

RULE OF LAW IN THE WESTERN BALKANS: EXPLORING THE NEW EU ENLARGEMENT STRATEGY AND NECESSARY STEPS AHEAD

April 16-19, 2018 | Alt Madlitz

In cooperation with:



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This reader includes conference papers and proceedings of Aspen Germany's Western Balkans conference in 2018.

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Accommodation and conference venue:

Gut Klostermühle, Mühlenstr. 11, 15518 Madlitz Wilmersdorf (Alt Madlitz)

Monday, April 16, 2018

Arrival of Participants during the Day

20:00

Welcome Dinner at Refektorium

Tuesday, April 17, 2018

09:00 – 09:30

Welcoming Remarks

Rüdiger Lentz, *Executive Director, Aspen Institute Germany*

Christian Hellbach, *Special Envoy for South-Eastern Europe, Turkey and the EFTA States, Federal Foreign Office*

09:30 – 11:00

Session I:

Implications of the New Enlargement Strategy for Rule of Law Reforms in the Western Balkans

On February 6, 2018, the European Commission published its new enlargement strategy for the Western Balkans. By providing a potential time frame for Serbia and Montenegro to join the EU by 2025 and the next steps to take by Albania, Bosnia and Herzegovina, Kosovo, and Macedonia, it tries to create further momentum for reforms in the region. What does the new strategy entail regarding the rule of law? What can be expected from the announced flagship initiative to strengthen the rule of law in the Western Balkans? What should this initiative focus on? What does this mean for the reform processes in this field? Are there any promising new approaches? How should the EU further develop its efforts?

Introduction: Andi Hoxhaj, *The New EU Rule of Law Initiative for the Western Balkans*

Moderation: Rüdiger Lentz

11:00 – 11:30

Coffee break

11:30 – 13:00

Session II:

How to Establish an Independent Judiciary in the Region

The establishment of an independent judiciary has been one of the key reform priorities in the EU accession processes of the Western Balkan countries. However, legal systems continue to be influenced by corruption and politicization, thereby impeding their independent functioning. How can justice systems be reformed successfully? Can the Albanian reform serve as a model for the region? What are the shortcomings in the Albanian model? How can corruption and political interference be curbed sustainably? How can vetting procedures be depoliticized and a culture of selective justice and impunity for high-level crimes be ended? Does the new enlargement strategy provide any answers?

Introduction: Arolda Elbasani, *International Promotion of Rule of Law: Facing Connections between Patronage, Crime and Judiciary Corruption*

Tamara Takacs, *Rule of Law and the Independence of the Judiciary in the Western Balkan Countries*

Moderation: Ana Trišić-Babić

13:00 – 14:00	Lunch at Finckenlounge (Breakfast Hall)
14:15	Departure to Berlin
16:00 – 17:00	Meeting with Dr. Joachim Bertele, Deputy Head of Division “Foreign and Security Policy”, German Federal Chancellery
17:30 – 18:30	Meeting with Dr. Christoph Hübner, Head of Division “Europe”, German Federal Ministry of the Interior
19:00	Reception and Dinner with Members of the German Bundestag Venue: Altes Zollhaus, Carl-Herz-Ufer 30, 10961 Berlin Confirmed MPs: Renata Alt, FDP Thorsten Frei, CDU/CSU Thomas Hacker, FDP Metin Hakverdi, SPD Josip Juratovic, SPD Gunther Krichbaum, CDU/CSU Michael Kuffer, CDU/CSU Nikolas Löbel, CDU/CSU Frank Müller-Rosentritt, FDP Andreas Nick, CDU/CSU Dietmar Nietan, SPD Manuel Sarrazin, Die Grünen Katrin Staffler, CDU/CSU

Wednesday, April 18, 2018

09:30 – 11:30	Session III: Depoliticization and Professionalization of Public Institutions One of the major challenges in the region continues to be the politicization as well as the lack of transparency and professionalization of public institutions. How can they be enabled to serve the benefits of the citizens rather than patronage networks? How can patronage networks be dismantled more efficiently? How can the independence of public institutions from political interference be increased? How can institutions that should be independent, such as Ombudsmen, Anti-Corruption Agencies, Electoral Commissions, etc., be protected from political control? How can these institutions be professionalized, and merit-based recruitment be ensured? Why have previous efforts not been successful and how can this be changed? How can the use of state resources for personal or party-political benefits be ended? Introduction: Martin Mendelski, <i>Good Governance Promotion in the Western Balkans: An Empirical Analysis of the De-politicization and Fragmentation of the State</i> Stefan Pürner, <i>Depoliticization and Professionalization of Public Institutions: How Should it (Not) be Done?</i> Moderation: Ramadan Ilazi
11:30 – 12:00	Coffee break
12:00 – 13:00	Discussion with Lidija Prokic, Regional Advisor for Southeast Europe at Transparency International on Transparency International's work in the Western Balkans

13:00 – 14:30

Lunch at Finckenlounge (Breakfast Hall)

14:30 – 16:30
Session IV:
Fighting Corruption and Organized Crime

The EU Commission's new enlargement strategy notes that "countries show clear elements of state capture, including links with organized crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests." To establish a functioning rule of law and end the undermining of the legal, economic, and political systems in the Western Balkans for personal interests, it is essential to fight corruption and dismantle criminal networks more efficiently. Does the new enlargement strategy provide any promising new approaches? Is there a need for completely new approaches, especially when it comes to fighting high-level corruption? What could new approaches look like? Should controversial models of transitional justice (e.g. plea bargaining, deferred prosecution agreements, immunity programs) be considered to more effectively dismantle existing informal power structures that undermine the functioning of the systems? What could be other new methods to fight high-level corruption more efficiently?

Introduction: Senada Šelo-Šabić, *Fundamentals First: Operationalizing the Fight Against Corruption in the EU Accession of the Western Balkan Countries*

Nieves Zúñiga, *The New EU Enlargement Strategy and Anti-Corruption Measures in the Western Balkans*

Moderation: Johanna Deimel

16:30 – 17:00

Coffee break

17:00 – 18:30
Session V:
Fundamental Rights and Equal Economic Opportunity

Safeguarding fundamental rights and providing equal economic opportunity continues to be a challenge throughout the region. While fundamental rights are largely protected in the legislation of countries throughout the region, they are often not fully implemented in practice. What are the major shortcomings in guaranteeing fundamental rights to all citizens equally? How can marginalized groups be better included? How can freedom of expression be better protected? At the same time, equal economic opportunity is challenged by weak economies and high unemployment on the one hand, but also clientelist economic structures on the other. How can clientelist economic structures be dismantled? What is the role of state-owned enterprises in this context? How can party patronage in the distribution of posts be addressed more effectively? What kinds of reforms should countries in the region focus on?

Introduction:

 Simonida Kacarska, *Guaranteeing Fundamental Rights in the Western Balkans*

Moderation: Valeska Esch

19:00
Barbecue on the shore of Madlitz Lake
Thursday, April 19, 2018
Departure of participants

LIST OF PARTICIPANTS

Dritan Abazović

Andrea Berner

Agnes Bernhard

Josip Brkić

Adnan Ćerimagić

Bernard Chappedelaine

Gordana Čomić

Ilir Deda

Johanna Deimel

Arolda Elbasani

Susan Falatko

Adam Gardener

Maja Gasal-Vražalica

Shkëndije Geci-Sherifi

Klajda Gjoshaj

Toni Gogu

Christian Hellbach

Andi Hoxhaj

Ramadan Ilazi

Beti Jaceva

Simonida Kacarska

Edvin Kulluri

Matthias Lüttenberg

Martin Mendelski

Žarko Mićin

Thomas Mühlmann

Aleksandar Andrija Pejović

Nikola Poposki

Lidija Prokić

Stefan Pürner

Konstantin Samofalov

Korab Sejdiu

Senada Šelo-Šabić

Tamara Takacs

Bernd Thran

Ana Trišić-Babić

Ivan Vujović

Nieves Zúñiga

The Aspen Institute Germany

Valeska Esch
Program Director

Rüdiger Lentz
Executive Director

Yannic Remme
Junior Program Officer

Olga van Zijverden
Program Officer

Sandra Esser
Rapporteur

PARTICIPANT BIOGRAPHIES

Dritan Abazović



Dritan Abazović is the president of the political party URA (United Reform Action) and a member of Parliament of Montenegro. He was born on 25.12.1985 in Ulcinj, Montenegro. He graduated from the Faculty of Political Sciences at the University of Sarajevo, where he was awarded the “Golden Badge” and “Golden Charter” of the University. He received his Master’s degree in 2008 from the Faculty of Political Sciences at the University of Montenegro. Currently, he is a doctoral candidate at the Faculty of Political Science at the University of Montenegro. Mr. Abazović is a longtime associate of non-governmental organizations in the field of human rights, the Euro-Atlantic and civic activism and has engaged in projects related to the promotion of multiculturalism in post-conflict areas of the former Yugoslavia. He participated in several international programs, conferences and seminars and specializes in several study programs. From 2005 to 2007 he was an assistant at the Faculty of Political Science at the University of Sarajevo. In 2009, he completed the course for the Study of Peace (Peace Research) at the University of Oslo. At the same University, he completed a seminar for professional development (Professional Development). In 2011, he resided in the United States while participating in the State Department IVLP program in Washington D.C. From 2010 to 2012, he was the Executive Director of the local broadcasting company Teuta (Ulcinj, Montenegro). From 2010 to 2012, he was Executive Director of the NGO Mogul in Ulcinj. In 2010, he published his first book “Cosmopolitan culture and global justice”. Since 2010, he has worked as a high school teacher in Ulcinj, teaching the sociology of Culture, Communication and the history of religion. He also teaches Social psychology at University level. In 2012 Mr. Abazović was one of the founders of the political party “Positive Montenegro”. Since 2012, he has been the youngest MP in the Parliament of Montenegro. In 2014, he was one of the founders of a political project Civic Movement URA (United Reform Action). He speaks English and Albanian.

Andrea Berner



Andrea Berner is working as a national analyst with the International Monitoring Operation for the Vetting Process of the judiciary in Albania. From February 2014 to March 2018 she was working as a policy officer at the Federal Ministry of the Interior, where she was responsible for the Western Balkans enlargement process, for organized crime and corruption, counter-terrorism at EU level and migration- and EU-related security policies. Before starting her career with the Federal Ministry of the Interior, she was a policy officer with the Representation of the Free and Hanseatic City of Hamburg to the German Federation where she was responsible for domestic policy and sports. Previously to this she held a number of positions with the City of Hamburg. The most recent of which was head of division at the domestic intelligence agency where she dealt with prevention of economic espionage, sabotage protection and security of classified information.

Agnes Bernhard



Ms. Bernhard is currently Team Leader of the EU funded project EURALIUS, which is assisting Albanian institutions since 2014 in developing and implementing a comprehensive justice reform in Albania. In the over 25 years of professional experience Ms. Bernhard has gained wide experience in judicial activities as a member of an administrative tribunal at appeal level in Austria, at the Austrian Constitutional Court and by defending Austrian cases before the European Court of Justice. Moreover, she was continuously providing training for judges, prosecutors and civil servants and has implemented a wide range of technical assistance projects, inter alia for the Albanian School of Magistrates, the High Court of Cassation and Justice in Romania and the Kosovo Judicial and the Prosecutorial Councils. She has carried out more than 40 studies, commissioned by the European Commission, in particular in the area of access to justice, efficiency of legal remedies, environmental criminal justice or anti-discrimination law. Ms. Bernhard holds a PhD in law and started her career at the University of Linz/Austria, Institute for Administrative and Constitutional Law.

Josip Brkić



Josip Brkić was appointed Deputy Minister of Foreign Affairs of Bosnia and Herzegovina in April 2015. He also chairs the Commission for the NATO-integration process of Bosnia and Herzegovina. Until his appointment to the Council of Ministers he worked at the Herzegovina University in Mostar. Mr. Brkić was Ambassador of Bosnia and Herzegovina to the Kingdom of Spain and Morocco from 2004 to 2008. Previously, he held several senior positions at the Ministry of Foreign Affairs from 2004 to 2008, Ministry of European Integration of Bosnia and Herzegovina from 2000 – April 2003 and Ministry of Education, Science, Culture and Sports of the Western Herzegovina County in 2000. His professional involvement includes several years in the business sector, from 2009 to 2015 holding a management positions. Since 2015 Mr. Brkić is the international secretary of HDZ BiH - the Croatian Democratic Union of Bosnia and Herzegovina and a member of the Main Board of HNS – Croatian National Assembly of Bosnia and Herzegovina. Mr. Brkić was born in Sarajevo, Bosnia and Herzegovina, in 1974 where he finished elementary and high school. He holds a law degree from the Faculty of Law at the University of Mostar and Master's Degree in European Study from the University of Sarajevo and University of Bologna. He is a Ph.D. candidate in Public International Law at the Faculty of Law – University of Mostar. Mr. Brkić is married and has three sons. He speaks fluent English and Spanish. In 2015 Mr. Brkić was awarded with the Royal Order of Isabella the Catholic by the King of Spain.

Adnan Ćerimagić



Adnan Ćerimagić is from Bosnia and Herzegovina and works as an Analyst for a think tank called European Stability Initiative (ESI) in Berlin. He studied law at the University of Graz and EU International Relations and Diplomacy at the College of Europe in Bruges. Adnan did a traineeship in the Secretariat of the European Parliament's Foreign Affairs Committee in Brussels and Strasbourg, worked in the Ministry of Foreign Affairs of Bosnia and Herzegovina in Sarajevo and the Mission of Bosnia and Herzegovina to the EU in Brussels. He is interested in EU enlargement policy, human rights, rule of law and foreign policy. He is fluent in English and German. At ESI, he is researching EU enlargement policy, the Western Balkans' EU integration process and Turkey.

Bernard Chappedelaine



Bernard Chappedelaine serves as Advisor to the Director of the Continental Europe Department of the French Ministry for Europe and Foreign Affairs. He was born on 26 December 1954 in France. Mr. Chappedelaine holds academic degrees in political science, Russian language and civilization. He started his professional career at the Ministry of Foreign Affairs in Paris, serving at the Consular Department, the Press Department, and the European Department, in charge of matters relating to former Yugoslavia between 1992 and 1994. Between 1994 and 2003 Mr. Chappedelaine held several positions, including that of First Secretary and Second Counselor, at the French Embassies in London, Moscow and Tel-Aviv. In 2003, he returned to Paris and resumed his work at the Ministry of Foreign Affairs, focusing on Iraq (Middle East Department). From 2007 until 2017, Mr. Chappedelaine worked at the French Embassy in Berlin and Ankara, assuming the position of first counselor and deputy head of mission. Since 2017, Bernard Chappedelaine is the Advisor to the Director of the Continental Europe Department in the French Ministry of Foreign Affairs in Paris.

Gordana Čomić


Gordana Čomić is a Member of Parliament in the National Assembly of Serbia, where she has served since 2000 as a member of the Democratic Party and is a deputy speaker of the assembly. As a member of the Democratic Party, Gordana was Chairperson of the Committee for Election in Novi Sad (1996), Chairperson of Provincial Board of Democratic Party for Vojvodina (1998-2001), Vice President of Democratic Party (2001-2004 and 2014-2016) and Member of Parliament in Provincial Assembly of Vojvodina (1996-2004). She was chairperson of the Committee for Foreign Affairs (2004-2008), a member of the Delegation of the National Assembly in the OSCE Parliamentary Assembly and served as Rapporteur for the Committee for Human Rights, Democracy and Humanitarian Affairs (2006-2016). She currently serves as deputy chairperson of the Committee on Constitutional and Legislative Issues, member of the Committee for assumed a very important role in the women's movement in Serbia, having been involved in the battle for equality in representation and participation of women in all decision-making processes in Serbian society. Mrs. Čomić has a degree in Physics and worked at the University of Novi Sad (1984-1999), Faculty of Technical Sciences, on the general course in Physics and Quantum Mechanics. She is married and has four children.

Ilir Deda


Ilir Deda has over a decade experience of work in national and international public and non-governmental institutions. His work has influenced decision-making and policy development both at national and international level regarding Kosovo. He has extensive knowledge of national, regional, and international affairs, governance, security and institution building. Ilir Deda is an independent Member of Parliament of Kosovo, elected from Vetevendosje list, which he left in spring 2016. He is also a lecturer at the University of Business and Technology in Pristina, teaching Public Policy. Ilir Deda was Executive Director of Kosovar Institute for Policy Research and Development (KIPRED). He also served as the Chief of Staff and Senior Political Advisor to President Atifete Jahjaga. Prior to joining the Office of the President, Deda was one of the co-founders of the FER party, which joined the Vetevendosje Movement at the end of March 2011. Deda worked with KIPRED since 2008, first as the Research Director, and afterwards as the Executive Director. He also worked as a policy specialist for UNDP HQ in New York; researcher at the Graduate Program in International Affairs of the New School; researcher at the Geneva Centre for Security Policy; was a political advisor to the first Kosovo Prime Minister (Bajram Rexhepi); and was an Analyst for the International Crisis Group in Kosovo. He is also the author of 2008/09/10 Kosovo reports of Freedom Houses' Nations in Transit annual publications. Ilir Deda has a Master of Arts from The New School University (New York City) and a Bachelor of Arts in Political Science. He has also published over a dozen papers both in Kosovo and abroad.

Johanna Deimel


Johanna Deimel has been Deputy Director of the Southeast Europe Association (Suedosteuropa-Gesellschaft, SOG) in Munich since 1998, where she was on temporary leave of absence between February 2008 and March 2010. In 1997 she received her Dr. rer. pol. in Political Sciences, Slavonic Studies and Economics from the Ludwig-Maximilians-University in Munich. At the SOG she organizes high level and policy oriented international conferences on Balkan issues and on the Black Sea region. She is specialized in European Union politics and strategies towards Southeastern Europe and the Black Sea region. From February until October 2008 she served as Executive Officer / Chief of Staff at the International Civilian Office in Kosovo. She is an expert for projects related to Kosovo of various organizations. In the end of 2009 she was Senior Expert for InWent and its Kosovo program. Ms. Deimel is a frequent commentator on Balkan affairs in German and international media.

Arolda Elbasani



Arolda Elbasani is a visiting scholar at the NYU, NY and senior analyst for the Wikistrat Consulting Network. She holds a PHD in Social and Political Sciences from the European University Institute, Florence. Previously, she held research and teaching positions at the Robert Schuman Center for Advanced Studies in Florence, Columbia University, the Social Sciences Research Center in Berlin, and the Free University of Berlin. Her articles have appeared in the Journal of European Public Policy, Europe-Asia Studies, Democratization, Politics and Religion, Balkans and Near Eastern Studies and Southeast Europe and Black Sea Studies, among others. She has also edited or co-edited: State-Building or State-Capture in Kosovo (Special issue of the Journal of Southeast Europe and Black Sea Studies, forthcoming), Governing Islam and Religious Pluralism in New Democracies (Special issue of the Balkans and Near East Studies 19(1), Local Islam(s) (Special Section of Nationality Papers), The Revival of Islam in the Balkans (Palgrave 2015), and European Integration and Transformation in the Western Balkans (Routledge 2013). Her research interests lay at the intersection of comparative democratization, post-conflict state-building, EU foreign policy, and contemporary Islam with a focus on Southeast Europe and Turkey.

Valeska Esch



Valeska Esch works as Program Director with the Aspen Institute Germany and is responsible for Aspen's Policy Program on Southeast Europe. Valeska joined Aspen in February 2009. She holds an MA in Political Science, International and European Law, and English Language and Literature with a focus on security politics, the EU, and Southeast Europe, for which she studied at the Rheinische Friedrich-Wilhelms-Universität Bonn and the University of Birmingham. Ms. Esch has published on the EU's engagement in Kosovo. Prior to joining Aspen, she worked for an event management firm in Bonn and interned at the United Nations University's Institute for Environment and Human Security (UNU-EHS).

Sandra Esser



Sandra Esser is a recent graduate of the Hertie School of Governance's Master of Public Policy program. Both throughout her Master's and her BA of International Relations, she specialized in climate and development policy, leading her to pursue internships at a sustainable development NGO in Indonesia, the German development agency GIZ as well as the climate change think tank E3G. Currently, she is working part-time at E3G, focusing on energy transitions in Central and Eastern Europe.

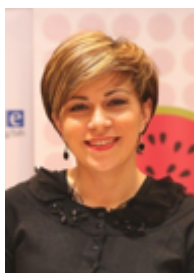
Susan Falatko



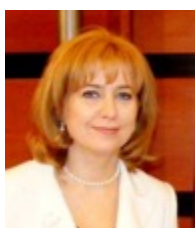
Ms. Falatko joined the Office of South Central European Affairs at the U.S. Department of State in July, 2017, following completion of a Master's Degree in Security Studies from the Eisenhower School at the National Defense University. Prior to that, she served as Deputy Chief of Mission to the U.S. Embassy to Mauritius and Seychelles from 2013-2016. She joined the Foreign Service in 1999, and served as an Economic Officer in Bamako, Mali (1999-2001) and Havana, Cuba (2001-2003). From 2003-2005, she worked on economic, counter-terrorism, and Western Balkans issues on the OSCE desk in the European Bureau's Regional Political-Military office (EUR/RPM). As Deputy Economic Chief in Sarajevo from 2006-2009, she was responsible for the budget/finance and counter-terrorism finance portfolios, and coordinated the USG assistance budget among the various agencies at post. Ms. Falatko has also been posted to Kigali, Rwanda as Public Affairs Officer and to the U.S. Mission to the United Nations in Geneva as the U.S. liaison to the UN Specialized Agencies on governance and budget issues. Originally from Chicago, Illinois, Ms. Falatko received a B.S. in Psychology from the University of Iowa (1990) and an M.A. in International Relations from the George Washington University (1997). Prior to joining the Foreign Service, she taught English for nearly seven years in Tokyo, Bangkok, Prague, and Washington, DC. She is proficient in French and Spanish.

Adam Gardener

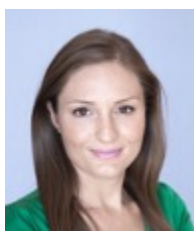

Adam Gardner is Head of International Serious and Organised Crime within the UK Home Office's Strategic Centre for Organised Crime. He has undertaken a variety of other roles within the Home Office, including Head of Serious and Organised Crime Strategy, Head of Western Hemisphere Serious and Organised Crime Threats, and Head of International Drugs. He has a Masters Degree in International Relations and World Order from the University of Leicester.

Maja Gasal-Vražalica


Maja Gasal-Vražalica is 34 years old and a professor of German language and literature. As a professor, she has worked in various primary and high schools, as well as various Non-Governmental Organizations. Ms. Gasal-Vražalica has also worked as an interpreter and authorized negotiator for the German Chamber of Commerce and Rolls Royce Deutschland in the process of sending applications for overhaul T 53 engines of UH 1 helicopters to the Ministry of Defense of Bosnia and Herzegovina. Ms. Gasal-Vražalica is a member of the Presidency of the political party Democratic Front. In 2014, she was elected to the Parliamentary Assembly of Bosnia and Herzegovina, the youngest female MP to do so in the history of the Parliamentary Assembly. In addition to being an MP in the House of Representatives of the Parliamentary Assembly of BiH, she is also a member of the Committee of Gender Equality and the Joint Committee for Human Rights.

Shkëndije Geci Sherifi


Shkëndije Geci Sherifi is the Director for Europe and European Union – Ministry of Foreign Affairs of the Republic of Kosovo. In 2013 she was appointed Ambassador Extraordinary and Plenipotentiary of the Republic of Kosovo to Croatia. Upon completion of her diplomatic mission in Croatia, the President of the Republic of Croatia awarded her with the Order of Duke Branimir for excellence in promoting bilateral relations of Kosovo and Croatia. Prior to that she served as Ambassador Extraordinary and Plenipotentiary of the Republic of Kosovo to Hungary from 2010 to 2013 where she established the first Kosovo Embassy in Budapest. Shkëndije is the first woman ambassador of Kosovo. She was appointed soon after Kosovo began to establish its diplomatic missions throughout the capitals of the world. After completion of her diplomatic mission in Budapest, she was awarded with the Middle Cross Order of Merit of Hungary by the Hungarian President for outstanding service in the promotion of the relations of the two countries. Before embarking on her diplomatic career, Shkëndije accomplished different academic and professional training programs in reputable universities and institutions in Europe and US. From 2008 up to her appointment as Ambassador she worked for the International Civilian Office/EU Special representative, responsible for Religious and Cultural Heritage Policy. Shkëndije was an Associate Lecturer of the University of Pristina, and from 2001 to 2008 she worked for the OSCE Mission in Kosovo, dealing with Human Rights and Rule of Law and Capacity Building. Shkëndije holds a MA degree in Contemporary Diplomacy from the University of Malta while she continues her research in the field of Foreign and Security Policies. She is a PhD Candidate at the National University of Public Service, Institute for International Studies in Budapest. Shkëndije teaches Diplomacy and Politics at the University for Business and Technology in Prishtina. She is the author of many scholarly articles published in different international academic journals.

Klajda Gjoshaj


Klajda Gjoshaj is a member of the Albanian parliament and Deputy Chair of the Foreign Affairs Committee. She was born in Tirana, on 28 July 1983. She is married and has a son. She attained a Master's degree in European Studies from the University of Reading, UK, in 2006. She graduated the University of Reading with a major in Politics and International Relations in 2005. Mrs. Gjoshaj served as Minister for European Integration (2013-2017), Deputy Minister of Labour, Social Affairs and Equal Opportunities (2012-2013). From 2012 to June 2016, she was deputy Leader of the Socialist Movement for Integration Party (SMI). She is Chairwoman of SMI Women's Forum, and member of the SMI steering board. Mrs. Gjoshaj held many executive positions in other institutions, such as Tirana Municipality, Tirana Regional Employment Directorate and National Tourism Agency. Further, Mrs. Klajda Gjoshaj completed training courses and internships at Japan International Cooperation Agency (JICA), European Parliament, Doris Pack office in Brussels. Mrs. Gjoshaj is proficient in English and has good command of Italian.

