, the Law additionally provides for “obligatory training,” which is organized through special programs for judiciary officials in the case of promotion, change of area of responsibility or office and specialization, and introduction of new procedures.

The Judicial Training Center was founded in 2000 within the Government of Montenegro Project of Reform of the Judiciary from 1998, with the aim of providing training programs to judges, judicial assistants and court trainees, as well as other staff employed in the courts’ administration and judicial security. The initial founders were the Ministry of Justice of Montenegro, the Association of Judges of Montenegro, the Foundation Open Society Institute, Soros - Representative Office Montenegro, and the American Bar Association/Central and East-European Legal Initiative (ABA/Ceeli). The main task of the Judicial Training Center is the training of judges and other target groups in the fields of new legislation, international standards in different legal areas and in modern methods of conducting judicial work, foreign languages, computer skills, etc. Since its establishment in 2000, the Center has organized seminars, round tables, workshops, courses, regional conferences, and study visits in which approximately 90% of Montenegrin judges have participated.30

6. Negotiation Phase

The more Montenegro has progressed in its EU accession talks, and the more the opening of the negotiations was in sight, work on the creation of a functioning judiciary has intensified. At the end of the five-year period of implementation of the Strategy for the Reform of the Judiciary, it became obvious that significant progress had been made; nonetheless some of the stipulated Constitutional and legislative solutions were still not fully in line with “European standards.” Most notably, the 2007 Constitution did not provide for the composition of the Judicial Council independent of political influence.

as only half of the Council's members are elected from among the judges. The political method of electing the President of the Supreme Court and President of the Judicial Council was criticized by the Venice Commission. In its 2010 Report, the European Commission stressed Montenegro’s need to “strengthen rule of law, in particular through depoliticised and merit-based appointments of members of the judicial and prosecutorial councils and of state prosecutors as well as through reinforcement of the independence, autonomy, efficiency and accountability of judges and prosecutors”\(^\text{31}\) on its path towards membership in the Union. On the other hand, the Commission praised the progress achieved with regard to the publication of court rulings and the significant reduction of case backlogs.\(^\text{32}\) However, enforcement of civil decisions remained weak and the court network remained in need of rationalization. A country-wide single recruitment system for first-time judicial appointments had yet to be established. Furthermore, ahead of opening of the EU negotiations strengthening and better streamlining of judicial training were in need of improvement.

Due to the firm commitment to gaining a green light for the beginning of accession negotiations, in December 2011 the Government of Montenegro decided to revisit the 2007 Action Plan for the Reform of the Judiciary. Based on the screening of actual implementation of the 2007 Action Plan, the Commission for the Implementation of the Action Plan concluded that only 7.5% of the proposed reforms were not implemented during the five-year cycle. In order to implement the remaining measures, the Government adopted the revised Action Plan for the Implementation of the Strategy for Reform of the Judiciary.\(^\text{33}\) The revised Action Plan amended a number of measures on the independence and efficiency of the judiciary and changed the relevant deadlines. Additionally, the Constitutional Issues and Legislative Committee of the Parliament of Montenegro, at the meeting held on 28 May 2012, proposed Amendments to the Constitution of Montenegro.\(^\text{34}\) Some of the Constitutional Amendments concerned the need to reduce political influence on the appointment of high-level judicial officials.


\(^{32}\) According to the latest EC Progress Report quoted in this text there were approximately 11,500 unresolved cases from previous years in all courts in Montenegro at the end of 2011, which made backlog of cases approximately 4% lower in 2011 than in 2010.


through more transparent and merit-based procedures and the introduction of substantial qualified majority thresholds, where the parliament is involved. Specifically, Amendment III changes the competences of Parliament in the procedure of electing and releasing from duty the President of the Supreme Court and the President of the Constitutional Court. According to this Amendment, the election and release from duty of the President of the Supreme Court and the President of the Constitutional Court should fall under the competence of the Parliament, which is not in line with the requirement for depoliticisation of the election of judicial and constitutional judicial officials. Amendment IX prescribes that the Judicial Council will have ten members, including the President of the Supreme Court, four judges, two renowned lawyers elected by the Parliament, two renowned lawyers appointed by the President of Montenegro and the minister in charge of judicial affairs. This solution aims to ensure balance in the number of the members of the Judiciary Council who are judges and those who are not by fixing their ratio at five of each. The President of the Judicial Council is elected by the Judicial Council from among its members, exempting the Minister of Judiciary the right to be elected. The vote of the President of the Judicial Council is decisive in case of equal number of votes. Due to the difficulties in securing qualified majority support for the revision of Constitution, it was more than a year before the parliament of Montenegro adopted a set of constitutional amendments aimed at enhancing the independence of the judiciary. The adoption of these amendments has been praised by the Commission as “a strong signal that Montenegro is able to achieve a large political consensus on key rule of law related reforms, which have been highlighted by the EU as a priority in the accession process,”35 while the amendments have been addressed as “fundamental of an effective judicial system.”36 Nevertheless, the Commission has pledged to continue to monitor the process of regulation of sub-constitutional legislation aimed at securing an efficient judiciary.

Montenegro’s continuous progress on democratization of the country, and particularly the latest efforts aimed at judiciary reform, were recognized by the European Commission in June 2012, when Montenegro became the first country in the region after Croatia to commence its accession negotiations with the EU. Based on the experience of recent enlargements and the challenges faced by enlargement countries, the Commission

36 Ivi.
has created a new approach to negotiations in the area of judiciary and fundamental rights and on justice, freedom and security, and Montenegro became the first candidate country to negotiate under the new negotiating framework. Fundamentally, the new framework is set to anchor the rule of law at the centre of the accession process by opening the Chapters 23 and 24 at the very beginning of the accession negotiations.

Following the Screening Report prepared by the European Commission, in June 2013 the government of the Republic of Montenegro adopted the action plan for Chapter 23, which addressed the recommendations made in the report and envisaged benchmarks for opening negotiations on this chapter. Apart from anticorruption and fundamental rights, most of the action plan covers the area of judicial reform. In production of the action plan, the government was in regular consultation with the Commission, but also with civil society elites and relevant stakeholders who will be the main partners of the government in the implementation of the agreed-upon plan.

Despite the evident progress Montenegro has achieved in the field of judiciary reform over the past decade, numerous issues remain to be addressed before the country’s eventual EU membership. With regard to the independence benchmark, selection criteria for the Judicial Council members remain vague, so that transparent assessment of candidates is yet to be guaranteed. Future work needs to focus on setting up a single recruitment system for judges and prosecutors based on transparent and objective criteria, a system for periodical professional assessment of judges’ performance, and also on increasing administrative capacity and budget allocations for the work of Judicial and Prosecutorial Councils. Concerning the accountability of the judiciary, the Commission warned that corruption and conflict of interest are still insufficiently monitored in the judiciary, and in this regard it recommends strengthening the procedures for removing the professional immunity of judges and establishing a system for professional evaluation of judges. The Commission acknowledged the advancement of the judiciary’s efficiency, as the backlog of cases has been further reduced by approximately 4% since the previous report. Nonetheless, the backlog of the commercial courts and the administrative court remains a matter of concern. It remains to be seen to what extent the institution of bailiff will in the future manage to influence the efficiency of the court network.

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7. Conclusion

Since the collapse of communism throughout Eastern Europe, promotion of the rule of law has become a major and recurrent objective of EU external policy. In this particular context, the rule of law has evolved to become one of the cornerstones of the EU enlargement policy, initially during the 2004 and 2007 enlargements, and currently for the WB (potential) candidate countries. As one of the enlargement policy objectives, the rule of law does not impose legally-binding obligations stemming from the Acquis but rather operates as a “soft” and largely undefined principal that is supposed to broadly guide EU actors and domestic actors of change when they act in the process of transformation. This is where we will re-introduce the study of Europeanization of the EU candidate countries and place it within the context of the rule of law as the value to be exported beyond the borders of the Union by means of conditionality, incentives and negotiation.

Particularly problematic in relation to the Europeanization by rule of law concerns is the content of the negotiations. Namely, as we have pointed out earlier throughout this text, in comparison to the other EU accession negotiation chapters the rule of law negotiations are not principally based on the Acquis. After learning the lessons from the accession talks with Croatia, during which chapters 23 (Judiciary and Fundamental Rights) and 24 (Justice, Freedom and Security) concerning the rule of law proved to be the most difficult to conclude and were open relatively late in the accession process, the EU has developed a new strategy for negotiating rule of law related issues.

Montenegro is the first EU candidate country facing the new rules for negotiating the rule of law accession criteria, which focus on institutional change. According to the analyzed framework, the negotiations commenced with an analytical assessment of the country’s performance in the rule of law implementation. The assessment was conducted by the European Commission and was followed by clear directives regarding the judiciary reform. After the initial “screening” phase, an overall strategy and an action plan has been prepared by the candidate country, which covers the progress from the beginning until the very moment of the accession, in compliance with benchmarks from Chapters 23 and 24. The most important innovation is the introduction of “interim benchmarks” so that the European Commission will thereby not only monitor the full alignment, but also the provisional progress.38 Obviously, during the negotiation process,

38 Interview with EU official (Brussels: November 2013).
the candidate country will continue to benefit from the IPA financial instruments, with the difference that the assistance will move away from a project approach to a sector-wide approach in chapter 23 and 24.

As seen in the first part of this chapter, Montenegro has a long-standing tradition of legacies and informal legal culture in which the independence of judiciary has perpetually been threatened despite the change of various political systems and regimes. Even today, a partitocratic system, in which the main criteria for job appointment and career advancement is party loyalty, threatens to undermine any institutional arrangement. Under such circumstances, a big part of the problem is also how to motivate the main actors, namely domestic gate-keeper elites, to see their interest in supporting the reform of the judiciary, which inevitably would lead towards weakening their political and often economic influence. Furthermore, as recently seen in Croatia, the creation of an independent judicial system might also lead towards opening investigation and court prosecution of such ‘predatory elites.’ This is precisely why Uljarevic observes that “the ability of all involved representatives of the [Montenegrin] state and other interested parties that will take part in the negotiations process to overcome these attempts at obstruction will be an indicator of their professionalism and readiness of the administration to lead us successfully through the process until the final accession to EU.”

In other words, the systemic changes that have reshaped judicial institutions have simply created the pre-conditions for improvement in Montenegrin judiciary. These changes however have not influenced the pattern of political relations in which the gatekeeper agents act as policy entrepreneurs in the field of the judicial reforms. It has only been with the announced beginning of the accession negotiations, i.e. with the approximation of reward, that the ruling elites have actually shown political commitment to creating a normative framework that provides elements of judicial independence, accountability, effectiveness and efficiency. By creating a two-tier network of linkage and leverage, that is by opening the accession negotiations, the EU has managed to affect not only policy, but the political system as well, by being able to design and argue more clearly for the more precise reforms. In order to Europeanize the rule of law system completely, it is also crucial to include a wider expert public in the reform process through socialization of civil society elites, various advocacy coalitions, legal experts, journalists etc. In the words of a senior public official involved in the negotiation process, “the

Government cannot join the EU on its own, or with the parliament and a few other institutions – the whole Montenegrin society must be ready.\textsuperscript{40}

On the side of the EU a recurrent problem remains the vagueness and elusiveness of the negotiating chapter 23 where most of the benchmarks are of highly political or constitutional importance and relate to Copenhagen political criteria rather than to the hard Acquis. Therefore we find it essential that the EU set clear criteria for the reform of the judiciary along the benchmarks of independence, accountability, efficiency and professional competence. Firm standards in this area in the phases of SAA, then in the phase of screening and finally in the negotiation phase would ensure the absence of political impact on the judiciary reform process.

\textsuperscript{40} Interview with a senior public official (Podgorica: 2012).
The Rule of Law in EU Enlargement Policy
- Impact and Obstacles in Serbia

Sanja Kmezić/Marko Kmezić

1. Introduction

The democratic and socio-economic transformation and the accession process to the European Union (EU) undergone by Serbia have been fraught with difficulties. In addition to the dual political and economic transformation from communist rule and a planned economy to democracy and market liberalism, this transformation in Serbia was shaped by state dissolution and the legacy of violent conflict, including the need for reconstruction and reconciliation. These multiple challenges stand at the core of explaining the delay in the EU integration process in the Western Balkan countries (WBCs). After the dissolution of the common state with Montenegro in 2006 and Kosovo’s declaration of independence in 2008, Serbia is currently governed by a Serbian Progressive Party (SNS)-led coalition government, while its political elite remain trapped in contradictions over state- and nationhood issues that hamper the prospect of EU integration. Additionally, the 2008 global financial and economic crisis has led to a drop in foreign investments and the collapse of export demand, which has deepened the already existing economic problems manifested in low gross domestic product financed mainly by foreign investments, huge unemployment rate, and underdeveloped private sector.¹

Nevertheless, besides the slow and unstable progress in transition which the country has achieved since the 2000 overthrow of Milošević, Serbia has managed to transform from an “impoverished, barely functioning state, still in the process of disintegration and

rife with numerous political, economic and social problems\textsuperscript{5} to a candidate country for EU membership.

Although functionally separate, the aforementioned transition processes are intimately interwoven within the Copenhagen conditions, which were originally established at the 1993 European Council for the ten countries taking part in the 2004 enlargement. After 2000,\textsuperscript{3} the EU sought to account for the region’s particularities with the Stabilization and Association Process (SAP) which, \textit{inter alia}, requires (I) that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, (II) the existence of a functioning market economy, (III) the ability to fulfill the obligations of membership in the implementation of the EU legal order, i.e. the \textit{Acquis Communautaire}. However, in spite of the fact that the SAP was launched more than a decade ago, Serbia’s democratic consolidation still remains hampered by political constraints, high corruption of the elites, and underperformance in the reform of the judiciary.

Democratic consolidation is thoroughly linked to the effectiveness of the rule of law. But, at the same time, the concepts of democracy and rule of law are not identical, as can be seen from the different historic developments in the English common law tradition, on the one hand, and continental European civil law traditions, on the other.\textsuperscript{4} However, as Kochenov describes for the 2004 Eastern enlargement process, “the structure and substance of the Copenhagen-related documents does not make any distinction between the assessment of democracy and the Rule of Law. In the course of the pre-accession, the Commission opted for fusing their assessment,”\textsuperscript{5} with the effect that it gained political maneuvering space for more specific policy prescriptions in the process. Moreover, rule of law as a constitutional principle and institutional mechanism in legal textbooks’ descriptions is quite different from practical requirements with regard to the

\textsuperscript{3} The year 2000 in the WB was marked by the collapse of Slobodan Milošević’s regime in Serbia and Montenegro, and the “second” democratic revolution through general elections in Croatia. These events provided preconditions for the start of democratic consolidation and economic reform in the region. Furthermore, in 2000 the EU launched its new WB policy based on the Stabilization and Association Process, which offered the countries of the region the ‘perspective’ of EU membership.
conceptualization and operationalization of benchmarks for monitoring processes in the SAP, as we will analyze further in this text.

This is precisely why this study will attempt to provide systemic analysis of the functioning and dynamics of the various judiciary institutions in the Republic of Serbia under the normative premises of establishing effective rule of law within the framework of EU integration. More specifically, we want to study whether the EU institutions have an influence on implementation of the rule of law in the WB and, if so, of what kind. From this basic analytical framework, a subset of more concrete research questions follows: What requirements are developed regarding the reform of judiciary during the EU monitoring process? Which organizational or institutional reforms have been made? Which gate-keeper elites resisted these reforms? Who (critical civil society actors) supported these reforms? What have been the effects and how have they changed over the last decade with regard to independence, responsibility, efficiency, and effectiveness benchmarks? In an attempt to answer all of these questions, this study will be divided into four parts. The first part will analyse the establishment of EU rule of law enlargement criteria; the second part will scrutinize the legacy of the past as an enduring obstacle for judiciary reform; part three will present the results of normative and empirical analysis of the judiciary reform in Serbia along the lines of independence, accountability and effectiveness. Finally in the concluding section we will try to establish the scope, mechanisms and limits of the EU influence on the rule of law implementation in Serbia.

Our research is based upon a combination of three methodological strands:

I. A normative approach based on the analysis of the rule of law criteria for EU membership established in the Enlargement Process, and even more so conditionality criteria in the context of the SAP.

II. A problem-oriented approach tackling the practical dimension of enforcement of the rule of law. Following analysis of existing legislation, we will combine our results with the empirical data we have gathered during expert interviews with domestic and foreign legal experts and practitioners, in order to assess progress, gaps and possible discrepancy dysfunctions between legislation and implementation. Although most attention is dedicated to the institutional dynamics of the core court structures, the political and societal context in which these are working will also be considered.

III. Lastly, an institutional approach providing for a clear picture of the competencies of and interrelations between the court system, the executive and legislative powers,
as well as the civil society. In order to gather deeper understanding within the institutional approach, part of this text will reflect on the Serbian judicial tradition, thus employing an historic institutional approach.

2. EU Integration Context

Based on the conclusions of the 2003 Thessaloniki European Council, all the WB countries have the prospect of EU membership once they fulfill the necessary conditions. Since then, political dialogue meetings at the ministerial level and policy dialogue between the European Commission and the Serbian authorities has been taking place as part of the Enhanced Permanent Dialogue (EPD). Inter-parliamentary meetings between members of the European Parliament and of the Serbian parliament have been taking place since 2006. Three years after the beginning of negotiations, in April 2008 the Stabilisation and Association Agreement (SAA) was signed, along with the Interim Agreement on trade and trade-related matters (IA) as a result of improved cooperation with the International Criminal Tribunal for Former Yugoslavia (ICTY). The SAA provides a framework of mutual commitments on a wide range of political, trade and economic issues based mostly on the EU’s Acquis Communautaire. As the result of a positive track record in implementing the obligations of the SAA and the IA, the European Council granted Serbia the status of candidate country on 1 March 2012. Additionally, Serbia participates in the multilateral economic dialogue with the Commission and the EU Member States. The aim of this dialogue is to prepare Serbia for participation in multilateral surveillance and economic policy coordination under the EU’s Economic and Monetary Union. Finally, the Council concluded on 5 December 2012 that the opening of accession negotiations will be considered by the European Council, in line with established practice, once the Commission has assessed that Serbia has achieved the necessary degree of compliance with the membership criteria, in particular the key priority of taking steps towards a visible and sustainable improvement of relations with Kosovo, in line with the conditions of the SAP.

In October 2008, the Serbian government adopted the National Programme for the Integration (NPI) of Serbia in the European Union for the period 2008–2012, in an effort to accelerate the process of integration. This document presents the legislative and administrative measures which shall be taken to ensure that, before the end of 2012,
the country is ready to take on most of the obligations stemming from EU conditionality. This is why we deem it worthwhile to assess the precise EU membership conditions, with a particular accent on the political conditions.

3. Rule of Law Conditionality

The issue of conditionality within the process of EU enlargement is rather complex\(^6\) and can be subdivided into three individual components:\(^7\)

I. Stabilisation and Association Process criteria;

II. Opening of negotiations criteria; and

III. Enlargement criteria.

The issue of conditions in each of these phases is addressed by the Union through a combination of political, economic, legal, administrative, and institutional criteria, while additional criteria can be set in respect to individual (potential) candidate countries.\(^8\) At this point we will dedicate our attention only to the political conditionality, as we try to distinguish which particular conditions are set regarding the establishment of the rule of law in (potential) candidate countries. Although the rule of law condition is governed by the EU Treaty, it has been laid down in more detail in various other Union instruments and has evolved in response to developments over the six waves of enlargement. Accession of new member states to the EU is governed by Articles 2 and 49 EU (TL).\(^9\) The amalgamation of these two articles provides that any European State that respects human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, and is committed to promoting them may apply to become a member of the Union. Despite its wording, Articles 2 and 49 EU (TL) form merely the departure point for the principles.

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\(^7\) These are based on the extensive research in this field conducted by A. F. Tatham. 2009. Enlargement of the European Union (Kluwer Law International: Alphen aan der Rijn).

\(^8\) For research in regard to conditionality in respect to the Western Balkan countries see more in S. Blockmans. 2008. Tough Love: The European Union’s Relations with the Western Balkans (The Hague: TMC Asser Press).

of conditionality that govern the enlargement process. As mentioned earlier in this text, the term rule of law has been left vague to the advantage of the EU, as there is no coherent checklist of contents to serve as benchmarks when assessing the compliance of (potential) candidates in this regard. The indeterminacy of the term rule of law has raised numerous concerns about possibilities for manipulation on the part of the European Commission during the enlargement process. 10 This is even more the case when one bears in mind that the European Commission’s choices and recommendations stemming from the Acquis are largely verifiable, unlike the pre-accession analysis of the rule of law development in candidate countries, where little can be established with clarity due to the very nature of the concepts analyzed.

Nevertheless, for the enlargement of the WBCs, the Union has set out a series of conditions that are exclusively applicable to the SAP countries. Under these conditions, SAP countries are required to make credible headway with general political criteria before concluding bilateral contractual relations with the Union in the form of the SAAs. Despite the fact that this sort of “pre-pre-accession conditionality”11 is exceptional and tailored to the need to accommodate the specifics of the WB region, previous waves of enlargement teach us that the exception might eventually turn out to be the rule in future enlargements as well. It is important to observe at this time that the application of conditionality to contractual relations has to be seen as an evolutionary process, in which at each new phase of the integration process a higher level of compliance is required.

When setting up the criteria to be met by the SAP countries at the very beginning of their integration process in 1997, the General Affairs Council laid down the criteria the European Commission must use when establishing levels of compliance.12 Although the initial intent was to “put more muscle onto the EU’s democracy and rule of law limbs,”13 again, the Conclusion only briefly mentions the condition concerning democratic reform, which subsumes the rule of law. However, within the Annex of the aforementioned Conclusions, the General Affairs Council makes direct reference to the various elements

10 See in D. Kochenov, op. cit.
upon which the European Commission should examine the level of compliance of the WBCs with the political criteria of the SAP. These political criteria are grouped under the headings of democratic principles, human rights and the rule of law, and respect for and protection of minorities. According to the extensive research conducted by Tatham we break down the human rights and rule of law principle into: freedom of expression, including independent media; right of assembly and demonstration; right of association; right to privacy, including family, home and correspondence; right to property; effective means of redress against administrative decisions; access to courts and right to free trial; equality before the law and equal protection by the law; and freedom from inhumane or degrading treatment and arbitrary arrest.\(^\text{14}\)

The Council Conclusions were reaffirmed and further elaborated in the European Commission Regular or Progress Reports.\(^\text{15}\) Progress Reports are the main monitoring tool by which the Commission annually reviews the progress of each of the applicant states towards accession in the light of the Copenhagen criteria. Progress is measured on the basis of decisions actually taken, legislation actually adopted, and measures actually implemented. Careful scrutiny of all nine Regular and Progress Reports for Serbia provides us with even clearer benchmarks that the Commission follows when assessing the rule of law compliance. Namely, the part of the Report which deals with the Political criteria provides an analysis of the situation in respect of the political criteria at the 1993 Copenhagen European Council: democracy, rule of law, human rights and protection of the judiciary. Each of the Reports contains a brief exposition of the legislature, executive and judiciary, which is then followed by an evaluation of the functioning of each branch of government.

Based on the findings from the 1997 General Council Conclusions and the scrutiny of the Progress Reports, the European Commission recognized the peculiarities of the aforementioned threefold transition - political and economic transformation from communist rule and a planned economy to democracy and market liberalism, as well as the transformation shaped by state dissolution and the legacy of violent conflict – and adopted the rule of law as the ideological underpinning and modern translation of the concepts of separation of powers and checks and balances. In order to be able to guarantee individual freedom through respect for human rights, the Commission observes the need to limit

\(^{14}\) Ibidem: 197.

\(^{15}\) After the CEEC accessions of 2004, the Commission renamed the Regular Reports as Progress Reports for the remaining candidate and potential candidate countries in SEE.
the use of arbitrariness by all state bodies. Thus the importance of adequate standards for achieving a system governed by the rule of law is recognized by the Commission as the path to meeting the criteria of legal security, equal access to the enforcement institutions, fair trials without discrimination, and effective protection of their rights. Hence effective and impartial functioning of the judicial institutions is the litmus test for rule of law in practice. Based on this thesis, we establish that the institutional system of courts has to be assessed in light of four principal elements that contribute to the re-enforcement of the rule of law in the Serbia: independence and impartiality, accountability, professional competence, and efficiency (effectiveness).16 Bearing this in mind, in the rest of this text we will analyze the effect of Europeanization according to these four benchmarks in relation to the performance of the judicial function.

4. Legacy of the Past: Enduring Obstacle against Europeanization?

The judiciary in Serbia had its roots in the emergence of an independent Serbian constitutional monarchy through most of the nineteenth century. The initial development of the Serbian judiciary was influenced mostly by the legal traditions of Austria, Germany, and France, which were introduced by the returning Serbian scholars after completion of legal studies at the European law schools. The Serbian Civil Code, enacted in 1844, was based closely on the French Code Civil along with an admixture of German and Austrian law, while in the northern parts of Serbia - territory of present day Vojvodina, Hungarian customary law was utilized until the nineteenth century. Since its establishment, the Serbian judiciary has been distinguished by permanent flux between the tendency toward creating an independent and moderate judicial system, on the one hand, and counter pressure from authoritarian monarchs attempting to impose political hegemony over state institutions, on the other.17 Still, the most significant and lasting influence on

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16 These elements follow the systematic approach adopted by the “Europe Aid Cooperation Report: Reinforcement of the Rule of Law, Division of Competences and Interrelations between Courts, Prosecutors, the Police, the Executive and Legislative Powers in the Western Balkans Countries, 2004.” The Open Society Institute. Monitoring the EU Accession Process: Judicial Capacity, Country Reports (Budapest: 2002); as well as by the American Bar Association-Central and Eastern European Legal Initiative (ABA-CEELI). Judicial Reform Index.

17 See more about the early years of the judiciary in Serbia in, S. Radic (ed). 2004. Two Centuries of the First Court in Serbia (Belgrade: Judges Association of Serbia).
the Serbian courts is the legacy of forty years of communist rule in the Socialist Federal Republic of Yugoslavia (SFRY),18 in which Serbia was one of the six constituent units.

The role and functioning of the judicial apparatus was among the most neglected topics of research in Communist-party systems. Most studies treated the judiciary simply as “auxiliary and highly manipulated aspects of overall party control”19 which therefore did not deserve systematic legal analysis. This essentially accurate perception of the judiciary as a political instrument in the hands of the regime during the mobilization phase of Communist parties in Eastern Europe has diverted scholarly attention from analyzing further legal and judicial developments. Despite its early departure from Marxist-Leninist models of judicial development, the Yugoslavian legal system was no exception in this regard. The analysis of the judiciary in communist Serbia inevitably follows the dynamics of the Yugoslav structural reorganization and decentralization, which introduced structural liberalization in other spheres of government based on the gradual progress of the economy. Although economic changes and decentralization were at the root of the 1974 constitutional changes, this Constitution introduced several important principles in the field of the judiciary as well.20

Most notably, it has introduced the formal independence of judges, which constituted a legal precedent among other Communist constitutions.21 According to Article 210, courts were independent in the performance of their judicial functions and were bound to administer justice in accordance with the Constitution, statutes, and self-management enactments.

Nevertheless, despite the constitutional guarantees of judicial independence and the profound transformation that led to the creation of a professionalized apparatus operating in a modern and complex environment, political interference remained highly pronounced, thus effectively subjugating the judiciary within the integral communist power structure.22

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18 In the rest of this chapter we will use the term Yugoslavia for the Federal People’s Republic of Yugoslavia founded in 1945, and its 1963 constitutionally changed name Socialist Federal Republic of Yugoslavia. The state is most commonly referred to by this last full name, which it held until the dissolution in 1991.
Deep interdependency between politics and the judiciary was described by Trajkovic in 1984, who saw the judiciary as “the most political institution” since it implements and applies the law which is in fact a concentrated expression of politics. The main factors that limited the impact of normative guarantees for the independence of the judiciary were political considerations in the election and re-election of judges and the pivotal role of the Communist Party in this process. Evaluations of categories such as “moral and political suitability” enabled party members effective influence over the judiciary. Membership in the party was effectively exercised as a condition for election. A comprehensive study conducted in 1979 with respect to 8000 judges and other judicial officers indicated that 87.2% of the judges were members of the League of Communists, while the percentage was even higher within the public prosecutor’s office employees (93.7%). While party interference in judicial matters operated in a rather subtle and indirect manner, one of the most political pressures exerted on the judiciary came from the prosecutorial branch of the judicial system. Another problematic issue was the high politicization of the constitutional courts system, which exercised “a special quasi-political role through their powers to review the constitutionality of laws.” It can be concluded that during communist rule, judges were subjected to a complex and subtle “interplay of professional, bureaucratic, political, and other influences,” which successfully prevented them from attaining acceptable political non-conformism in performing their judicial service. The declared adoption of the principles of separation of powers and the independence of the judiciary was neglected when “higher state interests” were concerned, and there is no doubt that the law was in these cases instrumentalized by politics.

In 1990, Serbia underwent a radical political transformation that ended 45 years of single-party rule. The fall of the League of Communists causally meant the evaporation of the formal one-party grip of ideology over the judicial sector. Nevertheless, this did not mean the end of political interference in the administration of justice. Already in the late 1980s, the judiciary “increasingly became another instrument with which emergent political elites could advance their nationalist strategies.” The in-

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instrumentalist approach of the politicization of judiciary was adapted to the change of ruling ideology, so even after the alleged ‘beginning of the democratization’ of Serbia in the 1990s the independence of the judiciary in political practice continued to be “more a phrase than a reality.”28 Despite the 1990 constitutional provisions,29 the system of checks and balances within different branches of the Serbian government existed only formally, while the President of Serbia and the authoritarian leader of the ruling Socialist Party of Serbia (SPS), Slobodan Milošević, swiftly managed to subordinate various government agencies, including the judiciary. Taking advantage of the lack of significant opposition in the National Assembly, Milošević (mis)used the constitutional provisions on the election and particularly re-election of judges and public prosecutors to execute political influence on the judiciary. Given the environment of all-out party struggle and the branding of the opposition as enemies of the state and traitors, the underlying goal was to make the judiciary one of the instruments of partisan political competition. Paradoxically, the institution supposed to be under control of the court was electing the judges who controlled it. The process of election of the judicial authority was described as a “symbolic act of obedience and suitability, as in all party states,”30 “the only difference being that [communist] committees are replaced by committees of the SPS.”31 By determination of judicial advancement based on political considerations rather than professional criteria, the authorities effectively subordinated the judiciary. Throughout the Milošević era judges operated in conditions of “great insecurity”32 concerning re-election and dismissal. Subtle political influence on the judiciary was also exercised through the role of the court’s presidents, who manipulated the assignments of politically sensitive cases in order to insure that their courts remained firmly in line with the regime. A prominent Yugoslav human rights lawyer analyzed the developing situation by concluding that “in Yugoslavia [there is] a condition of state anarchy [...]. Ten or twenty years ago we were dissatisfied with the legal state, but at least we had one,”33 he wrote.

Nevertheless, even during the times of starkest regime oppression, an embryonic struggle for the establishment of an independent judiciary was carried out through the Judges Association of Serbia. Since 1997, this organisation has been one of the leading actors in the fight for professional independence of judges, and currently strives to ensure the independence of the ongoing judicial reform process. Today, the Judges’ Association of Serbia is a non-governmental organization in favor of the establishment of an independent, impartial, professional, efficient and responsible judiciary, through the affirmation of law as a profession, the advancement of regulations, and the strengthening of the respect, professional ethics and dignity of judges, with a goal of building a legal state and the rule of law. It has approximately 1000 registered members and works through 10 Commissions in different fields of law.

Following the democratic changes in October 2000, the new Serbian government made the reform of the judiciary one of its priorities. The establishment of an independent, accountable and efficient judicial system was made the focus of political reforms in the country, while the role of the judiciary was recognized as an important instrument for establishing discontinuity with the legacy of the authoritarian past. Nonetheless, democratic changes did not fulfill the promise of an unbiased evaluation of the role of judiciary during the previous regime. The fact that the first post-Milošević democratic government was composed of 18 highly heterogeneous political parties made it impossible to find common ground for the process of lustration and making a clear break with the previous regime. While the illegal decisions on the dismissal of judges who had opposed election fraud were abrogated, and Milošević’s choices for presidents of courts were altered, the application of Milošević’s laws made the removal of his judges a difficult process. Finally, in 2003 the Serbian Assembly adopted the Law about Responsibility for Breaching of Human Rights which had features of a lustration law; however the law was never implemented. Clearly, neither political will of the elites nor broader political consensus to perform the lustration in Serbia never existed after 2000.

34 See more detailed information about the Judges Association of Serbia at <http://www.sudije.rs/>.
5. Main Shortcomings and the National Judicial Reform Strategy

Based on several phases of the Government’s assessments of the judicial system in Serbia after 2000, the main weaknesses of the judiciary were revealed to be manifold: 1) an inadequate constitutional and legal framework, resulting in excessive delays in court proceedings, difficult enforcement of court judgments, lack of accountability of the judicial bodies and corruption; 2) an overly complex and extended system of courts, resulting in higher than necessary operating costs and less efficient access to justice; 3) unclear selection, dismissal, performance, and promotion standards for judges, resulting in inconsistent judicial effectiveness and reducing public trust in the judicial profession; 4) a lack of integrated planning, budgeting and performance measurement capacities, reducing the judiciary’s ability to effectively monitor and improve system performance; 5) outmoded judicial administration operational practices, hampering effective justice administration and case processing; 6) onerous administrative burdens on judges, reducing judicial efficiency and lowering morale in the judiciary’s ranks; 7) lack of continuous training for judges and other judicial officials, hindering the development of a modern and professional staff specializing in judiciary management and administration; 8) inadequate curriculum of law faculties, contributing to a lack of preparation for the future leaders in the legal community and the judiciary; 9) poorly equipped and maintained facilities, restricting access to justice and straining the judiciary’s resources; 10) an overcrowded and outdated penal system, which does not effectively encourage rehabilitation or satisfy international standards of humane treatment; and 11) underutilization of information technology and automated systems, resulting in the continued use of inefficient and labor-intensive administrative practices. In order to eliminate the aforementioned shortcomings of the judiciary system, at the beginning of 2006 the Government of the Republic of Serbia adopted the National Judicial Reform Strategy.37

The main goal of the National Judicial Reform Strategy was to regain the citizens’ trust in the judiciary system of the Republic of Serbia by establishing a legal system based on legal security and respect for the rule of law. Serbian authorities have acknowledged that the cornerstone of future reform is the establishment of a democratic institutional

setting for the judicial apparatus. The framework for the full implementation of the strategy was set to end in 2013. The National Judicial Reform Strategy sets forth the challenges facing Serbia’s judiciary within the framework of four key principles and corresponding goals. The four goals are:

1. a judicial system that is independent;
2. a judicial system that is transparent;
3. a judicial system that is accountable; and
4. a judicial system that is efficient.

Drawing on previous experiences of judiciary reforms in Central and Eastern European countries\(^{38}\) and Latin America,\(^{39}\) it was concluded that normative changes of the organizational structure of the judiciary are the first step towards guarantees for the independent work of the judiciary and the functional division of branches of government. Once the new Constitution of the Republic of Serbia was promulgated in 2006, a set of judiciary-related laws were adopted in 2008: the Law on High Judicial Council, the Law on Prosecutorial Council, the Law on Organization of Courts, the Law on Seats of Courts, the Law on Judges, the Law on Public Prosecution, and the Law on the Judicial Academy.

### 6. Functions and Structure of the Justice System

Serbian courts are defined as autonomous and independent state bodies protecting the freedoms and rights of citizens and the rights and interests of legal subjects stipulated by law, ensuring constitutionality and legality. Courts adjudicate in accordance with the Constitution, laws and other general acts, where specified by law, generally accepted rules of international law and ratified international agreements. Courts are established and abolished by law, whereas provisional courts, ad hoc war courts or courts of special session may not be established.

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Pursuant to the goals set up in the National Judicial Reform Strategy, the Law on Organization of Courts was promulgated in the National Assembly in 2008. This legal act was supposed to introduce an “efficient, independent, objective and transparent system of judiciary.” When the Law came into effect as of 1 January 2010, it radically cut the number of courts from 168 to 64. The Law established courts of general jurisdiction – Basic, 26 High– and Appellate Courts in Belgrade, Nis, Novi Sad and Kragujevac, and the Supreme Court of Cassation as the court of highest instance in the Republic of Serbia. The Supreme Court of Cassation is immediate higher instance court to the Commercial Appellate Court, the Higher Misdemeanor Court, the Administrative Court, and the Appellate Court. The seat of the Supreme Court of Cassation is in Belgrade. A basic court is established for the territory of a town, that is, one or several municipalities, and a higher court for the territory of one or several basic courts. In places where former Municipal Courts were abolished, court branches are kept to provide direct access to citizens.

Additionally, courts of special jurisdiction were established: the Administrative Court, Commercial Courts, Commercial Court of Appeal, 45 Misdemeanor Courts and the High Misdemeanor Court. A commercial court is established for the territory of one or several towns, that is, several municipalities. An appellate court is established for the territory of several higher courts. A misdemeanor court is established for the territory of a town, that is, one or more municipalities. The Commercial Appellate Court, the Higher Misdemeanor Court, and the Administrative Court are established for the territory of the Republic of Serbia, with seats in Belgrade. These courts have departments outside their seats where they adjudicate permanently and undertake other court activities.