Toni Gogu



Mr. Gogu has a diverse leadership experience in public institutions and civil society organizations in Albania and the Western Balkans. Prior to being appointed Deputy Minister of Justice, Mr. Gogu served as National Director of World Vision West Balkans (Albania & Kosovo and Bosnia Herzegovina), a non-for-profit organization that focuses on the improvement of lives of vulnerable children and their communities. Mr. Gogu served for many years in banking and financial regulatory authorities, such as the Bank of Albania, Albanian Deposit Insurance Agency and the Ministry of Finance. Mr. Gogu has contributed also on the initial establishment of court administration in Albania. He served as the Chancellor of Tirana District Court, Director of Research at the High Council of Justice and as a professor and trainer at the School of Magistrates. Beside legal counseling, Mr. Gogu's experience in these institutions consists on managing change and organisational reform. Mr. Gogu has served on several public and non-profit boards including: the International Association of Deposit Insurers, the Executive Board Member of the Association Européenne pour le Droit Bancaire et Financier and the Inter-Confessional Bible Society of Albania.

Andi Hoxhaj



Dr. Andi Hoxhaj is a Teaching Fellow in EU Law at the University of Warwick, UK. His research focuses on corruption, the rule of law, and the EU integration of the Western Balkans. His work was referred by the UK Parliament 2018 Report on 'The UK and the future of the Western Balkans' on issues related to corruption, rule of law, and the role of international donors. He was awarded his PhD in March 2017 at the University of Warwick and his thesis was on 'Anti-Corruption Policy in the EU and Reflexive Governance'. Dr. Hoxhaj is currently transforming his thesis into a book for publication in 2019 with Routledge.

Christian Hellbach



Dr. Christian Hellbach studied law at the University of Konstanz from 1979 to 1985. Afterwards, he worked there as an Assistant Professor for four years. In 1989, he received his Ph.D. in Constitutional Law and was certified as attorney-at-law. From 1990 to 1992, he worked at the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety as Desk Officer and completed a traineeship at the Federal Foreign Office from 1992 to 1993. From 1994 to 2000, he worked at the German Embassy in Tashkent, at the Directorate-General Legal Affairs at the Foreign Office, and the Permanent Mission of Germany to the International Organizations in Geneva and the Directorate-General for Europe at the Foreign Office. Dr. Hellbach was Deputy Head of Mission at the German Embassy in Belgrade from 2000 to 2003, and served in the Directorate-General Political Affairs at the Foreign Office from 2003 to 2007. He worked as Deputy Head of Mission at the German Embassy in Bogotá from 2007 to 2010. Between 2014 and 2016, he was the German Ambassador to Bosnia and Herzegovina. He has been Special Envoy for South-Eastern Europe, Turkey and the EFTA-States at the Federal Foreign Office since August 2016. Dr. Hellbach was born on 20 July 1959 in Mexico City.

Ramadan Ilazi



Ramadan (Dani) Ilazi is a lecturer of peace and conflict studies at the UBT College and a senior expert at the Novus Consulting Company, working with the public administration reform process in Kosovo. From 2015 until 2016 he served as Deputy Minister for European Integration in the Government of Kosovo, where he was actively engaged in the process of Stabilization and Association Agreement, European Reform Agenda and the Visa Liberalization dialogue. Dani was an active member of civil society in Kosovo, serving as executive director of the Initiative for Progress (INPO) from 2005 until 2008, of the FOL Movement from 2008 until 2011 and of the Kosovo Institute of Peace (KIP) from 2012 until 2014. In 2012, he co-authored the paper "A Peace Treaty for Sustainable Peace: a new beginning for Kosovo and Serbia" and most recently the Aspen Institute Germany published his paper on the impact of the growing support for the far-right parties in the EU for the European perspective of the Western Balkans. Dani holds a Master of Letters degree from the University of St. Andrews and is currently a PhD Candidate in Politics and International Relations at the Dublin City University (DCU) in Ireland. His research interests include Statebuilding, Civil Society, Enlargement Policy and the EU's Foreign & Security Policy.

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Beti Jacheva is a career diplomat at the Ministry of Foreign Affairs of the Republic of Macedonia. She joined the Ministry in 1996 as a junior diplomat and worked in different departments at the Ministry, including the International Law department. Currently, she holds the position of Deputy Director (Minister Counselor) in the Directorate for the European Union. Twice she was posted as diplomat in the Macedonian Mission to the EU in Brussels. During her first posting (2006-2010), she was Justice and Home Affairs Counselor, dealing primarily with the visa liberalization process; in her second posting (2013-2016) she was Deputy Head of Mission. Throughout her career she was a member of a number of working groups at the Ministry of Foreign Affairs, such as the negotiating team for different bilateral treaties, drafting the Law on Foreign Affairs. Her current tasks include being one of the focal points for Berlin Process. Furthermore, she is a member of the inter-institutional working group on Plan 3-6-9, which is the main reform document of the Government of the Republic of Macedonia.

Simonida Kacarska


Simonida Kacarska is a director of the European Policy Institute, a think tank in Skopje, Republic of Macedonia. She is furthermore a Policy Leaders Fellow at the School of Transnational Governance of the European University Institute in Florence. Her previous professional experience includes lecturing at her alma mater the American University in Bulgaria, and a civil servant in the European Integration Office of the Macedonian government. She has held research positions at several European universities including the University of Edinburgh, the College of Europe, Oxford University as well as the Central European University. Simonida completed a PhD in Politics and International Studies at the University of Leeds in 2013 and MA in European Politics (with distinction) at the Sussex European Institute in 2005. Her research interests are related to the political transformation and European integration of the Balkans with a focus on national minority policies, a topic on which she publishes in academic journals and edited volumes. She is also a regular contributor to national and regional media and consults international organizations. Simonida was selected as a Marshall Memorial Fellow of the German Marshall Fund of the United States in 2017. She is currently based at the School of Transnational Governance of the European University Institute in Florence as a Policy Leaders Fellow for the academic year 2017/2018.

Edvin Kulluri


Edvin Kulluri works as lecturer on the History of Philosophy at Tirana University. Since October 2014 he has been a member of the National Council of Democratic Party of Albania. Prior to this position, Edvin worked as General Secretary at the Ministry of Defense of Albania from January 2010 to September 2013. He has furthermore held the position of Assistant to the Prime Minister of Albania. His duties hereby included Public Relations, Local Government and Public Policy Advising from September 2005 to January 2009. Edvin is fluent in Albanian, English and Italian.

Rüdiger Lentz


Rüdiger Lentz is the Executive Director of the Aspen Institute Germany. Previously he served as the Executive Director of the German-American Heritage Foundation and Museum in Washington from 2009 until 2013. From November 1998 until December 2009, he was the Washington Bureau Chief and Senior Diplomatic Correspondent for Deutsche Welle. Prior to his assignment in Washington, he served as Deutsche Welle's Brussels Bureau Chief. Before joining Deutsche Welle, Lentz worked as a correspondent for the German news magazine Der Spiegel, after having served in the German Armed Forces for eight years and as a TV commentator and reporter at ARD/WDR, Germany's largest public TV and radio station. Lentz has also held various positions including that of Editor in Chief at RIAS-TV Berlin from 1990-1992. As the Executive Director of German TV from 2002-2005 he was responsible for the branding and market entrance plan of German TV in the US. He has been a Visiting Lecturer at Harvard University, the School of Foreign Service in Washington and a regular guest on CNN and C-Span. Lentz was born in 1947 and studied international relations, history and economics at the University of Hamburg. He is a long-time member of the Atlantik-Brücke and a founding member of the German American Business Council (GABC) in Washington D.C.

Matthias Lüttenberg



Matthias Lüttenberg joined the German Federal Foreign Office in 2003. His first assignment was Pristina (Kosovo) where he initially worked at the German Liaison Office (2004-2006), continued as Political Advisor to the KFOR Commander Lt. Gen. Roland Kather (2006/2007) and later served as personal assistant to Ambassador Wolfgang Ischinger who represented the EU in the EU-U.S.-Russia Troika negotiations on the future status of Kosovo (2007). From 2008, he covered Russian domestic policy and was personal assistant to the Coordinator for German Russian relations (Dr. Andreas Schockenhoff). From 2010 to 2013 he served in the Political Department of the German Embassy in Tel Aviv. After another year in Berlin on the Middle East (desk officer for Palestinian Territories) he returned to South Eastern and Eastern Europe as Deputy Head of Division 212 at the Federal Chancellery in July 2014. In this capacity, he primarily focuses on Ukraine, Russia, and the Western Balkans. Matthias Lüttenberg studied law in Passau (Germany) and Aberystwyth (UK) and holds a Master of Laws LL.M. eur. (European Law) from Passau University. He lives in Berlin, is married and has three children.

Martin Mendelski



Martin Mendelski is a postdoctoral researcher at the Max Planck Institute for the Study of Societies in Cologne. His Ph.D. thesis from the University of Luxembourg was awarded the "THESEUS Award for Promising Research on European Integration". His current research addresses the interplay between society, economy, law and the polity in Eastern Europe, including research on constitutional crisis, the rule of law, governance and anti-corruption. Dr. Mendelski has held visiting positions at Harvard University, the European University Institute, Alexandru Ioan Cuza University, the University of Georgia, Bilkent University, the Max Planck Institute for the Study of Societies, the European Law Academy and the Max Planck Institute for European Legal History, among others.

Žarko Mićin



Žarko Mićin was born in 1982 in Novi Sad, Serbia. He studied law at the University of Novi Sad (Faculty of Law) and graduated in 2007. On the 21st of June 2017 he passed the Bar exam. From 2008 until 2010 he worked at a private law office after which he was employed as a legal assistant at NS INVEST LLC and the Director of International Business Investment LLC Novi Sad. From 2010 until February 2018 he was the Chairman of the Supervising Board at the Hotel Prag Belgrade. In 2012 he became the Executive Director in the public enterprise for city construction and development „JP Zavod za igradnju grada“, and from 2013 General Manager of the sports center „SPC Vojvodina“. In 2014 he was elected as a member of parliament of the National Assembly of the Republic of Serbia. From 2014 until 2017 he was employed as the Executive Director in public enterprise for urban development „JP Urbanizam zavod za urbanizam“. In 2014 he successfully completed the 2014 cycle of the Council of Europe school of political studies and participated in the Third Forum for Democracy of the Council of Europe. The same year, he successfully completed the program of the Regional Academy for Democracy „Human and Minority Rights 2014“ by the Council of Europe. He was involved in several high priority investment projects, and since 2015 he has officially been Project Manager for a high priority investment by the city of Novi Sad. At the 2016 parliamentary elections he was re-elected as a member of parliament and became a member of the European Integration, Judiciary and Local Self-Government Committee. He is a member of the delegation of the National Assembly to NATO PA and to the Parliamentary Assembly of the Council of Europe. Since 2018 he has been working as an Attorney at law.

Thomas Mühlmann



Thomas Mühlmann currently serves as Deputy Director for South-East Europe and EU Enlargement and Head of the Unit for Southeast Europe at the Austrian Foreign Ministry. Previous assignments in the Ministry included Head of Unit for the Austrian Candidature for a Non-Permanent Seat in the UN Security Council (2006-08), Deputy Representative to the Political and Security Committee in the EU during the Austrian EU Presidency (2005-2006) as well as Head of the Austrian Office in Kosovo (1999-2001). He also served as Chief Political Advisor to the EU Police Mission in Bosnia and Herzegovina (2003-2005), Advisor to the EU Delegation to the African Union (2008-2010) and Chief of Staff of EULEX KOSOVO (2010-2015). He studied International Economics and Political Sciences.

Aleksandar Andrija Pejović


Aleksandar Andrija Pejović holds a Master's degree in International Relations from the National University of Greece. Currently, he is finishing his PhD studies in EU Law. Mr. Pejović used to be Minister of European Affairs of Montenegro, Chief Negotiator for Montenegro's Accession to the EU and National Coordinator for EU funds. As career diplomat, he has served his country in Ljubljana, Skopje and also in Brussels as the Head of the Mission to the EU. He is a member of the PES Presidency and the WEF Europe Policy Group. He writes, sculpts and is an Honorary Captain of the Boka Navy.

Nikola Poposki


Nikola Poposki was born on 24 October 1977 in Skopje, Republic of Macedonia. He received his bachelor's degree in economics from the Universities of Skopje and Nice in 2002. In 2004 he completed his master's degree in languages and international trade in the EU from the Universities of Rennes and Skopje, before adding a Master of Arts in European Economic Studies at the College of Europe in Bruges, in 2005. Mr. Poposki started his career in foreign affairs as Secretary at the Embassy of the French Republic to the Republic of Macedonia. He later worked at a joint research center from the European Commission and subsequently assumed the position of Ambassador at the Mission of the Republic of Macedonia to the EU. From 2011 to 2017 he served as Minister of Foreign Affairs of the Republic of Macedonia. Mr. Poposki was Deputy Prime Minister of the Republic of Macedonia from 2016 to 2017, has since been a member of parliament and presides the National Council for European Integration as President. Mr. Poposki speaks fluent French and English, he has knowledge of Italian, Dutch, and Croatian. Throughout his political career he has been honored with the Order of the Star of Italy (Grand Officer) and the Excellence Award for Contribution to the EU's Western Balkan Policy by the European Commission.

Lidija Prokic


Lidija Prokic comes from the Transparency International Secretariat where she recently took the role of Regional Advisor for Eastern and South East Europe working with TI National Chapters across sixteen countries. Before joining TI Lidija spent fifteen years with the National Democratic Institute (NDI) working on democracy promotion in Serbia, where she designed and managed programs focused on fostering citizen participation in decision making, strengthening of democratic institutions, women's political participation and accountability monitoring. Her working experience also includes human and minority rights, particularly issues pertaining to LGBTI people. In addition to her main focus on building capacities of Serbia's civil society and state institutions, she participated in a number of Institute's initiatives that brought together political party members, activists and parliamentarians from the Western Balkans. Until recently Lidija was engaged as a member of the Advisory Board in the Center for Research, Transparency and Accountability (CRTA), one of the leading fact-checking and parliamentary monitoring organizations. She is experienced in organizational capacity development, political organizing, policy advocacy and campaigning and has worked extensively with NGOs, political parties and state institutions. Lidija studied psychology, she is a native Serbo-Croatian speaker and is fluent in English.

Stefan Pürner


Dr. Stefan Pürner is currently Head of Section for Bosnia and Herzegovina, Macedonia, Montenegro, and Serbia at the German Foundation for International Legal Cooperation (IRZ). Dr. Pürner studied Law and Slavonic languages. He received his Doctorate in 1992 for a study on Yugoslav Company Law. The same year he started to work as an attorney at law mainly concentrating on cases related to the former Yugoslav countries. Since 2000, he has served as a long and short-term expert in various projects in Southeast Europe. He is also a co-editor of numerous publications on the law of former socialist countries, e. g. co-editor of *Handbuch "Wirtschaft und Recht in Osteuropa"* (Handbook on Law and Economy in Eastern Europe), and an Editor in Chief of *"Nova pravna revija – časopis za domaće, njemačko i evropsko pravo"* (New legal gazette – magazine for regional, German and European Law, <http://nova-pravna-revija.info/>) and *"Kontinentalno pravo – časopis za održiv i skladan razvoj prava"*, skraćeno: *KoPra* ("Continental Law – Magazine for a sustainable development of the law, www.kontinentalno-pravo.info/). Dr. Pürner also regularly gives lectures at faculties in various countries of the region. In addition to that he is running the Blog Exyusite - Neues und Altes aus dem "ehemaligen Staat" (News and Olds from the „former state“, <https://exyusite.net/>).

Yannic Remme



Yannic Remme has been working as a Junior Program Officer at the Aspen Institute Germany since January 2017. He was born in London, England, in 1993, but lived in Germany and the United States of America for most of his life. After graduating from the German School in Washington D.C., he obtained his Bachelor's degree (LL.B.) in International and European Law from the European Law School at Maastricht University in 2015. In the same year, Yannic got involved with the Aspen Institute Germany for the first time during an internship. Throughout 2016, he volunteered to work with the Colombian Ministry of Education on Public Education Reform in a program called *Colombia Bilingüe* in Bucaramanga, Colombia. In 2017, he rejoined the Aspen Institute Germany to work in its Southeast Europe Program. Yannic speaks German, English and Spanish.

Konstantin Samofalov



Konstantin Samofalov was born in 1982 in Belgrade and graduated from the Law School of the University of Belgrade in 2007. He served as an elected member of the Belgrade City Assembly from 2004 until 2008 and was elected to the Parliament of Serbia in 2007, 2008, and 2012. During his seven years in Parliament, he served on the defense and security committee and as a member of the Serbian delegation to the NATO Parliamentary Assembly. In 2009, he spent three weeks in the USA attending the State Department's International Visitor Leadership Program (IVLP). He has also participated in the Senior Executive Seminar at the George C. Marshall Center for European Security Studies in Garmisch-Partenkirchen on "Countering narcotics trafficking". In 2011, Konstantin served voluntarily in the Serbian armed forces as part of the infantry unit. In 2012, he graduated in "Advanced defense and security studies" at the Serbian Military academy. In 2014, Konstantin joined the newly established Social Democratic Party (SDS) of former President Boris Tadić. Since June 2014, he has served as Spokesperson of the SDS and Chairman of the SDS Defense Committee. He is currently a Master Candidate at the Faculty of Philosophy at the University of Belgrade.

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Senada Šelo-Šabić

Senada Šelo Šabić holds a Ph.D. in political science from the European University Institute in Florence (2003) and has earned two Master's degrees – in international relations from the University of Zagreb (1999) and in peace studies from the University of Notre Dame, USA (1996). She holds a B.A. in English from the Faculty of Philosophy of the University of Zagreb. Senada is a Fulbright Scholars Fellow as of 2011 when she completed the study programme in the US in national security. She also completed the study programme at the University of Oxford in 2004 on challenges of global human development, the World Bank training in 2013 on international development cooperation, in 2014 training in strategic foresight at the German Council on Foreign Relations and in 2017 the Leadership

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Tamara Takacs

Dr. Tamara Takács is a rule of law expert with many years of experience in designing and delivering capacity-building programs, trainings and workshops for members of the judiciary, legislators and civil servants and as consultant providing legal and policy advice for international donors (EC, OSCE, OSCE/ODIHR). She has worked extensively in Southeast Europe, Ukraine, and the MENA region on projects concerning the administration of and access to justice, independence and self-governance of the judiciary and corresponding reforms. Dr. Takács received her law degree from the University of Pécs (Hungary), a Master's Degree in European Union Law (D.E.A in Droit Communautaire) from Université Nancy 2 (France) and completed her doctoral dissertation (PhD) at Utrecht University

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Bernd Thran

Bernd Thran is currently the Deputy Head of Mission of EULEX Kosovo. Prior to this position, he has been working as Senior Police Adviser in the European External Action Service (EEAS) / Civilian Planning and Conduct Capability (CPCC), as Negotiator in the Dialogue team of the High Representative / Vice President (HR/VP) in Brussels and as Head of Section and Deputy Head of Division at the Ministry of Interior of Rhineland-Palatinate, Germany. Bernd Thran holds a Senior Degree in Public Administration and Police Management from the Police and Command Staff College at the Police University in Muenster, Germany.

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Ana Trišić-Babić is the founder and head of the Executive Board of Centre for Policy Development. The Centre is supported by a team of activists, politicians, investigative journalists and entrepreneurs from Southeast Europe, motivated by the need to act, here and now, without delay, and challenge the status quo in all countries in the region. Previously Trišić-Babić served as Deputy Minister of Foreign Affairs of Bosnia and Herzegovina. Holding her BA in Law and MA in Management, she started her career as a journalist with Radio Free Europe. In the post-war period, Ana contributed to peacebuilding efforts through her work with USAID – OTI, where she acted as the Project Leader for Media and NGO Development, and the Office of the High Representative where she was Assistant Head of OHR Political Adviser for International Relations. Her political and diplomatic career intertwined when she served as Foreign Affairs Advisor in the Government of Republic of Srpska. Trišić-Babić then worked as Assistant Minister for Bilateral Relations for six years, during which period she was also the Head of Work Group I for Stabilization and Accession Agreement. While dedicated to her position of Deputy Minister, she was also the President of BiH Council of Minister's NATO Coordination Team. Trišić-Babić assured to continually develop her security and state-building expertise academically as well, and thus is alumna of programs of distinguished institutions worldwide, such as Harvard's Kennedy School of Government. Throughout her career, Trišić-Babić was working hard to empower women as a part of peacebuilding and society development process. Her efforts were acknowledged when she was Bosnia and Herzegovina's candidate for CEDAW. Trišić-Babić now works as a political analyst and consultant and is still actively focused on women and youth empowerment.

Olga van Zijverden



Olga van Zijverden works as Program Officer with the Aspen Institute Germany's Southeast Europe Program. Olga joined Aspen in February 2018. She holds an MA in European Studies focusing on Central and Eastern Europe from the University of Leipzig and the Kliment Ohridski University in Sofia. In her Bachelor's she pursued a French-German Degree on International Economics. Previous to Aspen, Olga worked at the policy research institute Rand Europe in Brussels on diverse projects for European institutions. Later she managed a European Commission's project at TÜV Rheinland Consulting in the field of digitalization. Olga speaks German, English and French.

Ivan Vujovic



Ivan Vujovic was born on February 17th in 1977. He received a law degree from the University of Podgorica in 2000 with a focus on international relations. Additionally, he has numerous certificates in informal education. Mr. Vujovic served as UNDP Project Coordinator and later as Deputy Secretary for Culture and Education in the City of Podgorica. Between 2010 and 2016, he served as Advisor for International Relations in the Cabinet of the President of the Parliament of Montenegro and subsequently as Head of the Cabinet of the President of the Parliament. Currently, Mr. Vujovic is the Head of the Communication Department of the Socialdemocratic Party of Montenegro (SDPM). Within this party, he functioned as Member of the Presidency and the Local Board of SDPM in Podgorica. Further, he worked in both local and national election campaigns, in 2016 as Head of the Operative Election Headquarter. Mr. Vujovic has experience in the NGO sector and is fluent in English and Italian.

Nieves Zúñiga

Dr. Nieves Zúñiga received her MA and PhD in Political Science from the University of Essex in the UK. After her PhD she was Research Fellow at the School of Politics and International Relations at the University of Nottingham working on the EU's ANTICORRP project, Anticorruption Policies Revisited. Global Trends and European Responses to the Challenge of Corruption. At Nottingham she analysed the anticorruption policies in Bolivia and Rwanda and worked on the idea of integrity management to fight corruption. Since 2017 she provides research support to Transparency International's work on state capture in the Western Balkans. In addition, she supports the work of the Transparency International Anti-Corruption Helpdesk, providing tailored answers to corruption-related queries from Transparency International's movement as well as development practitioners.

Nieves has extensive experience as a researcher and public speaker on socio-political issues developed in the UK and in Spain, and she is specialized in qualitative research methods with fieldwork experience in Latin America and Africa. Her work has been published in books, journals, magazines, newspapers and on the internet.

THE NEW EU RULE OF LAW INITIATIVE FOR THE WESTERN BALKANS

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The European Commission adopted its new enlargement strategy for the Western Balkans in February 2018. This strategy sets out an action plan with six flagship initiatives, targeting specific areas of interest of both the EU and the Western Balkans countries, in particular in the fields of rule of law, security, migration, and good neighborly relations. Moreover, it provides a time frame for Serbia and Montenegro to potentially complete their accession process by 2025 and outlines the next steps to be taken by Albania, Bosnia and Herzegovina, Kosovo, and Macedonia to join the EU at a later stage. This paper evaluates the implications of the new enlargement strategy for rule of law reforms and argues that the negotiating chapter 23 on ‘Judiciary and Fundamental Rights’ and chapter 24 on ‘Justice, Freedom and Security’ should be at the heart of the strategy in order to support the transformation process in the region. Further, this paper discusses how the new enlargement strategy tries to overcome the enlargement fatigue in the EU and how this renewed approach injects reform momentum into both the rule of law and the fight against corruption in the Western Balkans.

Introduction

Since the successful integration of the Central and Eastern European states into the EU, the European Commission has attempted to replicate the same success in the Western Balkans, albeit with greater caution. However, the long-standing ethnic disputes, wide-spread corruption, state capture, organized crime, poor track record of democracy and independent institutions as well as weak civil societies¹ have created many barriers for the enlargement policy in the Western Balkans. This especially holds true before the backdrop of the failure of the integration of Bulgaria and Romania as well as recent developments in Hungary and Poland aiming at ‘constitutional capture’ to gain political control over the judiciary, thereby weakening checks and balances.²

These multiple challenges can help to explain the delay in the EU integration process in the Western Balkans countries and underline the challenging conditions in which the EU is working in this region. Bearing this in mind, one of the bigger challenges in the six Western Balkans countries in the years to come will be to keep the political parties and citizens motivated to continue the reform process and ensure that the rule of law and independence of institutions are supported.³ So far, the EU’s enlargement policy on the Western Balkans has

¹ Sanfey, P., Milatovic, J., and Kresic, A. (2018) ‘How the Western Balkans Can Catch Up’. European Bank for Reconstruction and Development (EBRD) Working Paper No. 185. Available at SSRN: <https://ssrn.com/abstract=3119685> or <http://dx.doi.org/10.2139/ssrn.3119685> (Accessed: 6 March 2018).

² Maurice, A., and Meuwese, A. (2017) ‘Constitutionalism and the Rule of Law: Bridging Idealism and Realism’. Cambridge University Press, Cambridge, pp. 419 – 525.

³ Memeti, A. (2014), ‘Rule of Law through judicial Reform: A Key to the EU Accession of the Western Balkans’, *Contemporary Southeastern Europe*, Vol.1, No (1), pp. 58-67.

been running on autopilot and is rather perceived as a box-ticking exercise than as a substantial reform, such as in areas like the progress on democratization, the creation of independent institutions, the implementation of rule of law reforms and the respect of law as part of the daily culture.⁴

On February 8, 2018, the Commission adopted a strategy for 'A credible enlargement perspective for and enhanced EU engagement with the Western Balkans', thus supporting the future enlargement of the European Union in the Western Balkans region as a geostrategic investment for the EU.⁵ This strategy spells out the priorities and areas of joint reinforced cooperation, addressing the specific challenges that the Western Balkans face, in particular the need for fundamental reforms and good neighborly relations. Furthermore, the new enlargement strategy sets out six flagship initiatives targeting specific areas of common interest, such as the rule of law, security and migration, socio-economic development, transport and energy connectivity, the digital agenda, reconciliation and good neighborly relations.⁶

The aim of this paper is to provide an assessment of the EU's new enlargement strategy towards the Western Balkans and, in particular, to discuss the rule of law initiative. This paper will provide a brief analysis of the key obstacles that the region is encountering in the areas of corruption, organized crime and state capture.⁷ Furthermore, the paper will attempt to provide an answer to the critical question of whether the current EU approach to enlargement in the Western Balkans is sufficient and what the flagship initiative on the rule of law should focus on. Particular attention will be dedicated to the shortcomings of the enlargement strategy in previous accession countries, which now have problems with respecting the rule of law. This is followed by several recommendations for the rule of law initiative and the action plan for the Western Balkans regarding their ongoing structural reforms in the area of judiciary and security.

Supporting the Rule of Law as a Policy Goal

The Western Balkans Strategy pays particular attention to the issues concerning the rule of law, with the topic constituting one of the six flagship initiatives. The strategy sets out some broad suggestions for strengthening the rule of law in the region and points out that in the next two years, 2018-2020, the Commission will develop a detailed action plan together with the countries from the region to address shortcomings and prioritize key issues to align existing legislation and practices with EU standards.⁸ Furthermore, the strategy illustrates that the EU will work closely with the Western Balkans towards ensuring that the judicial reform is passed and implemented accordingly. Moreover, the EU will offer technical support to the Western Balkans in the fight against corruption and organized crime.

The Western Balkans enlargement strategy indicates that the EU should make use of the negotiating frameworks in the case of Montenegro and Serbia, particularly to address the outstanding issues concerning the rule of law reforms throughout the negotiations process. Thus, the Commission recommends that greater use should be made of the leverage provided in the negotiating frameworks with the countries of the Western Balkans. Furthermore, the strategy suggests that substantial improvement in the rule of law and, in particular, judicial reform and the fight against corruption and organized crime is crucial for the Western Balkans and must be addressed before technical talks on other chapters of the accession negotiations can be closed.

These proposals set the stage for meeting the membership criteria regarding the rule of law, also known as the 'Copenhagen criteria'.⁹ In particular, the strategy's focus on judicial reforms, the fight against corruption and organized crime, and depoliticizing public administration in order to enhance a functioning democracy and independent institutions is expected to strengthen the rule of law.¹⁰ Albania is an example where the Commission made judicial reform a key condition for opening accession talks. All 140 lawmakers in Albania's parliament voted in favor of the judicial reform package on July 21, 2016, which amended nearly one third of the constitution.¹¹ On paper, the constitutional amendments

⁴ Gstohl, S. (2016) 'The European Neighbourhood Policy in a comparative perspective: models, challenges, lessons. Routledge', pp. 1 – 15.

⁵ European Commission (2018), 'Communication on A credible enlargement perspective for and enhanced EU engagement with the Western Balkans', COM (2018) 65 final.

⁶ European Commission (2018), 'Communication on A credible enlargement perspective for and enhanced EU engagement with the Western Balkans', COM (2018) 65 final.

⁷ Transparency International (2016), 'Fighting Corruption in the Western Balkans and Turkey: Priorities for Reform'. (online), pp.1-18. Available at: https://www.transparency.org/whatwedo/publication/fighting_corruption_in_the_western_balkans_and_turkey_priorities_for_reform (Accessed: 6 March 2018).

⁸ European Commission (2018), 'Communication on A credible enlargement perspective for and enhanced EU engagement with the Western Balkans', COM (2018) 65 final.

⁹ Müller, J. (2015) 'Should the EU Protect Democracy and the Rule of Law inside Member States?', *European Law Journal*, Vol. 21, No. (2), pp. 141–160.

¹⁰ Fagan, A., and Kopecký, P. (2018), 'The Routledge Handbook of East European Politics', Abingdon, Oxon: Routledge, pp. 113 – 125.

¹¹ Albert, R., and Benvindo, J., and Rado, K., and Zhilla, F. (2017), 'Constitutional Reform in Brazil: Lessons from Albania?', Boston College Law School Legal Studies Research Paper No. 453. Available at SSRN: <https://ssrn.com/abstract=2960734> (Accessed: 6 March 2018).

and legal changes to establish new institutions are aimed at battling organized crime and corruption, thus reducing the politicians' long-standing influence on the courts. The reform is seen as a major step in the nation's journey towards EU membership and the Commission has expressed that it will recommend opening accession talks in June 2018.¹²

In theory, the judicial reform should ensure that Albania formally fulfills the criteria set out in the negotiating chapters 23 and 24 on 'Justice, Freedom and Security'. However, in my assessment, tangible results in implementing the judicial reform and developing a positive track record in fighting high-level corruption and organized crime will also be required. Furthermore, the vetting of key 'Anti-corruption institutions, the Prosecutor's Office, the High Court, the Central Election Commission and the High Inspectorate for the Declaration of Audit of Assets and Conflict of Interest' will be necessary in Albania, as they are regularly subjected to political pressure, preventing them from implementing the new judicial reform. Moreover, many employees of these institutions as well as Members of Parliament have been subject to previous criminal conviction and links to organized crime.¹³ In my view, the Western Balkans countries will need to go through a thorough judicial reform and will be required to show a track record of cracking down on high-level corruption and organized crime.

Rule of Law Flagship Initiative

The Western Balkans enlargement strategy sets out the EU's support to the transformation process of the region, targeting specific areas of interest of both the EU and the Western Balkans. This paper focuses on the main initiative, the rule of law. So far, the enlargement strategy points towards addressing reforms in the areas of rule of law, fundamental rights and good governance, as they remain the most pressing issues in the region.¹⁴ Furthermore, as the strategy suggests, the key benchmark against which the prospects of these countries will be judged is the rule of law. Moreover, the initiative on the rule of law underlines that the Western Balkans countries must embrace fundamental EU values and incorporate

them into their daily culture. Therefore, strengthening the rule of law is not only an institutional issue, but it also requires a societal transformation in the countries of the Western Balkans.

The key message of the Western Balkans enlargement strategy regarding the rule of law is to ensure the independence, quality and efficiency of the judicial system. The strategy not only requires the independence of the judiciary and of individual judges to ensure fairness and to hold the executive and legislative branches of the government to account, but it can also be translated as a crucial precondition for any democratic society based on the rule of law in the European Union.¹⁵

In my observation, in order to transform the judicial system into an effective and independent body, the judiciary and its institutional operations must not only be re-organized and re-structured, but Article 2 of the Treaty on European Union (TEU) must also be fully embraced. This Article states that the European Union is founded on values such as the respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights, including the rights of persons belonging to minorities.¹⁶ It is crucial that Western Balkans countries demonstrate their respect of Article 2 of TEU, especially now that some Member States in the EU have backtracked in this regard.

An example of this is Hungary, where the Government is abusing its constitution-changing majority in order to eliminate forms of extra-parliamentary control through the court system as well as the media.¹⁷ Furthermore, similar tendencies can also be observed in Poland, where the governing coalition has undermined the independence and functioning of the constitutional court and seeks to restrict the freedom of the media.¹⁸ Therefore, the political situation in some of the Member States jeopardizes the values set out in Article 2 of TEU to a considerable degree; this notably holds true for the principle of the rule of law. Thus, the EU needs to adopt a tougher stance in the Western Balkans prior to welcoming these countries as new Member States.

¹² Juncker, J (2018) Interviewed by Efi Koutsokosta for Euronews, 02 March. Available at: <http://www.euronews.com/2018/03/02/jean-claude-juncker-and-eu-enlargement-fatigue> (Accessed: 6 March 2018).

¹³ Mejdini, F. (2016), 'Albania Sacks MPs and Mayor for Hiding Convictions', *Balkan Insight*, 29 December. Available at: <http://www.balkaninsight.com/en/article/two-albanian-mps-and-a-mayor-dismissed-from-office-12-29-2016> (Accessed: 6 March 2018).

¹⁴ European Commission (2018), Communication on A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM (2018) 65 final.

¹⁵ Konstadinides, T. (2017), 'The Rule of Law in the European Union: The Internal Dimension Modern Studies in European Law', Oxford and Portland: Hart Publishing, pp. 15 – 38.

¹⁶ Closa, C., and Kochenov, D. (2016), 'Reinforcing Rule of Law Oversight in the European Union', Cambridge: University of Cambridge Press, pp. 68 – 69.

¹⁷ Jusic, A. (2016), 'Constitutional Changes and the Incremental Reductions of Collective Religious Freedom in Hungary', *Vienna Journal of International Constitutional Law*, Vol. 10, No. (2), pp. 199-219.

¹⁸ Wojciech, S. (2018), 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding'. *Sydney Law School Research Paper No. 18/01*. Available at SSRN: <https://ssrn.com/abstract=3103491> (Accessed: 6 March 2018).

In my view, the rule of law flagship initiative should focus on three transformational pillars in order to strengthen the rule of law in the Western Balkans: (1) Increasing Judicial Capacity, (2) Access to Justice; and (3) Digital Justice. Below is a brief discussion on how these pillars can both transform the judiciary and strengthen the rule of law.

1) Increasing Judicial Capacity

In this pillar, the EU can anchor key changes in the Western Balkans related to the culture, organizational structure, and good governance practice in the judiciary, thereby improving transparency and tackling corruption more effectively.

The experience with Bulgaria and Romania, where the Commission established a monitoring mechanism known as the ‘Cooperation and Verification Mechanism’ to ensure that the rule of law is upheld in line with EU standards, has led the Commission to exert more caution, thus requiring future members to have a better track record in this respect.¹⁹ With regard to the rule of law reform in the case of Bulgaria and Romania, in addition to the recent developments in Poland and Hungary, it can be seen that a merely institutional approach to the rule of law and, in particular, in closing Chapters 23 and 24 which pertain to ‘Judiciary and Fundamental Rights’ and ‘Justice, Freedom and Security’, is not adequate and that wide-reaching social transformation is also needed.

In the previous round of enlargement, the accession negotiations were rather a box-ticking exercise regarding legislative approximation. Thus, the EU’s rule of law promotion policy in candidate countries translated the rule of law into an institutional checklist.²⁰ An argument against such a merely formal approach in the rule of law promotion by the EU so far is that it does not work beyond the norm adoption phase of particular legislations; thus, this leverage is only available during the negotiation phase.²¹ Therefore, the EU should work together with the countries of the Western Balkans in seeking to change the philosophical compass for the judiciary and place good governance practice at the heart of modernizing the justice system.

The judiciary in the Western Balkans is, in most cases, subject to ‘political capture’ and is highly corrupt.²² Therefore, creating a judiciary that is sensitive and

responsive to the needs and EU aspirations of ordinary citizens is crucial. Furthermore, the initiative on the rule of law should seek to create an institutional environment of the judiciary that is friendly and fair to people in its decisions and process. Thus, establishing a framework based on accountability, integrity and openness that will undergird the institutional design of the judiciary should be a major part of the rule of law initiative. Furthermore, the initiative can support an adoption of modern management practices driven by a clear focus on results and a reliable accountability, monitoring and evaluation framework assisted by the Commission. This will also help to institutionalize the performance of judicial systems and, as a result, strengthen the judicial processes and potentially eliminate unethical practices and reduce the level of corruption.

The infrastructural investment in the judiciary has been inadequate in the Western Balkans thus far. Courts are usually far away, thereby forcing citizens to travel long distances as soon as cases move to upper courts and tribunals. Thus, many years of neglect and underinvestment have undermined the objective of access to justice of ordinary citizens in the Western Balkans. Therefore, together with the countries of the region, the EU’s rule of law initiative should develop an infrastructure development strategy to accelerate the reconstruction of courts and increase the capacity and resources of the judiciary. The overall objective should be to render the judiciary more accessible to the citizens of the Western Balkans countries.

2) Access to Justice

The constitutions of the countries of the Western Balkans by law guarantee equal protection for their citizens. Thus, the constitutions ensure that all state organs must enable access to justice for all of their citizens. However, access to justice and free legal aid still poses a challenge to citizens of the countries of the Western Balkans.²³

In this pillar, the rule of law initiative should pay attention to supporting the judiciary in taking effective steps towards reducing the obstacles that hinder public access to information, ensuring proximity and closer access to courts as well as simplifying court procedures so that all parties can effectively participate in court processes.²⁴ The constitutions of the countries of the Western Balkans by law demand that the judiciary must

¹⁹ Carp, R. (2014), ‘The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism’, *Utrecht Law Review*, Vol. 10, No. (1), pp. 1-16.

²⁰ Dallara, C., and Piana, D. (2015), ‘Networking the Rule of Law: How Change Agents Reshape Judicial. Surry: Ashgate Publishing’, pp. 17 – 32.

²¹ Knezić, M. (2015), ‘The Western Balkans and EU Enlargement: Lessons learned, ways forward and prospects ahead’. European Parliament Think Tank. Available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_IDA%282015%29534999 (Accessed: 6 March 2018).

²² Transparency International (2016), ‘Fighting Corruption in the Western Balkans and Turkey: Priorities for Reform’, (online) Available at: https://www.transparency.org/whatwedo/publication/fighting_corruption_in_the_western_balkans_and_turkey_priorities_for_reform (Accessed: 6 March 2018).

²³ European Commission (2017), Press Statement on EU – Western Balkans Justice and Home Affairs Ministerial Forum. (online) Available at: http://ec.europa.eu/newsroom/just/itemdetail.cfm?item_id=606474 (Accessed: 6 March 2018).

²⁴ Westminster Foundation for Democracy (2016), ‘Regional Road Map on Good Governance for the Western Balkans’. (online)

offer access to justice. However, the judiciary is not open and available to all who seek its assistance due to high levels of corruption and lack of resources. Therefore, the initiative on the rule of law must ensure that an effective strategy to reducing the citizens' alienation from the justice system is established, thereby simplifying the court documents and procedures for all parties involved in the due process.

The rule of law initiative should also support the establishment of more courts or tribunals, in particular with regard to special courts for young offenders and other vulnerable groups.²⁵ Furthermore, small claims courts and tribunals of petty offenders should be supported in the initiative in order to provide more effective and fairer trials. The rule of law initiative might also encourage and offer technical support in developing a digital case management system and apply appropriate technology to enhance court efficiency, including audio-visual recording and transcription of court proceedings. This would not only make courts more transparent and easy to access, but also reduce the level of corruption in the judiciary.

As a last point, the rule of law initiative should, in my view, support the establishment of free legal aid centers and incorporate these into the judicial system.²⁶ In every EU Member State, the exercise of basic human rights and freedoms mostly depends on the fact of whether and how the rights to free legal aid are attained. Furthermore, free legal aid is a very important element of the access to justice and public administration bodies for all the citizens, especially for marginalized and vulnerable groups. However, exercising the right to free legal aid depends on the functioning of judicial institutions and state administration, their accessibility by the citizens, and legal culture in a society. In the Western Balkans, access to justice is challenging and limited, due to that fact that legal aid is not fully institutionalized and there is still a lack of trust in the institutions based on their communist and authoritarian legacy.²⁷ Thus, the rule of law initiative for the Western Balkans should prioritize access to justice and support the establishment of free legal aid for the public.

3) Digital Justice

The use of technology in the judiciary has an enormous potential to improve the administration of justice as a cross-cutting imperative for the above pillars that this paper suggests in transforming and modernizing the judicial system in the Western Balkans. If the technology is properly harnessed and deployed throughout the judiciary, it can have a positive impact on enabling fair trials and further enhancing the effectiveness of administrative processes through data management, data processing, and secure archiving of the information of cases.²⁸ Such use of technology would guarantee more transparency and fairness in the adjudication of cases and the due process, as well as facilitating a better internal and external communication of the judiciary in the region. Thus, the use of technology has great potential to also enhance public confidence in the judicial process, the lack of which Western Balkans courts currently suffer from. Furthermore, using technology will minimize the risk of misplacement or loss of court files, and make it easier to conduct an annual review of the judiciary performance.

Therefore, the rule of law initiative should encourage the use of technology in the judiciary and, more broadly, in delivering public services across the Western Balkans. Many studies support that the use of technology can help to deliver more efficient, intelligent and citizen-centric public services as well as encourage fairer decisions in courts.²⁹ However, to date, public services in the Western Balkans have barely scratched the surface of technology's potential and, therefore, the rule of law initiative can make a transformative change by increasing the use of technology in the delivery of services by the judicial system. In most countries of the Western Balkans, long court delays are common and efforts to reduce the time frame have not been a policy objective so far.³⁰ Therefore, the court system remains cumbersome and victims of crime must wait a long time for cases to be completed. There is also a significant regional variation between metropolitan and rural areas. Thus, in my evaluation, the increase of the use of video technology is a key part of the answer to these interrelated issues. Furthermore, the use of technology would also fight corruption more effectively in the justice system. Another logistical issue, which the use of technology could change, is the convention that court

Available at: http://www.wfd.org/wp-content/uploads/2017/11/Regional_Road_Map_Good_Governance.pdf (Accessed: 6 March 2018).

²⁵ Jeffrey, A., and Jakala, M. (2015), 'Using courts to build states: The competing spaces of citizenship in transitional justice programmes', *Political Geography*, Vol 47, pp. 43 – 52.

²⁶ Huszka, B., and Körtvélyesi, Z. (2017), 'Human Rights and EU Conditionality in the Western Balkans Intersections', *East European Journal of Society and Politics*, Vol 3, No (2), pp. 8 – 52.

²⁷ Elbasani, A. (2013), 'European Integration and Transformation in the Western Balkans. Europeanization or Business as Usual?', Abingdon, Routledge, pp. 85 – 101.

²⁸ Alcaide, L., and Rodriguez, M. (2017), 'International E-Government Development: Policy, Implementation and Best Practice', Cham: Palgrave Macmillan Publishing, pp. 39 – 73.

²⁹ Preiser, W., Hardy, A., Schramm, U. (2018), 'Building Performance Evaluation', Cham: Springer Publishing, pp. 223-230.

³⁰ Sanfey, P., Milatovic, J., and Kresic, A. (2018) 'How the Western Balkans Can Catch Up', European Bank for Reconstruction and Development (EBRD) Working Paper No. 185. Available at SSRN: <https://ssrn.com/abstract=3119685> or <http://dx.doi.org/10.2139/ssrn.3119685> (Accessed: 6 March 2018).

hearings are dependent on getting every relevant actor in the same room at the same time. Particularly at the early stages of the judicial process, this exercise is quite unnecessary and expensive too, in particular for the countries of the Western Balkans, where the budget is limited. The rule of law initiative could thus explore the use of a virtual court, which establishes a video link between defendants detained in police custody or prison and a court room. As a result, such practice could reduce the time between custody and the first hearing from hours to minutes. Furthermore, transporting defendants who are detained in prison or a police station is a time-consuming and risky operation, during which detainees have previously escaped from court houses or en route to the court. This can be avoided by police/prison-to-court video links, hereby also reducing the expense attached to running court custody facilities. Therefore, greater use of technology in the judiciary can significantly cut some of the costs involved, thereby freeing up resources that can be made available for better use of public services for the citizens of the Western Balkans.

Conclusion

The EU's new enlargement strategy for rule of law reforms in the Western Balkans is promising and offers a platform for a productive dialogue between the EU and the countries of the Western Balkans. Moreover, it is a clear indication of the EU's future engagement in the region. The six flagship initiatives target specific areas of common interest, such as the rule of law, security and migration, socio-economic development, transport and energy connectivity, the digital agenda, reconciliation and good neighborly relations. These constitute encouraging policy objectives for transforming the countries of the Western Balkans into more liberal democracies. The initiative to strengthen the rule of law in the Western Balkans is therefore very much welcome, as the new approach can accelerate the process of the judicial reform in the region. However, the Commission should aim to not only focus on institutional capacity-building in the region to strengthen the rule of law, but also on the cultural transformation of the judiciary. In my view, the rule of law initiative should focus on three transformational pillars to further strengthen the rule of law: judicial capacity, access to justice and digital justice. As outlined above, these three pillars can assist the countries of the Western Balkans in fighting corruption more effectively in the judiciary as well as offering better access to justice to its citizens.

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INTERNATIONAL PROMOTION OF RULE OF LAW: FACING CONNECTIONS BETWEEN PATRONAGE, CRIME AND JUDICIARY CORRUPTION

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How do externally promoted judiciary reforms fare in specific post-communist contexts marked by strong connections between organized crime, political patronage and a corrupt judiciary? Can the EU and international involvement break down long-established links and historical processes that keep the judiciary hostage to politics? What kind of institutional change can we expect based on the evidence of externally promoted reforms so far?

This paper analyses the resistance to recent judiciary reform in the case of Albania, which is often seen as one of the most advanced cases of internationally promoted reform and, possibly, as a model to replicate across the region. Specifically, we analyze what the reform seeks to establish, what the anti-reform block stands for, and whether the international community can break down binding connections between organized crime, political control and judiciary corruption, that characterize the current system.

Introduction

On December 18, 2017, the Albanian Parliament elected a temporary Prosecutor General, Arta Marku. Her profile is radically different for a system that has traditionally favored political protégés: Marku brings along 15 years of experience in the Albanian provinces, where she has shown remarkable integrity, no affiliation with politics, and no preference for media fuss. Notably, she is among the first institutional outputs of an internationally-led reform, which has been in the making since 2014 and promises to vet all levels of the judiciary for links to crime, corruption and politics.¹ Hence, her choice is the epitome of what the reform seeks to establish, but also demonstrates who stands in the way and what form of resistance can be expected.

The reform project was largely sponsored by the EU and the US, who provided much of the preparatory work and expertise, facilitated political negotiations and supplied the necessary financial sources. The ruling majority, 2013 to present, backed the project by leading a special parliamentary commission, extending political support, and steering related constitutional changes in July 2016. ‘Today’s vote will set the stage for a much-expected revolution of the judiciary... I assure the Albanian people – the iron broom of vetting will wipe out corrupt judges and prosecutors,’ the Prime Minister Edi Rama

¹ Elbasani, Arolda. 2017. ‘Judiciary as a Mechanism of State Capture: External Actors, Party Patronage and Informality.’ In *Captured*

States in the Balkans, Perspectives No 3: <https://ba.boell.org/bs/2017/09/29/perspectives-captured-states-balkans-0;>.

told the Parliament following the consensual vote of July 2016.²

The implementation of the constitutional package, however, proved rather slow and uncertain. To start with, the drafting of the reform package had already begun in 2014, with all parties' declaration of enthusiastic support, but the legal package only made it to the Parliament after two years of inexplicable delays, blockages, boycotts, and political touches to experts' drafts. The political ultimatum from its international sponsors, including a text message from the US Ambassador 'summoning' Albanian MPs to the US Embassy to 'take vision of the consequences the American state would adopt towards them in case of voting against the reform', was instrumental for the extraordinary midnight voting of the package in the Parliament. Even afterwards, critical secondary laws, and the institutions necessary to realize what was agreed upon, were fiercely challenged, boycotted and blocked along the way; indeed a reminder of the powerful and effective anti-reform block that militates against it.³

The need for a temporary Prosecutor General itself exposed the delays in creating the new institutional set-up already agreed upon in the 2016 constitutional package. Moreover, before, during and after the election of the new Prosecutor, major opposition parties rallied against her voting in the Parliament. On the day of Marku's election, the Parliament was in uproar: bodyguards had to protect her from possible physical attacks by members of the opposition, and key political representatives announced her election unconstitutional.⁴ Their position stood in stark contrast not only to international experts' opinion that provided the legal justification for Marku's election, but also to international actors' public support for her profile. The opposition's warning of 'popular confrontation with major consequences of stability' even brought aggressive militants in front of Parliament to disrupt the vote.

The new Prosecutor General only received the votes of the governing majority, which, in the mid-2017 elections, had attained an absolute majority of parliamentary seats, also because of the promise of

judiciary reforms. The swearing in of the Prosecutor amidst tear gas and war-like attacks, however, heralded ongoing resistance and many blockages along the way. What brings together the resisting block, what it stands for and the interests at play are made clear by the profile of the outgoing Prosecutor General, Adriatik Llalla, a nominee and long-term protégé of the protesting parties, but also publicly known for his corruption-tainted profile, links to organized crime and the politically sponsored career.