At the same time, the reappointment procedure for all judges was carried out under the lead of the Ministry of Justice. The overall number of judges was reduced by 20–25%. However, the reappointment procedure raised serious concerns for the EU and the domestic expert public alike. Namely, the procedure for judges and prosecutors was carried out in a non-transparent way, putting at risk the principle of the independence of the judiciary. The fact that the High Judicial Council acted in a transitory composition,

42 This included 138 municipal courts and 30 district courts, which were the courts of the second instance.
43 Interview with the judge (Belgrade: 2012).
and neglected the mandatory representation of the profession throughout the process of reappointment led to serious accusations of political influence over the process.\textsuperscript{44}

The role of the Constitutional Court is regulated under the separate section of the Constitution. It is defined as an “autonomous and independent state body which shall protect constitutionality and legality, as well as human and minority rights and freedoms.”\textsuperscript{45} As the “guardian of the Constitution,”\textsuperscript{46} the Constitutional Court performs an important role in reinforcing the principle of the rule of law. Namely, through its responsibility for normative control of the legislation and the protection of human rights, it “indirectly”\textsuperscript{47} participates in the decision making process. The Constitutional Court is a collegiate body, consisting of 15 justices, which acts as an autonomous and independent body in deciding on the issues from its jurisdiction. Decisions made by the Constitutional Court are “final, enforceable and generally binding.”\textsuperscript{48}

\textit{Graph 7.1: Serbian court network}

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\end{center}

\textsuperscript{44} Interview with journalist (Belgrade: 2012).
\textsuperscript{45} Constitution. Article 166, para 1.
\textsuperscript{47} Ivi.
\textsuperscript{48} Constitution. Article 166, para 2.
Furthermore, since 2003 special departments within the Serbian court system have existed for war crimes and organized crime. Both departments are operational with special prosecutorial offices. Since the 2010 reform of the court structure, these departments have been parts of the Belgrade Higher Court. Pursuant to the Law on the Organization and Competencies of Government Authorities in Prosecuting Perpetrators of War Crimes of July 2003, special departments for war crimes and organized crime have jurisdiction over alleged violations of the Basic Criminal Code, in addition to crimes against humanity, violations of international law, and criminal acts as defined by Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY). The Belgrade Higher Court’s war crimes department, comprised of six judges and one assistant, exercises first instance jurisdiction over all war crimes cases tried in the Republic of Serbia. The special department on organized crime exercises first instance jurisdiction over offenses involving criminal conspiracies, such as money laundering, human trafficking, and extortion, as well as illicit trade in arms, ammunition, and explosive substances. It is comprised of 13 judges, working with 2 assistants. Decisions of Specialized departments may be appealed to the Belgrade appellate court.

Finally, in 2009, Special Divisions for combating high technological crime were established within the Higher Public Prosecution Office and the Higher Court in Belgrade, with jurisdiction over the entire territory of the Republic of Serbia. Judges allocated to the Criminal Division of the relevant court participate in the work of the court division.

7. Benchmarks and Remaining Challenges

7.1. Independence

The independence of judges is at the heart of the doctrine of separation of powers. An essential precondition for the establishment of effective rule of law systems lies in direct and formal guarantees of real independence of individual judges in exercising their core decision making function. The strong and lasting legacy of the judiciary’s subordination as part of the political culture of authoritarianism, which we described above, required farreaching normative reforms in order to meet the prescribed level of independence in the judges’ position. Even though the strategic decision for the purpose

49 Published in the Official Gazette of the Republic of Serbia 67/03 (Belgrade: 1.07.2003) as amended, see Official Gazette of the Republic of Serbia 135/04 (Belgrade); Official Gazette of the Republic of Serbia 61/05 (Belgrade).

of ensuring access to meaningful justice for all has been promulgated within the National Judicial Reform Strategy, it is important to observe that political and economic factors are capable of undermining the impartiality of the adjudication process. This is why we have chosen to test the independence of judges not only as part of the principle of division of powers, but also against political and economic factors.

The division of competencies between the judiciary and all other branches of government, as well as the civil society, is the outcome of historical and cultural evolution. The concrete institutional design for assuring sufficient guarantees for the division of power in Serbia is determined by the Constitution. The Constitution guarantees the division of power as one of the Constitutional principles with the provision that the “[g]overnment system shall be based on the division of power into legislative, executive and judiciary.” Still, the issue of independence is intimately linked with the issue of the interdependence of various state bodies as a consequence of the delicate system of balances within the theory of division of powers. Each intervention into this complex system is likely to create consequences also for other, indirectly affected parts. This is why we observe the recommendation that “the insistence on the independence of the judiciary should not (automatically) lead to its isolation from the rest of the institutional set-up.” The Serbian Constitution recognizes this recommendation by provision that the relation between the three branches of power shall be based on balance and mutual control. Judiciary power shall be independent.

In order to critically assess the political independence and self-administration of the judiciary, we will closely scrutinize solutions pertaining to the main organizational issues of the judiciary, namely to selection, promotion, and to a limited extent dismissal of judges, while economic independence will be tested against the annual proposals for the judiciary budget and salaries of the judges.

The independence of judges is guaranteed by the Constitution, which prescribes that the judge is “subordinated only to the Constitution and the law.” Pursuant to the

52 “Europe Aid Cooperation Report: Reinforcement of the Rule of Law, Division of Competences and Interrelations between Courts, Prosecutors, the Police, the Executive and Legislative Powers in the Western Balkans Countries. 2004,” cit: 13.
54 Constitution. Article 149, para 1.
Constitution, courts are independent and autonomous in their work and they adjudicate in accordance with the Constitution, laws and other general acts, when stipulated by Law, as well as generally accepted rules of international law and ratified international treaties. Basic principles of judicial independence proclaimed by the Constitution are also confirmed under the provisions of the Law on Organization of Courts and the Law on Judges.

The Law on Organization of Courts prescribes that the judicial power is vested in courts and is independent of the legislative and executive powers, and that judicial decisions are binding on all and may not be subject to extrajudicial examination (Article 3.1 and 3.3). Pursuant to the Law on Organization of Courts, use of public office, instruments of public information or any public appearance that may unduly influence the course and outcome of legal proceedings is prohibited, as well as any other form of influence on courts and pressure on parties in the proceedings (Article 6).

The Law on Judges further elaborates the basic principles stipulated under the Constitution of the Republic of Serbia, and provides that judges are independent and autonomous in their work, that they adjudicate and render judgments in accordance with the Constitution, Law and other general acts, ratified international treaties, and generally accepted rules of international law (Article 1).

The Constitution of the Republic of Serbia and the Law on Judges regulate the election and promotion of judges. The number of judges is established pursuant to the Decision on the Number of Judges in Courts. According to the established number of judges in courts, the High Judicial Council announces the election to fill the vacancies in the office of judge.

The provisions of the Law on Judges regulate the procedure for the election of judges and the requirements necessary for election (Articles 43-52). A citizen of the Republic of Serbia may be elected for a judge if he or she meets all conditions for employment with government authorities, holds a Law degree, has passed the Bar Exam, and has expertise, competence and worthiness for the judge’s office. The High Judicial Council established the criteria and standards for the evaluation of the fulfillment of the aforementioned requirements under the Decision on the Establishment of Criteria and Standards for Evaluation of Qualification, Competence and Worthiness for Election of Judges and Presidents of Courts. Competence is described as possession of specific legal knowledge needed for case solving, expertise
includes possession of theoretical and practical knowledge necessary to perform judicial functions, while worthiness implies moral qualities that judges should have, and behavior in accordance with these traits. Specific requirements are set for individual court positions: two years for a judge at Magistrate Court; three years for the position of judge at the Basic Court; six years for a judge at Higher, Commercial and Higher Magistrate Court; ten years for a judge at the Court of Appeal, Commercial Court of Appeal, and the Administrative Court; and twelve years for the position of a judge at the Higher Cassation Court. The Law excludes discrimination on any ground within the process of election, promotion and nomination to the office of judge. Upon election and nomination to the office of judge, the national composition of the population, appropriate representation of members of national minorities and knowledge of professional legal terminology in the language of the national minorities need to be taken into consideration. The High Judicial Council runs the procedure for election by announcing the election of judges, and upon receiving the applications, it gathers opinions and data on the candidates.

Article 147 of the Constitution provides that the National Assembly of the Republic of Serbia shall, upon the proposal of the High Judicial Council, elect for a judge a person who is being elected to the office of judge for the first time, for a mandate of three years. A judge who was elected for the first time has to be elected to the permanent office of judge if he/she is graded with “exceptionally successful discharge of the duties of judge” each year during his/her mandate. Alternatively, the judge who was elected for the first time may be elected to the permanent office of judge if he/she was graded with “exceptionally successful discharge of the duties of judge” or “successful discharge of the duties of judge” during his/her mandate. Criteria for the grading process are established by the High Judicial Council. In accordance with the law, the High Judicial Council alone elects judges to the permanent tenure of office, in the same or another court.

Termination of tenure of office and dismissal from the office constitute an important part of the political independence of a judge’s position since it is their task to eliminate the risk of arbitrary procedures against ‘disloyal’ judges. The Constitution provides that a judge’s tenure shall be terminated at his/her request, upon fulfilling the legal retirement age, or upon dismissal from office for reasons stipulated by law, as well as if he/she is not elected to the permanent office (Article 148). The decision on termination of a judge’s office is passed by the High Judicial Council, and the dismissed judge has the right to an appeal before the Constitutional Court.
The Law on Judges provides that judges are dismissed from office upon conviction with imprisonment of no less than six months for a criminal offence or for a punishable offence which makes them unworthy to perform the function of a judge, or in the case of a serious disciplinary infringement (Article 62). Additionally, a judge may be dismissed in the case of unprofessional conduct, which is determined according to the criteria and standards for the evaluation of the performance of judges. The initiative for the removal of a judge may be submitted by any person, while the President of the Court, the president of the higher court, the president of the Supreme Court of Cassation, bodies responsible for evaluation of work of judges, the Disciplinary Commission, and the High Judicial Council are entitled to initiate the dismissal procedure. The High Judicial Council establishes the grounds for dismissal and makes a decision in proceedings closed to the public. The judge has the right to be immediately notified of the reasons for initiating proceedings, and to be informed about the case, supporting documentation, and the course and outcome of proceedings. The judge has the right to present his/her statements orally before the High Judicial Council. The High Judicial Council must make a reasoned decision within 45 days of the initiation of the procedure, which decision the dismissed judge has the right to appeal before the Constitutional Court. The decision of the Constitutional Court is final.

The independence of the Constitutional Court is fostered by the Constitutional provisions (Articles 172-174) on the process of electing the Constitutional Court justices, their immunity, the incompatibility of the judicial function with other functions, as well as the reasons for the termination of the tenure of a Constitutional Court justice.

After the procedural role of the High Judicial Council in the election, promotion, termination of tenure, and dismissal of judges elaborated above, we will pause at this point to highlight the role of this body for the political independence of judges' function. The High Judicial Council was established with the Law on High Judicial Council in November 2001. The High Judicial Council is an independent and autonomous body that was established to guarantee the political independence of courts and judges.

According to the Constitution, the High Judicial Council appoints and relieves judges, proposes to the National Assembly the election of judges in the first election to the post of judge, proposes to the National Assembly the election of the President of the Supreme Court of Cassation as well as presidents of courts, participates in the proceedings to terminate the tenure of office of the President of the Supreme Court of Cassation and presidents of courts, decides about the termination of a judge’s tenure without their
consent, and approves the detention or arrest of judges in criminal proceedings (Articles 144-154). Additionally, the Law on the High Judicial Council provides that this body proposes candidates for presidents of courts to the Assembly, decides on the transfer and appeal of judges, rules on the incompatibility of other services and jobs with the judge’s office, appoints juror judges and performs activities of the judiciary administration within its jurisdiction (Article 13). However, certain activities of the judiciary administration—court security, proposals of the amount and structure of budgetary funding, their distribution to courts and supervision of their spending—have remained in the exclusive jurisdiction of the Ministry of Justice, or as divided competences between the Ministry of Justice and the Council. Furthermore, the decision about the number of court personnel, contrary to the National Judicial Strategy, has been transferred to the jurisdiction of the Ministry.

The High Judicial Council has eleven members and is composed of the President of the Supreme Court of Cassation, the Minister responsible for justice and the President of the Judicial Committee of the National Assembly as members ex officio, and an additional eight members elected by the National Assembly.\(^{57}\) Elected members include six judges holding the post of permanent judges, of which one must be from the territory of autonomous provinces; and two respected and prominent lawyers, of which one must be an attorney, and the other a professor at the law faculty.

The Law on Judges guarantees the independence of the judges’ function by ensuring their financial independence (Article 4.2). The salary of judges is established according to the Law on Judges based on the ratios set in the Law on Budget, which establishes the base of calculation and payment of salary for public servants.

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<thead>
<tr>
<th>Function</th>
<th>NET Salary in EUR</th>
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<tr>
<td>The Judge of Supreme Court of Cassation</td>
<td>1.315</td>
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<tr>
<td>The Judge of Administrative Court</td>
<td>1.052</td>
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<td>The Judge of Commercial Appellate Court</td>
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<td>The Judge of Appellate Court</td>
<td>1.052</td>
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<tr>
<td>The Judge of Higher Court</td>
<td>921</td>
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<td>The Judge of Commercial Court</td>
<td>921</td>
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<td>The Judge of Basic Court</td>
<td>789</td>
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<tr>
<td>The Judge of Higher Misdemeanour Court</td>
<td>921</td>
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<tr>
<td>The Judge of Misdemeanour Court</td>
<td>658</td>
</tr>
</tbody>
</table>

\(^{57}\) Constitution. Article 153.
Table 7.1 presents an overview of the net amount of salaries of the bearers of judicial positions in the Republic of Serbia. Although there are no available data for the average salaries of other participants in court proceedings (attorneys), we might compare judges’ salaries with the Republic average net salaries of public servants, who make only 309,71 EUR. From this data it can be assumed that the prerequisites for the economic independence of judges are met.

7.2. Accountability

Independence and accountability of the judiciary are two sides of the same coin in a democratic society. Given that the judges are provided with real independence in performing their core function, there exists a need for evaluation of their performance, followed by the implementation of appropriate measures, as we will here describe.

The law on Judges stipulates that the work of all judges and presidents of the courts is subject to regular evaluation (Article 32). Evaluation of the performance of judges is enacted on the basis of transparent, objective and standardized criteria in a proceeding that ensures the participation of the judge or the president of the court whose work is being evaluated. Evaluation is set to cover all aspects of the judge’s job, namely quantity, quality and commitment to judicial work. Based on the performance rates, which are “performs judge’s office with extreme success,” “successfully performs a judicial function,” and “fails to meet requirements,” the evaluation may result in an election, promotion, mandatory training of the judge or removal from office. The criteria and procedures for evaluation are elaborated by the High Judicial Council such that the quality of performance of a judge is expressed through the percentage of repealed decisions under legal remedy, the quantity is evaluated on the basis of the number of cases that a judge resolves during a year, while the quality is evaluated on the basis of quality of decision-making, the efficiency of case-processing, and professionalism in conduct. By taking into account qualitative evaluation of the work of judges, the evaluation procedures have managed to avoid the trap of over-quantification, but still it remains unclear if they takes into consideration criteria such as the complexity of cases and other specific circumstances, such as court location and human resources. The evaluation of judges of lower courts is conducted by councils established in courts of directly higher instance. The High Judicial Council evaluates the work of presidents of the courts and decides on complaints. Evaluation of permanent judges is conducted once every three years, while the performance of judges elected for the first time is conducted each year.
The Law on Judges introduces the disciplinary accountability of judges, regulates disciplinary infringements and sanctions, as well as the conduct of disciplinary proceedings and the bodies for conducting disciplinary proceedings. The High Judicial Council plays an important role in the disciplinary procedures against judges, as it adopts the Rulebook on Disciplinary Proceedings and Disciplinary Accountability of Judges (Article 93.3), and elects the members of the Disciplinary Commission, a standing working body of the High Judicial Council. Members of the Disciplinary Commission are appointed from among judges. The prescribed disciplinary sanctions that may be imposed by the Disciplinary Commission are public reprimand, salary reduction of up to 50% for a period not exceeding one year, and prohibition of advancement in service for a period of up to three years. The judge against whom the disciplinary proceedings were conducted has the right to an appeal before the High Judicial Council, which makes the final decision.

Last but not least, external complaint mechanisms to channel mistrust in the work of the judiciary are important. Besides the competent judicial authority, litigants and other participants in legal proceedings have the right to file a complaint to the High Personnel Council on the performance of judges if they think that there is any kind of unauthorized influence on the course and outcome of the proceedings. Although internal rules and norms establish efficient mechanisms for holding judicial officers in Serbia accountable, a number of NGO “watchdogs” daily scrutinize and monitor the work of the judiciary, thus enhancing the standards in the field of accountability of judges. Some of these include the Belgrade Centre for Human Rights, the Youth Initiative for Human Rights, the Yugoslav Committee of Lawyers, etc. The recommendation is that the Ombudsman institutions should also be made competent to receive external complaints against the judiciary by the civil society.

Moreover, accountability is guaranteed by issues of criminal and civil liability and the professional discipline of judges. Restrictions related to the accountability of judges are provided in the Constitution regarding the protection of judges in the exercise of the office of a judge. Namely, a judge may not be held accountable for his/her expressed opinion in the process of judicial decision making, except in cases of criminal offence or violation of a law by a judge (Article 151), whereas broad rights regarding judges’ immunity are provided for under the Law on Judges (Article 5). On the other hand, a judge may not hold office in legislative or executive bodies, may not be a member of a political party, engage in any paid public or private work, or offer paid legal services or advice.
Judges’ accountability is further fostered through guarantees of their non-transferability.58 The law on judges elaborates non-transferability in more detail by stipulating that a judge can be transferred to another court, another state agency, institution or international organization in the field of justice only upon his/her written consent (Article 19). Exceptionally, the judge may be moved for a period not longer than one year to another court without consent in the event of termination or suspension of the court for which he/she was elected based on the decision of the High Judicial Council (Article 20).

The promotion of a judge implies the election of the judge to a court of a higher rank, regardless of the type of court. Apart from the prescribed general requirements and necessary experience in the legal profession, the basic criterion for election to the office of a higher-ranking judge is the performance evaluation. During the evaluation of candidates, additional standards are considered: membership in a selected or arbitration court, published professional papers, presentations at national or international expert meetings, participation in the training of judges, academic degree, as well as computer literacy and knowledge of foreign languages.

7.3. Professional Competence

It makes little sense to make judges and prosecutors independent, if they are professionally incompetent to perform judicial function. Legal education in Serbia is almost entirely based on theoretical legal positivism taught by professors who have never practiced law. Consequently, Serbian law students have little knowledge of the realities of practicing law. A simplified version of textual positivism and the ideology of bound judicial decision-making was thus able to survive the process of judicial reform in Serbia. Legacies of old legal culture, even disconnected from the former political system, remain alive and continue to influence the contemporary legal thought of judicial officers. Consequently, harmonization with the **acquis** and, more importantly, the application of the EU law, creates an unprecedented challenge for the Serbian judiciary. In order to be able to implement the **Acquis Communautaire** in its full meaning, judges must not consider merely the “limited law”59 of the texts of harmonizing legislation, but also texts of European directives, their reasoning and rationale, European Court of Justice jurisprudence, and case law of the EU member states.