Judiciary, Crime and Corruption

In February 2018, Llalla, who had just ended his term in office, was designated as the first Albanian official to be publicly banned entry to the US based on evidence of 'significant corruption'.⁵ The US press release for the occasion stated: 'In cases where the Secretary of State has credible information that foreign officials have been involved in significant corruption or gross violations of human rights, those individuals and their immediate family members are ineligible for entry into the United States.'⁶ Back in 2017, Llalla was also nominally mentioned as one of the officials blocking reform and was deprived of his US visa together with a few other high-ranking colleagues in the judiciary.

The US didn't release specific evidence on Llalla's corruption, but the media has already provided a wealth of data on the former Prosecutor's affairs, including hints that Llalla's family had developed unusually expensive tastes for holidays, cars, fashion, and real estate. Evidence of the luxury and lavishness the family enjoyed was totally disconnected from their official income. Only during the last months in office, Llalla was apparently involved in transactions worth millions of dollars, which fitted into a clear scheme of money laundering, such as the reevaluation and sale of properties, which he had bought only a few months before, at a much higher price.⁷ In one case, the transaction involved selling a property for a price 23-times higher than the one he had allegedly bought it for from a person with an official record of killings and various crimes.⁸ The public also learned that Llalla's high school diploma cannot be found, but the alleged lack of secondary education

² Euractiv. 2016. Albanian Parliament Passes Judiciary Reform Key to EU Accession. <https://www.euractiv.com/section/enlargement/news/albania-parliament-passes-judiciary-reform-key-to-eu-accession/>.

³ Carmona-Boryas, Robert. 2017. Judicial Reform in Albania still Face Many Obstacles. <http://thehill.com/blogs/congress-blog/foreign-policy/322819-judicial-reforms-in-albania-still-face-many-obstacles>.

⁴ Semini, Llazar, 2017. Albania opposition protesters in clashes outside parliament <http://www.chicagotribune.com/news/nation/world/sns-bc-eu--albania-parliament-clashes-20171218-story.html>; Daci, Merxhan, Albania's Judicial Reform all but Go Up in Smoke. www.euronews.com/2017/12/31/albania-s-judicial-reforms-all-but-go-up-in-smoke.

⁵ <https://www.state.gov/r/pa/prs/ps/2018/02/278338.html>.

⁶ Erebara, Gjergj. 2018. US Bans Albanian Former General Prosecutor. www.balkaninsight.com/en/article/us-state-department-bans-albania-former-general-prosecution-from-entering-us-02-152-018.

⁷ The Scheme: How Adriatik Llalla transformed 100 thousand dollars into a million and a half. www.gazetatema.net/2018/03/09/skema-e-plote-si-i-beri-magjistari-adriatik-llalla-100-mije-eurot-nje-miliard-eegjysem/.

⁸ 2018. The document: Adriatik Lalla Buys from the Killer. www.tiranapost.al/dokumenti-adriatik-llalla-bleuvrasesit3000metrakatoreullishte-ne-tirane-per-1-5-milione-leke.

seemed rather insignificant amidst the allegations of criminal charges that have surfaced.

Indeed, the former Prosecutor General is a meaningful case and perhaps one of the institutional orchestrators of by now evident connections between the judiciary, crime, and corruption, but he is neither an isolated case and quite probably nor the worst. 80% of Albanian professional judges cannot justify their own declarations of assets.⁹ The recorded ownership of substantial business shares, large portfolios of real estate properties, large bank accounts, dynamic movements in the property portfolios and luxurious lifestyles of Albanian judges may appear shocking to judges in other parts of the world.¹⁰ And that is only the tip of the iceberg that is made public based on the Albanian judges' declarations of assets. The noted discrepancies between their official income and declarations, let alone undeclared assets, tend to escape any judicial scrutiny thanks to the cooperation of their colleagues within the system. Cases of judiciary corruption that are exposed in the media, however, indicate individuals paying judges 'in cash' for favorable decisions, the prosecutors' manipulation of evidence, the judiciary transfer of big chunks of state properties to individual claimants, burdening of the state with harsh penalties when the state is a party, favors to corrupt businesses, and, in general, the doctoring of final decisions based on who offers the highest bid. Anecdotal evidence shows a well-organized scheme of bribe-sharing between lawyers, judges and prosecutors. Not surprisingly, surveys persistently rank the judiciary as the most corrupt institution.

Llalla's alleged transactions with registered criminals are also symptomatic of a larger trend of connections between the judiciary and organized crime, where some of the judiciary's unjustified wealth seemingly stems from. The Albanian public has already learned long ago, both through the media and personal experience, that renowned 'international' criminals – killers, pimps, drug dealers and leading heads of organized crime – get released during various stages of the 'due' process. The released protagonists come to the attention of the public not because they are investigated, but because they often strike again. In an explosive case in 2016, a notorious prisoner accused of several killings, international drug trafficking and orchestrating businesses' racketeering schemes – activities which the police found he continued to pursue from prison – was pardoned for 'good behavior'.¹¹ Various prosecutors and judges involved in his decade-long process gave him minimal fines and then systematically shortened his term in prison – decisions which went through and involved various levels of the judiciary. The US ambassador, then actively involved in

the ongoing judiciary reform, did not mince his words: "I want to say to the corrupt judiciary that this is an unacceptable decision."

Patronage Networks: Political Sponsorship and Judiciary Services

Most importantly, the outgoing Prosecutor General best signifies political sponsorship of key members of the judiciary in return for their political loyalty and services, including the cover-up of high-level political corruption.¹² Political sponsoring usually entails nomination and promotion of suitable political candidates across top layers of the judicial hierarchy. Until the 2016 reform package, the politicization of Albanian presidents, who maintained the constitutional prerogative to nominate key judiciary posts and chair the High Council of the Judiciary, proved to be the key institutional mechanism through which party cronies made it into the judicial hierarchy.¹³ As five out of six post-communist presidents have been nominees of one party and the first and last two presidents hailed from that party's close circle of leadership, the Albanian presidents usually served to carry out party patronage schemes by positioning individual and party loyalists across the judiciary system. The process of selection, moreover, typically sidelined professional criteria, thus often promoting people who lacked the required expertise and experience for the job. Since those appointees owed their job to the party, they served the party patronage schemes – by controlling active investigations, nominating lower-level appointments, distributing cases to suitable prosecutors and judges, etc. – in order to advance their careers. Consequently, not only did the Albanian presidents establish a long-running mechanism of political patronage, but they also helped to maintain low professional standards, as the second side of the same coin.

The system of patronage-cum-low-professional-standards was not incidental. Instead, it proved an effective tool to transform the judiciary into a subsidiary political institution. Llalla came to office as a result of that purposeful mechanism involving a politically-charged presidency and a corruption-tainted ruling majority in need of keeping the judiciary under control. The nomination and timing of Llalla's appointment back in 2012 was very significant with regard to how and why he would acquire that position. At the time of his appointment, the ruling coalition faced daunting cases of political corruption, involving key members of the then-Cabinet – a 2007 case that allegedly cost the state €230

⁹ Likmeta, Besart. 2016. The Integrity Gap, <http://www.balkaninsight.com/en/article/the-integrity-gap-albanias-appeals-court-judges-asset-disclosures-raise-redflags-06-16-2016>.

¹⁰ Bakillari, L. 2016. Albanian Judges' Wealth Escapes Scrutiny, <http://www.balkaninsight.com/en/article/albanian-judges-suspicious-wealth-escapes-scrutiny>.

¹¹ BTI. 2018. Albania Country Report.

¹² Elbasani, A. and S. Šelo Šabić. 2017. 'Rule of law, corruption and democratic accountability in the course of EU enlargement.' *Journal of European Public Policy*. Onlinefirst: <http://www.tandfonline.com/doi/abs/10.1080/13501763.2017.1315162>.

¹³ Elbasani, 2017

million, a 2008 case including the explosion of a facility that killed 26 people, a 2011 case involving the live-broadcasting of huge corruption deals among key members of Cabinet, and a 2012 case involving the

killing of four unarmed protesters by the Republican Guard, whose chain of command was limited to top government officials.¹⁴ Since all cases implicated key ministers, the PM and their family members, the then-ruling majority was keen on investing in a president from their close political circle for the 2012 presidential race. To be sure, the outgoing President was also the former number two of the same party, but not meek enough to respond to the party's immediate contingencies. The President-elect in 2012 was indeed part of the ruling majority's Cabinet before being voted into his new position. Once in the new office, he made sure to remove via a questionable process the acting prosecutor who had dared to open investigations into some of the abovementioned cases, and whom his party echelons had publicly humiliated as a 'boulevard prostitute' on national TV.¹⁵

The President's choice for the vacant position, Llalla, had already shown political loyalty in his appointment as chief of the High Directorate of Declaration and Audit of Assets - an institution which, under Llalla, maintained total silence on unfolding cases of corruption. Llalla showed the same political loyalty and submission in his new position by closing all old and new cases of political corruption.¹⁶ He also mobilized against the reform package that targeted the very patronage relations, impunity of political abuses, and judiciary corruption that he represented. When facing accusations from the US ambassador that, 'for 18 months, the Attorney General has spoken persistently and loudly against reform', Llalla wrote a letter of 'complaint' and then met to discuss his reaction with the then-President-elect and the then-Chair of the Parliament, both representing the coalition that had entrusted him to the position, leaving no doubt as to whom he relied on. Indeed, loyalty and services of patronage networks work both ways: Llalla was nominated to control ongoing investigations into high-level political abuses of office, and so he did; the presidency and the parties that nominated him, in return, extended their protection throughout all the eventful moments that marked his term in office between 2012 and 2017.

Yet, the 'mutual services' between politics and judiciary that the outgoing Prosecutor General represents

implicate all levels of the judiciary system. How politically 'delicate' cases end up going nowhere because of the collaboration of the judiciary is illustrated by a case on the privatization and subsequent collapse of the Albanian Power Distribution Company, the so-called CEZ affair, in 2016. The then-Attorney General, Llalla, who enjoyed centralized control over active investigations, refused to investigate a file documenting potential abuses in the 2009 privatization scheme. The High Court of Justice, another important institution that is usually filled with political appointees and thus has a reputation for serving as a political instrument,¹⁷ effectively closed down further investigations. A parliamentary committee led by the ruling party, which was in opposition when the privatization was concluded, continued to investigate the involvement of key political figures – several then-ministers, the former PM, his son, and other state officials – in the affair. The parliamentary investigations showed that a third person received a \$7 million transfer for 'consultancy', a sum he withdrew in cash soon after the deal. The same 'consultant', who is neither a public official nor any kind of expert in the field, had registered around 100 calls with the then-PM back in 2006, when the privatization was not yet on the public agenda. Neither the recorded calls, nor red-light transfers, nor disclosed emails and meetings between the 'consultant', Albanian politicians and their relatives, proved sufficient for the judiciary to investigate the case, a demonstration of how the system serves to cover up political corruption.

So far, various levels of the judiciary have managed to obstruct, delay and ultimately close down all cases of high-level political corruption, a strong indicator that it is the politics that pull the strings of the system.¹⁸ When the Parliament voted for Llalla's successor, the US ambassador made clear the link between political and judicial corruption that the reform targeted: 'The Prosecutor General who refused to prosecute politicians is gone. The people of Albania are impatient for justice. And the politicians are afraid.' Whether other implicated members of the judiciary will be ousted and the judiciary will amass independence to investigate political corruption remains to be seen.

Externally Promoted Reform: What the International Stakeholders Got Wrong

Disturbingly, however, Llalla is also the epitome of the institutional changes that the international actors,

¹⁴ Primatarova, A. and Deimel, J. 2012. Bridge over Troubled Waters? The Role of Internationals in Albania. Center for Liberal Strategies, Sofia; BTI. 2014. Albanian Country Report. https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2014/pdf/BTI_2014_Albania.pdf.

¹⁵ BTI, 2014.

¹⁶ Elbasani, Arolda and Senada Šelo Šabić. 2017. 'Rule of law, corruption and democratic accountability in the course of EU

enlargement.' Journal of European Public Policy. <http://www.tandfonline.com/doi/abs/10.1080/13501763.2017.1315162>.

¹⁷ Ibid.

¹⁸ BTI. 2016. Albania Country Report. https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI_2016_Albania.pdf.

including the EU, have helped to promote. The international community in Albania has maintained a leading role in initiating, negotiating and sponsoring major institutional reforms at least since the collapse of the state order in 1997.¹⁹ After 2000, the European Union emerged as a leading actor, with the EU integration providing a consensual agenda around which the country's progress is evaluated. Hence, the EU has long been in the position to set the priorities, monitor reforms, use various diplomatic channels to push for its priorities, and allocate substantial funds in target areas of EU integration.²⁰

The judiciary and other rule of law institutions have received the lion's share of external assistance and of EU funds in particular. Since 2005, moreover, the EU has poured financial assistance into the so-called Euralius mission, which aims at 'the development of a more independent, impartial, efficient, professional, transparent and modern justice system'. The EU rule of law mission is now in its fifth extension. Other projects and funds related to the judiciary kept coming in within the framework of other international organizations, including the Council of Europe, OSCE, World Bank and other foundations. Throughout the process, Ljalla and his alike colleagues within the system have benefited as key interlocutors, stakeholders, and the very target of external assistance.

The international community's focus on rule of law also enabled streams of well-paid international experts to come in and suggest new rules, procedures, and institutional arrangements. Many projects were successfully concluded and huge amounts of assistance, some of which was provided as loans, were successfully spent. Although the country received plenty of international advice, legal assistance and actual financing, the formal institutional and legal changes resulting from these initiatives had little effect on curbing political control over or widespread corruption within the ranks of the judiciary. Nor did they delve into the real problems of the judiciary appointments, patronage networks, or links to organized crime that loomed underground. Instead, international support insisted on training and coaching judiciary personnel²¹ which was already politically nominated and part of the patronage networks of loyalty embedded into institutions, thus enabling rather than challenging a politically-controlled and self-serving judiciary system. To put it differently, international assistance has more often than not facilitated the work of political appointees, like the outgoing Prosecutor General, without ever questioning how he was picked for the job and what he stood for.

A crucial problem of why such internationally-led campaigns have failed to make a real change is related to the technicalities of funding. As Mendelski suggests on the basis of comparative evidence from South-East Europe, most financial assistance has focused on technical capacities – better infrastructure, improved payment schemes, clear institutional procedures, training etc. – while ignoring the dimension of impartiality, such as independence, corruption and de facto separation of the institutions in question.²² Much of the assessment conducted under the auspices of international bodies moreover focuses on one-shot, quick and formal assessments of newly built institutions while ignoring the informal patronage schemes and long-term historical processes that hold these new institutions hostage to politics. Hence, most external reporting on the issue remains at the superficial level of formal institutional change and fails to dig deeper into the actual links, actors and historical processes that enable judiciary corruption.

A related problem has to do with the nature and time frame of international projects. Most projects have a specific time span and are concerned with spending the allocated funding while recording a list of demonstrable outputs within that specific time period. Few projects had a long enough time span to evaluate how the newly built institutions functioned, whether they changed and/or were replaced after the project ended. Besides, most international consultants employed by such projects are interested in skipping from one position to another and reaping the benefits of lucrative international positions, instead of delving into the mud of long-term informality and corruption, which would probably also put them on bad terms with domestic politicians whose support they need to pursue further consultancy appointments and projects. Most projects, therefore, typically cater to politics and steer away from identifying problems that hint at political patronage, binding connections and mutual services. Certainly, the usual international reporting on general institutional and judiciary changes that skims the surface of reform is more rewarding for their authors than delving into how and why those institutions are and remain captured in the first place. The result is an abundance of formal laws and formalistic changes, but little consistent long-term change in the way the institutions function, and even less analysis of the gap between frequent formal changes and persistence of similar problems in the long term.

Last but not least, the international community has often proved rather weak in consistently pushing for its initiatives and counteracting complex networks and strategies of resistance. In the case of judicial reform, the EU and the US have sponsored the entire legal package

¹⁹ Abrahams, F. 2015. *Modern Albania*. NY: NYU Press

²⁰ Elbasani, Arolda. ed. 2013. *European Integration and Transformation in the Western Balkans: Europeanization or Business as Usual?* Abingdon: Routledge.

²¹ www.euralius.eu/index.php/en/events/past-events/range.listevents/.

²² Mendelski, Martin. 2015. 'The EU's pathological power: the failure of external rule of law promotion in South Eastern Europe.' *Southeastern Europe* 39(3): 318–346.

and arranged a ‘consensual’ adoption of the necessary constitutional changes. Yet, the secondary legislation necessary to implement the constitutional changes was still blocked and delayed, the creation of new institutions is still pending, and various parties have continued boycotts and blockages. The international officials, moreover, have often proved reluctant to name and shame sources of resistance, preferring instead to pace their requirements and facilitate consensus, even when consensus can end up protecting the patronage schemes that the reform targets. Specifically, when some segments of the Parliament mobilized to block the constitutional package in 2016, the EU and other international officials reached for a ‘political’ offer, which watered down the experts’ draft so that the parties would be in charge of appointing, thus controlling, members of the new vetting commissions – a concession that played into the parties’ interest in maintaining control over ongoing reforms. As we learned later in the process, it was exactly the concessions made to the contesting parties in 2016 that enabled them to delay the creation of new institutions. In another twist that shows how strong the anti-reform block is, the Albanian Association of Judges silently appealed the vetting law to the Constitutional Court while the parties were seemingly working to set up the new vetting institutions in the summer of 2017. The court had already checked and arguably watered down some of the key articles of the vetting laws during a previous appeal that involved judges and politicians.

To what extent the concessions have managed to water down the main pillars of reform, particularly the vetting procedures, can be evaluated only during the process of implementation, which has only just started. For the time being, the country has elected a new temporary Prosecutor General, who remains heavily challenged by key political and institutional actors. Most prosecutors and judges that embody the connections between political patronage, organized crime and widespread corruption are firmly holding onto their positions.

Conclusions

Political consensus, a crucial focus of the international supporters of reform, rarely delivers long-term and sustainable institutional change in transition contexts. As the progress of the constitutional package adopted with the votes of the entire Parliament shows, political actors often use the process of consensus to water down challenging aspects of reform; additionally, during the implementation stages, they can easily withdraw what they formally consented to.

Political resistance to reform is neither straightforward nor candid. Instead, it arises in the form of informal strategies – delays, boycotts, protests etc. – that aim to hold institutional changes hostage to politics. Hence, any

analysis of short-term, formal changes that lack engagement with informal strategies and processes that bind coalitions of resistance fails to account for more than surface-level forms of institutional changes.

International structures promoting reforms have often insisted on formal technical improvements that have failed to identify or address the patronage schemes, historical processes and underground links that merge politics, crime and judiciary into a network of mutual services.

The poor performance of international projects and legal missionaries that offer quick, formal, institutional fixes, often without knowledge of the context of and accountability for what they do, has not delivered in terms of sustainable institutional changes. Most such missionaries have proved more interested in reaping the benefits of their lucrative positions than tackling difficult issues of rule of law as well as political and criminal linkages that loom underground.

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RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY IN THE WESTERN BALKANS

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The rule of law and issues related to the independence and operation of judicial systems have been at the heart of the reforms and conditionality prescribed by the European Commission in the context of enlargement. This is revealed in the Cooperation and Verification Mechanism introduced *vis-à-vis* Romania and Bulgaria in 2006 and in the context of the Western Balkan countries, with the integration of the two relevant negotiating chapters being the first ones to be opened, continuously assessed, and last ones to be conclusively assessed and closed in the process of harmonization. This conditionality and assessment of compliance, in lack of a common EU-based system and framework, reverts to standards by reference to recommendations and guidelines developed and adopted as soft-law instruments within regional rule of law organizations (Council of Europe and its Venice Commission, GRECO). One must note, however, that even within the EU's pluralistic landscape of justice systems, deviations from these standards emerge – and the EU's reaction appears to be rather slow to address these concerns.¹ Indeed, there is no specific EU *acquis* against which to measure the 'rule of law-readiness' in various areas under this specific conditionality criteria; moreover, the EU has also not managed to prescribe a specific blueprint for judicial independence or to harmonize a judicial model "based on the institutional legacies of the judicial systems of the old Member states".²

While the main dimensions of the institutional framework for a modern judiciary in line with EU standards are either in place or coming into place in the countries of the Western Balkans, the big challenges are (i) the implementation / application of the new body of law that has been passed, (ii) the operationalization / funding / staffing of the new organizations / entities that have been established.³ These judicial reforms will necessarily have to improve the structural and operational independence, efficiency, accountability, and enforcement capacity of judicial institutions.

Indeed, for a successful judicial reform, a comprehensive approach is best suited, due to the evident linkages between the different building blocks. For example, independence and accountability are closely linked: a judiciary that is not accountable to society and has no eye for societal needs will not gain the trust of society and

¹ The most obvious example would be the judicial reforms in Poland and therein the Draft Act on the Council of the Judiciary and other Acts related to the judiciary from 2017, condemned by various regional rule of law organisations and addressed by the European Commission in defense of the independence of the judiciary. See: http://europa.eu/rapid/press-release_IP-17-5367_en.html.

² Piana, D. (2009) 'The Power Knocks at Courts' Back Door: Two Waves of Postcommunist Judicial Reforms', *Comparative Political Studies* 42(6), p. 828. Cited by Denise Preshova et al., 'The

effectiveness of the 'European Model' of Judicial Independence in the Western-Balkans: Judicial Councils as a solution or a new Cause of concern for judicial reforms', *CLEER Papers*, 2017/1, p. 10.

³ 'Thematic evaluation of the Rule of law, Independence of the Judiciary and Fight against corruption and Organised Crime in the Western Balkans – Lot 3.' Final Main Report, February 2013. Available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/financial_assistance/phare/evaluation/2013_final_main_report_lot_3.pdf.

will endanger its independence in the short or long run.⁴ Similarly, efficiency and quality are connected: a transparent and efficient way of organizing the judiciary – and public services in general – contributes to less corruption, more public trust, better justice, and improved rule of law.⁵

Such comprehensive reforms should also go beyond the verbatim transposition of international standards and should aim at transforming and fostering a judicial culture and attitude wherein these reforms can be implemented. This transformation is key to a successful reform of the justice system; it will also present a challenge not only for the implementation but also for the effective assessment of developments in the negotiation process.

Independence and Self-Governance of the Judiciary: a Tool to Curb Political Interference and Corruption

Independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.⁶ Independence of the judiciary is also a prerequisite for the adequate protection of the fundamental human right to a fair trial, as recognized by international and regional human rights treaties.⁷

There are various ways to ensure that the independence of the judiciary is appropriately discharged, and its governance is effective. The creation of Councils of the Judiciary (judicial councils) in charge of ensuring the self-governance of the profession has been recommended by various regional rule of law

organizations and observers.⁸ Judicial councils are “designed to insulate the functions of appointment, promotion, and discipline of judges from the partisan political process while ensuring some level of accountability”.⁹ Such independence and accountability relate to curbing corruption and interference. Councils of the Judiciary “are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system.”¹⁰ Self-governance of the judiciary is expected to guarantee and contribute to not only strengthening the independence of the judiciary but also to the efficient administration of justice.¹¹

By now, most European countries have introduced judicial bodies of self-governance.¹² The historical, political and cultural context constitutes the foundations of the legal and constitutional system of each country and thus has implications on the status and structure of self-governing judicial bodies. From the existing wide variety of models, each country adopts one whose composition and competences reflect the concern about the judiciary in a specific context, balancing demands for accountability and independence.¹³ European guidelines place broad competences for all questions concerning the status of judges within the responsibilities of these judicial self-governance bodies; these competences include the appointment, promotion, career development, and discipline of judges as well as the organization, in addition to the functioning and image of judicial institutions. These guidelines should enjoy a

⁴ EJNC Report (2017) ‘Independence, Accountability and the Quality of the Judiciary’, Performance Indicators 2017, p. 11. Available at https://www.enj.eu/images/stories/pdf/workinggroups/independence/encj_report_ia_ga_adopted_ga_13_6.pdf.

⁵ Council of Europe Working Group on Efficient Judicial Systems (2013) ‘Enhancing judicial reform in the Eastern Partnership’, Project Report, March 2013, p. 7. Available at: https://www.coe.int/t/DGHL/cooperation/cepej/cooperation/Eastern_partnership/FINAL%20efficient%20judicial%20systems%20EN%20March%202013.pdf.

⁶ UN Human Rights Council (2015) ‘Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers’, A/HRC/29/L.11, 30 June 2015. Available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/L.11 This resolution emphasizes ‘the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards’.

⁷ See International Covenant on Civil and Political Rights (ICCPR) (1966) Article 14, Universal Declaration of Human Rights (UDHR) Article 10, the European Convention on Human Rights and Fundamental Freedoms (ECHR) (1951) Article 6, African Charter of Human and People’s Rights (ACHPR) (1981) Article 7.

⁸ Establishing such independent bodies has been recommended by the Venice Commission (2010) ‘Report on independence of the judicial system—Part I: the independence of judges’ par. 32; Venice Commission (2007) ‘Judicial Appointments’ pars. 44 et seq., and the Consultative Council of European Judges (hereinafter) Magna

Charta of Judges (2010) art 13. See also several concluding observations by the UN Human Rights Committee on State compliance with obligations under the ICCPR and reports from the UN Special Rapporteur on the independence of judges and lawyers. Moreover, see Judicial Integrity Group (2010) ‘Measures for the effective implementation of the Bangalore Principles of Judicial Conduct’, par. 4.1.; OSCE/ODIHR (2010) ‘Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia’; Council of Europe (2010) ‘Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities’, article 26 and Consultative Council of European Judges (CCJE) (2007) ‘Opinion No. 10 on the Council for the Judiciary at the Service of Society’, par. 42. Available at [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2007\)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true).

⁹ Nuno Garoupa and Tom Ginsburg (2009) ‘Guarding the guardians: Judicial Councils and Judicial Independence’, *American Journal of Comparative Law* 57, pp. 103-134 and p.108.

¹⁰ Council of Europe (2010) Recommendation on judges, article 26. See also, CCJE (2007) ‘Opinion No. 10’, par 11.

¹¹ European Network of Judicial Councils (hereafter: ENCJ) (2008) ‘Budapest Resolution’, par. 1.

¹² With the notable exception of Germany, Austria, the Czech Republic and Finland.

¹³ Nuno Garoupa and Tom Ginsburg (2009) ‘Guarding the guardians: Judicial Councils and Judicial Independence’, *American Journal of Comparative Law* 57, pp. 103-134.

leading role, in co-operation with other bodies as applicable.¹⁴

Placing the Council of the Judiciary at the constitutional level (or equivalent basic law) is recommended “to secure the independence of the judiciary ‘from every other power’, to ensure effective self-governance” as well as to “ensure the role of judges as monitors and guarantors of the basic rights of every citizen whilst counteracting any perception of self-interest, self protection or self-referencing”.¹⁵ Provisions should be made for setting up such a body as well as for the definition of its functions, the sectors where its members may be drawn from, and the establishment criteria for membership and selection methods.¹⁶ In addition, the constitutional basis for judicial councils may emphasize their importance as a guarantor of independence, and help strengthen their legitimacy and position *vis-à-vis* the other branches of government and within the judiciary.¹⁷

The composition of the Council of the Judiciary should be such as to guarantee its independence and to enable it to carry out its functions effectively.¹⁸ Membership of judicial councils should include “substantial judicial representation”¹⁹ as well as “representatives of the higher judiciary and the independent legal profession”.²⁰ In addition, the broad-based membership of the Council of the Judiciary should “include a majority of judges, but not less than 50% of the membership should be judges”, and the latter should be elected by their peers. In Europe, the CCJE recommendation for the selection process of judge members favors the complete exclusion of political authorities and, with respect to the selection of non-judge members, the preference of non-political authorities of appointees; otherwise, it calls for safeguards for opposition support and diverse representation of society to prevail over political considerations.²¹

In the context of the Southeastern European countries, the reform requirements set by the European Union include the establishment of judicial self-governance and enhanced judicial independence. Chapter 23 and its segment on judicial reform explicitly envisage the establishment of a self-governing judiciary led by a judicial council.²² The ‘EU induced processes of institutionalization of judicial councils as one of the most

important pillars of the judicial reforms’, have manifested in new legislation in all of the countries; however, the actual implementation – that is the operational and functional assessment of such a council’s impact on judicial independence, on professionalization, on internal and external accountability – has showed a mixed picture, and has oftentimes negated the results that had been hoped for or anticipated. Based on the case of Macedonia, *Preshova et al.* explain the multi-faceted problems arising from the functioning of the Supreme Judicial Council that had been introduced following the standards of the strong Euro-model: Its processes have been repeatedly condemned by the European Court of Human Rights (ECtHR), criticized by the European Commission and gained little, if any, trust from the judiciary and citizens.²³ Specific concerns include the lack of accountability of the Council and of guarantees for its impartiality, hereby underlining the vulnerability to external pressure (from other branches of power) and that of the individual judges from the Council.

Still, others lend their critical voice to the rule-focused institutional reforms in the region, whereby ‘the parallel process of transformation of culture’ is missing, leading to adverse effects, or where the introduction of judicial councils in systems without sufficient political maturity and clarity on appropriate leveling between judiciary and other political branches has led to corruption and clientelism as well as failing comprehensive judicial reforms.²⁴

It should therefore be noted that, while the EU’s enlargement conditionality, justice reforms and independence of the judiciary and curbing of corruption are closely linked to the establishment of ‘strong’ judicial councils, the introduction of the latter may lead and has led to adverse effects when carried out prematurely, without the appropriate legal and judicial culture and mentality. Such adverse effects on the independence of judges has come about through the functioning of the judicial councils and the implementation of their tasks relevant to the career development / disciplining of individual judges; moreover, independence was further damaged by the unclear terms of the accountability and liability of the councils’ members, with increasing

¹⁴ CCJE Magna Charta of Judges (2010) par. 13; ENCJ (2008) ‘Budapest Resolution’, par. 2; CCJE (2007) ‘Opinion No. 10’, par. 42.

¹⁵ ENJC (2010-2011) ‘Councils for the Judiciary Report’, p. 3. Available at https://www.encj.eu/images/stories/pdf/workinggroup_s/report_project_team_councils_for_the_judiciary_2010_2011.pdf

¹⁶ CCJE (2007) ‘Opinion No. 10’, par. 11. Available at [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2007\)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true); Council of Europe (1998) ‘European Charter on the Statute for Judges’, par. 16. Available at <https://wcd.coe.int/ViewDoc.jsp?p=&id=1766485&direct=true>.

¹⁷ Violaine Autheman and Sandra Elena (2004) ‘Global Best Practices: Judicial Councils. Lessons learnt from Europe and Latin America,’ IFES Rule of Law White Paper Series, (p. 7. Available at http://pdf.usaid.gov/pdf_docs/PBAAB591.pdf.

¹⁸ CCJE (2007) ‘Opinion No.10’, par. 15.

¹⁹ Universal Charter of the Judge (1999) Arts. 9 and 11.

²⁰ Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1995) Art. 15.

²¹ CCJE (2007) ‘Opinion No.10’, pars. 31 and 32.

²² Denise Preshova et al., see n.2. at p. 14.

²³ D. Preshova et al., see n. 2.

²⁴ M. Bobek and D. Kosar (2014) ‘Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe’, German Law Journal 15(7), pp. 1257-1292 and p. 1280.

elitism, clientism, and opaqueness in the exercise of their powers.²⁵

Thus, judicial councils can have an important role in sustainably establishing independence and curbing political interference from the judiciary, while at the same time increasing the effectiveness and accountability of the justice sector; this is under the premise of such councils operating in a functional framework with mature judicial culture and mentality, and with a sufficient sense of accountability enhanced by transparency and professionalism. This will certainly not be a one-size-fits-all solution and, while standards are instructive and inspiring, the local particularities will greatly affect the outcome.

Depoliticizing Vetting Procedures

The vetting of judges provides for an operational framework to exclude individuals who lack integrity from the administration of justice. Such a framework plays an important role in justice system and institutional reforms, with a view to ensure an effective and legitimate personnel, and with the general objective of strengthening the accountability and integrity of the public sector, restoring confidence in national institutions, and eradicating corruption.²⁶ In the context of these reforms, “[i]nstitutions such as courts and prosecution services that abused human rights and defended the partisan interests of a few need to become institutions that protect human rights, prevent abuses and impartially serve the public”.²⁷ Vetting procedures typically consist of the investigation and evaluation of skills, competencies, personality, assets and other aspects of a given individual, whereby depoliticization is an indispensable condition of the entire operational framework so as to exclude political preferences and interferences. This condition should apply to all stages: the adoption and design of the underpinning legislative framework should be based on wide consultations and requires assessment and transparency; moreover, the independent oversight body must carry out the assessment through impartial procedures that are just and fair, with consequences (sanctions) that are deterrent and duly implemented.

Not only is depoliticization crucial in such a system, but also the prevention of corporatism and self-referencing by the assessors. Holding the members of the judiciary accountable and screening their integrity through vetting processes expands to the potential of detecting

connections with organized crime as well (through the verification of asset declarations).

Vetting can thus be a useful tool and building block within justice system reforms to curb corruption and detect/prevent connections to organized crime in particular, but also to establish and operate individual judicial accountability mechanisms in general, as long as its impartiality is beyond question.

The EU Enlargement Strategy: Addressing Judicial Independence and the Way Forward for Justice Reforms

The most recent EU Enlargement Strategy underscores the centrality of rule of law, fundamental rights and good governance (all with direct linkage to justice system reforms) as being the most pressing issue for the Western Balkans; moreover, it emphasizes the fact that “strengthening the rule of law is not only an institutional issue – it requires societal transformation.”²⁸ The independence of the judiciary and of judges is essential to enforce the accountability of political powers, and plays a central role among the institutions that prevent and tackle corruption. The Commission’s suggested actions reveal a recognition of the major challenges, such as the trial monitoring to prevent impunity for high-level crimes, and the commitment – in general terms – to calibrate the assessment of justice reform progresses so as to gauge its success. Moreover, the prevalence of this area above all other technical chapters in the negotiations, the achievement of concrete results in judicial reforms and in the fight against corruption and organized crime places these topics at the heart of the assessment process under the current Enlargement Strategy.

Judicial reforms and the fight against corruption are areas that are inherently comprehensive and are closely related to appropriate legal and judicial culture and mentality. It will therefore be of utmost importance for the Commission to assess these areas appropriately and for the EU to appear as a credible negotiating partner that truly stands up for these rule of law standards.

²⁵ D. Preshova et al., see n. 2., p. 21.

²⁶ UN Security Council (2004) ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General’, S/2004/616, 23 August 2004, p. 2. Available at: <http://www.un.org/en/sc/documents/sgreports/2004.shtml>.

²⁷ UNHCHR (2006) ‘Rule-of-law tools for post-conflict states. Vetting: An operational framework’, p. 10. Available at:

<http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf>.

²⁸ European Commission (2018) ‘A credible enlargement perspective for and enhanced EU engagement with the Western Balkans’, COM(2018) 65 final, p.4.

GOOD GOVERNANCE PROMOTION IN THE WESTERN BALKANS: AN EMPIRICAL ANALYSIS OF THE DE-POLITICIZATION AND FRAGMENTATION OF STATE

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Abstract

This paper analyzes the externally-driven process of de-politicization (good governance reforms) which has accompanied the Europeanization of the Western Balkans. It is argued that, rather than improve governance and the functionality of the state, de-politicization (de-etatization) has reinforced the fragmentation of the state. The Europeanized, balkanized and fragmented state has not had the strength to rebuild coherence through a national counter-movement of unity building. Instead, countries from the Western Balkans have tried to overcome fragmentation through a revival of informality (i.e. informal hidden structures based on clientelistic, secret services, organized crime and paramilitary networks). Overall, the imposed good governance agenda of neutralization and depoliticization has fragmented and weakened the state and reinforced informal governance.

Der Vorgang der Entpolitisierung, die Schaffung staatsfreier Sphären, ist nämlich ein politischer Vorgang.¹

Introduction

We are living in the age of the de-politicization of the state. In the Western Balkans and elsewhere, the de-politicization, erosion, and fragmentation² of the state has been propelled forward under the guise of neutral 'good governance' reforms. The 'good governance' agenda,³ which has aimed to create an impartial, capable, and pluralistic state, has paradoxically led to the emergence of a fragmented, politicized, and dysfunctional state. After two decades of externally-driven state-building and good governance reforms in the Western Balkans, the *fragmented state* looks like a cake (or pie chart) that was split into multiple diverse pieces (be it political parties, ministries or regions), or like a Swiss cheese, perforated by numerous, autonomous, 'neutral' public agencies that, in many cases, have turned

¹ [The process of de-politicization, the creation of state-free spheres, is a political process]. Carl Schmitt (1932), 'Starker Staat und gesunde Wirtschaft', reprinted in Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916-1969, Berlin, Duncker & Humblot, 1995, pp. 89-91.

² Fragmentation is a process that involves the splitting of a coherent whole into many conflicting and incoherent parts. Political fragmentation refers to the erosion and dissolution of 'the political', i.e. a lower degree of political cohesion or unity and is therefore closely intertwined with processes of de-politicization of the state.

See Schmitt, C., Der Begriff des Politischen (Duncker & Humblot 1932).

³ Andrews, M. (2008) 'The Good Governance Agenda: Beyond Indicators without Theory', 36(4) Oxford Development Studies 379; Mendelski, M. (2009) 'The Impact of the EU on Governance Reforms in Post-Communist Europe: A Comparison between First and Second-Wave Candidates.', 9(2) Romanian Journal of Political Science 42; Fawcett, P., Flinders, M., Wood, M., & Hay, C. (Eds.). (2017). Anti-politics, Depoliticization, and Governance. Oxford University Press.

into unaccountable enclaves or politicized fiefdoms.⁴ This ‘reformed’, ‘Europeanized’ and ‘de-politicized’ state in the Western Balkans resembles a ‘Frankenstein state’, which consists of multiple conflicting models and a hybrid panoply of best practices and incoherent institutional varieties.

How did the fragmented state emerge? This paper argues that the emergence of the fragmented state is the result of its de-politicization, which occurred through four interrelated processes (1. Pluralization, 2. Agencification, 3. Party-politicization and 4. Dispersion). The outcome of these processes is a disintegrated state that lacks political unity and institutional coherence. Precluded from (re)building political unity through patriotic nation-state building, elites from the Western Balkans have attempted to re-integrate their states, economies, and societies through informal relationships of reciprocity (of clientelism, nepotism, kinship). Hence, the fragmented parts of the Frankenstate were stitched together with threads of informality, which, in its pathological form, result in corruption and the emergence of hidden, parallel state structures. The paper aims to shed light on the processes that have produced state fragmentation in the countries of the Western Balkans (Albania, Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Serbia).

Conceptual Clarification: What Does De-politicization Mean?

The concept of de-politicization (as employed by Carl Schmitt) has led to much confusion. In his work ‘Der Hüter der Verfassung’ (The Guardian of the Constitution),⁵ Carl Schmitt distinguished between two opposite processes of de-politicization: 1. *de-politicization* (de-etatization, *Entpolitisierung*) and 2. *de-party-politicization* (*Entparteipolitisierung*) (see Table 1). The first type of *de-politicization* refers to a centrifugal de-politicization process of the state through political parties and interests groups.⁶ This type of de-politicization can be understood as *Entstaatlichung* and reflects a process in which the state is captured by particularist interests and ‘emptied’ of its substance, so that it can no longer integrate the diverse political and societal groups and serve as an umpire above factions (i.e. in the sense of multipartiality). Schmitt was aware that de-politicization (the creation of state-free spheres) was a highly political process. He was concerned about the depoliticizing effects of political pluralism (*Parteienstaat*) as it existed in the Weimar Republic, a pluralism that produced or fostered a fragmented and

instable political system, including the instrumentalization of the law and the politicization of autonomous state structures. This type of centrifugal, party-related politicization (de-politicization in the Schmittian sense) nowadays reflects, for instance, the capture of autonomous state bodies (e.g. the Constitutional Court, the anti-corruption agency, the judicial council) by diverse party interests, turning them into party-political weapons and not into constraining neutral accountability institutions.

Table 1: Two types of de-politicization

	De-politicization (party politicization)	De-party- politicization
Synonyms	Entpolitisierung Entstaatlichung/ de-etatization Pluralization	Entparteipolitisi- erung State formation Unification
Method	Political partisanship	Nonpartisanship
Direction	Centrifugal	Centripetal
Process	Fragmentation, Erosion of the political	Integration, Formation of the political
Outcome	Disunity	Unity

Source: Author's elaboration based on Schmitt 1931.

The second type of de-politicization (de-party-politicization) has to be understood as a non-pluralist, centripetal counter-process of political integration (re-politicization, re-integration, de-fragmentation) which seeks to rebuild political unity (‘the political’), on the basis of which the state would be able to take decisions in the interest of the entire nation. Carl Schmitt was a conservative advocate of a strong state who wanted to reverse the process of legislative and state fragmentation of the Weimar Republic by rebuilding political unity and strengthening the unitary state. Schmitt criticized the centrifugal type of disintegrated political pluralism and the party-politicization of autonomous state institutions. His aim was to reverse the fragmenting neutralization/de-politicization processes of the German state and rebuild its unity, for instance through the president as a ‘pouvoir neutre’ and the ‘guardian of the constitution’. This view contrasted with Hans Kelsen’s call for creating the Constitutional Court as the guardian of the constitution, which would resolve political conflicts and promote political consensus among conflicting parties.⁷ In Germany’s post-war democracy, both institutions (the office of the president and the Constitutional Court) have been important integrative

⁴ Pesic, V. (2007) ‘State Capture and Widespread Corruption in Serbia’, CEPS Working Document No. 262/March 2007, 22 and 24. Available at <http://bgcentar.org.rs/bgcentar/wp-content/uploads/2013/12/CEPS-State-Capture-and-Widespread-Corruption.pdf>.

⁵ See Schmitt, C., *Der Hüter der Verfassung* (Duncker & Humblot 1931).

⁶ Schmitt, C., *Der Begriff des Politischen* (Duncker & Humblot 1932).

⁷ Kelsen, H., *Wer soll der Hüter der Verfassung sein?* (Rothschild 1931).

forces that continue to counter-balance the fragmenting centrifugal forces of political pluralism.⁸

Empirical Trends: Measuring De-politicization (Fragmentation) of the State

This section analyzes the processes of de-politicization of the state in the Western Balkans. The countries from this region are ‘typical or pathway cases’ to test my main hypothesis, which can be summarized briefly as: De-politicization (in the form of externally-driven good governance reform) has reinforced state fragmentation. In the Western Balkans, the de-politicization of the state occurred through four interrelated reform and policy processes: 1. Pluralization of the political system, 2. Agencification of the state, 3. Party-politicization, 4. Dispersion of coordination and decision-making. Most of these neutralization processes were the outcome of best practices and the mantra of good governance.⁹

1) Pluralization

The process of the democratic pluralization of the state started right after the collapse of communism in the early 1990s. It included the introduction of a *de facto* multi-party political system, which, in the Western Balkans, exhibited high legislative fragmentation or polarization. Three decades later, most countries from the region continue to have relatively high and growing legislative pluralization (and polarization). This is reflected in the high number of political parties for the region, which was on average around seven political parties in the early 1990s and has grown to 10 parties in 2015 (see Table 2).

Table 2: Number of Political Parties in the Western Balkans

	1992/94	1996/97	2000/01	2003/04	2007/08	2011/12	2014/15
Albania	5	5	11	13	9	10	7
Bosnia & Herzegovina		10	14	12	12	12	12
Croatia	9	6	6	9	8	9	9
Kosovo			14	17	18	17	15
Macedonia	6	7	6	7	8	6	6
Montenegro			5	4	8	8	9
Serbia	10	5	4	6	11	12	12
Average	7.5	6.6	8.6	9.7	10.6	10.6	10.0

2) Agencification

The second de-politicization process of the state has been the mantra of agencification, i.e. the functional de-concentration of ministerial responsibilities to (semi-) autonomous agencies. The number of agencies has grown considerably: in Croatia and Kosovo by 400% and in Serbia by 500% (see Figure 1). The intensification of agencification can be attributed to processes of Europeanization.¹⁰ Several interrelated factors stand behind the process of de-politicization of the state through agencification: 1. The European Union (and other international donors) as a driving force, capacity-builder, and upholder of agencies; 2. The doctrine of New Public Management and its mantra of neutrality, expertise, and efficiency (output orientation); 3. The desire of transnational coalitions to advance reforms speedily by circumventing ‘burdensome’ democratic processes (e.g. legislative debates and oversight) or the inertia and resistance of bureaucracy; 4. The desire of an enhanced regulation of markets, society, and the state, regardless of who wins the elections (erosion of sovereignty).

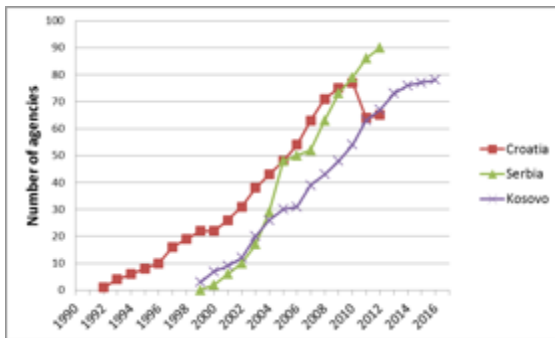
⁸ See Böckenförde 1991, see Herzog 1971.

⁹ It could be thus argued that the good governance agenda from the 21st century has become the new ‘central sphere’ of de-politicized neutrality (after theology in the 16th, metaphysics in the 17th, morality in the 18th, economics in the 19th, and technology in the 20th century). See Schmitt, C., *Der Hüter der Verfassung* (Duncker & Humblot 1931).

¹⁰ Bileišis, M. and Kovač, P. (2017) ‘Public administration reforms in Eastern European Union member states: post-accession convergence

and divergence’; Musa, A. (2013) ‘Agencies in Croatia: Something Old or Something New?’, 13(2) *Hrvatska i komparativna javna uprava* 353; Musa, A. and Koprić, I. (2011) ‘What kind of agencification in Croatia: trends and future directions’, 6 *Transylvanian review of administrative sciences* 33; USAID (2013) ‘Agencies in Serbia. Analysis and recommendations for reform’, March 2013. Available at [http://www.bep.rs/documents/news/Analysis of agencies in Serbia.pdf](http://www.bep.rs/documents/news/Analysis%20of%20agencies%20in%20Serbia.pdf)

Figure 1: Agencification Trends in the Western Balkans



Source: USAID 2013; Ministry of Public administration Kosovo

While working relatively well in developed countries (e.g. in Sweden), agencification has been associated with several pathologies in the Western Balkans, such as fragmentation of the state, weaker accountability, less predictability and more party-politicization. Several revealing examples can be cited:¹¹

“The organization of the administration lacks coherence, with too much fragmentation; it is too bureaucratic, is managed very hierarchically and very formalistically.” (Sigma, ‘Albania’, 2010:4);

“The main weakness is the danger of fragmentation that blurs clear accountability lines, undermines the coherence of the state administrative system and might foster politicisation of the administrative level.” (Sigma, ‘Bosnia and Herzegovina’, 2013:8).

“Problems reported in previous years related to the confusing system of agencies, their unclear roles and weak accountability still persist.” (Sigma, ‘Croatia’, 2009:6)

“An important obstacle to good administrative practice is caused by the ill-advised practice in recent years of establishing new administrative institutions (for instance agencies) for new tasks. This tendency for ‘agencification’, instead of integrating new functions in the existing infrastructure, has led to a fragmented administrative system with a number of inefficient sub-elements and overlapping competences. Sometimes newly created bodies remain completely understaffed; they might exist on paper but in reality are nearly empty shells. Sometimes new mechanisms have been established in parallel to already existing institutions (departments in ministries, administrative bodies).

Further ‘agencification’ is weakening the rule of law in Montenegro.” (Sigma, ‘Montenegro’, 2011:6)

“The large number of agencies that operate under a separate regime, set out in the Law on Public Agencies is problematic. It should be noted that a number of agencies were allegedly established as a requirement for EU accession, while in fact most of them were purposefully created as forming a parallel administration established by the after 2000 authorities to circumvent the old Milosevic administration, which was mostly left untouched.” (Sigma, ‘Serbia’, 2011:11)

“In addition, the international presence is still very strong in Kosovo, and has contributed to the non-systemic creation of different autonomous agencies and independent bodies. As a result, the state administration has grown on the basis of ad hoc criteria, resulting in a fragmented structure mainly composed of microinstitutions.” (Sigma, ‘Kosovo’, 2014:15)

Overall, the establishment of autonomous agencies, instead of complementing existing state structures (e.g. ministries, the judiciary, prosecution etc.) has produced conflicting, parallel and unaccountable enclaves that have reinforced fragmentation and structural heterogeneity (including duplication and overlap).

3) Party-politicization

In the Western Balkans, under the conditions of structural and political fragmentation, the newly transplanted or established regulatory agencies, accountability structures as well as new laws did not become impartial constraints over the executive, but have developed into ‘political weapons’ of opposing political factions in most cases. Polarized political competition was reflected in fights over key positions and nominations of heads of autonomous structures (personalization of politics). Regulatory agencies, constitutional courts, anti-corruption agencies and judicial councils became partisan and politicized ‘third parties’, shifting their loyalties according to the reconfiguration of political powerholders’ constellations. Judicial councils (the supposed guarantors of judicial independence), evolved into politicized, unaccountable, and nontransparent bodies.¹² Similarly, anti-corruption agencies, integrity structures and specialized courts turned into unaccountable ‘political instruments’ of party and business elites with vested interests.¹³

¹¹ See <http://www.sigmaweb.org>.

¹² Seibert-Fohr, A. (2012) ‘Judicial Independence in Transition’ (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Veröffentlichungen des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht), vol. 233, Springer Berlin Heidelberg); OSCE (2009) ‘Legal analysis: independence of the judiciary’. Available at [http://www.osce.org/skopje/67584?](http://www.osce.org/skopje/67584?download=true)

[download=true](http://www.osce.org/skopje/67584?download=true); OSCE (2012) ‘Independence of the Judiciary in Kosovo: Institutional and Functional Dimensions’. Available at <http://www.osce.org/kosovo/87138?download=true>.

¹³ See the descriptions of anti-corruption agencies in the National Integrity System Assessments, published by Transparency International. Available at <http://www.transparency.org/whatwedo/publications/doc/nis/>.

4) Dispersion

External good governance promotion in the Western Balkans has been characterized by processes of dispersion and, in particular, a lack of reform coordination, which can be, among others, attributed to the heterogeneity of the international community. Good governance reforms in the Western Balkans were insufficiently coordinated by a variety of multilateral and bilateral donors with competing goals, interests, agendas, and methods. Dispersed post-conflict state-building has undermined the creation of unitary states and resulted in the hybridization of policy and governance (most notably in Bosnia and Herzegovina, Serbia, and Kosovo).¹⁴ Donor and policy coordination, although improved in some countries (e.g. Serbia, Albania), was often reduced to mere information exchange or functioned only in narrow sectors. In addition, there has been a lack of coordination within the EU itself. The EU as a highly heterogeneous union of multiple states, traditions, interests, and actors could neither offer one coherent model of governance (or the rule of law etc.) nor a coherent strategy to implement it.¹⁵ The consistency of EU conditionality was undermined by the lack of internal coordination, the presence of multiple cross-conditionality, the (geopolitical) interests of its members (Realpolitik), and the employment of national legal experts and consultants (e.g. Twinning advisors) with diverse cultural and legal backgrounds.