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58 Constitution. Article 150.
In an attempt to provide an answer to these challenges, the Ministry of Justice and the Judges’s Association of Serbia jointly established the Judicial Training Centre for the professional training of judges in 2001. The sole mission of the Centre was to provide continuous training for judges. Due to the fact that this kind of training was not mandatory and not a condition for the election or promotion of judges, the results of the Centre were modest. Only with the adoption of the Law on the Judicial Academy did judicial training become integrated into the process of recruitment of judges in Serbia. The main goal of the Judicial Academy is the enhancement of independence and efficiency of judiciary. Besides the initial training of future judges and prosecutors, the Academy also provides comprehensive training for sitting judges, prosecutors, and court assistants. The systematic training of candidates for judicial positions is expected to have a decisive impact on the professionalization of the judicial service, since in the future it should be conducted subject to transparent and measurable criteria.

By professional competence, we assume the ability of a judge to make sound judgments, to be equipped with professional erudition, and to have the skill to prosecute or render judgments effectively in accordance with the law. To ensure this, the Law on Judges stipulates election and promotion of judges in accordance with procedures that verify their personal and professional suitability as we have described above. Namely, pursuant to the Law on the Judicial Academy, initial training is a precondition for election to the office of judge; only if there are no candidates who have completed the initial training may candidates who fulfill the general requirements for election to the office of judge or public prosecutor laid down under the Law on Judges be nominated for election to the office of judge of Misdemeanor or Basic Court. Beyond the criteria for election, judges have the “right and obligation” continuously to refresh and improve their professional knowledge and skills (Article 9). Besides legal requirements, continuous training may also be required by the decision of the High Judicial Council based on the change of specialization of a judge, substantial changes in regulations, the introduction of new techniques, and in order to eliminate shortcomings in the work of judges identified by the assessment of their work. In the rest of this subsection we will address the issues of initial and continuous training at the Judicial Academy, as well as other forms of professional training of judges. Family Law provides for the special training for judges acting in the proceedings pertaining to the field of family relations and in criminal

proceedings against juveniles. Additional, judges and prosecutors are trained through training events and seminars by lecturers and foreign experts, within the scope of the twinning program established by the EU.

7.4. Efficiency

Law and society grant judges independence, but in return they expect from them to ensure the administration of the rule of law in accordance with the law in a timely and efficient manner. This requires firm court organizational structure, equipped with skilled management and technical support. An endemic problem of the Serbian judiciary was observed to be precisely the lack of human and technical resources, as well as an inadequate court structure, which led to a huge backlog of cases and undue lengthy procedures.

In an effort to deal with this problem, the Ministry of Justice of the Republic of Serbia initiated the reform of court structure, which we elaborated in Graph 7.1. Since 2010 the new system has been operationalized with the aim of redistributing the workload and in order to “alleviate the previous disparity between overburdened urban courts and underused rural courts.” At this early stage of the work of the new court structure, it is still difficult to critically assess whether it will influence balanced distribution of the workload between the courts. Additional measures have been introduced through the stipulation of the Law on Judges that urges a judge to notify the President of the Court about the reasons that caused him or her to extend the proceedings in first instance for over six months (Article 28). Recommendations can be made regarding the incentives for alternative dispute settling procedures that would decrease the workload of sitting judges, namely conciliation procedures and arbitration. Citizens would also benefit from such settling procedures, bearing in mind the high costs of court proceedings and attorneys fees.

Still, despite the achieved normative changes, a large backlog of pending cases remains a matter of concern, in particular as the recent decrease in the number of permanent judges has impacted negatively on the overall efficiency of the judicial system. The EU in its Progress Report stated that the reduction of the number of judges and prosecutors was not based on a proper needs assessment. Despite significant financial assistance and expertise, case registration and the technical system connecting all courts and court

units are still not fully operational. Therefore, it can be concluded that judiciary reform did not manage to bring satisfactory results under the efficiency benchmark.

8. Conclusion: Europeanization by Rule of Law Adoption vs. Rule of Law Implementation

Europeanization studies were limited to analyses the member states of the EU until the process of eastern enlargement created major possibilities of EU norm export. Eastern EU enlargement in combination with the high number of rules attached to membership conditionality have allowed the EU to develop its unprecedented “transformative power” over (potential) candidate countries.

Based on the explanatory model of the institutionalist analytical framework, which contrasts rationalist and constructivist causal models for the EU’s impact on rule of law transfer we shall analyze international and domestic factors that either enhance or block the effects of the EU’s external influence on Serbian judicial reform. Most of the theoretically informed studies on Europeanization of candidate countries are set within the debate between conditionality as a strategy emphasized by rational institutionalists, and persuasion and socialization highlighted by constructive institutionalists. Such studies contrast the use of conditionality with other sociological strategies as the best fit for the EU norm export to candidate countries. The Serbian case study shows that that these two analytically distinct mechanisms are not necessarily mutually exclusive.

The primary mechanism of the EU’s impact on judicial reform in Serbia has so far been Europeanization through conditionality. Namely, the EU set the judiciary reform as a condition that Serbia must fulfill in order to advance in various negotiation phases with the Union, and ultimately receive membership status. Besides membership as an ultimate reward, the EU provides (potential) candidate countries with additional interim incentives such as financial aid, market access, and institutional ties on the condition that they follow the EU’s demands. Domestic political elites evaluate the material threats

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65 This approach was first elaborated by Schimmelfennig and Sedelmeier in F. Schimmelfennig and U. Sedelmeier (eds). 2005. The Europeanisation of Central and Eastern Europe (New York: Cornell University Press).
and prospect of promised rewards made by the EU and based on a rationalist cost-benefit calculation respond with institutional adaptation or non-doing. Thus far, Serbia’s reiterated ambition to achieve membership status has been driving its compliance with the EU demands for the reform of judiciary; however, the process can be characterized as slow, inconsistent and dependent on the change of the ruling elites.

A number of empirically informed studies consider the clarity and credibility of the EU demands as important factors in increasing the likelihood for the effectiveness of the EU norms transfer to the candidate countries. By clarity it is understood that the candidates need to know precisely what they are expected to do if they decide to comply with the EU conditions. Our study shows that neither of the two factors is fully satisfied, which effectively impedes the rationalist institutionalism strategy for the export of rule of law norms to Serbia. Particular traps for uncertainty may be found in the ever-growing body of EU law, or the absence of a single EU model in many policy areas as the case is with the rule of law.

Additionally, the benchmarks related to the negotiations on Accession Chapters 23 and 24, unlike any other Chapters, refer more to the political or constitutional principles than to the “hard” Acquis. Finally, the European Commission often includes additional benchmarks during the negotiations process. This all adds to the lack of clarity of the EU’s rule of law demands, and consequently affects the effectiveness in the rule transfer.

Therefore, the EU should employ a new approach based on four principles. First, the EU needs to have a better understanding of the situation of the judiciary in the candidate country ahead of the start of the accession process (not only the negotiations), particularly bearing in mind legacies of the past that influence the independence of judiciary. The importance of the historical legacies is elaborated by Pop Eleches, who concludes that they “need to be taken seriously not only because of their own intrinsic importance in post-communist democratization but also because our understanding of alternative explanations has to be embedded in the complicated reality of the region’s intertwined historical legacies.” While it remains difficult to accurately predict which legacies matter most, it can be concluded that “fundamental cultural predispositions play an important role in democratization and, possibly, shape the relationship between

[candidate] countries and the EU as well. Taking into account legacies of the past and understanding of the current situation would allow the Commission to be able to prepare a specific country-tailored strategy in order to effectively export rule of law criteria.

Second, constructive institutionalists argue that by using strategies of socialization and persuasion as ‘soft’ mechanisms for the EU’s norm export, the Union is more likely to convince the elites in the candidate countries to accept the external rules as legitimate regardless of material or other incentives. The factor that facilitates the likelihood that these strategies will be efficient is the conviction of the domestic public and its elites that the proposed changes are legitimate and politically appropriate. Hence, the EU should attempt a bottom-up approach to the EU rule of law promotion in which civil society actors will be empowered so that they can play a rights-holder’s role vis-à-vis public authority in order to push for compliance with key laws, monitor their implementation and influence socialization.

Third, the use of benchmarks on independence, responsibility, efficiency, and effectiveness of the judiciary in the accession negotiations serves as an important catalyst for rule of law reform. Nevertheless, it is not clear what exactly is expected under each of these benchmarks. This is why we deem it important that each of these benchmarks be elaborated in more detail by the Commission. By elaboration we understand that the benchmarks should be clear and predictable to the domestic actors in the candidate country ahead of the start of the accession. Otherwise the reforms are driven by ad hoc prepared country strategies with the potential danger that the effects of the achieved progress might be influenced with the change of the ruling elite, as witnessed in Serbia in 2012, where a newly elected government pledged to re-assess judicial reform, thus delaying the end result.

Finally, the benchmarks should be elaborated in such a fashion that the results of the reform would be measured by the behavioral change in different phases of the negotiation process. Namely, by completing tasks conditioned by the EU, the country would gradually progress in the EU membership negotiations, which in effect would increase the effect of the credibility of the EU’s promise.

The combination of four Europeanization strategies decreases the risk that shortcomings related to the constructivists approach will hinder the process of Europeanization. This is why we argue that the best way to succeed with Europeanization by rule of law in Serbia is within the interplay of credible conditionality application, socialization and persuasion of domestic elites and civil society.

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PART THREE

Scope, Depth and Limits of Europeanization by Rule of Law Implementation in the Western Balkans: Conclusions

Marko Kmezić

1. Introduction

Just over two decades ago, after the fall of the Berlin Wall, it seemed that the Western ideals of democracy, rule of law and individual rights would be spread undisturbed throughout the world, thus leading to “the end of history.”¹ Instead, an array of nationalistic, ethnic, and religious conflicts, global economic crisis, and terrorist acts, as well as the war on terror, soon dissolved the “triumphalist confidence of the 1990s.”²

In an answer to the new lines of global conflict caused by the differences between the liberal West and non-liberal East, the developed North and undeveloped South, Islamic and Christian religious communities, between global corporations and third world countries, etc., a widespread agreement was created “on one point alone: that the rule of law is good for everyone.”³ This acknowledgment has led to the multiple efforts to export democracy and the rule of law.⁴ Over the past twenty years the “rule of law

³ Ibidem: 1.
revival,” as Carothers calls it, has influenced political and economic liberalization in a multitude of countries in Asia, Latin America, the former Soviet Union, Eastern Europe, sub-Saharan Africa, and the Middle East.

The EU is a relative latecomer to the arena of democracy and rule of law promotion. The Union is engaged in the process of rule of law export as part of its enlargement policy towards the Western Balkans and Turkey, its neighborhood policy towards Russia, the so-called Newly Independent States (NIS) and the Southern Mediterranean countries, and finally its external policies towards a number of countries from Asia, Latin America and Africa. Well beyond the immediate European neighborhood, the EU runs numerous initiatives based on the rule of law conditionality, offering financial and technical aid to countries that do not qualify for EU membership. Notwithstanding the evident success of the EU’s influence on democratic transformation of the so-called third countries, the focus of this book has been on the analysis of the rule of law promotion taking place within the current process of EU enlargement.

The EU’s comprehensive strategy to promote effective rule of law exercised through the Stabilisation and Association Process (SAP) in SEE consists of the progressive development of contractual relations and institutional ties based on an enhanced political dialogue and monitoring process, supported by financial assistance and technical aid, and complemented by the demand to comply with clear set of political conditions. All of these processes are intimately interwoven within the famous Copenhagen conditions, which were originally established at the 1993 European Council for ten countries taking part in 2004 enlargement. After 2000, the EU sought to account for the SEE particularities with the SAP, which requires inter alia that the candidate country has achieved “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”

Notwithstanding the relative enlargement fatigue in the EU institutions that are currently preoccupied with the challenges of the economic crises and very viability of the Euro Zone, it is still the difficulties of the dual political and economic transformations that explain the current delay in the EU integration of the remaining non-EU SEE countries. Amongst the other conditions imposed for EU membership, the rule of law, and in

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6 For an overview of the financial crisis currently gripping the eurozone, including its root causes, outcomes and the uncertain future of the euro, see P. Arestis and M. Sawyer (eds). 2012. The Euro Crisis (New York: Palgrave MacMillan).
particular judiciary reform, remains among the crucial challenges that the SEE countries must resolve on their respective accession paths.

As previously analyzed in Chapter 1, the third generation of Europeanization scholars analyze “Europeanization” as the key concept in the exploration of the impact of the EU integrations on democratic consolidation in Central and Eastern Europe (CEEC), and currently have on prospective EU members from the SEE. Namely, the EU enlargement is understood not only as a foreign policy approach in the context of international relations, but also as a form of “governance export” and “norm diffusion.” Hence, democratic consolidation, including the establishment of an effective system of rule of law, is part of the more general top-down process of Europeanization that regards “the influence of EU institutions, rules and policy-making processes and their impact on the laws, institutions and identities [...]” of candidate countries. In the first chapter, we have addressed the Europeanization study in relation to the rule of law implementation in the SEE when setting up the main research question this book attempts to answer - whether the EU institutions have had an influence, and if so of what kind, on implementation of the rule of law in Bosnia-Herzegovina, Kosovo, Macedonia, Montenegro and Serbia. For clarity’s sake, we will recall other research questions, since precisely these will provide the structure for the comparative conclusions of our study addressed in this chapter.

What are EU requirements developed in the monitoring process? Which organizational-institutional reforms have been made? Which gate-keeper elites resisted these reforms? Who (critical civil society actors) supported these reforms? What have been the effects and how did have they changed over the last decade with regard to independence, responsibility, efficiency, and effectiveness benchmarks? By focusing specifically on the area of the judiciary, the main findings of this book are:

a) comprehensive normative and empirical analysis of the judiciaries in five case study countries;
b) specification of the conditionality criteria for the EU accession in the field of the rule of law; and
c) policy recommendations for future institutional settings in the WB countries.

As observed earlier in this book, rule of law is a vaguely defined concept, the substance of which is often elusive. Acknowledging various issues included in the Justice and Home Affairs (JHA) policies of the EU, ranging from asylum and borders control to the fight against corruption and organized crime, this book chooses not to deal with the effects of EU policies in this sector covered by Chapter 24, but narrows its research interest to the normative and empirical analysis of the effective functioning of the judiciary in five case study countries. However, another conceptual problem arises from the fact that the effects of judicial sector reform are not easily captured, due to “the lack of a coherent theory of judicial independence, and the difficulty to measure the performance of the judicial system,”10 as has been observed in regard to monitoring activities during the 2004 and 2007 Eastern enlargement processes.

Bearing this in mind, first we have developed an integrated set of “benchmarks”, based on the EuropeAid study conducted by Joseph Marko et.al.,11 in order to apply and test the empirical findings elaborated in the course of our research. To address the research question of Europeanization influence on judiciary reform in the SEE (potential) candidate countries for the EU membership, we have sought to trace evidence of such influence along the lines of judicial independence, accountability, efficiency and effectiveness. Over the past two years, an international and interdisciplinary research team investigated the institutional reform carried out in the judicial sector by a content analysis of legal rules and administrative regulations, and empirically tested their implementation. Special focus was dedicated to the political, economic and ethnic challenges of judicial independence stemming from the establishment of High Judicial Councils whose members are appointed by parliaments and/or the executive, the low level of salaries paid in the judiciary, and proportional ethnic representation. Secondly, we observed that independence must be balanced with accountability against the danger of a “gouvernement des juges.”12 Thirdly, independence and accountability are of no effect, if judges and prosecutors are not efficient and effective. Hence, capacity-building in the judicial sector and the effectiveness of its institutional mechanisms are functions that


have to be studied both from a normative and an empirical perspective. Based on the elaborated integrative operationalization of the research hypothesis, we were able to critically assess not only the endogenous factors favoring or preventing the reform of the judicial sector, but also the “dynamic” rule setting in the EU rule of law monitoring process and to conclude whether incomprehensiveness, vagueness and establishment of ad hoc new requirements is part of the problem rather than the solution.

Analytically, we have approached the problem armed with a number of key notions. First, we wanted to overcome the separation of research by EU legal scholars, lawyers, and political scientists and to re-integrate the different aspects of legal and political analyses through the logic of “functional interdependence.”\(^\text{13}\) Second, we have tried to identify with more precision the independent variables for the rule of law implementation during the EU pre-accession process by selecting countries that are involved in different stages of the EU integrations. Finally, the comparative method also helped us to identify and specify the independent variables both in the normative and empirical analyses. Hence, we will attempt to identify the “misfit”\(^\text{14}\) between adopted and implemented norms regulating the judicial matters by analysis of “vetos” and “veto players” in the different phases of EU accession. Ultimately, we were able to test how and why the “logic of consequences” either gives way to a “logic of appropriateness” or might be reversed again so that neither “norm socialization” at the domestic level, nor “learning processes” on the side of the EU take place.

The way we have conceptualized our analytical questions is important not merely for the purpose of plugging the existing research gaps in comparative politics, international relations, political science, international legal studies, and studies on European integrations, but also in order to be able to provide assistance to myriad policy-makers and practitioners in the SEE countries, EU institutions, other multilateral institutions at regional and global level, as well as non-state organizations and networks who are dealing with the rule of law promotion, judiciary reform, norm-socialization and Europeanization issues. In this book we have sought to contend with this conundrum by conceptualizing


key components of the puzzle and then testing them against the normative and empirical analysis within a comparative analytical framework, with the main goal of capturing the dynamics and potential success or failure of Europeanization influence on the rule of law implementation in the SEE.

2. Political and Legal Dilemmas Surrounding the European Union Rule of Law Conditionality Criterion

Our immediate task is to specify the conditionality criteria for the EU enlargement in the field of the rule of law. Despite the apparent lack of a universally accepted definition of the “Rule of Law,” the EU, as well as developed countries and international organizations, has spent “more than a billion dollars over the last twenty years trying to build the rule of law in countries transitioning to democracy.”

Judith Shklar, prominent political theorist, comments on numerous attempts to define the rule of law:

It would not be very difficult to show that the phrase ‘the Rule of Law’ has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling class chatter.

We do not fully agree that the concept of the rule of law has become meaningless by ideological abuse, but for the needs of this book, we conclude that the definition of the rule of law remains legitimately open-ended, and therefore academics and practitioners alike are at liberty to formulate what attributes must be included in its definition. Furthermore, the fact that there is still room for debate about the proper definition of the rule of law “should not blind us to the broad consensus of its core meanings and basic elements.” Hence, we choose to avoid going deeper into the quest for the proper definition of the term “Rule of Law,” but in order to grasp its core concept within the EU

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context, and more precisely within the field of EU external policy, we will instead provide a brief analysis of the contemporary academic dilemmas surrounding the theoretical and applied conception of the rule of law, as well as its essential characteristics.

The rule of law principle has a long common tradition in most influential legal traditions, but it has not been precisely defined by any of them, as it was not defined by the ECJ or the founding fathers of the EU. It has instead become a predominant organizational paradigm of modern constitutional law, a dynamic “meta-principle” providing a firm foundation for an independent and effective judiciary. As such, the rule of law essentially describes and justifies the subjection of public power to formal and substantive legal constraints with a view to guaranteeing the primacy of the individual and his or her protection against arbitrary or unlawful use of public power. It never appears as a “stand-alone” principle but rather as an “umbrella-principle,” usually accompanied by the principles of liberty, democracy, and the respect for fundamental rights.