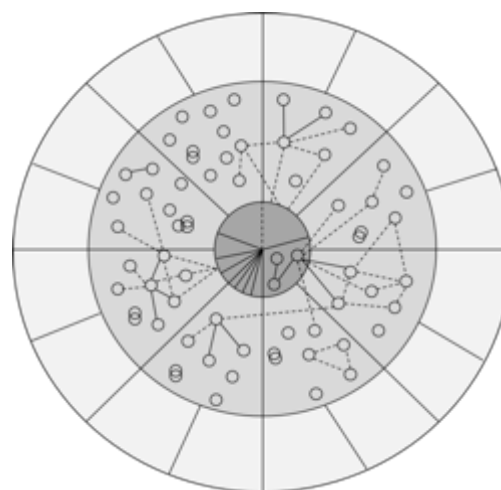
The Rise of the Fragmented State and Informality in the Western Balkans

Good governance reform can be seen as a modern attempt to de-politicize the nation-state. In the Western Balkans, this process has been reflected in the mantras of pluralization, agencification, and judicialization of the political. The introduction of independent regulatory agencies and specialized judicial and prosecutorial structures has resulted in several unintended and pathological consequences, such as increased fragmentation, duplication and the party-politicization of state structures. The emerging fragmented state lacks institutional coherence and is unable to effectively coordinate its activities. Similar pathological outcomes of neutralization and de-politicization were already observed during the Weimar Republic. The fragmented

state in the Western Balkans looks like a mixture between a Swiss cheese and a birthday cake and exhibits excessive political and administrative fragmentation (see Figure 2).

The fragmented state is perforated by myriads of autonomous 'islands of excellence' (e.g. autonomous agencies, specialized bodies, regulatory agencies, integrity structures, etc.); these appear to be based on the logic of Western governance (independence, high budgets and salaries, expertise, efficiency and result orientation), but remain embedded in a sea of conflicting forms of governance, be it hierarchical subordination or informal networks of reciprocity (dashed lines in Figure 2). Hardly any spillover to the entire system is visible. The autonomous 'foreign bodies' have rather turned into externally-empowered 'enclaves' that are able to deliver quantitative results (e.g. an increasing number of convictions, sentences, asset declarations, fines etc.), but no overall improvement of governance.¹⁶

Figure 2: The Fragmented State¹⁷



Despite selective progress in some sectors, the overall structural heterogeneity reduces the functionality of the entire political system. The problem here is not pluralism *per se*, but the lack of political unity, cooperation, and coordination of activities between the diverse governmental structures (i.e. state agencies, ministries, judicial structures etc.). The result is a fragmented (balkanized) state full of quarrels over competence and

¹⁴ See Juncos, A.E. (2011) 'Europeanization by Decree? The Case of Police Reform in Bosnia*', 49(2) JCMS: Journal of Common Market Studies 367; European Court of Auditors (2014) 'EU Pre-accession Assistance to Serbia', Special report No. 19, p.14.

¹⁵ Tolksdorf, D. (2014) 'Incoherent Peacebuilding: The European Union's Support for the Police Sector in Bosnia and Herzegovina, 2002-8', 21(1) International Peacekeeping 56.

¹⁶ See Mendelski, M. (2017) 'The Revival of Balkanization: How Externally-Driven Reforms Reinforce the Fragmentation of Governance in South Eastern Europe'. Available at SSRN: <https://ssrn.com/abstract=3001231> or <http://dx.doi.org/10.2139/ssrn.3001231>

¹⁷ Notes: The figure is a visual illustration of a typical fragmented state of the Western Balkans. The inner core circle reflects the fragmentation (separation) of powers, including the fragmentation of the legislative into numerous parties (legislative fragmentation) and the co-habitation of the executive. The inner middle circle reflects the fragmentation of the executive into ministries (which is 23 on average). The small circles reflect autonomous governmental agencies (administrative enclaves) that are linked through formal laws, semi-secret protocols or informal relationships between heads of these agencies. The outer circle reflects further administrative subordination, decentralization and fragmentation of state structures (e.g. into ministerial departments, units etc.).

posts, frictions, duplication, inefficiency as well as lack of accountability. The most extreme case of a fragmented 'state' is Bosnia and Herzegovina, which is probably the "world's most complicated system of government".¹⁸ It can be concluded that, instead of coherently integrating and embedding different autonomous state agencies and units into a coherent whole, good governance reform (as de-politicization) has reinforced structural heterogeneity and fragmentation.

The fragmentation of the state in the Western Balkans through processes of depoliticization and neutralization has resulted in a weaker state, unable to take decisions and to coordinate reforms and policies. Nevertheless, total state collapse and state failure has been avoided through a counter-process of de-fragmentation. In the Western Balkans, the re-integration of the state occurred through hidden networks of informality. First, almost all countries in the Western Balkans saw the emergence of informal networks and practices in the form of patronage, clientelism, nepotism, and informal connections (stela, s vrukta, vruzki, veza, kumstvo, vrski).¹⁹ These informal networks have had ambiguous effects. On the one hand, informal institutions have had a compensating role, helping to deliver public goods when a fragmented and dysfunctional state could not provide them. On the other hand, informal networks have undermined the proper functioning of formal institutions. In some cases, they have turned into forms of state capture, patronage, and parallel structures (parallel state, deep state) that undermine the legitimacy of the state.²⁰

In sum, the empirical analysis demonstrates how depoliticization through externally-driven good governance reforms has resulted in a fragmented state that has been partly re-integrated through informal structures. Persisting fragmentation is reflected in the Weimarization of the political system (the number of parties remains high), the presence of factionalized elites, party-politicization and a high number of autonomous agencies and international donors. The fragmented state is a weak and dysfunctional state that is unable to protect society from the fractionalizing forces of liberalization, globalization, and Europeanization.

Conclusion

The paper has made an attempt to empirically analyze the degree of fragmentation in the Western Balkans and to explain the emergence of the fragmented state. I argued that, rather than alleviating fragmentation, international state-building and good governance reforms reinforce it and thus reproduce a dysfunctional mode of governance. This sobering finding reflects the absence of a transition towards 'good' (i.e. impartial, coherent, capable, effective) governance, despite considerable reform efforts by the EU and the international community. Two decades of externally-driven liberal reforms in different areas have neither resulted in functioning democracies (rather in polycracies), nor in coherent and performant market economies or the rule of law. Hybrid and fragmented dysfunctionality persists.

The good governance agenda (including the rule of law and anti-corruption) has promised fewer conflicts, more stability, and prosperity to the citizens from the Western Balkans. In reality (and under the conditions of political fragmentation), the de-politicization of the state has resulted in the exact opposite: more fragmentation and more instability. While in more advanced countries from the West, de-politicization/neutralization processes have created an integrated pluralist system (in the sense of embedded autonomy), in the Western Balkans depoliticization has resulted in a mainly fragmented pluralism and a dysfunctional weak rule of law.²¹

What are the implications of the emergence of a depoliticized and fragmented state? First, a fragmented state (which lacks political unity and institutional coherence) will rely much more on alternative modes of coordination and integration, such as a 'neutral' Podestà from abroad (e.g. the High Representative in Bosnia and Herzegovina and Kosovo), an activist and frequently politicized 'pouvoir neutre' (e.g. the Constitutional Court), an authoritarian guardian of the constitution (e.g. the charismatic, activist president), or informal networks that work as a binding force that helps to stick the fragmented parts of the state together. All these means of unity formation are not optimal from the perspective of a modern nation-state, but they can become compensating

¹⁸ <https://www.theguardian.com/news/datablog/2014/oct/08/bosnia-herzegovina-elections-the-worlds-most-complicated-system-of-government>.

¹⁹ Bojicic-Dzelilovic, V. (2013) 'Informality, Inequality and Social Reintegration in Post-War Transition', 7(2) *Studies in Social Justice* 211; Giordano, C. and Hayoz, N. (2014) *Informality in Eastern Europe*, Peter Lang 2014; Kleibrink, A., 'Political elites and decentralisation reforms in post-socialist Balkans regional patronage networks in Serbia and Croatia (New perspectives on South-East Europe, Palgrave)'; Cvejić, S. (2016) 'On inevitability of political clientelism in contemporary Serbia', 58 (2) 2 *Sociologija* 239.

²⁰ Priebe, R. (2015) 'The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts' Group on systemic Rule of

Law issues relating to the communications interception revealed in Spring 2015'; Pesic, V. (2007) 'State Capture and Widespread Corruption in Serbia', CEPS Working Document No. 262/March 2007, 22 and 24. Available at <http://bgcentar.org.rs/bgcentar/wp-content/uploads/2013/12/CEPS-State-Capture-and-Widespread-Corruption.pdf>; Heinrich Böll Stiftung (2017) 'Perspectives - Captured states in the Balkans'. Available at <https://ba.boell.org/bs/2017/09/29/perspectives-captured-states-balkans-0>.

²¹ Mendelski, M. (2015) 'The EU's Pathological Power: The Failure of External Rule of Law Promotion in South Eastern Europe', 39(3) *Southeastern Europe* 318.

‘functional equivalents’ of integration of fragmented states.

Second, the de-politicized and fragmented state lacks sovereignty and the ability to decide in the name of the interest of the dominant group (national, ethnic, civic, etc.). The divided state is therefore much easier to control, be it by foreign and transnational networks, international organizations or by hidden networks (shadow elites, transnational, parallel and informal networks, security-based and paramilitary networks or organized crime groups). The result of this lack of national sovereignty is a dependent and dysfunctional state (and economy). Despite selective progress in enclaves of excellence, the process of modernization (cum Europeanization) remains incomplete. Fragmented states do not achieve political unity (in the sense of a degree of structural coherence and cohesiveness among elites) and remain in a perpetual transition between the traditional and the modern. They are caught between national centripetal forces that try to rebuild the nation-state and international centrifugal forces (e.g. Europeanization, globalization) that erode the nation-state. Fragmented states never achieve the recombination of these two competing movements. Rather, they are torn apart by them.

How to overcome fragmentation and rebuild coherence? How to transition towards good (i.e. coherent) governance? Given the different historical, geopolitical, and socio-economic conditions, ‘one-size-fits-all’ approaches will hardly work. Re-forming and rebuilding the state through de-politicized agencies and horizontal accountability structures (e.g. constitutional courts, anti-corruption agencies) may work during periods of elite consensus (e.g. the Visegrád states in the early 1990s), but reinforce politicization, polarization, and conflict when elites are disunited (e.g. in Western Balkans). Strengthening national and political unity through partial exclusion of minorities (e.g. ethnic Russians) may create a unitary polity and good governance in one country (e.g. Estonia), but the same strategy can provoke a violent counter-reaction by the excluded minority in another country (e.g. Ukraine).

There should be many diverse transitional paths towards a unitary and functional nation-state. They can run from recreating political unity through national identity building, socio-economic integration (e.g. a common infrastructure), consensus on the legal norms, goals or values. The paths towards modern, integrated nation-states vary across time and space. The main policy advice for domestic reformers would be to avoid fragmentation, fractionalization, and too much heterogeneity. Building unity and coherent state structures can be done by initiating processes of de-agencification, de-fragmentation, de-party-politicization and de-feudalization. Only after having reconstructed political unity at the core, more pluralism at the periphery may be

sensible. Last but not least, civilizational processes are processes of recombination (and not of rejection). Successful reforms need to recombine the modern with the traditional, but in such a way that political unity at the core is preserved or rebuilt.

DEPOLITICISATION AND PROFESSIONALISATION OF PUBLIC INSTITUTIONS: HOW SHOULD IT (NOT) BE DONE

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Introduction: Why this Paper will Raise More Questions Than it Answers

There are some questions where the person who is supposed to provide an answer knows from the outset that they will fail. One of these questions is surely the issue of how one can prevent the (continued) abuse of public institutions in the transition states of the Western Balkans for the purpose of nepotism and patronage. If it were easy to achieve the depoliticization and professionalization of public institutions, it would already have been done. Despite great efforts by a wide range of different players with considerable financial resources at their disposal to combat the phenomena collectively referred to herein as ‘abuse of office’, this has so far not been possible. It would therefore be unrealistic to expect that the path to that goal can be described in this short paper.

Conclusive answers therefore cannot be provided here. However, suggestions can be put forward on individual points and it should be possible to formulate some proposals for further discussion.

The focus will lie on points which, in the author’s opinion, are usually given too little consideration in the discussion; a cursory presentation of all the ‘usual suspects’ among the generally recommended means of combating patronage networks and the like will thus be deliberately avoided. These mainly undiscussed points range from awareness-raising through protection for whistle blowers and the protection of journalists, including against civil law sanctions for reporting on patronage networks, to criminal sanctions for abuse of office. The participants in this event are probably already aware of these.

Why Some ‘Standard Methods’ Have Had Little Success So Far (and Will Continue to Do So)

It must also be pointed out before discussing this issue that some of the ‘standard methods’ in the fight against abuse of positions in public institutions are unfortunately less effective in practice than one would wish.

Judicial prosecution remains a blunt weapon if the justice system is dysfunctional.

The legal pursuit of abusers of public office is ineffective if the judicial system which considers the cases does not work properly and conducts the prosecution and clarification of such issues only half-heartedly or not at all. There are examples of this in the region with regard to corruption in the university examination system, where even high-profile proceedings against alleged

criminal offences have not been concluded even after ten years.¹

Judicial measures can only be as good as the justice system which handles them. And that justice system is in poor shape for many reasons (which, in the area of criminal procedural law, include rash legislative reforms that hamper judicial practice). Therefore, one area of activity in the fight against abuse of office must be the justice system and reform thereof.

Is ‘Naming and shaming’ often perceived as mere ‘Beyond a good horse there’s a lot of dust’?

The strategy of ‘naming and shaming’ also only works to a very limited degree in a social environment in which accusations by the media are more the rule than exception, as allegations tend to lose their potency in such a context. Irrespective of this (or because of it), media which operate reliably must be supported in order to increase their credibility and thus the pressure that media coverage can exert. ‘Naming and shaming’ is frequently conducted with support evidently being lent by foreign players. This is relevant because in South-East Europe there is a cultural tendency to close ranks if one’s compatriots (including those towards whom one is otherwise rather critically disposed) are attacked by outsiders. In a climate of such an enforced solidarity (which may also be called ‘reflexive solidarization’) with one’s ‘own people’, naming and shaming campaigns can therefore easily remain without effect or even be counterproductive, eliciting the old saying that “Beyond a good horse there’s a lot of dust” ? (this saying means that the fact that someone is the aim of criticism does not necessarily mean that this person really deserves to be criticized but may also be a sign of envy by the critics)

The ‘international community’ often has a credibility problem.

Furthermore, only he who is without fault should throw the first stone. As a foreigner from the West, one must bear in mind that in public perception in the respective country one is seen as being ‘in the same boat’ as all the members of the international community. ‘Naming and shaming’ campaigns with an all too obvious foreign background (which can also include financing by non-governmental organizations) can therefore easily fizzle out or even be counterproductive.

Generally, one must be aware of the fact that the ‘international community’ does not always set a good example as far as nepotism and cronyism in South-East Europe are concerned. Big scandals, though they do

happen², are not required for the inhabitants of the country to get the impression that the ‘international players’ are ‘no better’ and ‘do not practise what they preach’. Sometimes it is enough to merely watch, as an external observer (whether international or domestic is irrelevant), the personnel merry-go-round on the international (and also domestic) level over a longer period of time: Staff run from one project to another and from one position to the next (in some cases already in their second decade). It is thus easy to come to the conclusion that in this area such offices are obtained ‘through contacts’, as is alleged to occur in the case of domestic institutions.

Is there greater abuse of public institutions today than during socialism?

One must not forget that in many people’s perceptions there was less politicization and abuse of public institutions previously (i.e. in the socialist period) than is the case today. At that time there was certainly no shortage of attempts to abuse public institutions either. However, in socialist times, the abuse (even if it served personal purposes) was mostly perpetrated by the ruling party, which was also the only party, or by its members. Today in the post-conflict region of the Western Balkans, the group of individuals who abuse public institutions has presumably grown considerably and become more heterogeneous.

The naive faith in independent commissions and authorities

If one systematically addresses the subject of ‘depoliticization and professionalization of public institutions’, one finds that the following arguments are often put forward:

- Institutions are depoliticized and professionalized if their members and/or employees are selected and appointed according to professional criteria (and, during their work, are not subjected to any pressure and also do not themselves cede to the temptation to abuse their position).
- One must therefore take away the power to appoint them from politicians (parliaments) and transfer it to independent commissions.
- They will then decide independently and select the best candidates for the positions in question exclusively based on professional criteria.

¹ See, for example, <https://www.blic.rs/vesti/drustvo/afeta-indeks-trajanje-sudenja-neizvesno-i-posle-deset-godina-postupka/q1scvmv>.

² See, for example, <https://www.walesonline.co.uk/news/wales-news/former-director-kosovo-airport-bribes-2279238> and <https://bartstaes.be/nl-BE/artikel/content/200406-airport-corruption-row-inflames-kosovo-balkan-insight/24866>.

Following this approach, a wide range of commissions and councils have been set up in various states, from legal aid commissions to judicial councils or separate councils for appointing judges and public prosecutors. At least when one looks at Macedonia³ and Bosnia and Herzegovina⁴, doubts may arise as to whether this approach works as intended.

The problem that then arises can be described as follows: *‘What do you do if a commission which has deliberately been granted a high degree of independence decouples itself from the rules it is supposed to follow, if it turns into an ‘unguided missile’?’* This is a serious problem, particularly because these commissions are deliberately endowed with a largely untouchable status. As a result, their decisions are less contestable than typical administrative decisions.

These bad experiences should act as an impetus for a fundamental rethinking of the concept of independent commissions, particularly because such commissions raise questions from the point of view of the democratic principle and the principles of parliamentary democracy. For example, one might ask whether someone who mistrusts the political system with regard to appointments to public institutions therefore does not also reveal a mistrust for parliamentary democracy. Sometimes, one cannot avoid the impression that in discussions on this subject the phrase ‘the political system’ is used where the conversation should actually be about ‘abuse of a political position by politicians’ or by ‘certain parties’. Such mistrust for the political system also not least engenders disenchantment with politics and democracy.

This conclusion is important in the context of the subject of this paper because it follows from it that the education of members of parliament (besides the education of citizens in political matters) is also an important aspect of the fight against abuse of office. It is a good thing that civil society and the media also see themselves as watchdogs. However, this must not blind us to the fact that there should also be such watchdogs in the system of state institutions. This role should be played by members of parliament, though up to now they have performed it inadequately.

One should also consider whether it would not be better to set up and develop an administrative jurisdiction which qualitatively and objectively reviews, in accordance with the applicable laws, decisions on appointments to public institutions, promotions and sanctions against officeholders in those institutions

rather than rely on independent and therefore sometimes also unpredictable commissions.

Ideas for Discussion and Proposals

The situation is therefore ambiguous. For this reason (or in spite of this?), I will now put forward some ideas for discussion and make some proposals.

General observations

As we consider what a possible solution to the problem may look like, we must first understand that the key starting point on the pathway towards professionalization and depoliticization of institutions is access to those institutions. One must also take into account that there are essentially two types of access to positions in public institutions:

- 1.) The first are positions for which one must/should **qualify** through one’s own achievements and skills. These include, to put it simply, all typical civil service functions for which one has to be selected. One can therefore refer to these as **selected** public positions.
- 2.) The other type are positions to which one is **elected**, from traditional political offices to roles in commissions and authorities, which did not exist in this form in the past.⁵ These can be referred to as **elected** public positions.

A paradox

A paradox exists with regard to these two groups – for the first group, the possibilities of influencing the selection of the employees of the public institutions are greater. For the second, the elected offices, they are more limited, although the influence that individuals of this group have in their respective offices will usually be considerably greater than that enjoyed by those in the former. This means that the possibility of exercising influence over a public institution and its members and the influence of the public institutions and their employees are inversely proportional. This is a regrettable but unalterable fact.

Qualification-oriented positions in public institutions (selected positions)

For typical positions in the civil service which are not elected political offices, measures aimed at

³ https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20-17.09.14_seg_report_on_systemic_rol_issues_for_publication.pdf.

⁴ https://www.slobodna-bosna.ba/vijest/63181/pravni_eksperti_o_vs-tv_u_chemu_i_kome_sluzi_ovakvo_visoko_sudsko_i_tuzilackovj-ee_kao_i_sudije_i_tuzitelj-koje_ono_bira_i_postavlja.html.

⁵ There are also mixed forms, i.e. positions which are primarily filled based on performance but for which a collective body is involved in the appointment decision, so that the candidate’s performance is a requirement for inclusion in the group of candidates while the ultimate selection occurs through an election.

professionalization and depoliticization must primarily be taken at the point of access to those offices. Reforms in this respect should be immediately tackled, irrespective of progress in other areas, as inappropriate procedure at the point of access to public offices has the longest lasting repercussions – with each new appointment which is not made according to objective criteria, the existing situation in the relevant public office will be enshrined for decades, as, once a person has been appointed, they can only be removed from their position with difficulty under the current rule of law.

The search for objective criteria for the selection of officeholders.

To ensure that officeholders are appropriately selected, objective selection criteria must be established first. But what are objective criteria? This will have to be separately established for each role.

However, there are some common features: **Not everything that looks like an objective criterion is objective.** The first statement in this regard is probably surprising for some readers, as not everything which is measurable also automatically constitutes an objective criterion. For example, the mere number of cases that a judge deals with in a particular period says nothing about the quality of his decisions.

Nor is the number of cases dealt with by a judge which are reversed by the next instance an objective criterion. If it was, a judge whose decisions were all upheld in the next instance would be the best judge. However, since it is part and parcel of a continental European constitutional state that case-law is to a certain extent also a self-learning system and can improve (and therefore change), judges must have the personal aplomb to make decisions that diverge from the hitherto prevailing view. If, however, their reversal rate determines their advancement, judges become mere 'parrots' of the case-law of the next instance. This is incompatible with both the objectives of legal development through case law and the ideals of an independent judge; moreover, the citizen seeking justice is thus deprived of a functional instance.

The above arguments already indicate that the issue of objective content criteria is complex. Furthermore, it is clear that there are also 'bogus objective' criteria, which one should not use as the basis for a selection decision.

The selection procedure

Blind justice as a model for the selection procedure. The content of access examinations is only one of the issues which must be clarified in this context. Another question is how one can formally, objectively organize examinations that qualify candidates for a public office. In this respect, there is an ideal on a meta-level, which

has developed in the European cultural environment in the area of case-law and which can also serve as a guide for access to public offices, namely blind justice. In blind justice, a decision is made without looking at the person due to the judges being blindfolded.

The fact that one can actually implement a procedure that is blind to any information regarding the identity of the participants is demonstrated by the final examinations associated with legal education in Germany. The exams predominantly consist of written tests which, similar to scientific publications, are assessed by two examiners in a double-blind review, anonymously and independently of one another. Such a system can, if it is rigorously implemented, actually lead to anonymous examinations (in Germany, it even regularly happens in such examinations that professors give students who were among their favorites in lectures poor grades in written tests).

However, a precondition for this is that such a system must be consistently implemented and the other examination arrangements must also be in line with the idea of neutral selection of those individuals who are actually the best qualified in technical terms.

A broad range of grades. This also includes having a broad range of grades which is actually fully utilized by the examiners. It is particularly important that top grades are only awarded rarely and that fine differentiations within the top third of the performance range are made. This anonymous examination will thus also differentiate between those who are 'only' among the best and those who are the very top candidates.

A large written and anonymous part of the exam. Consistent implementation of the notion of selection of the best candidates also affects the number of written examinations and the weight that they have with respect to the subsequent oral test. A large number of exams reduces the risk that exam results are based primarily on flukes or one-off failures. Moreover, ensuring that the number of written anonymous examinations is as large as possible reduces the weighting of the subsequent oral exam in the overall assessment, in which anonymity cannot be granted for obvious reasons.

Minimum grade as a K.O. criterion. The points above alone are not enough to exclude errors (or manipulations) in an examination of this kind; thus, it is also necessary

that minimum grades (based on the number of positions to be filled) are established, below which employment in the public institution is impossible without exception. This is the only way nepotism and 'favors for friends' can be largely excluded – even a child of the national president will be 'out of the running' if he/she fails to achieve that minimum grade (the requirement for that

range of grades to actually be utilized by the examiners is mentioned above).

Measures following selection. This selection procedure is a *condicio sine qua non* for ensuring that only the best candidates in technical terms find their way into public institutions. However, this procedure alone is not sufficient, as technical qualifications alone do not guarantee that the office will not be abused. The temptation to abuse an office can never be entirely excluded, but it should be prevented as much as possible. Rules of conduct, such as a code of conduct, and internal regulations, as well as external regulations such as laws, through which the different forms of abuse of office are punished, may help to achieve this.

Almost even more important than this is that the employees in the public institutions are paid enough so that they do not give in to the temptation to abuse their office for material reasons. It is therefore necessary to pay the employees in these institutions an adequate (one could even say decent) salary. There would even be financial room for manoeuvre here if, as numerous people have demanded for many years, the hopelessly overmanned civil service were reformed and the subsequent smaller number of employees were paid more in their individual salaries. However, it must be borne in mind that this task is difficult to accomplish in terms of domestic policy. This is not only due to the resistance of those who would lose their job in a public institution as a 'technological surplus', but also due to the politicians in power who would lose out as a result. Even if they are not well-paid, positions in the civil service are also a means of conducting political patronage and thus securing votes.