Due to the predominance of the legal interpretation of the rule of law principle, it has already been asked whether the principle is not more a “Rule of Lawyers” than a “Rule of Law.” The dilemma that this question raises is not one of efficiency or protecting the purity of law, but rather of preservation of the integrity of law, which can only be achieved if the institutional arrangements are capable of dealing reasonably with the dual dangers of anarchy and unrestrained power. The (legal) institutional arrangements alone, however, are not sufficient to complete this task, as they always need “a supporting circumstance,” namely societal and political support, which are often difficult to engineer. More concretely, institutions must fulfill certain conditions in order to be able to restrain the exercise of power. These conditions, at the other hand, depend on other non-legal conditions falling within the scope of sociology and politics. Successful attainment of the rule of law therefore is a social outcome, not a merely legal one. To conclude, if rule of law—this applies even more to EU rule of law—should become a significant element in the life of a society, then norms must become socially normative.

22 Ibidem: 64.
Functionally, the rule of law exercises two main functions. The first is to impose restraints on government officials by requiring compliance with the existing law, as their acts must have positive legal authorization and must not contravene a legal prohibition or restriction, and also to impose limits on the law-making power. The second function of the rule of law is to maintain and coordinate behavior and transactions among the citizens. In this regard, we observe that the establishment of a lasting and effective rule of law requires not only a widely shared conviction among the society—citizens and political and economic elites—that people identify themselves with law, but also the presence of an institutionalized, independent, accountable, efficient and effective judiciary, crucial to both aforementioned functions. However, a well-functioning judiciary is not conceivable without the existence of a robust legal profession and a legal tradition committed to the rule of law. This egg–hen situation presupposes the need of the rule of law promoters to dedicate particular attention to the reform of judiciaries around the globe.

2.1. Rule of Law as EU Accession Criterion

Accession of new members to the EU is governed by Article 49 (1) EU (TL), which provides that:

Any European state which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

Article 2 of the EU requires the respect and promotion of the values on which the Union was founded as one of the conditions not only of membership but also of an application for membership. Values on which the Union is founded are “respect for

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23 Ibidem: 10-12.
25 Reference to Article 2 of the EU was first introduced by the 1992 Maastricht Treaty. The list of values, formerly called principles, did not at the time include human dignity and equality.
human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” In *Partie Ecologiste ‘Les Verts’* vs. Parliament* from 1986, the ECJ for the first time affirmed that the European Community is “a community based on the rule of law” and that the Treaty had to be recognized as its “basic constitutional charter.” Based on this ruling, values such as rule of law under the Treaty of Lisbon are “constitutive” of the European Union, since they define the collective identity of the whole organization and thus essentially determine the Union and rightful Union action in the domestic and international realms as well as the conditions for membership. Despite its wording, both Articles 2 and 49 EU TL are merely the departure points for the progression of the (potential) candidate countries towards EU accession.

The accession system is very loosely rooted in the EU Treaties. In fact, it is not elaborated in a single working document, but in the bulk of Copenhagen-related documents that Kochenov describes as a “‘spider web’ of political and legal obstacles” towards capturing the essence of the rule of law accession requirement. Building on Kochenov’s work, we distinguish between two principal groups of documents pertaining to the rule of law conditionality. The first group includes the documents addressed to particular countries and consists of six types of documents, namely the Commission’s Opinions on the Application for Membership of the EU, Regular Reports on the candidate countries’ progress towards accession, the Commission’s Comprehensive Monitoring Reports, Accession Partnerships, Roadmaps and Monitoring Reports on the State of Preparedness. The second group of Copenhagen-related documents comprises documents of more general application, relevant for the progress towards accession of two or more candidate countries. It includes the general Commission documents establishing the principles of progress assessment and containing an overview of the progress towards accession achieved by all the candidate countries, such as the Commission’s Agenda 2000, yearly Composite Papers and Strategy Papers, and Comprehensive Monitoring Reports.

Furthermore, both groups of documents frequently reference credentials created by sources falling beyond the scope of EU law, thus effectively including international organizations such as the OSCE and the Council of Europe to indirectly contribute to the

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26 Art. 2 EU TL.
assessment of the candidate countries’ compliance, particularly in regard to the political criteria of democracy and the rule of law. By providing a variety of influence tools, “the Copenhagen-related documents provided the Commission with a sophisticated system of reform promotion in the candidate countries that allowed it to make practical use of the conditionality principle for the benefit of both the European Union and the candidate countries.”

Moreover, “the structure and substance of the Copenhagen-related documents does not make any distinction between the assessment of democracy and the Rule of Law. In the course of the pre-accession, the Commission opted for fusing their assessment,” with the effect that it gained political maneuvering space for more specific policy prescriptions in the process. In addition to the existing confusion, let us once again remind ourselves that both terms, democracy and the rule of law, were left indeterminate to the advantage of the Union, which, “by providing no single list of contents to act as benchmarks, was able to introduce new components under these umbrella terms.” Consequently, the Union is able to manipulate these terms in dealing with membership candidate countries.

An additional predicament arises from the difficulty of quantitatively verifying the achieved level of compliance in regard to the Copenhagen political criteria. In contrast to economic reform, which is easily measured against the benchmarks of inflation rate, gross domestic product, inflation, etc., little can be established with great accuracy in the field of the rule of law and democracy due to the very nature of these concepts. Since the political accession criteria are generally not amenable to quantitative verification, EU candidate states are confronted with conditions that appear to them as “moving targets.” Bearing this in mind, we are prepared to systematically conclude which benchmarks the EU uses in assessing rule of law compliance.

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29 Ibidem: 84.
30 Ibidem: 46
32 A. F. Tatham illustrates this claim by comparison of the section on political criteria in the Commission’s 1997 Opinions on the applications of Slovakia and Romania for membership. Namely, despite its internal difficulties Romania received a green light, whereas Slovakia was a non-starter at that time. F. A. Tatham. Enlargement of the European Union, cit.
2.2. Rule of Law Accession Condition

The requirements for democracy and the rule of law were first addressed in respect to the Mediterranean enlargements of the 1980s for the three post-totalitarian countries acceding to the EU within the wider framework of their respective democratic transitions. These requirements were addressed at the 1978 Copenhagen European Council in its Declaration on democracy. Through the Declaration, member states confirmed their will

[...] to ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights.

The application of these principles implies a political system of pluralist democracy which guarantees both the free expression of opinions within the constitutional organization of powers and the procedures necessary for the protection of human rights [...].

They solemnly declare that respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Communities.

Despite the wording of the Declaration, which was meant to be applied in member states, it was “essentially aimed at underlining the EEC’s consistent attitude to potential Members.” However, it was not until the fall of the Iron Curtain and the prospect of Eastern Enlargement that the EU enhanced its rule of law membership requirement. As mentioned earlier in this Chapter, the Maastricht Treaty on European Union in its Preamble confirmed the Member States’ attachment to the principal of the rule of law. Nonetheless, in the absence of clear EU indicators of the contents of requirement for democracy and the rule of law, in its negotiations with CEEC and SEE the Union borrowed external indicators, most notably the Commission on Security and Cooperation in Europe’s 1990 Charter of Paris for a New Europe, which stipulates:

34 F. A. Tatham, Enlargement of the European Union, cit.: 208.
Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has as its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person.

Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law.

Regardless of its initial intention, the Paris Charter yet again failed to address the rule of law, which “continued to be considered as something of ‘an umbrella concept’ that ‘has no determinate meaning.’” Finally, in regard to the CEEC, the European Commission defined its political criteria in Agenda 2000 as a combination of free and fair elections, political pluralism, freedom of expression and freedom of religion, the need for democratic institutions, and for the first time independent judicial and constitutional authorities. Even so, this approach was criticized for its rather “simplistic sum [...] of the rule of law,” and the lack of “actual substance.”

Only with the prospect of enlargement to the SEE did the EU become more aware of the need to provide content criteria, or benchmarks, with which to measure success or failure in fulfilling the principle of democracy and the rule of law. Hence, in its April 1997 Conclusions, the General Affairs Council declared the political criteria SEE countries need to fulfill to conclude an SAA, which marks only the beginning of the contractual relationship between the EU and the candidate country. This time the Council made express reference to the rule of law, as it concluded that each SEE country must be ready to demonstrate (1) the separation of executive, legislative and judicial powers, (2) effective means of redress against administrative decisions, (3) access to courts and the right to a fair trial, (4) equality before the law, and (5) freedom from inhumane or degrading treatment and arbitrary arrest.

Additional clarifications aimed at each potential candidate country individually were voiced by the European Commission in its Progress (previously Regular) Reports.

38 F. A. Tatham, Enlargement of the European Union, cit.: 209.
Benchmarking that had direct bearing on the judiciary in the accession countries identified from the content analysis of the Progress Reports prepared for the SEE countries scrutinized in our research consists of (1) rule of law, (2) independence of judiciary, (3) training of judges and judiciary to apply the Acquis, (4) human resources and system of infrastructure, and (5) effectiveness of court procedures.

To conclude, the EU rule of law promotion taking part within the accession conditionality process tends to translate the rule of law into an “institutional checklist,” with primary emphasis on the judiciary. More precisely, alignment with the Acquis is measured up to formal legal and institutional benchmarks. Interchangeable use of the terms rule of law and judicial reform is common in the field of rule of law promotion, since most of the promotion specialists are lawyers, and “when lawyers think about what seems to be the nerve center of the rule of law they think of the core institutions of law enforcement.” However, a particular challenge still lies in the fact that the basic concepts—democracy and the principle of rule of law—remain interlocked and characterized by ambiguity and vagueness throughout the accession process. Finally, despite the fact that we agree on the rule of law as a legitimizing principle for the exercise of state authority, and that we accept the institutional approach for the rule of law promotion, we were unable to locate the existence of a uniform “European standard” for institution-building or monitoring activities by the EU in this area. Therefore, we employ the aforementioned benchmarks of independence, responsibility, efficiency, and effectiveness in order to test the implementation of the rule of law reform in five countries of intervention.

At this point, we can summarize the essential normative and empirical findings stemming from five country studies on the reform of the judiciary as part of Europeanization by rule of law implementation in the Western Balkans. More analytically, let us turn to comparatively highlight our most salient findings in order to assess the effect of Europeanization.

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41 Ivi.
3. Comparative Analysis of the Normative and Empirical Research

Immediately after 2000, the main weaknesses of the judiciary systems common for all the WB countries were identified as: (1) an inadequate constitutional and legal framework, resulting in a lack of judicial independence and accountability, (2) an overly complex and extended system of courts, (3) huge backlogs of cases, excessive delays in court proceedings, and difficult enforcement of court judgments, (4) unclear selection, dismissal, performance, and promotion standards for judges, (5) corruption of the judicial bodies, (6) a lack of integrated performance measurement capacities for the judiciary, (7) outdated administration practices, hampering judicial effectiveness and efficiency, (8) lack of initial and continuous training for judges and inadequate curriculum of law faculties, hindering the development of professional staff competent to implement the Acquis in domestic legal system, and (9) poorly equipped judicial facilities and underutilization of information technology, restricting access to justice. By focusing on the depth of the undertaken reforms, we have observed that the EU-led reforms focused on (1) revising laws to introduce provisions related to the “European standard,” (2) strengthening of rule of law related institutions in accordance with accountability, effectiveness and efficiency benchmarks, and (3) increasing governments’ compliance with law.

“Fully aware that enhancing efficiency of judicial bodies and bolstering their independent and autonomous position in the overall system of power, represented necessary steps on [...] way to European and Euro-Atlantic integrations,” all five countries under research scrutiny have adopted Judicial Reform Strategies as the first step to harmonizing the procedures of the judicial institutions with the procedures of the EU law and other relevant international institutions. Comparative analysis of these documents indicates that the main goals of the strategies are set to enhance the independence and efficiency of the judicial institutions, accept new organizational, material and procedural laws as a normative background, implement newly accepted laws, enhance professional development of the holders of the judicial function, establish special institutions and develop the judicial information system, and finally to enhance the public trust in the judiciary.

3.1. Independence

A comprehensive comparative study of judicial institutions in the WB confirms that the “lack of the political preconditions for [judicial] independence is visible in many countries; [and that] an insufficient culture of independence and separation of powers and functions still emerges in the whole region due to the presence of legacies of the political culture.”43 In order to achieve the independence and self-government of the judiciary, all analyzed countries have established a Judicial Council – an autonomous body dealing with the main organizational issues of the judiciary, namely selection, promotion and to a limited extent dismissal of judges, and in some cases proposals for the budget.

<table>
<thead>
<tr>
<th>Judicial Council</th>
<th>BiH</th>
<th>Kosovo</th>
<th>Macedonia</th>
<th>Montenegro</th>
<th>Serbia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appoints judges</td>
<td>Yes</td>
<td>Makes non-binding recommendation to the President of the Republic</td>
<td>Yes</td>
<td>Yes</td>
<td>Makes binding recommendation to the Nat’l Assembly</td>
</tr>
<tr>
<td>Removes judges from position</td>
<td>Yes</td>
<td>Yes (although appeal to supreme court is permitted)</td>
<td>Yes</td>
<td>Makes recommendation to the Parliament</td>
<td>Yes (although appeal to constitutional court is permitted)</td>
</tr>
<tr>
<td>Oversees judicial training</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Prepares budget</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Proposes the budget to the Parliament</td>
<td>No</td>
</tr>
<tr>
<td>Administers the work of courts</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

The Judicial Councils in the WB for the most part follow the Southern European model, as their main responsibility is the appointment and disciplining of personnel. In some cases the role of Judicial Councils in appointment and promotion is effective (e.g. in Bosnia-Herzegovina, Macedonia and Montenegro), in some others it is slightly limited (Serbia, where the Judicial Council makes binding recommendation), while in Kosovo it remains rather limited due to the de facto, although not de jure, veto power exercised by the country’s President. Removal of judges is in the exclusive competence of the Judicial Council in all five countries, although in Kosovo and Serbia right to a Supreme Court and Constitutional Court appeal, respectively, is permitted. In Kosovo and Bosnia-Herzegovina, the role of the Judicial Council is extended to oversee the initial and continuous training of judges, as well as to administer the work of courts. Such legal solutions should be interpreted in light of the increased international community presence in the two countries, particularly in terms of the direct influence of this presence on institution building, as well as its indirect influence epitomized in the dominant role of foreign financial aid in the process of state-building.

The salaries of judges are an important element of their social and economic status, intimately linked to their independent and impartial position. In this regard, the economic independence of judges provides an additional guarantee for preventing forbidden influence on judges. The salaries of the judicial branch are regulated by special laws that take into consideration the salaries of all public officials. In comparison to the average of these salaries, it can be observed that the prescribed salaries of judges meet satisfying standards, except in Kosovo. However, general economic malaise has made it a fairly common temptation for judicial servants to engage in bribe taking.

A general problem regarding the independence benchmark remains evident in the lack of appropriate procedures to make the role of the Judicial Councils more binding, as well the need for greater inclusiveness of these institutions in the process of drafting the legislative reforms. We observe a possible threat to judicial independence in the lack of

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44 According to Dietrich’s typology, two types of Judicial Councils predominate: the Southern European model, currently in use in France, Italy, Spain, and Portugal, characterized by the role of the council being largely limited to the appointment, promotion, and disciplining of Judges; and the Northern European model, found in Sweden, Ireland, and Denmark, where the primary role of the councils is to oversee the management of the courts, administer the budget for the judiciary, and conduct judicial training. A third model exists in countries that do not have judicial councils at all, i.e. Austria and Germany. In these countries, appointment, advancement, and disciplining of judges, as well as the management of the courts, falls within the competence of the Ministry of Justice. See M. K. Dietrich. 2008. “A Comparative Review of Judicial Councils in the Former Yugoslavia,” East West Management Institute. Occasional Papers Series. Available at <http://ewmi.org/Pubs/EWMIOPSJudicialCouncils.pdf>. 

clearly established criteria for career advancement, as well as in the rules for appointing the courts’ presidents, which leave room for political influence on the process.

### 3.2. Accountability

The accountability and independence of judiciaries are two sides of the same coin in a democratic society. Namely, despite their constitutionally guaranteed independence, judges must be held accountable for their actions and decisions. Judges are constrained by existing laws, procedures and practices to prevent them from ruling perversely or corruptly. Hence, judges find themselves under control of a judicial or administrative nature ensuring evaluation of their performance and the carrying out of disciplinary proceedings.

Performance evaluation in the countries of interest is performed by the higher courts in accordance with standardized criteria established by the Judicial Council. Evaluation covers mainly quantitative criteria, namely the percentage of repealed decisions under legal remedy and the number of resolved cases per year, except in Serbia where evaluation requires accounting for all aspects of the judge’s job - namely quantity, quality and commitment to judicial work. Quality is evaluated by an analysis of decision-making, the efficiency of case processing, and professionalism in conduct. Qualitative evaluation escapes the trap of over-quantification, but it remains unclear if it takes into consideration more compound criteria, such as the complexity of cases and other specific circumstances, such as court location and human resources. Evaluation may result in election, promotion or removal from office. In Serbia, evaluation may additionally result in mandatory training.

Disciplinary proceedings are conducted by the Judicial Councils - or Disciplinary Commission in Serbia - in accordance with the Code of Ethics and/or Rulebook on Disciplinary Proceedings. Available disciplinary sanctions include public reprimand, salary reduction of up to 50% for a limited period of time, and prohibition of advancement in service for a period of up to three years. Besides the competent authority, litigants and other participants in legal proceedings have the right to file a complaint concerning the performance of judges in cases of perceived unauthorized influence on the course and outcome of court proceedings.

Despite these legal provisions, we observe major problems in the implementation of judicial accountability in Serbia and Macedonia. Namely, in the latter there have been
only a few dismissals of judges, while in the former 800 of a total of 3,000 judges lost their jobs in a process that lacked transparency and was criticized several times by the EU officials. However, the review procedure was again neither transparent nor fair, which was also repeatedly highlighted by international and independent observers.

Due to the poor enforcement of the accountability benchmark, we insist on the inclusion of the public—both general and expert—as “watchdogs” over the performance of the judiciary. Namely, according to the law, unless decided otherwise, hearings, trials and rulings should be open to the public, which creates a possibility for citizens and the media to discuss and criticize the work of the courts. A number of NGOs are already taking part in this process, as they daily scrutinize and monitor the work of the judiciary, thus enhancing standards in the field of the accountability of judges.

3.3. Effectiveness

Independence and accountability benchmarks make little sense if law enforcement bodies remain incompetent. By competence of judicial servants, we understand that they must have sound judgment, professional erudition, and the skill to prosecute or render judgments effectively in accordance with the law. Current judicial elites in the WB have embraced the notion of judicial independence and accountability as a means of preserving and perpetuating the exclusive role of judges in the judicial sector, thus indirectly entrenching traditional values and ways of conducting judicial processes. Despite the establishment of modern legislative and institutional frameworks, the professional competence of the judiciary still remains one of the most widespread problems in the WB. Political eruptions in the process of transformation severely affected the professional competence of the judiciary in the WB countries, and continue to undermine the competence of the judiciary, particularly in Bosnia-Herzegovina and Kosovo. In Kosovo, for example, even the quality of written judicial decisions is widely criticized as reflecting poor analytical, research, and writing skills.\(^\text{45}\) Except for the constitutional court, the majority of judges continued in their formalist reading of the law rather than performing their assumed transitional role. Improperly supported by their education, judges often sought a way out of more difficult legal cases by disposing them based on purely formalistic grounds. In this way, the simplified version of textual positivism and the ideology of bound judicial decision-making were able to survive the process of judicial reform. Legacies of

\(^{45}\) See the Kosovo Chapter in this book.
old legal culture, although without connection to the former political system, thus remain alive and continue to influence contemporary legal thought.