Elected Positions

In the following, some ideas for discussion and proposals with regard to elected positions will be put forward.

Democracy puts limits on influence

The situation with elected positions is significantly more delicate. Here, respect for democracy rules out the possibility of introducing any direct influence. The question therefore arises as to how one can respect voters' autonomy and, at the same time, ensure that they are not manipulated or allow themselves to be manipulated. In order to get closer to a solution, one must first address abstractly (and perhaps also somewhat naively) the issue of how an 'ideal world' would look, in which public institutions (and therefore their employees) would work exclusively in a practically-oriented manner and in the interests of public welfare.

Support for public welfare must be strengthened

To do this, an overall social climate is required in which it is not one's own advantage (or that of one's own group) but public welfare which is seen as the goal of all action.

How can this be achieved? Realistically, it requires a certain level of material security, i.e. a certain standard of living of society as a whole. For altruism to exist, people must be able to afford it. This is already a well-nigh impossible task in view of the current situation in the transition states of the Western Balkans.

However, that alone is not enough. In societies in which the idea of public welfare has not gained acceptance for numerous reasons, a fundamental change in general consciousness is also necessary. This is not only a difficult educational task, but it is also tricky because overall social re-education measures actually fit in poorly with the ideal of a democratic, pluralist society, which is the aim of the transformation. At any rate, it should be noted that raising awareness is indispensable, but that this is only the first step.

The younger generation is the most important

Ingrained habits are hard to change. It becomes all the more difficult the older the target group is and the longer it has had that habit. It is easier to address younger target groups, whose idealism hopefully has not receded along with their hairline.

It follows from this that this awareness-raising must particularly address the young generation. Obviously, this also means that the self-imposed task of combating abuse of office will take several years, if not several generations, to accomplish. Anyone who expects quick fix solutions in this area must understand that he is ignoring important psychological, sociological and historical facts in the same way that the 'prophets' of early socialism did, who thought that a new world could be built within a few years.

The collective with which one identifies must be prioritized

Such awareness-raising should not take too naive and bold an approach. In principle, it should acknowledge that egoism exists. Strictly speaking, the current nepotism and clan mentality, like every form of collectivism, is egoism, based on the motto: if I do other people in 'my group' a favor, they will also do me one in return. When my group is doing well, the same goes for me. At least with regard to the second attitude, there is nothing to criticize. Strictly speaking, support of public welfare does not work any differently in a pluralist, democratic society. The only difference is that one defines the group which is supposed to prosper more

broadly and that, as a result, because the members of that group include everyone, it is also in my interests that the most qualified individuals take on particular offices.

Conclusion

Obviously, in such a short paper, important points relevant to the subject cannot be addressed to the necessary extent or even at all. In the author's view, the following points are significant for further discussion:

- We have not come close to finding the 'philosopher's stone'.
- Some steps that have been taken in the past (and are suggested or at least supported by the international community) should be reviewed.
- In particular, it should be considered whether independent commissions and councils are really always the right choice.
- The key point we should focus on with regard to the prevention of abuse of office is access to positions in public institutions.

This can be made very detailed in the case of employment relationships.

- In the case of positions which are filled through elections, the possibilities of exercising influence are comparatively limited. In this case, prevention of abuse of office must primarily focus on strengthening the responsibility of those who elect and those who are elected.
- A functional and actually independent administrative jurisdiction which allows questionable appointments and promotion decisions to be objectively examined is also necessary.
- In the area of access to positions in public institutions, action must be taken immediately. With each new appointment made according to questionable existing criteria, not only is the technically better qualified but unsuccessful candidate wronged, but the current situation is also prolonged by decades.
- The selection of qualified employees alone does not prevent abuse of positions in public institutions. If the material situation of the employees is inadequate, even objectively selected employees may be inclined to abuse their position.
- Moreover, the substantive laws must provide a lever against abuse of office and at the same time protect

those who counteract abuse of office (e.g. whistleblowers or journalists) from the possibility of being prosecuted for their actions.

- A functional justice system is also necessary to implement those regulations.

Abuse of office is symptomatic of the fact that the entire system of public service is seriously defective. At the same time, these defects in turn also give rise to abuse of office. Abuse of office is thus both symptom and cause at once; it therefore cannot be combated in isolation. Without comprehensive reform of all public institutions, combating abuse of office will always remain piecemeal.

FUNDAMENTALS FIRST: OPERATIONALIZING THE FIGHT AGAINST CORRUPTION IN THE EU ACCESSION OF THE WESTERN BALKAN COUNTRIES

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How to Read the New Enlargement Strategy

Corruption remains one of the primary traits of societies in the Western Balkans. The effective and successful fight against it has not yet occurred. Corruption impairs democracy, the economy, and the overall prosperity anywhere it takes place.

The new EU Enlargement Strategy, published in February 2018, spells out key areas of policy concentration in the upcoming period. These are grouped into four areas¹:

- Rule of law, fundamental rights, governance
- Strengthening the economy
- Applying EU rules and standards
- Reconciliation, good neighborly relations, and regional cooperation

The Commission makes no reservations in pointing out that “reforms in the area of rule of law, fundamental rights and good governance remain the most pressing issues for the Western Balkans.”² Under this heading, it lists tasks that urgently need to be fulfilled: an independent judiciary, the fight against corruption, the transparent management of public funds, tackling organized crime, the protection of fundamental rights, strengthening democratic institutions, carrying out public administration reform, and inclusive social dialogues with all relevant stakeholders.³ Let us just spend a moment on the first task: a judiciary which must be independent and free from political interference in its work.

Corruption cannot be uprooted in societies in which courts rule unfairly and in which citizens are not equal under the same law.⁴ It is as simple and as basic as this. The new enlargement strategy, if it wants to deliver, may not need to go any step further. The Commission and other stakeholders could just spend all their efforts in ensuring that judges are competent, that they are independent, and that courts are staffed and resourceful. Fairness and justice are the foundations of a functional, stable democratic system which ensures that all its citizens, regardless of their race, ethnicity, religion, gender, economic status, political affiliation, family background and any other identity trait, are equal under law. Such a rules-based system makes the existence of untouchables impossible. Such a system nurtures trust and strengthens social ties. It works for the benefit of all, not just a privileged few.

¹ European Commission (2018) 'A credible enlargement perspective for and enhanced EU engagement with the Western Balkans.', 6 February 2018.

² Ibid, p. 4.

³ Ibid, pp. 4-5.

⁴ Eric M. Uslaner, an expert on corruption, speaking at a training workshop, 'Anti-corruption and transparency in public administration', held in Zagreb on March 15-17, 2018.

An accountable executive and legislative ensure that elected officials work for the benefit of society, not for themselves or their patrons. Slowly, a sense settles that the government is not there to abuse, cheat, and misappropriate, but to protect, advance, and safeguard public interests.

Fundamentals First⁵

With this vision in mind, reforms are not conducted to tick a box in the evaluation reports of Commission officials, but to create genuine positive changes in a society. Only a new generation of leaders able and willing to articulate such a vision and a society that recognizes and supports such leaders will make a lasting change. Anything short of that is a cosmetic, superficial change that scratches the surface without ever delving deeper into the corrupt undercurrents of Balkan societies. A sophisticated and elaborate guise of reforms⁶, as a reaction to ever more sophisticated and elaborate EU conditions, would not do the job.

The EU understands the current underperforming reform dynamic in the Western Balkans, but is also criticized as being an accomplice in democratic regression by its preference for stability over democracy.⁷ Embroiled in its internal battles, confronting Brexit and responding to ever increasing foreign policy and security demands from outside, it is not surprising that the EU exhibits preference for stability and peace in its Southeastern corner, even at the price of democracy.

There is no need to elaborate here on how self-defeating this approach is, however. A number of experts have already warned about this ill-fated policy preference.⁸ With little appetite for further enlargement under current circumstances in the EU and in light of prevailing trends in the Western Balkans, there are slim prospects for deep and comprehensive change in this region in the next few years. Yet, these years should not be lost time. Positive trends exist – a potential brought about by a change of government in Macedonia and the resolution of the border dispute between Montenegro and Kosovo. To maximize both time and effort, the EU should further

streamline the new enlargement strategy and pronounce a selected few key goals it wants to achieve in the coming years.

The focus should be on entrenching the rule of law, an effective fight against corruption and organized crime, support for competent and independent judiciary, and the protection of minority rights. These lie at the core of the EU and, thus, should be at the core of the EU's approach to this region.

Compromising on fundamentals undermines the overall objective of the EU's engagement in the Balkans. Choosing easy goals will not do the trick. It is rather time for a slow, steady and stubborn policy of 'fundamentals first'.

Reflecting on the Croatian Experience in Fighting Corruption

When operationalizing the rule of law and the fight against corruption, the Croatian experience may be instructive. Lessons learned from the accession negotiations of a country that, in terms of historical legacy, geographic vicinity, and temporal proximity is the closest to the countries in the Western Balkans, is valuable both in terms of what and what not to do.

To effectively fight corruption, Croatia both adopted new and changed existing laws in addition to taking a number of other steps, including the establishment of USKOK, an anti-corruption agency⁹ whose powers and resources grew over time. Croatia, to start with, had some relatively independent judges as well as media that extensively reported on corruption cases, and a staunch civil society acting as watchdog. In addition, Croatia negotiated the most demanding *acquis* to that date alone. This meant that the capacity to monitor a small country negotiating alone was much higher than it is in the case of a cluster of ten, or even two.

The fight against corruption was also high on the EU's agenda in assessing Croatia's progress. Since 2006, the EU Commission insisted that Croatia intensified the fight

⁵ See Alexander Strelkov (2017) 'Rising nationalism and EU transformative power in the Balkans: What went wrong and how to fix it' in Valeska Esch and Yannic Remme, eds., *A European Future for the Western Balkans. Addressing Political and Economic Challenges*. The Aspen Institute Germany.

⁶ Gergana Noutcheva (2007) 'Fake, Partial and Imposed Compliance: The Limits of the EU's Normative Power in the Western Balkans', *Journal of European Public Policy* 16(7); Florian Bieber (2011) 'Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans', *Europe-Asia Studies* 63(10).

⁷ Kurt Bassuener (2017) 'Power in the Balkans: Time to reverse a decade of regression.', *The New European*, 13 June 2017. Available at <http://www.theneweuropean.co.uk/top-stories/power-in-the-balkans-time-to-reverse-a-decade-of-regression-1-5059969>; Bodo Weber (2017) 'The Western Balkan Societies' *Travails with Democratic Transformation and the Fate of the Transformative*

Power of EU Integration' and Marko Kmezić (2017) 'Democracy in the Western Balkans - the Current State of Play', both in Valeska Esch and Yannic Remme, eds., *A European Future for the Western Balkans. Addressing Political and Economic Challenges*. The Aspen Institute Germany.

⁸ Jasmin Mujanović (2018) *Hunger and Fury: The Crisis of Democracy in the Balkans*. Hurst Publishers; Srđan Cvijić (2017) 'EU is ready to trade democracy for stability in the Western Balkans.', *European Western Balkans*, 5 April 2017; Marko Kmezić and Florian Bieber, eds. (2017) *The Crisis of Democracy in the Western Balkans. An Anatomy of Stabilitocracy and the Limits of EU Democracy Promotion*. BiEPAG (Balkans in Europe Policy Advisory Group), March.

⁹ The Bureau for the Suppression of Corruption and Organized Crime (USKOK) serves as a model for creating anti-corruption agencies in other countries of the Western Balkans.

against corruption.¹⁰ To demonstrate seriousness, the country started with a few corruption trials of university professors, an out-of-favor business tycoon, and several other cases that were usually referred to as ‘small fish’ in the media.¹¹ However, due to a set of circumstances, Ivo Sanader, the Croatian prime minister, resigned in 2009, leaving Jadranka Kosor as his successor - at the time the minister for war veterans. Sanader apparently selected Kosor as his replacement counting on her loyalty as well as lack of political independence, and lack of explicit political ambition.¹² Kosor enjoyed no political clout within the party nor in the Croatian society. She spent the first months in office making sure that her cabinet and the public acknowledged the fact that she was the prime minister. Kosor, to Sanader’s surprise, proved anything but loyal or obedient.¹³ She was determined to gain legitimacy and the best way to achieve that was by doing what her predecessor could not, namely unblock Croatia’s accession negotiations.

One aspect of this was to show determination in fighting corruption. Kosor gave full political backing to USKOK and the police to carry out investigations and raise charges against those suspected of corruption, whoever they may be. Her policy of ‘zero tolerance for corruption’¹⁴ resulted in the apprehension and trials of government ministers, public officials, businessmen, and eventually, of the former prime minister himself. If not this, then what would be proof that Croatia was serious about uprooting corruption?

The political will in the case of Kosor seems to have come out of the genuine belief that Croatia should do everything necessary to join the EU, including an uncompromising fight against corruption. At the same time, by pursuing such a policy, she personally stood with nothing to lose. She was not a part of Sanader’s clique in HDZ (Croatian Democratic Union) or any other corrupt network. On the contrary, fighting corruption could help Kosor eliminate opponents and bolster her own hold on power.

In two independent court procedures, Sanader was found guilty in 2012 and 2014, convicted for nearly two decades in prison and obliged to return millions of euros.

HDZ, as the first political party ever, was found guilty and required to pay back four million euros. Croatia entered the EU with several prominent court cases ongoing, including a further case against Sanader. There was a belief that the fight against corruption was entrenched and that Croatia had crossed a point of no return. The Commission decided not to impose a monitoring mechanism despite a consortium of NGOs in Croatia requesting otherwise. As a result, a ‘Sanader syndrome’ has spread across the Western Balkans, as leaders are undermining the rule of law and the fight against corruption if that saves them from jail.

After joining the EU, enthusiasm for fighting corruption receded in Croatia. Under Kosor, HDZ lost elections in late 2012 and she was kicked out of the party on March 1, 2013. In 2015, the Constitutional Court, in one case against Sanader, and the Supreme Court, in another case, demanded new trials.¹⁵ There was hardly any progress in ongoing court cases. The investigation of a powerful mayor of Zagreb, lasting for several years including his arrest, did not materialize in an official charge against him. Even a convicted former minister in Sanader’s cabinet, who in 2012 admitted his crimes and was sentenced to community work as a cooperative repentant (a few months of peeling potatoes in a public kitchen), requested the annulment of his conviction and demanded a renewed trial in July 2017 in the spirit of regression on the fight against corruption.¹⁶

In 2016, the minister of interior at the time called the Constitutional Court in Croatia a threat to national security, making reference to questionable decisions the Court made in a number of criminal proceedings.¹⁷ A Committee on Deciding on Conflict of Interest was an active and visible body investigating conflicts of interest of public officials for several years. One of its investigations led to the resignation of Tomislav Karamarko, HDZ’s party president, in 2016. However, in 2018, the Committee was taken back under political control when the Croatian Parliament did not renew the mandate of the Committee’s female president, an agile and outspoken person. The same fate is probably awaiting the president, also a woman, of the Committee

¹⁰ European Commission, ‘Enlargement Strategy and main challenges 2006-2007.’ Brussels, 7 November.

¹¹ HINA (2009) ‘Pusić: Demontirajmo ‘kulturu’ korupcije’, T-portal, 13 November 2009. Available at <https://www.tportal.hr/vijesti/clanak/pusic-demontirajmo-kulturu-korupcije-20091113>.

¹² Gordan Malić (2010) ‘Zašto Sanader umjesto Jadranke Kosor nije izabrao Bebića, Šeksa ili Kalmetu?’, Jutarnji list, 9 November. Available at <https://www.jutarnji.hr/arhiva/zasto-sanader-umjesto-jadranke-kosor-nije-izabrao-bebica-seksa-ili-kalmetu/1891488/>.

¹³ Mislav Bago (2009) ‘Kosor: nekome smeta moja odlučnost’, Dnevnik.hr, 10 September 2009. Available at <https://dnevnik.hr/vijesti/hrvatska/kosor-nekome-smeta-moja-odlucnost.html>.

¹⁴ Anita Malenica (2009) ‘Kosor: Vlada ima nultu toleranciju za bilo koji oblik kriminala i korupcije’, Večernji list, 19 December 2009. Available at <https://www.vecernji.hr/vijesti/kosor-vlada-ima-nultu-toleranciju-za-bilo-koji-oblik-kriminala-i-korupcije-69339>.

¹⁵ A. Elbasani and S. Šelo Šabić (2017) ‘Rule of law, corruption and democratic accountability in the course of EU enlargement’, Journal of European Public Policy, Published online 4 May 2017. DOI 10.1080/13501763.2017.1315162.

¹⁶ I.I.R. (2017) ‘Čobankovićev odvjetnik pojasnio zašto je zatraženo poništenje u slučaju Planinska’, Dnevnik.hr, 7 July 2017. Available at <https://dnevnik.hr/vijesti/hrvatska/petar-cobankovic-zatrazio-ponistenje-presude-u-slucaju-planinska---482046.html>.

¹⁷ Zdravko Milinović (2016) ‘Orepić u velikom intervjuu novom Globusu: ‘Najveća prijetnja nacionalnoj sigurnosti Hrvatske je Ustavni sud, vrijeme je da podnese kolektivnu ostavku!’’, Globus, 6 December 2016. Available at <https://www.jutarnji.hr/globus/Globus-politika/orepic-u-velikom-intervjuu-novom-globusunajvec-aprijetnja-nacionalnoj-sigurnosti-hrvatske-je-ustavni-sud-vrijeme-eda-podnese-kolektivnu-ostavku/5354147/>.

for Access to Information, whose mandate runs out in 2018.

GONG, a local prominent NGO, held a press conference on the occasion of Anti-corruption day in December 2017. The key message was that the will to fight corruption in Croatia has significantly decreased since the country joined the EU.¹⁸

What the Croatian experience teaches us is that the fight against corruption is a permanent struggle and that temporary breakthroughs do not necessarily entrench an anti-corruption mindset for good. The pledge to fight corruption has to be regularly renewed.

Final Observations

How does the Croatian story relate to the Western Balkan dynamic in fighting corruption? Croatia had a relatively independent judiciary and a solid civil society at the beginning of negotiations. It also had a consensus on joining the EU. One, both or all three of these may be lacking in one or more of the Western Balkans countries. The consensus to join the EU was strong, but it seems that vested interests were stronger. Securing clientelistic and corrupt networks has inhibited a genuine fight against corruption despite public statements, political campaign slogans, extensive media reporting on corruption and pressure from the EU. What has been lacking is the political will. In Croatia, the will to fight corruption came as a completely unusual episode, with the prime minister resigning to be replaced by a person who apparently had no corrupt networks to protect. This, in combination with EU pressure, led to a breakthrough. Yet, once Croatia joined the EU, the will to fight corruption receded. Perhaps this regression is a result of the incoherence of Croatia's laws, as some legal experts claim? Or is it a result of deep corrupt undercurrents going all the way to the Constitutional Court, as a former interior minister claimed? One can only hope that the regression in the fight against corruption is of temporary nature and that it will accelerate when a new consensus is fostered – namely that reforms are carried out to develop one's society, not to please the EU Commission. Croatia indeed had a consensus on acceding to the EU, but it was "a political goal instead of being the main instrument for the achievement of development goals."¹⁹

Despite its shortcomings, Croatia stands as a 'success story' in fighting corruption during the final stages of the accession process. How likely, then, is it to try to replicate its experience in other Western Balkan countries? How likely is it that one or more of the current

leaders in the region voluntarily steps down and gives way to a successor who has no reservations in fighting corruption?

Short of an option to manipulate office succession processes, the EU should focus on instruments and policies that take into account an existing lack of will to fight corruption.

With corruption identified as the second biggest problem after unemployment by citizens in the Western Balkans²⁰, the EU should prepare itself for a long-lasting battle to help create conditions in which corruption can be fought and resilient democratic institutions sustained. Operationalization of the rule of law in the new strategy has to be detailed and strategic.

Possible measures such as earmarked funds for the development of independent anti-corruption agencies, the training of judges, the protection of judges' independence, the active dialogue with and support of civil society, education and public campaigns on anti-corruption already exist. What is needed on behalf of the EU is a clear and uncompromising focus on the fight against corruption as a crucial policy area in the enlargement process.

¹⁸ GONG (2017) 'After joining EU, Croatia lost political will to fight corruption.', 8 December 2017. Available at <http://gong.hr/en/good-governance/after-joining-eu-croatia-lost-political-will-to-fi/>.

¹⁹ Pero Maldini and Davor Pauković, eds. (2016) *Croatia and the European Union*. Routledge. Introduction.

²⁰ Center for the Study of Democracy (2016) 'Izviješće o procjeni korupcije u 2016. godini', p. 7.

THE NEW EU ENLARGEMENT STRATEGY AND ANTI-CORRUPTION MEASURES IN THE WESTERN BALKANS

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In February 2018, the European Commission (EC) published a new strategy setting out its future plan to engage with the Western Balkans on their journey towards joining the European Union (EU). This strategy reinvigorates the languishing aspiration of the six Western Balkan states to be part of the Union, and it calls for concrete action and results from the countries and from the EU in achieving that goal. The EU highlights its commitment to support this process, and reminds the countries of the need to give priority to the rule of law, justice, and fundamental rights in their negotiations. The EU's recognition of these countries as captured and the fight against corruption are especially relevant aspects of the strategy.

Anti-Corruption in the New EU Enlargement Strategy for the Western Balkans

The new EC strategy 'Credible enlargement perspective for an enhanced EU engagement with the Western Balkans' (2018) strongly prioritizes the fight against corruption as part of the rule of law, fundamental rights, and good governance, the key benchmarks against which the Western Balkans will be judged by the EU. The strategy emphasizes the importance for Western Balkan countries to 'root out corruption without compromise'. The EC suggests two approaches to achieve that goal: through the enforcement of the rule of law and effective sanctioning mechanisms, and through prevention. In the first case, strong and independent institutions are crucial to conduct more effective investigations and prosecutions leading to the enforcement of court decisions and the inclusion of dissuasive sanctions. The need to strengthen specialized prosecutorial structures and judicial bodies, including special police units to prosecution offices, is particularly important.

Regarding the prevention of corruption, the EU highlights the need for reform in the area of public procurement. Specifically, it recommends more transparency in the management of public funds at all stages of public procurement, increased competitiveness and fairness in public procurement tenders, a limit on the use of confidential procedures, and the introduction of safeguards to preclude political influence on bidders. Crucial reforms for the prevention of corruption include transparent and publicly accessible e-procurement to enable citizens to know how their taxes are spent, managerial accountability, and an institutional culture of internal control.

The way in which the EC refers to the problem of corruption as part of the new enlargement strategy presents some novelties. One is the increased priority given to the problem of corruption. Since the 1990s, anti-

corruption measures have been vital for accession to the EU, since corruption undermines the core democratic values, stability of institutions and economic growth necessary to meet the Copenhagen criteria (Lilyanova, 2017). Nevertheless, at the start of the accession talks, corruption in the context of the Western Balkans was only mentioned after organized crime, which was considered the primary concern in the region (Stabilisation and Association Process 1999, Western Balkan Summit in Thessaloniki 2003, Ministerial Meeting Brussels 2003). The importance of corruption started to rise around the time of the Berlin Process in 2014, when a zero-tolerance policy on corruption was considered vital for achieving sustainable economic growth. Under the new strategy, the emphasis on corruption is not only mentioned (as was previously the case); it is also defined, and this leads to the second novelty.

The increased importance of tackling corruption is accompanied by a broader and more complex understanding of corruption in the region. From an initial narrow comprehension of corruption as bribery in the EU (Open Society Institute, 2002), the new strategy presents a complex and more realistic picture of corruption, characterized by the links with organized crime; the existence of corruption at all levels of government and administration; the strong entanglement of public and private interests; impunity; inequality; and extensive political interference in and control of the media and in public procurement. Of particular importance is the explicit mention of the existence of state capture in the region. The message to Western Balkan countries about it is clear: any sign showing that the machinery of the state has been captured by private interest will seriously compromise any chance of becoming an EU member by 2025 (Transparency International, 2018).

A powerful motivation to include the emphasis on corruption and state capture in the new strategy is the realization that previous rounds of enlargement failed to address this problem efficiently. For example, according to data provided by Transparency International's 2009 Corruption Perception Index (CPI), among the 15 countries considered to be most corrupt in the EU, 10 were then recently added member states: Bulgaria, Romania, Latvia, Slovakia, Lithuania, Czech Republic, Poland, Hungary, Malta, and Slovenia. The index for 2017 showed the same findings, with the addition of Croatia.

The EC is also continuing with its recent inclusion of benchmarks (which had previously been absent); moreover, it is focusing on results, and not just on harmonizing legislation (Lilyanova, 2017), in the assessment of anti-corruption progress. For example, the Action Plan in Support of the Transformation of the

Western Balkans (2018) includes concrete and specific methods, such as case-based peer-review missions, trial monitoring for serious corruption and organized crime, and the measurement of results in justice reform. Related to this is the EC understanding that strengthening the rule of law is not only an institutional issue; it also requires changes from different elements of the society (Transparency International, 2018).

New Insights on State Capture: Rethinking Anti-Corruption Approaches in the Western Balkans

Since the prospect of integrating the Western Balkans and Turkey into the EU first arose in the 1990s, these countries have made important steps towards fighting corruption through the creation of anti-corruption institutions and laws. Decades later, however, the results of these measures have not been as expected. In Transparency International's most recent Corruption Perception Index (2017), the Western Balkan countries and Turkey scored below 46 (100: considered very clean; 0: highly corrupt), with Montenegro performing best (CPI score 46) and the Former Yugoslav Republic of Macedonia performing worst (CPI score 35). This negative perception is confirmed by the Balkan Barometer 2017, which shows that corruption is seen as pervasive across the region and corroborates an overwhelming sentiment that the rule of law is a problem there. Several studies point to the 'systemic nature' and 'institutionalisation' of corruption as the region's major difficulty (Lilyanova, 2017).