The problem becomes even more worrisome in light of the fact that the WB countries have in their respective SAAs taken over the obligation to gradually harmonize domestic legal norms with EU law. In the near future, in order to account the Acquis Communautaire in its full meaning, judges will not only need to consider the mere “limited law” ⁴⁶ of the texts of harmonizing legislation, but also texts of European directives, their reasoning and rationale, European Court of Justice Jurisprudence, and the case law of the EU member states.

All five countries of interest belong to the continental legal tradition, with a civil-service or career model that gives preference to new law graduates or young professionals, who are then gradually promoted throughout their careers. At the same time, education in law schools very often lacks any practice orientation, and even judicial and bar examinations only test applicants’ technical legal knowledge.

In an attempt to improve the quality of the judiciary, Judicial Academies specialized in initial and/or continuous education of judges have been established in all countries with the exception of Kosovo, where the Kosovo Judicial Institute was established. Judicial Academies are not a part of the regular educational system, but rather an integral part of the judicial system. Their main purpose is to provide competent, professional, independent, impartial and efficient performance of the judicial function through organization and implementation of initial training of candidates integrated into the process of recruitment, and continuous professional training of judges. In Macedonia and Bosnia-Herzegovina, Academies accommodate the training of prosecutors as well, while in the latter, due to the limited power of the central government, there are two entity-based institutions for the education of judges and prosecutors, namely the Training Centres in the Federation of Bosnia-Herzegovina and Republika Srpska.

Enhancement of the effectiveness of judges is additionally supported by a number of foreign aid donors and domestic expert NGOs, for example the Council of Europe, Foundation Open Society Institute, Soros - Representative Office Montenegro, and American Bar Association / Central and East-European Legal Initiative (ABA/Ceeli), Association of Judges, Centres for Human Rights, etc. On the other hand, we find striking, particularly bearing in mind the common legal tradition of the WB countries, both the lack of regional

law journals and the nonexistence of a regional community of lawyers to exchange ideas and experiences and discuss problems common to all of their countries.

3.4. Efficiency

The efficiency and effectiveness of the judiciary are interlinked and cannot be analyzed in an isolated perspective. That is, by focusing merely on effectiveness, in the long run access to justice and the public trust in the judiciary are threatened because of ever increasing costs and delays. This is why we conclude that the professional competence and productivity of the judiciary need to be in balance. Problems faced by WB judiciaries in relation to the efficiency benchmark are a lack of human and technical resources, an inadequate court structure, huge backlogs of cases and unduly lengthy procedures.

In an effort to eliminate the problem of lengthy case resolution, all five countries have undergone restructuring of their respective court networks. A three-tier court structure has been established in all of the countries, but significant problems were observed in Kosovo, Bosnia-Herzegovina and Serbia. Namely, Kosovo faces the problem of implementation of the Brussels Agreement on Normalization of Relations between Serbia and Kosovo, which envisages the integration of judicial authorities from the Serb-inhabited northern part of the country within the Kosovo legal framework. Additionally, the Appellate Court in Pristina is supposed to establish a panel composed of a majority of Serb judges to deal with all Kosovo Serb-majority municipalities. In Bosnia-Herzegovina, the complex defragmentation of the country has an influence on the functioning of the whole justice system. Finally, in Serbia, the court system established in 2010 with the Ministry of Justice is currently preparing yet another reform of the judiciary, which will include restructuring of the court network.

Additionally, specialization of institutions has contributed to the relaxation of work of regular courts, as well as to an improvement of the quality of judgments and the competence of judges who are specially skilled and trained for resolving specific and complex cases. In all WB countries, commercial and administrative courts have been established, while in Serbia special departments for organized crimes and war crimes and the Division for combating high technological crime have been set up.

Improvements in infrastructure and administration directly contribute to more efficient case resolution by allowing judges to concentrate more on adjudication. Most of the WB Courts are hopelessly overbooked, and there are even Courts with a single
courtroom. Although guaranteed by law, the right to public hearing is often breached as a result of such shortcomings. State funding of the strategic investment in judicial sector is rather limited and therefore international financial assistance still plays a pivotal role in funding for equipment and related costs that enhance the institutions’ capacity to deliver quality services. Nevertheless, in all countries, the administrative capacity of the courts needs to be further developed. Namely, basic administrative issues such as case registration, technical systems connecting all courts and court units, statistics, reporting systems and monitoring units are still not fully operational. Furthermore, Court Presidents are not trained in court management, while only a few Courts are equipped with administrative and managerial staff members. Besides providing training to judges on court administration issues, improvement also seems possible by employing trained junior legal and professional administrative staff for specific quasi-judicial tasks, such as maintaining records or case management. This would relieve judges of administrative tasks and divert their focus to their adjudicative functions.

Despite all these reforms, huge backlogs of pending cases, especially in civil and enforcement proceedings, remains a matter of grave concern and regular criticism on the part of the EU in all five countries of concern. Furthermore, it is not uncommon for judicial proceedings to take years or even decades to resolve cases brought before the courts or to enforce decisions. Additional efforts in legal reform should thus not only focus on proceedings, but also on the enforcement procedures as well as on the decriminalization of certain offences, the simplification of procedural rules and alternative methods of dispute resolution, namely conciliation procedures and arbitration.

3.5. Recommendations for the Improvement of Judiciary in the WB

Despite the evident progress achieved in the reform of the judiciary in the WB countries over the past decade, the EU still insist that the “reform momentum needs to be sustained in all areas of the political criteria in particular to ensure implementation.”47 In particular, “the rule of law [...] needs to be strengthened.”48 Scrupulous attention is called for in the reform of the judiciary, “where recent setbacks underline the need for renewed commitment to pursue reforms, and ensure its independence, impartiality and efficiency.”49 Substantial additional efforts are deemed necessary in order to reinforce

48 Ivi.
49 Ivi.
the justice sector in line with the identified priorities in the context of the EU-Kosovo and Bosnia-Herzegovina Structured Dialogue on the Rule of Law, the EU-Macedonia High Level Accession Dialogue, and the Montenegro and Serbia accession negotiations. Bearing this in mind, we have prepared a list of open questions/recommendations on the improvement of the judiciary reform in the WB countries.

**Table 8.2.: Recommendations for Judiciary Improvement**

<table>
<thead>
<tr>
<th>Country / Benchmark</th>
<th>Independence</th>
<th>Efficiency</th>
<th>Accountability</th>
<th>Effectiveness</th>
</tr>
</thead>
</table>
| **Bosnia - Herzegovina** | 1. Consider establishment of functionally separate High Judicial Council and High Prosecutorial Council.  
2. Set clear criteria for promotion of judges. | 1. Establish the Supreme Court in order to influence uniform interpretation of law and legal certainty.  
2. Reduce the backlog of cases.  
3. Modernize case management software.  
4. Link the Case Management System with the Police database.  
5. Provide the court staff with set of practical skills, such as decision writing, administrative management, etc. | 1. Increase the role of NGO “watchdogs” and society in control of accountability of judges.  
2. Fight the perceived corruption of the judiciary.  
3. Establish mechanisms to ensure the accountability of judges. | 1. Set professional qualifications as the standard for appointment of judges rather than “equal rights and representation of constituent people and others.”  
2. Introduce courses on harmonization of the legislation with the Acquis at the Judicial and Prosecutorial Training Centre.  
3. Improve curricula at law faculties. |
| Kosovo | 1. Include the Kosovo Judicial Council in the drafting of judiciary-related legislation.  
2. Establish transparent process for the adoption of the judicial budget.  
3. Reduce the Government control over non-judicial court staff members.  
4. Respect the principle of equal ethnic representation in judiciary.  
5. Limit the right of the President of Kosovo to refuse appointment of the proposed candidate for a judge.  
6. Increase financial independence of the judicial branch. | 1. Establish the Case Management System.  
2. Improve court infrastructure and modernize equipment.  
3. Reduce the case backlog.  
4. Modernization of judicial administration.  
5. Foster alternative ways of dispute settlement.  
6. Implement the Brussels Agreement on Normalization of Relations between Serbia and Kosovo in relation to court structure. | 1. Increase the role of NGO “watchdogs” and society in control of accountability of judges.  
2. Fight the perceived corruption of the judiciary.  
3. Increase the public trust in judiciary. | 1. Modernize the curriculum at the law faculties.  
2. Improve the quality of writing of judicial decisions.  
3. Establish Judicial Academy.  
4. Introduce mandatory continuous training for sitting judges.  
5. Secure access to justice particularly for minorities. |
| Macedonia | 1. Strengthen judicial independence in order to eliminate 'soft pressure' from other branches of government.  
2. Provide budgetary independence of courts. | 1. Improve court infrastructure.  
2. Decrease the backlog of pending cases.  
3. Improve procedural rules in order to resolve lengthy court proceedings and case backlog.  
4. Improve the administrative capacity of courts. | 1. Fight the perceived corruption of judiciary.  
2. Increase the role of NGO “watchdogs” and society in control of accountability of judges.  
3. Set clear criteria for qualitative evaluation of the work of judges.  
4. Set legal provisions distinguishing between disciplinary and dismissal proceedings against judges. | 1. Establish a clear set of educational requirements for the election of judges, bearing in mind mandatory recruitment of judges and prosecutors from the Academy for Training of Judges and Prosecutors graduates.  
2. Introduce mandatory professional training for judges.  
3. Improve curricula at law faculties. |
| Montenegro | 1. Implement Constitutional amendments on independence of the judiciary.  
2. Specify the criteria for the appointment of judicial office holders. | 1. Decrease the case backlog.  
2. Improvement of Court network.  
3. Develop judicial information system. | 1. Fight the perceived corruption of judiciary.  
2. Increase the public trust in judiciary.  
3. Increase the role of NGO “watchdogs” and society in control of accountability of judges. | 1. New enforcement system needs to be introduced to improve efficiency.  
2. Country-wide single recruitment system for first-time judicial appointments should be established.  
3. Strengthening and better streamlining of the judicial training.  
4. Improve curricula at law faculties. |
Serbia

1. Introduction of transparency in the work of the High Judicial Council.
2. Set clear criteria for appointing the courts’ presidents.

1. Reintroduce new court network.
2. Foster alternative ways of dispute settlement.
4. Modernization of judicial administration
5. Enforcement of existing legal framework in an effort to reduce excessive delays in court proceedings.
6. Increase the budget intended to improve courts’ infrastructure.

1. Set clear criteria for qualitative evaluation of the work of judges.
2. Increase the role of NGO “watchdogs” and society in control of accountability of judges.
3. Combat the perceived corruption of judiciary.

1. Modernize the curriculum at the law faculties.

4. Europeanization by Rule of Law Implementation

As described in Chapter 1, the EU’s influence over the (potential) candidate countries comprises another case of “deep Europeanization” beyond EU borders. Let us recall once again that the EU rule of law promotion relies on supplying institutional ties as well as economic and technical assistance to the candidate state, accompanied by a demand to comply with certain political conditions. Before starting membership negotiations with candidates, the EU focuses on the general principles of EU governance described in the Art. 49 (TEU) – the political criteria of freedom, democracy, protection of human and minority rights, and the rule of law. Conversely, once the accession negotiations are open, the focus shifts to more specific rules of EU governance, i.e. the independence, accountability, efficiency and effectiveness of the judiciary. Still, the outcome of the

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negotiations is already principally predetermined – it ends in the applicant’s full adoption of the EU legislation and policies embodied in the Acquis Communautaire. What primarily interests us is the relative success of the EU in influencing accession negotiations in the sphere of the rule of law. We will therefore attempt to shed more light on the ability of the EU to influence the process of rule of law implementation, bearing in mind the EU’s unique feature among the multitude of rule of law international promoters – to combine two main modes of influence, i.e. conditionality and socialization.

4.1. Rationalist Institutionalism

Rationalist institutionalism focuses on the EU’s use of conditionality to influence candidate countries. Following up on the abundant literature on Europeanization (see Chapter 2), we have focused our investigation on the clarity of EU demands and the credibility of conditionality as two main facilitating international factors, as well as the domestic costs of adopting rules as domestic facilitating factors, in order to come to conclusions about the success of rule of law EU conditionality in the five countries under research scrutiny.

4.1.1. International Factors: Clarity, Credibility and Efficient Monitoring

Clarity

An important factor in increasing the likelihood of the effectiveness of rule of law conditionality lies in the clarity of EU demands. Clarity, according to Sedelmeier, means “that the candidates know what they need to do if they decide to comply with the EU conditions.”51 In addition to the already elaborated issue of vagueness of the rule of law criterion per se, even judicial organizations and judicial and legal systems throughout EU differ from one another, due to differences in the constitutional systems and legal traditions of European states. Notoriously, the EU does not hold any jurisdiction over the judicial systems of its member states, which remain sovereign in shaping the organization of the courts system. However, with the enlargement of the EU toward the ex-communist East, “a spectacular variety of standards, recommendations, opinions, peer reviews, have been developed by the EU and Council of Europe.”52 Although not legally binding, this

collection of norms paved a way for the development of a soft power over European judicial governance “based on moral suasion and communicative action, rather than regulation.”\textsuperscript{53}

Currently, various European institutions and expert organizations are contemplating models and templates of judicial governance. These include the European Network of Councils for Judiciary (ENCJ),\textsuperscript{54} the Consultative Council of European Judges,\textsuperscript{55} The European Judicial Training Network,\textsuperscript{56} and the European Judicial Network.\textsuperscript{57} Contemporary discourse on judicial reform in the EU is underpinned by the Vilnius Declaration, adopted by the ENCI in 2011.\textsuperscript{58} The significance of the Vilnius Declaration is a set of recommendations for the judiciaries of Europe on how to respond to the actual challenges and opportunities they are facing due to the new economic landscape. The recommendations call for the courts to improve their efficiency, to establish alternative dispute resolution, and to promote stronger relations with civil society in order to reinforce public confidence and gain support for necessary reforms. Following on the ENCI findings, the European Commission has established the EU Justice Scoreboard, an evolving tool that should assist the EU and its Member States to achieve more effective justice by providing objective, reliable and comparable data on the functioning of the justice systems of all Member States. The EU

\textsuperscript{53} Ivi.

\textsuperscript{54} In 2011 the European Network of Councils for the Judiciary (ENCJ) adopted the Vilnius Declaration, which lists a set of recommendations for the judiciaries of Europe on how to respond to the actual challenges and opportunities they are facing due to the new economic landscape. The recommendations call for the development of long-term policies that include necessary reforms of the judiciary. Courts should improve their efficiency, alternative dispute resolution should be promoted, and the judiciary should develop stronger relations with civil society in order to reinforce public confidence and gain support for the necessary reforms. Councils for the Judiciary should take the lead in the reform process involving judges and courts. See more at <http://www.encj.eu>.

\textsuperscript{55} The Consultative Council of European Judges (CCEJ) is an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges. It is the first body within an international organisation to be composed exclusively of judges, and in this respect, it is unique in Europe. The CCJE adopts Opinions for the attention of the Committee of Ministers on issues regarding the status of judges and the exercise of their functions. It addresses topical issues and, if necessary, visits the countries concerned to discuss the ways of improving the existing situation through developing legislation, institutional frameworks and/or judicial practices. See more at <http://www.coe.int/t/DGHL/cooperation/ccje/default_en.asp>.

\textsuperscript{56} The European Judicial Training Network (EJTN) was established in 2000 as the principal platform and promoter for the development, training and exchange of knowledge and competence of the EU judiciary. EJTN develops training standards and curricula, coordinates judicial training exchanges and programmes and fosters cooperation between EU national training bodies.

\textsuperscript{57} The European Judicial Network (EJN) was established in 1998 as a network of national contact points for the facilitation of judicial co-operation in criminal matters. See more at <http://www.ejn-crimjust.europa.eu/ejn/EJN_StaticPage.aspx?Bread=2>.

Justice Scoreboard is a non-binding tool operated as part of an open dialogue with the Member States which aims to help the Member States and EU institutions in defining better justice policies. The first EU Justice Scoreboard concludes that “[w]hatever the model of the national justice system or the legal tradition in which it is anchored, quality, independence and efficiency are some of the essential parameters of an ‘effective justice system’.” On the basis of the first EU Justice Scoreboard, the Commission is supposed to commence work towards improving national judicial systems in the EU in close collaboration with judges, judicial councils and legal practitioners, as well as with the European Parliament and with EU Member States.

Nevertheless, the promotion of European judicial standards remains in its infancy, as thus far only one element is common for all European judicial systems, this being a general notion that justice is the cornerstone of the rule of law and consequently the independence of the judiciary is vital in any democratic society. This is however not sufficient to claim that EU demands in connection to the rule of law conditionality are clear. Bearing the aforementioned in mind, we argue that an unambiguous establishment of a “promotion of the quality of justice” EU policy addressing not only potential members, but existing member states as well, would enhance the effectiveness of rule of law implementation in the EU accession process. Namely, if a candidate country is held to particular standards, the EU itself should not be exempt from its own standards. To be precise, for a smoother process of the pre-accession reforms, candidate countries should know when and how they are considered to be progressing. Therefore, the EU has to distil particular criteria and indicators on which basis countries will be graded.

Credibility

The credibility of EU conditionality has two sides. As Sedelmeier argues, “[t]he candidates must be certain that they will receive the promised rewards after meeting the EU’s demands. Yet they also must believe that they will only receive the reward if they

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indeed fully meet the requirements.”62 Despite the fact that full integration into the Union is still not in sight for the WB countries due to the reasons partially addressed in this book, the EU unequivocally confirmed their European perspective at the Thessaloniki European Council63 ten years ago. The promise made by the EU in 2003 was very clear on one point: the Western Balkans were promised full membership in the EU only once they meet the established accession criteria.

In respect to the rule of law, the credibility of EU conditionality can be observed in several aspects. This study has primarily tested the consistency of application of the rule of law conditions. By taking into account all Enlargement Strategy and Main Challenges European Commission working papers, we have concluded that the rule of law condition is applied consistently in the WB. A particular problem could have been caused by the premature accession of Bulgaria and Romania in 2007. Namely, these two countries joined the EU before they had fully complied with the rule of law condition. Such “side-payment”64 by the EU could have undermined the credibility of the rule of law conditionality in the subsequent accession negotiations. However, this risk was averted with the introduction of the Cooperation and Verification Mechanism, which was envisaged to closely maintain monitoring post-accession rule of law and anti-corruption compliance until full compliance is reached. Furthermore, merit-based application of the rule of law conditionality in the 2013 accession of Croatia reassured the rest of the WB candidate countries of the credibility of conditionality.

Additionally, the Negotiating Framework for Montenegro’s accession adopted by the General Affairs Council in 2012 introduces a “safeguard clause” that allows the Commission and/or Member States to put the overall negotiation process on hold if progress in the chapters 23 and 24 is lagging too far behind, which also contributes to the credibility of the EU rule of law conditionality. Namely, in the case that the progress of negotiations in chapters “Judiciary and fundamental rights” and “Justice, freedom and security” significantly lags behind progress in the overall negotiations, the Commission will on its own initiative or on the request of one third of the Member States propose to withhold its recommendations to open and/or close other negotiating chapters, and adapt the associated preparatory work, as appropriate, until this imbalance is addressed.

64 U. Sedelmeier, Europeanization in new member and candidate states, cit.: 12.
**Efficient Monitoring**

Finally, the credibility of conditionality is closely linked with the ability of the EU to efficiently monitor the fulfillment of its requirements. The EU has therefore invested significant efforts in developing its monitoring mechanism. The EU began to systematically monitor the accession process of each candidate from 1997 through bilateral negotiations including the closing of chapters, and the Progress Reports on the candidate countries. Progress on the path towards accession is measured in Progress Reports “on the basis of decisions actually taken, legislation actually adopted, [...] and measures actually implemented.”65 This snapshot of a candidate’s development over the twelve months since the previous monitoring period provides the European Commission with information necessary to conclude the objective assessment of the candidate country in terms of its preparation for accession. The EU borrows expertise from other international organizations during the monitoring of the rule of law conditionality, mostly from the Council of Europe, the OSCE, international financial institutions, and relevant NGOs.

4.1.2. Domestic Politics: Gatekeeper Elites, Legacies of the Past

By setting accession conditions, the EU seeks to disseminate its internal rules to candidate countries, which have to meet them in order to progress on their respective accession paths. Consequently, rationalist approaches to candidate Europeanization suggest that conditionality is based on “the EU’s manipulation of other actors’ cost-benefit calculations.”66 Hence, in order for EU conditionality to be functional, domestic adaptation costs must not be higher than reward; otherwise a rational target state will not comply.

According to the typology developed by Sedelmeier,67 the EU’s influence can be aimed at the polity dimension (democratic principles, human rights, minority protection, etc.) or the policy dimension. Our study deals with the reform of the judiciary, which falls under the latter. In the policy dimension, the key facilitating factor at the domestic level that mediates the EU’s influence is the low level of domestic veto players, while another strand of literature relates governments’ adjustment costs to the strong institutional legacies of the communist past.

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66 F. Schimmelfenning, Europeanization beyond Europe, cit.: 8.
67 U. Sedelmeier, Europeanization in new member and candidate states, cit.: 14.
Gatekeeper Elites

We follow the line of argumentation created by Tolstrup, who claims that “[d]omestic elites should not only be perceived as mere objects of external influence, [...] but rather as gatekeepers that actively facilitate or constrain ties to external actors. [...] The gatekeeper elites directly affect the capacity that determines the strength of the external actor. [...] They hold the key to turning the volume of external actors’ pressure up or down.” The classical distinction between the political elites, the economic elites, and the civil society elites is often blurred in the WB, since most of the elite actors are interlinked and prone to joint corruption scenarios, whereas society elites are not as empowered as they are in the Western world. That’s why for this project we accept the division between ruling political elites, which control the state apparatus, and oppositional elites, which compete with them for control over the state apparatus.

Ruling elites make decisions that have consequences not only for the wider society, but for their self-preservation as well, and in this regard, according to the rational-strategic logic, they calculate the costs incurred at the national level before they accept or block rule of law implementation. “If the costs are unfavorably distributed or simply too high compared to the benefits, integration will not be pursued. On the contrary, if the expected costs are deemed insignificant, integration will be considered a free lunch.”

Our study shows that despite the declared support for the rule of law implementation, domestic veto players still influence implementation of the reforms. Furthermore, as we learned in an interview with a judge in Serbia,” the primary obstacles to the judiciary reform are not technical or financial, but political.” The rule of law does not easily take root in WB systems prone to state-wide spread corruption, where entrenched ruling and oppositional elites alike refuse to cede their traditional impunity and vested interest. Carothers finds that even the “new generation of politicians arising out of the political transitions of recent years are reluctant to support reforms that create competing centers of authority beyond their control.”

Of particular interest for our study is the finding that leaders in countries closest to EU membership have more of an incentive to institute protracted judiciary reforms that are bound to restrain politically powerful gatekeeper elites. Once Montenegro com-

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69 Ibidem: 17.
70 Interview with a judge (Belgrade: 2012).
menced its membership negotiations, and with the prospect of accession no longer so distant, country leaders were swift to adopt delayed Constitutional amendments guaranteeing the independence of the Judicial Council. This in turn opens a legitimate concern about how to influence elites in countries at a lower level of EU integrations, namely Kosovo and Bosnia-Herzegovina, but also Macedonia, whose accession has effectively been blocked for almost a decade now due to the Greek veto. This problem is even more worrisome taking into account the fragmentation of political elites along ethnic lines, which creates obstacles for the adoption and implementation of relevant legal acts in all three countries.

Let us try to provide a theoretical explanation and practical solution for the observed problem of gatekeeper elites, beginning from Levitsky and Way’s72 emphasis on a state’s geographical, historical and cultural traits as important factors that determine the density of ties between the EU and the target state. Namely, their theory of “leverage and linkage” suggests that the success of EU’s influence in democracy and rule of law export is conditioned by high leverage as manifested in an asymmetrical power relationship between the EU and the target state, and dense linkages through density of ties between the negotiating parties. The logic proposed by Levitsky and Way tells us that the more the target country becomes ensnared in institutional ties with the EU, the more vested interests will consolidate on both sides, ultimately leading to the natural desire of the holders of vested interests to preserve such ties. As seen from our empirical study, gatekeeper elites are capable of affecting the actual level of ties by downgrading or upgrading integration measures. In other words, “gatekeeper elites produce differences in linkages that again produce differences in the chances that external actors can influence democratization.”73 This is why we argue that the greater determinacy of the EU in combination with the consolidation of vested interests on both sides will eventually lead to limitation of the maneuverability of gatekeeper elites in the WB countries. In other words, “opening the gates too widely simply produces a path-dependency that constrains the elites for many years.”74

In this regard, we understand and heartily welcome the deepening of contractual relations along the lines of rule of law promotion between the EU and countries whose

74 Ivi.
candidate status is still pending, namely Kosovo and Bosnia-Herzegovina. A newly-established mechanism of the European Commission, Structured Dialogue on Justice with Bosnia-Herzegovina and Structured Dialogue on the Rule of Law with Kosovo, aims to advance structured relations on the rule of law with potential candidate countries, even prior to the entry into force of the SAA.

Bosnia-Herzegovina is the first enlargement country to benefit from the Structured Dialogue methodology. The idea for the Dialogue stemmed from the commitment of the European Commission to advance structured relations on the rule of law with potential candidates. The Structured Dialogue on Justice aims to ensure the independence, professionalism and accountability of the justice sector, as well as to reinforce judicial institutions at all levels through technical exercise based on the idea that “depoliticising the debate on justice related issues is the only possible way to secure the independence of the judiciary for good.” At the end of each plenary session of the Dialogue, the European Commission issues a set of technical recommendations that serve as interim benchmarks to be implemented between the two sessions.

The Structured Dialogue on the Rule of Law with Kosovo has a broader scope of targets, as it regularly assesses Kosovo’s progress on three issues: the judiciary, the fight against organised crime and the fight against corruption. Concerning the reform of the judiciary, the European Commission highlighted the importance of an efficient and independent judiciary. The Dialogue is supposed to serve as a high-level forum that should encourage judicial reform to further strengthen independence, impartiality and transparency, as well as to address reducing the backlog of cases, ensuring a sufficient budget for the proper functioning of the courts, the restructuring of prosecutorial offices, and equal representation of minorities in judiciary institutions.

Additionally, in Macedonia, which finds itself in a deadlock eight years after receiving its candidate status due to the constant Greek veto on opening of accession

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75 The EU-BiH Structured Dialogue on Justice was launched by Commissioner Fuele on 6 and 7 June 2011 in Banja Luka. The second Session took place on 10th and 11th November 2011 in Sarajevo, the third session took place on 5th and 6th July 2012 in Mostar, and the fourth in Brčko District, 08-09 April 2013.


negotiations, the European Commission established the High Level Accession Dialogue (HLAD) in March 2012 in order to continue to provide support for key reforms in the country. The HLAD mainly focuses on rule-of-law issues, although it does not directly envisage judiciary reform as one of its priorities.\(^7\)

Finally, the new EU approach on chapters 23 and 24 introduced in the Croatian negotiating process envisaged an interim benchmarking system assessing the country’s preparedness to open and close a negotiating chapter. The Negotiating Framework for Montenegro accession reiterates a specific emphasis on chapters 23 and 24, thus reflecting concerns about issues pertaining to the rule of law, corruption and organized crime. In addition to opening and closing benchmarks, the following procedures have been determined for chapters 23 and 24:

Given the challenges faced and the longer-term nature of the reforms, the chapters ‘Judiciary and fundamental rights’ and ‘Justice, freedom and security’ should be tackled early in the negotiations to allow maximum time to establish the necessary legislation, institutions, and solid track records of implementation before the negotiations are closed. They will be opened on the basis of action plans to be adopted by the Montenegrin authorities. Screening reports to be prepared by the Commission for these chapters will provide substantial guidance, including on the tasks to be addressed in the action plans, which will constitute the opening benchmarks. Where justified by exceptional circumstances arising during the screening process, the Council or the Commission, each in accordance with their respective roles, may determine that the action plans should include measures to address the identified shortcomings within a specific timeframe, including where necessary as a matter of urgency. Once the Council is satisfied, on the basis of an assessment by the Commission, that the opening benchmarks have been met, the Council will decide on the opening of these chapters and lay down interim benchmarks in the EU opening positions. These interim benchmarks will specifically target, as appropriate, the adoption of legislation and the establishment and streng-

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thening of administrative structures and of an intermediate track record and will be closely linked to actions and milestones in the implementation of the action plans. Subsequently, the Council will lay down in an interim position closing benchmarks requiring solid track records of reform implementation.79

**Legacies and Cultural Predispositions**

The second obstacle at the domestic level that mediates EU influence over the rule of law implementation relates to the role of legacies as “deep conditions”80 preventing judicial reforms in the WB. For the purpose of this study, the author borrows the definition of legacies from Schimmelfenning and Cirtautas, understanding them as the “inherited aspects of the past relevant to the present.”81

The empirical study performed for this report in the five target WB countries has established a high degree of correlation between obstructing legacies from the communist and post-communist periods.82 A common feature for both phases is the neglect of constitutional and legal guarantees for the independence of the judiciary and its instrumentalization as a tool for political oppression. During these periods, holders of judicial functions were subjected to a complex and subtle interplay of professional, bureaucratic and political influence that prevented them from attaining acceptable political non-conformism in performing their judicial service. Furthermore, covert political influence was also exercised from within the judiciary through the role of the court’s administration, which manipulated the assignments of politically sensitive cases and influenced the court budgets. Paradoxically, the institutions supposed to be under control of the courts, the executive and legislative bodies, were electing the judges that controlled them. The erosion of professionalism in the judiciary peaked under conditions of continuous political pressure in post-communist turmoil in the Balkans, particularly in Serbia and Montenegro, as a consequence of the authoritarian rule of Slobodan Milosevic, and in Kosovo and Bosnia-Herzegovina due to the armed conflicts that ravaged their respective societies. Finally,

81 Ibidem: 426.
82 For the needs of this book, we consider the post-communist phase as ending with the beginning of the EU’s enlargement policy in the WB, marked by the creation of the Stabilisation and Association Process.
during sixty years of onerous judicial practice, WB societies have developed certain cultural predispositions that impede the reform of the judiciary today. Well-developed lawyers’ tactics of excessive delays of court procedures, symptomatic failures to appear, to produce an evidence, or to meet court deadlines are simply some of the manifestations of the cultural predispositions created over the past decades.

These cultural predispositions and deep legacies still matter in the WB judiciaries, as they daily impact the administrative and technical capacities of courts, pedagogy at the law schools, budgetary constraints, court proceedings, enforcement of judgments, independence of the judiciary, etc. Without a doubt, the pre-existing judicial systems in the WB candidate countries create disabling conditions for the EU-led internalization of the reform of judiciary. Presupposing that legacies have not permanently altered the judicial culture of future Member States, the question remains as to what degree such legacies and cultural predispositions operate as structural constraints.

In order to reach an answer to the research question, we shall recall that all five target countries share a common cultural and historical background, and furthermore that they used to share a common judicial setting during the former Yugoslavia. Despite the fact that all five countries commenced their respective EU integrations at the same time (except for Kosovo) and under the same admittance requirements, they do not find themselves at the same level of the integration scale. Specifically, and as mentioned at several places throughout this book, Montenegro is negotiating candidate, Serbia is expected to start its accession negotiations in January 2014, Macedonia is a candidate country, while Bosnia-Herzegovina and Kosovo are lagging behind. From our empirical study, we have observed that the success of judicial reform strikingly corresponds with countries’ current stage of EU integration. Two sets of legacies explain such divergent patterns of European integration and judicial reform. First is the institutional legacy that focuses on “regularized patterns of social action enforced by the institutional characteristics of particular regimes,”83 while the second is located at the interactional level and traces the “contingent events, choices and decisions engendering processes of increasing returns and reactive sequences.”84 In combination, institutional and interactional legacies are capable of seriously undermining rule of law implementation. Therefore, we conclude that the internalization of the judicial reforms is crucially dependent on political and legal stability in countries of concern. In practical terms, this implies that (1) the absence of high political fragmentation which

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83 F. Schimmelfenning and A. M. Cirtautas, Europeanization Before and After Accession, cit.: 424.
84 Ivi.
hampers Bosnia-Herzegovina, (2) the absence of ethnic cleavages that seriously impact processes in Bosnia-Herzegovina, Kosovo and Macedonia, and (3) fully effected state-building (see Chapter 1) are necessary conditions for judicial reforms. In order to support our finding, we recall that Slovenia and Croatia were also part of the former Yugoslavia, and thus shared a common legal tradition and culture. Nevertheless, these two states were more efficient in resolving the problem of the ethno-authoritarian hybrid regimes that initially replaced the communist government, and consequently became full EU Member States in 2004 and 2013 respectively.

4.2. Constructivist Institutionalism: Socialization and Persuasion

Constructivist institutionalism suggests processes of socialization and persuasion as central mechanisms of the EU’s domestic impact, through which national elites become convinced that the EU’s rules are legitimate and need to be internalized. A particular problem regarding this approach lies in the fact that the EU demands unilateral adjustments, and that the candidate countries did not participate in the setting of the rules that they need to adopt. In order to impact the public and domestic elites to positively identify with the EU demands and be more open to persuasion, the EU employs “transnational networks” as a facilitating factor for its influence. Since we have already dealt with the issue of political elites and come to a conclusion regarding their obstructionist potential, at this point we shall observe the facilitating role of civil society elites and EU actors for rule of law promotion, as well as the main EU strategies aiming to socialize candidate countries’ attitude towards the reform of the judiciary.

**Technical Assistance**

Technical assistance provided by the EU for the reform of the judiciary in the WB over the past thirteen years is comprised of European Agency for Reconstruction (EAR) assistance, structural development programmes of the EU embodied in the Technical Assistance and Information Exchange (TAIEX) assistance, and twinning programmes. Until the end of 2008, when the EAR officially ceased to exist, it had provided substantial support to improve the efficiency and independence of the judiciary in the WB. This assistance included support for the implementation of the National Judicial Reform Strategies, computerization of courts, upgrading of registries and court administration

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85 U. Sedelmeier, Europeanization in new member and candidate states, cit.: 14.
systems, introduction of an alternative dispute resolution system, and training of judicial staff. TAIEX continues to support partner countries in more technical ways with regard to the approximation, application and enforcement of EU legislation. Managed by the Directorate-General Enlargement of the European Commission, this mechanism is largely demand-driven and facilitates the delivery of appropriate tailor-made expertise to address issues at short notice. WB judiciaries received assistance within the scope of TAIEX in the form of short-term technical assistance and advice on the transposition of EU legislation into the national legislation, implementation and enforcement of such legislation, administrative and technical training and peer assistance to judges, training them in EU legislation. Of particular importance are the study visit and expert mission components of the TAIEX, which facilitate the creation of a cultural match between the EU and a limited number of target country judges and public officials. Specifically, study visits and expert missions provide an opportunity for the beneficiaries to work alongside Member State officials and to discuss legislation, experience first-hand administrative procedures and infrastructure and see examples of best practices within the field of expertise. Finally, since 2005 WB countries have taken part in various twinning programmes that aim to improve public administration, including judicial capacity. The uniqueness of such programmes is that they envisage officials appointed from the member states to assist their counterparts in the candidate countries in adopting EU legislation within the field of their expertise, thus directly communicating the transposition of rules on the expert level.

The success of EU socialization and persuasion strategies is highly dependent on the politicization of projects and the expertise of individuals involved. By focusing exclusively on institutional socialization, the EU has thus far failed to influence the wider community and particularly the expert public in order to empower it to become part of the cognitive convergence pressure group and thus exercise bottom-up pressure on the political elites in the target country.

Civil Society Elites

Turning to civil society elites, the contemporary literature assumes their profit-maximizing logic in the sense that their main goal is to advance the position of the organizations they represent. Similarly, Tolstrup concludes that “[n]o matter whether we are speaking of leaders of trade unions, ethnic movements, or religious groups they all strive to improve the position of their organization, and as such they will seek to build
linkages to external actors that will strengthen their cause, and cut linkages to external actors that weaken their cause.”86 In other words, if leaders of organizations that strive for the reform of the judiciary believe that the EU will try to push the leaders of the country towards implementing such reforms, it is more likely that the representatives of these groups will form partnership relations with the EU.

Our empirical study identified a number of ‘champions of change’ in the WB, which track the dimensions of rule of law emphasizing the reform of judiciary. These NGOs are involved in or even contracted to help monitor implementation of government efforts to address the failings of the judiciary system, to build the capacity of relevant state institutions, and to work with them on creating appropriate strategies for reform. In this regard, the civil society in the five case study countries acts as a “supportive force for cooperative elements in the state and as a countervailing force against anti-reform elements.”87 Nevertheless, their voice remains very limited and dependent on the willingness of government incumbents to accept it. The main problem they face concerns the lack of resources not only for substantive analytical and dissemination work but also for bare survival. Additionally, WB NGOs often have to deal with the phenomenon of negative incentives. Namely, NGO representatives are often physically threatened by the members of far-right organizations, but also certain government officials, while at the same time they are not provided with adequate protection by the state institutions.

Over the last couple of years, the EU has demonstrated understanding of the crucial role of the NGO sector in extracting cooperation from state institutions, and furthermore in the identification of government personnel dedicated to the reform course. In this regard, we interpret the declared goal of permanent consultations between the EU and civil society organizations in Bosnia-Herzegovina and Kosovo within the framework of the Structured Dialogue on Justice with Bosnia-Herzegovina and the Structured Dialogue on the Rule of Law with Kosovo. These consultations are intended to guarantee that the voice of civil society reaches EU decision-makers, but their underlying agenda is to “acculturate the post-communist CEEC national elites into the ‘European’ discourse.”88

Additionally, the EU Delegation and the Office of the EU Special Representative to Bosnia-Herzegovina have organized meetings with civil society organizations active in the justice sector.