National Integrity System assessments (a methodology to analyze the robustness and effectiveness of a country's institutions in preventing and fighting corruption) for the seven countries¹ point to the consistent dominance of political parties over the Executive and the lack of cooperation and coordination among state actors as key explanatory factors for the lack of better anti-corruption results (McDevitt, 2016). While anti-corruption laws and policies are good on paper, they are selectively enforced, and corruption goes largely unpunished (McDevitt, 2016). A general characteristic across the region is the subjection of the media and civil society to different kinds of direct and indirect pressures. The media, for example, is characterized by tight government control, external interference and self-censorship, which reduces its ability to act as an impartial watchdog (McDevitt, 2016). The weakness in law enforcement is attributed in large part to the captured political systems, and the close links to organized crime networks and wealthy private businessmen.

State capture (understood as a situation in which powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a

¹ The Western Balkan Six and Turkey.

nation's policies, legal environment and economy to benefit their own private interests) is consistent across the seven countries (McDevitt, 2016). Nevertheless, even if the existence of state capture in the Western Balkan countries has been publicly acknowledged, its complexity has not always been understood. Transparency International's analysis of obstacles to good governance and state capture in high-risk sectors in the Western Balkans sheds light on how state capture takes place in the region.²

Despite the specificities in each country, Transparency International's analysis suggests some important key shared characteristics of state capture for anti-corruption design. One is that the capture of a specific sector often needs to work at two levels: at the decision-making level, for the actual achievement and protection of the capture through the design of tailor-made policies and laws (or the nationalization or privatization of the sector); and at the level of maintaining that capture through different mechanisms of corruption. Customized laws and policies to suit the interests of the captors alone are not sufficient. To preserve the structure that maintains the capture, the captors need to put an array of corrupt mechanisms in place to keep the 'right or favorable' officials in office, to maintain the cracks in the state apparatus that facilitate the capture, to buy impunity, or to bribe the police due to their controlling power (among other factors). This implies that state capture should be approached at two levels: in the way it is achieved and in the way it is maintained. Thus, the separation between grand corruption and petit corruption mechanisms as traditionally understood is blurred, since both can be interlinked.

A second key realization is that state capture is not about the size or extent but the distribution of corrupt activities. On the one hand, there are contexts in which we find extensive corruption in government, but the decision-making processes at policy level are not necessarily captured. On the other hand, there can be less extended corruption that operates in a way that controls decision-making processes in a specific sector at the macro level. Moreover, the state capture can be replicated in smaller decision-making processes, creating micro-state capture.

Third, the capture of a certain sector cannot be addressed in isolation from other government sectors. This does not only imply the existence of networks necessary for the capture of the state, but also considers the connections between policies, looking at how the capture of a specific sector or policy area affects others, generating either corrupt relations of dependency or contradictory governance.

Finally, one of the overall conclusions of Transparency International's research on state capture in the Western Balkans region is the difficulty in providing a universal definition of state capture due to the different understandings and forms that the capture of the state can take, depending on the context. Despite some historical differences between the countries of the Former Yugoslavia and Albania, they share some contextual characteristics that are important to consider for an effective anti-corruption approach. One of the most significant is the existence of strong patron-client relationships. In post-communist countries, for example, patron-client networks have played an important role in structuring the relationship between the state, the private sector and the citizens (Open Society Institute, 2002). Those networks are generally based on inter-temporal systems of exchange of benefits that make corruption very difficult to define or identify (Open Society Institute, 2002). In addition, social fragmentation and ethnic and religious divides in Western Balkan societies – with the exception of Albania, which has a considerably homogenous society – create a context in which favoritism and uneven application of the law is applied (McDevitt, 2016). Thus, a broader understanding of the phenomenon of corruption in the Western Balkans, together with contextual specificities, should be accompanied by more specific and contextualized anti-corruption approaches.

Strategies to Counteract Corruption in the Western Balkans

A more complete understanding of the problem of corruption in the Western Balkans requires specific strategies to fight it. Regarding concrete recommendations, the new EC enlargement strategy for the region points to the Judiciary, the political system, and the media and civil society as priority areas for reform. The following table (please see Annex) compares EC recommendations and Transparency International recommendations based on the National Integrity System regional report (McDevitt, 2016) for those specific areas (based on Transparency International, 2018).

Conclusion

In general, the anti-corruption policy measures the EC has tended to recommend to candidate states have emphasized the enforcement of criminal anti-corruption law, a top-down approach to the promotion of codes of ethics to public officials (Open Society Institute, 2002), and institutional reform to increase the capacity of institutions to identify and denounce corruption. This

² This analysis is based on the case studies done by Transparency International chapters and partners in 2017 on high-risk sectors such as health, energy, urbanism and private security in Bosnia-Herzegovina, The Former Yugoslav Republic of Macedonia,

Serbia, Kosovo, Montenegro, Albania and Turkey. Since this paper focuses on the Western Balkans, we do not refer to the case of Turkey.

anti-corruption approach seems to understand that corruption happens because it is both convenient (from the perspective of rational choice behavior) and possible (following the Klitgaard approach, the high discretion of public officials and the little transparency and accountability they encounter). Recent studies show that the origin of corruption might be more complex and less logical. Particularly in the Western Balkans, relations of dependency, links with other social challenges (such as organized crime and ethnic and religious divisions), and social norms that shape behavior (such as the communist legacy, the associated lack of a clear sense of public responsibilities and a public culture that rewards integrity [Open Society Institute, 2002]) are important conditions. Those conditions call for broader societal reforms and anti-corruption approaches to address two key challenges in the region: the effective implementation of anti-corruption mechanisms and the lack of the political will to fight corruption.

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Annex

	EC Enlargement Strategy (2018)	TI's NIS report (2016)
Judiciary	<p>Ensure the independence, quality and efficiency of the judicial system</p> <p>Strong specialised prosecutorial structures to fight corruption and organised crime and judicial bodies</p> <p>Allocation of special police units to prosecution offices</p> <p>Pursue and enforce the stripping of illegally acquired assets, the loss of the right to hold public office, stricter compliance rules for public officials and accessible information and complaints mechanisms for citizens</p> <p>A concrete and sustained track record in tackling corruption, money laundering and organised crime</p>	<p>Reduce executive influence over the judiciary and prosecution by ensuring transparent and more objective systems for the appointment, transferal and dismissal of judges and prosecutors</p> <p>Reduce the politicisation and strengthen the professionalisation of the police by applying strict sanctions on members of the police who engage in political activity, and by ensuring merit-based appointment of police personnel</p> <p>Strengthen cooperation between bodies responsible for investigating and prosecuting corruption, and improve the quality and sharing of information regarding the prosecution of corruption offences</p> <p>Minimize delays in processing corruption cases and provide transparent justification for decisions not to prosecute</p>
Political system	<p>Reform the rules for the public and private financing of political parties</p>	<p>Improve the transparency of political party finances, including full publication of party incomes and expenditures</p> <p>Develop stronger and more coordinated oversight of political party and campaign finances and activities, and ensure that violations of electoral and campaign regulations are consistently punished</p> <p>Apply strict penalties for the abuse of public resources for election campaigns</p> <p>Ensure the integrity of those running for political office, for example by establishing checks on candidate backgrounds and excluding those faced with criminal charges</p>
Media and civil society	<p>Safeguard the freedom of expression and the independence of the media</p> <p>Ensure stakeholders can actively participate in the reform and policy-making process by, for example, establishing inclusive structured dialogues on reform priorities with the involvement of an empowered civil society</p>	<p>Investigate all allegations of threats and violence against media and civil society representatives without delay, and apply strict sentences when these are proved to be well-founded</p> <p>Ensure full transparency in terms of media ownership and civil society organisation funding</p> <p>Ensure fair and transparent procedures for the allocation of state subsidies and tax exemptions for civil society and media organizations, and establish clear rules for state-sponsored advertising in the media</p> <p>Ensure effective and apolitical regulation of media and civil society organizations</p>

GUARANTEEING FUNDAMENTAL RIGHTS IN THE WESTERN BALKANS

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Introduction

Post-conflict societies with deep ethnic cleavages create less than optimal circumstances for guaranteeing fundamental rights to all citizens equally, as the case of the Western Balkans has clearly indicated. The legal guarantees and the institutions in the region have been in flux in the last three decades due to the various wars and conflicts, the democratic and economic transition, and the numerous conditionalities from international organizations. The legislation has been shaped by the adaptation to international and European instruments of human rights protection as well as the broader context of European integration. While on paper, the regulations guaranteeing fundamental rights are in place, in practice the realization of rights has been difficult, especially for vulnerable and marginalized groups. The regional standing in various international and European human rights indices confirms this broad gap between the legal guarantees and their realization.¹

The implementation of the numerous reforms has been difficult due to a number of issues which include basic rule of law issues and state capture, as the European Commission noted in its last communication on credible enlargement.² The elements of state capture in most of these societies relate to a grip of the executive over the other branches of government and the increasing role of political parties. In response, the trust in institutions, including the judiciary, is very low.³ In these circumstances, the realization of fundamental rights becomes increasingly difficult due to a variety of reasons which can be traced to weaknesses in all branches of power, including the executive, the judiciary as well as independent bodies responsible for their protection.

With this in mind, this paper aims to analyze how the interplay of the weaknesses of the various branches of government in the Western Balkans has contributed to the problems in guaranteeing fundamental rights in the region, focusing on anti-discrimination policies. Anti-discrimination is a policy area which has been shaped significantly by the European Union due to the legislative alignment requirements. These include a well-functioning executive, the operation of an independent equality body, and also a judicial track record. Anti-discrimination is therefore an appropriate policy area to examine how the weaknesses of various branches of government and institutions contribute to the feeble implementation of this legislation across the region.

¹ See table in annex 1.

² European Commission, 'A credible enlargement perspective for and enhanced EU engagement with the Western Balkans', February 6, 2018, available at: [https://ec.europa.eu/commission/sites/beta-](https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf)

[political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf).

³ See 'Balkan Barometer 2017', available at: https://www.rcc.int/see ds/files/RCC_BalkanBarometer_PublicOpinion_2017.pdf.

Systemic rule of law weaknesses and realization of fundamental rights

From a systemic perspective, the realization of fundamental rights relies on the effective operation of all branches of government and respect for international instruments. Yet, the governments and public administrations in the region have been facing substantial difficulties in terms of competences and capacities. At the policy level, the fundamental rights protection is based on inter-institutional cooperation and coordination, which is one of the weakest links in these policy systems.⁴ In addition, legal certainty in the region has been undermined by the adoption of laws with extraordinary procedures as well as hasty alignment with the European *acquis* and best practices. The international obligations are largely seen as external and are not embedded in the national systems.

Second, while the executive has been a weak link in upholding the rule of law, the judiciaries in the region have been plagued by questions as to their impartiality.⁵ There is low awareness of human rights instruments, although ratified and considered to be part of the domestic legal framework. At the same time, the judiciaries do not sufficiently use the practice of the European Court of Human Rights (ECHR) or the European Court of Justice (ECJ) as a reference point. The judicial reforms, although lengthy, have still not bred significant results in terms of positioning the judiciary as a third power in these countries.

Third, the circumstances of state capture have not been fertile for the work of independent bodies vested with fundamental rights protection; for instance, ombudsmen and equality bodies all over the region are plagued by underfunding, including low staffing levels. In most cases, ombudsmen and human rights protectors all around the region do not satisfy the Paris principles for national human rights institutions in terms of their financial independence and the approval of their budgets.

Fourth, fundamental rights depend on the support and mobilization of civil society organizations (CSOs), which mobilize and advocate on behalf of various marginalized groups. The Balkan Civil Society Development Network noted in 2017 that the opportunities for civil society development are diminishing in all enlargement candidate countries,

which brings to the fore the need to prioritize support for ensuring an adequate legal environment, diversified financial sources, political support and effective cooperation between the state and CSOs in a regular, structured way.⁶

In these circumstances, it is broadly expected that the prospects of EU membership will help to support democratizing forces of the society and the reestablishment of checks and balances between the various branches of government. The question remains, however, whether this is too heavy a lift for what is now a relatively weak enlargement process compared to the early 2000s. The occasional preferences for stability and security on the side of the Union at the expense of democracy have not helped in this context.

Which role for antidiscrimination policies and bodies?⁷

The interplay of these numerous institutional and legal obstacles is well-illustrated in the weak implementation of the anti-discrimination legislation in the Western Balkans as one of the key tools for guaranteeing the fundamental rights to all citizens equally. The anti-discrimination laws in the region were adopted almost eight years ago against the background of the requirement of the visa liberalization dialogues. Even in this area, which is fairly regulated at the EU level, there are deficiencies which can be linked to the weaknesses of all the institutions responsible for policy-making and policy implementation, as can shown by numerous indicators in this policy area (see table in Annex 1). In this regard, the latest communication on enlargement by the European Commission notes that “decisive efforts are needed to protect minorities and fight discrimination, notably against the Roma – for whom social inclusion should be more robustly promoted - and the LGBTI community”.⁸

First, on the side of the executive, despite the relatively clear guidelines on the side of the EU, the legislation in most of the Western Balkans is still not aligned with the *acquis* in this policy area. In Macedonia, even eight years after the adoption of the law, we are still not able to speak of effective protection against discrimination, especially when it comes to marginalized groups; the main issues that remain unresolved include: the access to justice due to court expenses for initiating court procedures for

⁴ See ‘SIGMA 2017 Monitoring Reports’, available at: <http://www.sigmaweb.org/publications/monitoring-reports.htm>.

⁵ A survey of the European Policy Institute and the Helsinki Committee for Human Rights in Macedonia recently indicated that respondents consider equality before the law a key issue in human rights. See: <http://www.merc.org.mk/aktivnost/41/mrezha-23-54-odadministracijata-smeta-deka-sostojbata-vo-pravosudstvoto-e-losha>.

⁶ See Balkan Civil Society Development Network, ‘Monitoring matrix on enabling environment for civil society development regional report 2016’, available at: <http://www.balkanecd.net/novo/wp-content/uploads/2017/09/56-1-2016-Monitoring-Matrix-Regional-Report.pdf>.

⁷ The analysis of the anti-discrimination legislation and its implementation presented in this paper draws upon a regional study, ‘Reforming from the bench – Marking offside: The (in)effectiveness of the EU benchmarking mechanism in the Western Balkans’, conducted by the Think for Europe Network. Available at: http://epi.org.mk/docs/Benchmarking_Comparative_Regional_BE-NCHER.pdf.

⁸ European Commission, ‘A credible enlargement perspective for and enhanced EU engagement with the Western Balkans’.

protection from discrimination, independence of the Commission and absence of sexual orientation and gender identity as grounds for discrimination.⁹ In Kosovo, the Law on Protection Against Discrimination lacks legal harmonization with other laws and, in general, there is insufficient protection from discrimination in practice due to many inconsistencies, contradictions, and misinterpretations of the law.¹⁰ The Montenegrin Law on Prohibition of Discrimination was amended in 2017, when, according to the government, it achieved compliance with EU standards.¹¹ The key changes included a more precise definition of direct and indirect discrimination and discrimination based on race, as well as streamlining the role of the ombudsman in protecting against discrimination and prescribing additional sanctions to deter discriminatory behavior.¹² Serbia's legal framework for protection against discrimination is in place,¹³ but not fully aligned with the EU *acquis*, particularly "as regards the scope of exceptions from the principle of equal treatment, the definition of indirect discrimination and the obligation to ensure reasonable accommodation for disabled employees."¹⁴

When it comes to the equality bodies as responsible institutions, there is lack of institutional capacities of both new bodies and ombudsmen across the region in cases where they were assigned this role. In Macedonia, the Commission for Protection against Discrimination cannot be said to meet the criteria of the directives in terms of its independence as well as its members. Some of the members have, "aside from being publicly known

as supporters of the [former] ruling party, [have] publicly voiced homophobic statements and have relativized discrimination, hate crime and hate speech".¹⁵ In Montenegro, the leading institutions in the area of anti-discrimination, the ombudsman and the Ministry, have reinforced their capacities with additional staff; however, the capacity building of these institutions has not been properly institutionalized and has therefore failed to contribute to moulding and strengthening the human rights culture. The peer review mission reports on the poor, inadequate and overcrowded working conditions in the Ministry.¹⁶ In Serbia, the Office for Human and Minority Rights and the Equality Commissioner's Office, the two main institutions responsible for implementing the anti-discrimination legislation, still do not have the complete institutional capacity required by the EU, primarily due to budgetary restraints.¹⁷ Organizational needs of the Equality Commissioner's Office, for example, relate to filling vacant posts, the need for adequate premises, additional professional development, and improving the organizational structure and internal procedures and standards.¹⁸ In terms of the professional competence, the institutions have organized training sessions and other professional development activities for the employees, but the mechanisms to monitor the effects of these activities are usually not defined. A similar institutional capacity issue is present in other institutions as well: for instance, anti-discrimination knowledge is still lacking among prosecutors and judges,¹⁹ which often results in a misapplication of the notion of discrimination.²⁰

⁹ For a detailed analysis, see Kotevska, B., 'Country Report Macedonia: Non-Discrimination', 2017, available at: <https://www.equalitylaw.eu/downloads/4460-fyr-macedonia-country-rep-ortn-on-discrimination-2017-pdf-1-79-mb>.

¹⁰ Kosovo has a more 'fresh' case of legal implementation as of 2015, when the so-called 'Human Rights Package of laws' was adopted. The aim of this package is to protect and promote the rights of individuals, including anti-discrimination and gender equality provisions. One of the three laws adopted was the Law on Protection from Discrimination. This came as a result of the requirements of the EU Visa Liberalization Roadmap with Kosovo, which required the adoption and implementation of legislation that ensures effective protection against discrimination as well as full respect of domestic provisions on human rights. See more in: 'EU's benchmarking Mechanism on Fundamentals First: Results and Challenges – Benchmarking in Kosovo'. Available at: http://epi.org.mk/docs/Benchmarking%20in%20Montenegro_BENCHER.pdf.

¹¹ See more at: <http://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/181/1458-9287-23-3-17-3-3.pdf>.

¹² 'Izveštaj o razmatranju Predloga Zakona o izmjenama i dopunama Zakona o zabrani diskriminacije', Odbor za ljudska prava i slobode, Skupština Crne Gore, 28. jun 2017 (Report on the discussion on the Draft Law on Changes and Amendments to the Law on the Prohibition of Discrimination, Committee for Human Rights and Freedoms, Parliament of Montenegro, June 28, 2017 – Available only in Montenegrin) See more in: 'Unravelling Montenegro's frontrunner status in EU accession process'. Available at: http://epi.org.mk/docs/Benchmarking%20in%20Montenegro_BENCHER.pdf.

¹³ General protection from discrimination is guaranteed by the Constitution, while two specific anti-discrimination laws serve as umbrella legislation. Additionally, a set of nearly 20 legal acts

contain anti-discrimination provisions, including the Gender Equality Law, the Labor Code, the Law on Free Access to Information of Public Importance, etc.

¹⁴ European Commission, 'Screening Report Serbia, Chapter 19 – Social policy and employment', January 18, 2016, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/serbia/screening-reports/screening_report_ch_19_serbia.pdf [17.1.2018].

¹⁵ Kotevska, B. 2017, p.87. See: Flash report 'Appointment of new members of the equality body', <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equalitybody-pdf-123-kb>.

¹⁶ Šelih Ivan, Dolčić Tone, Peer Assessment Report (Second Follow-up, November 21-25, 2016), January 2017;

¹⁷ Roagna, Ivana, Peer review mission on the capacity of the Ministry of Human Rights, April 3-7, 2017, May 2017, See more in: 'Unravelling Montenegro's frontrunner status in EU accession process'. http://epi.org.mk/docs/Benchmarking%20in%20Montenegro_BENCHER.pdf.

¹⁸ Šelih Ivan, Dolčić Tone, Peer Assessment Report (Second Follow-up, November 21-25, 2016), January 2017; Roagna, Ivana, Peer review mission on the capacity of the Ministry of Human Right, April 3-7, 2017, May 2017, See more in: 'Unravelling Montenegro's frontrunner status in EU accession process'. http://epi.org.mk/docs/Benchmarking%20in%20Montenegro_BENCHER.pdf.

¹⁹ Ivana Krstić, 'Country report - Non-discrimination -Serbia' European Commission, Directorate-General for Justice and Consumers, 2016, http://ec.europa.eu/justice/discrimination/files/ad_2015_country_reports/2016-rs-country_report_nd_final_en.pdf.

²⁰ 'EU's Benchmarking within Chapters 23 and 24 in accession negotiations with Serbia – effects and challenges', available at:

As mentioned above, the Europeanization process has predominantly been a process supportive of the protection of fundamental rights, analyzed above through the case of anti-discrimination. Yet, specifically in this area, the pressure from EU Member States to decrease the number of asylum seekers from the region has been accompanied by unwanted practices such as profiling (predominantly) Roma people upon exit.²¹ This practice has raised concerns among international human rights defenders. For example, the Meijers standing committee of experts on international immigration, refugee and criminal law highlighted that “the EU pressure on third countries to prevent Roma from entering the EU in order to claim asylum, [...] may contribute to a climate of stigmatization and repression of ethnic minorities in Balkan countries”.²² Such practices disproportionately affect the Roma community across the region and add an additional layer of discrimination, which goes as far as denying exit from the country in the cases of Macedonia and Serbia.²³ This example highlights how the securitization of Europeanization can lead to unintended consequences such as discrimination of disadvantaged groups in terms of their freedom of movement.

increased pressure from the same actors on the Western Balkan countries to lower the number of asylum seekers has resulted in an additional layer of discrimination against Roma as one of the most vulnerable groups of these societies

Conclusions

The guaranteeing of fundamental rights in the Western Balkans has been plagued by deficiencies that can be linked to the rule of law, as well as the elements of state capture that have affected all branches of power, including the executive, judiciary, and the responsible independent bodies. The case of anti-discrimination policy examined above illustrates the common challenges of the implementation of legislation that was required and supported by the European Union through the visa liberalization process as well as the accession negotiations in the case of Serbia and Montenegro. Even though there are fairly clear rules that have been supported by EU conditionality in this policy area, the record in this field is patchy. Despite the adopted legislation, a significant legislative and institutional gap prevents the effective implementation of anti-discrimination policies in all countries in the region. This is reflected in the weak alignment in relation to LGBT communities, which face significant discrimination in the region as well as the weaknesses of responsible equality bodies across the region. At the same time, though anti-discrimination has been a topic supported by the European Commission and the Member States, the

<http://cep.org.rs/en/publications/eus-benchmarking-within-chapter-s23and24-in-accession-negotiations-with-serbia/>.

²¹ For more on this, see Kacarska, S., ‘Europeanisation through mobility: Visa liberation and citizenship regimes in Western Balkans’, 2012, *CITSEE Working Paper* 2012/21. (Edinburgh: University of Edinburgh).

²² Meijers Committee, ‘Letter to European Parliament: Note of the Meijers Committee on the proposal to introduce a safeguard clause

to suspend visa liberalization’, 2011, *Meijers Committee Standing committee of experts on international immigration, refugee and criminal law*. Available at: <http://www.statewatch.org/news/2011/dec/eu-meijers-committee-visas.pdf> (accessed 09 January 2012).

²³ Kacarska, S., ‘Losing the Rights along the Way: The EU–Western Balkans Visa Liberalisation’, 2015, *European Politics and Society*.

	IMPLEMENTATION OF LAW ON PROTECTION AGAINST DISCRIMINATION					
	The Global Gender Gap Report 2016 ¹ , World Economic Forum – ranking					
Macedonia	73 out of 144 countries					
Bosnia and Herzegovina	83 out of 144 countries					
Serbia	48 out of 144 countries					
Montenegro	89 out of 144 countries					
Kosovo	No data					
Albania	62 from 144 countries					
	The Global Gender Gap Report 2017 ¹ , World Economic Forum - ranking					
Macedonia	67 th					
Bosnia and Herzegovina	66 th					
Serbia	40 th					
Montenegro	77 th					
Kosovo	No data					
Albania	38 th					
	RAINBOW EUROPE 2017 ¹					
	Rank among EU countries	Achieved LGBTIQ rights (score)	Equality and Non – discrimination Legal and policy situation	Hate Crime & Hate Speech Legal and policy situation		
Macedonia	41 st among 49	16%	21%	0%		
Bosnia and Herzegovina	25 th among 49	31%	58%	26%		
Serbia	28 th among 49	30%	52%	38%		
Montenegro	21 st among 49	39%	71%	51%		
Kosovo	27 th among 49	30%	65%	13%		
Albania	24 th among 49	33%	52%	51%		
	SOCIAL PROGRESS INDEX 2017 – TOLERANCE AND INCLUSION ¹					
	Ranking	Tolerance for immigrants	Tolerance for homosexuals	Discrimination and violence against minorities	Religious tolerance	Community safety net
Macedonia	98 th	113 th	106 th	77 th	54 th	58 th
Bosnia and Herzegovina	88 th	90 th	94 th	73 rd	54 th	81 st
Serbia	69 th	72 nd	65 th	95 th	56 th	46 th
Montenegro	79 th	69 th	89 th	88 th	54 th	55 th
Kosovo	No data	94 th	108 th	No data	92 nd	73 rd
Albania	70 th	81 st	80 th	30 th	1 st	117 th