Without advocating a civil society paradigm that glorifies NGOs as universally altruistic and honest, we still believe that credible and responsible civil society organizations complement the work of state institutions. Bearing in mind the potential impact and value of NGO contribution to the rule of law promotion, the support for this sector should continue to be the exclusive focus of part of the EU rule of law assistance programs, but should be also be introduced as a component in most others. NGO empowerment should in the future consider strengthening their expertise, capacities, technical organization, and provide for international networking possibilities. Furthermore, the EU should maintain its support for the inclusion of responsible NGOs and individual experts in an effort to create pressure on the government to do its job better.

**EU Actors**

Despite the crucial role of domestic actors in rule of law promotion, it is actually EU policy advocates that are directing the whole process. The main role of EU policy advocates is to promote policies with which candidate states conform based on material self-interest and strategic bargaining power. The EU Member States are the official parties to the accession negotiations, while the Presidency of the Council of Ministers chairs negotiating sessions at the level of ministers or their deputies. Nevertheless, the European Commission emerges as the key institution in the accession process since it proposes the draft negotiating positions, maintains contact with the applicant countries in order to seek solutions to problems arising during the negotiations, and runs Delegations of the EU in (potential) candidate countries. Within the Commission, the enlargement process is coordinated by the Directorate General (DG) for Enlargement. Staff members of the DG Enlargement and EU Delegations are the backbone of the integration process responsible for the internalization of EU identity by the WB.
5. Conclusions: Does the EU Rule of Law Promotion in Candidate Countries Work?

Over the past thirteen years, EU policy makers have placed a growing emphasis on the rule of law and particularly the reform of the judiciary in transition countries of the WB region (See Chapters 3-8). Our comparative research had confirmed that the EU’s strategy of promoting the rule of law in the WB relies on the demand to comply with certain political criteria in combination with the supply of institutional ties, technical and economic assistance. This proves the distinctive characteristic of the EU rule of law promotion strategy, which is based on the unique combination of two principal modes of influence for an international actor: conditionality and socialization. Therefore, we conclude that rationalist and constructivist strategies for the promotion of the rule of law in Bosnia-Herzegovina, Kosovo, Macedonia, Montenegro and Serbia should not be considered as mutually exclusive, but rather as complementary approaches in order to enhance the EU’s influence.

The accession process generates unique, broad-based and long-term support for the establishment of the rule of law in the candidate states. The most visible instrument for promotion of the rule of law has been the conditional offer of inclusion in full membership. Our findings support the assertion by a number of recent studies that only the credible promise of full EU membership, as Montenegro displays, is an effective mechanism in persuading national governments to adopt rules and establish institutions they would otherwise resist. On the other hand, where the credibility of the EU promise is either weak or distant - as could be observed in Kosovo and Bosnia-Herzegovina, and to a certain degree in Macedonia – the achievement of formal compliance with the EU rule of law conditionality has proven to be less complete. A chief obstacle to judicial reform remains the pervasive influence of the legacies of the past, including the repetitive cycle of clientelistic relationships among the domestic ruling elites and institutions prone to corruption. It is therefore crucial to observe the rule of law promotion not as a technical or legal, but rather a political task.

Finally, what most interests us is how the interplay between rationalism and constructivism influences the end goal of Europeanization by rule of law implementation in the WB, and more specifically, how it affects the socialization of the rule of law norms. Coming back to the reconceptualized “spiral theory” (see Chapter 1) we observe that the dichotomy of “rationalist” and “constructivist” institutionalism are interchangeably used throughout the norm transfer processes, which aim to introduce political and social change in the field of rule of law in the five case study countries. In order to measure the EU’s influence, we have already established differentiation of four phases within the framework of the Europeanization process, namely rule transfer, rule adoption, rule implementation and norm socialization. Rewriting constitutions, laws and regulations, as well as the far-reaching institutional reform comprised of court system reconstruction, improvement of court infrastructure and retraining of judges is only the first and easiest step that the potential candidate countries for EU membership need to undertake. At the other hand, the implementation of law is a formal operation of introducing legal texts into the system of law, while norm socialization is an evolutionary process of rooting the legal norms in culture. In other words, the socialization of norms is “a process by which social interaction leads novices to endorse expected way of thinking, feeling and acting.” It is a lengthy, even life-long process, during which the social and cultural continuity of the transferred norms is eventually attained, particularly by providing every responsible member of society with skills and habits for their implementation.

In spite of the increasing political will to implement far-reaching reform of the judiciary in the WB, currently mostly visible in Montenegro and Serbia, the reform process still suffers from instability and incoherence. The main problem observed in all five scrutinized countries is the incomplete implementation of the adopted norms. Poor rule implementation and extremely weak rule internalization are caused both by the presence of veto players armed with rationalist calculations of social costs of deviation, and by inadequate institutional and administrative capacities in the target countries. Furthermore, the technocratic and short-term nature of the EU rule of law conditionality leads to at best redistributive, capacity-related and short-term outcomes rather than sustainable and transformative change. Martin Mandelski goes even further in explaining the limited capacity of EU’s rule of law conditionality in his bold claim that in its “guerilla

tactics” the EU only “pretends to reform and clientilistic powerful domestic actors pretend to be reformed” in order to advance in the accession process.91

In order to achieve the goal of socializing adopted norms in everyday life, it is necessary to include wider social strata into the rule of law transformation process. Basically, it is necessary to achieve the “transformation of vertical power structures (e.g. clientele networks) into horizontal power structures (i.e. the creation of civic networks).”92

Graph 8.1: Good Governance Scheme

Rule of law promotion focuses mostly on judiciary reform under the assumption that the improvement in performance of the functional triangle of judiciary, police and prosecutor’s office is the most direct way to improve compliance with the law in the target country. Although it is self-evident that the role of formal public institutions is important for the respect of the law, this approach fails to deal with the problem of WB cultural predispositions, to address the issue of informal institutions and centers of power and to

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92 Ivi.
include the wider society in the reform process. Therefore, matters such as the fairness and legitimacy of laws and court procedures, the effectiveness and accountability of the judiciary, and the role of civil society remain marginalized. Bearing this in mind, we will provide a list of false assumptions on which the EU rule promotion is conducted in the WB before we propose a set of recommendations for Europeanization by rule of law implementation in Bosnia-Herzegovina, Kosovo, Macedonia, Montenegro and Serbia.

5.1. Wrong Assumptions

1. An Institutional Approach is the Answer

Despite the recent promise made by the European Commissioner for Enlargement, Štefan Füle, that the accession negotiations will not simply involve ticking boxes about legislative approximation (See Chapter 1), the EU’s rule of law promotion policy to candidate countries still translates rule of law into an institutional checklist, with a primary emphasis on the judiciary. Moreover, the terms judicial reform and rule of law are frequently applied interchangeably by the rule of law promotion actors. Although the EU practitioners define the rule of law as their ultimate goal, they implicitly identify it by its institutional attributes as the most conveniently measurable ends. Thomas Carothers provides a possible explanation for the emphasis on an institutional approach by arguing that “most rule-of-law promotion specialists are lawyers and when lawyers think about what seems to be the nerve center of the rule of law, they think about the core institutions of law enforcement.” Additionally, the extension of law in the rule of law more often than not dissuades non-lawyers from engaging in study and criticism of the existing approach. Finally, the very notion that the experience of the actors taking part in the rule of law promotion is mostly institution-based might also help us to understand the trend.

The main reason why we argue against the institutional approach in rule of law promotion is to be found in the fact that it does not work beyond the norm-adoption phase of the “spiral,” as demonstrated above. Furthermore, such approach might even have unintended consequences. Namely, in semi-consolidated democracies, among which we have earlier in this book included Bosnia-Herzegovina and Kosovo, an institutional ap-

93 “Institutional definitions of the rule of law are not new. Their heritage stretches back to Ancient Greek discussions of the need for standing laws, impartial courts, and enforcement mechanisms (although the latter were often religious, political, or cultural structures, not modern-day law-enforcement bodies).” R. Kleinfeld, “Competing Definitions of the Rule of Law,” in T. Carothers, Promotion of the Rule of Law Abroad, cit.: 47.
proach to the rule of law promotion policy is intended to strengthen state institutions and their ability to implement laws and regulations. Although desired, this outcome does not necessarily contribute to the creation of an effective rule of law system. By strengthening institutions in unconsolidated democracies, the institutional approach actually does not fulfill its purpose to create a system in which citizens trust the law and the institutions that implement it instead of a system in which they are dependent on the protection of predatory ruling elites. The outcome of the institutional approach actually might further stabilize clientelistic rulers by providing them with additional tools to exercise their authority.

2. Governments are the Key to Achieving Legal Reform

The EU accession negotiations are conducted with national governments, whose role in the implementation of legal and political reforms is without a doubt pivotal for the success of the whole process. Yet it seems that the EU practitioners have overemphasized the extent of governments’ part in the rule of law reform process. For reasons already addressed throughout this book, WB governments are not always able, or even willing, to implement the reform process. Some of the obstacles we have addressed include the high level of corruption prevalent among government officials, lack of expertise, lack of technical capacities, and lack of cooperation between highly fragmented levels of government. Furthermore, WB governments even in countries furthest along in the accession process fall short of providing a satisfactory level of political transparency in their work and accountability towards their citizens. We argue that inclusiveness of civil society is the key to overcoming the potential problems accompanying a governmental approach.

3. New Laws are the Answer

No matter how good the legislative solutions adopted by national parliaments are, they are not able to compensate for the lack of quality of the judicial authorities. In other words, even the best laws make little sense if law enforcement bodies are incompetent. The application of law is conducted by judges and lawyers, and by their competence we understand that they must have sound judgment, professional erudition, and skill to prosecute or render judgments effectively in accordance with the law. In order to achieve this goal, the judiciary is reliant on law schools, judicial academies, paralegal training, learning through experience by soliciting advice from NGO personnel, and
expert exchange programs. As we have learned throughout our study, education in law schools is lacking in skills training, while even judicial and bar examinations only test applicants’ technical legal knowledge. Clearly, the lack of judicial capacity to implement adopted legislation efficiently and effectively cripples compliance with the EU rule of law conditionality in the pre- and post-accession periods alike.

Hence, capacity-building of the judicial sector and strengthening the effectiveness of its administrative mechanisms deserve more attention during the EU accession process. Particular focus should be placed on the capacity building of the newly established Judicial Academies. Judicial Academies are the central institutions aiming to eradicate the features of Socialist legal education, which was marked by rigid, authoritarian and formalistic training, state maintained control over the curriculum, and an almost complete absence of analytical study of case law. The role of non-state actors, local and international NGOs, should not be neglected during this process as well. We argue that the effects of capacity building would be increased by the inclusion of non-state actors in the process, and hence by employing the mechanism of socialization to complement the efforts invested in the conditionality.

4. Governments Know What They are Expected to Comply With

Clarity of EU conditionality presupposes that the target governments know precisely what they are expected to do should they decide to comply with the EU conditions. Nevertheless, our study has found that the candidate country governments experience uncertainty regarding the rule of law conditions set upon them by the EU. Problems surrounding the clarity of EU demands may be found in the ever-growing body of EU law and the absence of a single European model of judiciary. Additionally, the benchmarks related to the negotiations on the Judiciary and fundamental rights and Justice, freedom and security Chapters, unlike those for any other chapter, place more importance on the political principles and constitutional values than to the “hard” Acquis Communautaire. Finally, the European Commission sometimes includes additional benchmarks even during the negotiations process. This all adds to the lack of clarity regarding the EU’s rule of law demands, and consequently affects the effectiveness of the rule transfer.

We believe that there is no ready-made solution that can be appropriately used in any given candidate country regarding the rule of law accession criteria, and instead we propose a package solution based on a complex preparatory operationalization that con-
sists of three interconnected parts. First, the EU needs to have better understanding of the situation of the judiciary in the candidate country ahead of the start of the accession process, and not only ahead of the opening of negotiations, particularly bearing in mind legacies of the past that influence the independence of judiciary. Historical legacies need to be taken seriously not only because of their inherent significance in post-communist democratization, but also due to their ability to shape the relationship between the candidate countries and the EU. Namely, taking into account legacies of the past allows for better understanding of the current problems in the field of the judiciary and enables the European Commission to prepare a specific country-tailored strategy in order to effectively export rule of law norms. Second, the use of benchmarks on independence, accountability, efficiency, and effectiveness of the judiciary in the accession negotiations serves as an important catalyst for the rule of law reform. Nevertheless, it is not clear what exactly is expected under each of these benchmarks. This is why we deem it important that each of these benchmarks be elaborated in more detail by the Commission. By elaboration we understand that the benchmarks should be clear and predictable to the domestic actors in the candidate country ahead of the start of the accession process. Otherwise the reforms are driven by an ad hoc prepared country strategy that faces the potential risk of diminishing the effects of already achieved progress with every change of the ruling elite in the target country, as witnessed in Serbia after the 2012 elections, when the newly elected government made its priority to re-assess judicial reform, thus delaying the end result of the transformation.

5. Membership Incentive is Sufficient

Conditionality is at the heart of EU relations with the WB countries. In most of these countries, EU conditions have led to the rule of law reforms. Beyond any doubt, the ‘credible’ prospect of full membership has been the ‘golden carrot’ along the way. In principle, EU conditionality and the rewards attached to it are expected to function as an incentive for national authorities to pursue reform and prepare for integration. Furthermore, they “also provide an excuse for national governments to proceed with unpopular policies.”95 However, while EU incentives have an important role in facilitating reforms, a sustainable reform process also requires certain domestic conditions to prevail. First

and foremost, the reforms proved to be impossible without the civic pro-reform political parties, and second, “a broad consensus among the political, economic and social elites and the citizens as to the necessity of EU-guided democratization.”

Despite academic and popular mythology, the distant prospect of membership has proven to be incapable of mobilization civic politics proposed by the EU and local NGO activists for the past two decades in Bosnia-Herzegovina, Kosovo, Macedonia and even Montenegro. This democratic deficit keeps the gatekeeper elites incumbent in the WB, effectively blocking the rule of law reform. Lack of commitment on the EU supply side reflected in the deficit of actual membership perspective for the WB countries, apart from Montenegro, and particularly the non-existence of interim rewards tied to a gradual prospect of rule of law implementation, is part of the problem instead of the solution in the WB. Without any intention to advocate for ‘short-cut conditionality,’ we recall that the promise of EU integration actually holds the WB together, and alternatively, postponing the accession into the indefinite future undermines hard-won peace and stability in the region.

This being said, we argue that the promise of full EU membership is not incentive enough for the non-consolidated WB countries, and that in order to support pro-reform domestic actors the EU should set up an intermediary system of rewards upon the achieved interim goals. The recent visa liberalization in the region serves as a good example for the mechanics of EU ‘soft pressure.’ We observe three lessons to be learned from the visa liberalization process: (1) the EU should motivate state institutions and civil sector to take part in the reform process, (2) the EU has to set out an explicit and detailed conditions map, and (3) finally the EU has to create a comprehensive implementation strategy with a measurable interim system of goals and rewards so that the domestic actors have a clear and immediate rationalist-based motivation to adhere to the rule of law conditionality.

5.2. Recommendations

1. Under the “rule-of-law orthodoxy,” civil society is at best adjunct to the institution building process. We argue for the need of a more inclusive bottom-up approach to the EU rule of law promotion, in which civil society actors will be empowered to play a rights-holder’s role vis-à-vis public authority in order to push for compliance of key laws, monitor their implementation and influence socialization.

2. Strengthening change actors, thereby weakening veto players.

96 Ivi.
3. Europeanization by rule of law implementation works under certain conditions but only for the adoption of norms that are not necessarily followed through with rule internalization. Continuous efforts are therefore needed to ensure sustainability of the reforms by norm-socialization of adopted rules.

4. The institutional approach employed by the EU rule of law promotion policy pays most attention to the independence of the judiciary. As we have mentioned several times in our study, the independence benchmark makes little sense if it is implemented by an unaccountable and incompetent judiciary. Therefore, more attention should be dedicated to these two additional benchmarks within the screening and negotiations process.

5. Investigate studies conducted at the Law Faculties in the WB and continue the support for the Judicial Academies.

6. Bearing in mind problems of implementing the rule of law in non-consolidated democracies, the EU should elaborate the overall and interim objectives with regard to good governance and rule of law.

7. The apparent thinness of the Acquis Communautaire in the field of the judiciary contrasts with the centrality of this issue in the accession negotiations process. The lack of codified institutional rules influences the use of soft conditions and individually tailored guidelines. For a smoother process of the pre-accession reforms, candidate countries should know when and how they are considered to be progressing. In this regard, the EU has to distil particular criteria and indicators on the basis of which candidate countries’ progress will be graded. Furthermore, the rule of law specialists, including the EU practitioners, should continue their efforts to reach a definitional consensus on the concepts of ‘Rule of Law’ and ‘Judiciary Reforms.’

6. The way Forward: Questions for Future Studies

In sum, the top-down institutional approach employed by the EU, empowered by the golden carrot of full membership, has proved to be powerful incentive for rule of law reform and progress towards EU membership in the WB. Even so, while EU conditionality has an important role in prompting reforms, a sustainable reform process also requires certain domestic conditions to prevail – most notably the reduction of the number of
veto players and elimination of institutional and administrative obstacles caused by the legacies of the communist past. Furthermore, this approach has limited reach in non-consolidated democracies, since it runs counter to democratization by favoring ruling elites and depoliticizing civil society. On the other hand, bottom-up soft socialization mechanisms are not used equitably enough in order to strengthen the capacity of civic society organizations, and to create a broad consensus among the political, economic and social elites on the necessity of socialization of the adopted norms. Finally, the actual lack of European standards in judiciary has raised some questions as to whether it is fair to ask new democracies to incorporate changes from which the EU member states are exempted. In this regard, the EU is called upon to distil particular criteria and indicators on which basis candidate countries will be graded.

The problems observed in this book are not revolutionary insights. Similar critiques were made of the international efforts for the judiciary reforms of the 1960s. World Bank rule of law specialist Richard Messick accounted for similar shortcomings in his research twenty years ago. Wade Channell summarized the concerns of earlier critics, which for the most part emphasized “top-down, state-centered approaches, use of transplanted laws, and reliance to adopt laws to drive change in the culture and habits” of the target countries. Bearing this in mind, one may only conclude that lesson learning is indeed a slow process among the current generation of EU rule of law specialists. It could be that the rule of law practitioners did not learn from the earlier mistakes, since the “incentive structures within the legal reform industry do not encourage learning,” as Channell suggests. We argue that the learning process by rule of law policy makers on the Europeanization by rule of law implementation must follow the same approach employed in this study, namely a neo-institutional approach overcoming the separation of legal studies and the political sciences. Only in this way will it be possible to address the regional peculiarity of the WB and secure the sustainability of the rule of law reform process.

99 W. Channell, Lessons not Learned About Legal Reform, cit.: 139.
100 Ivi.
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