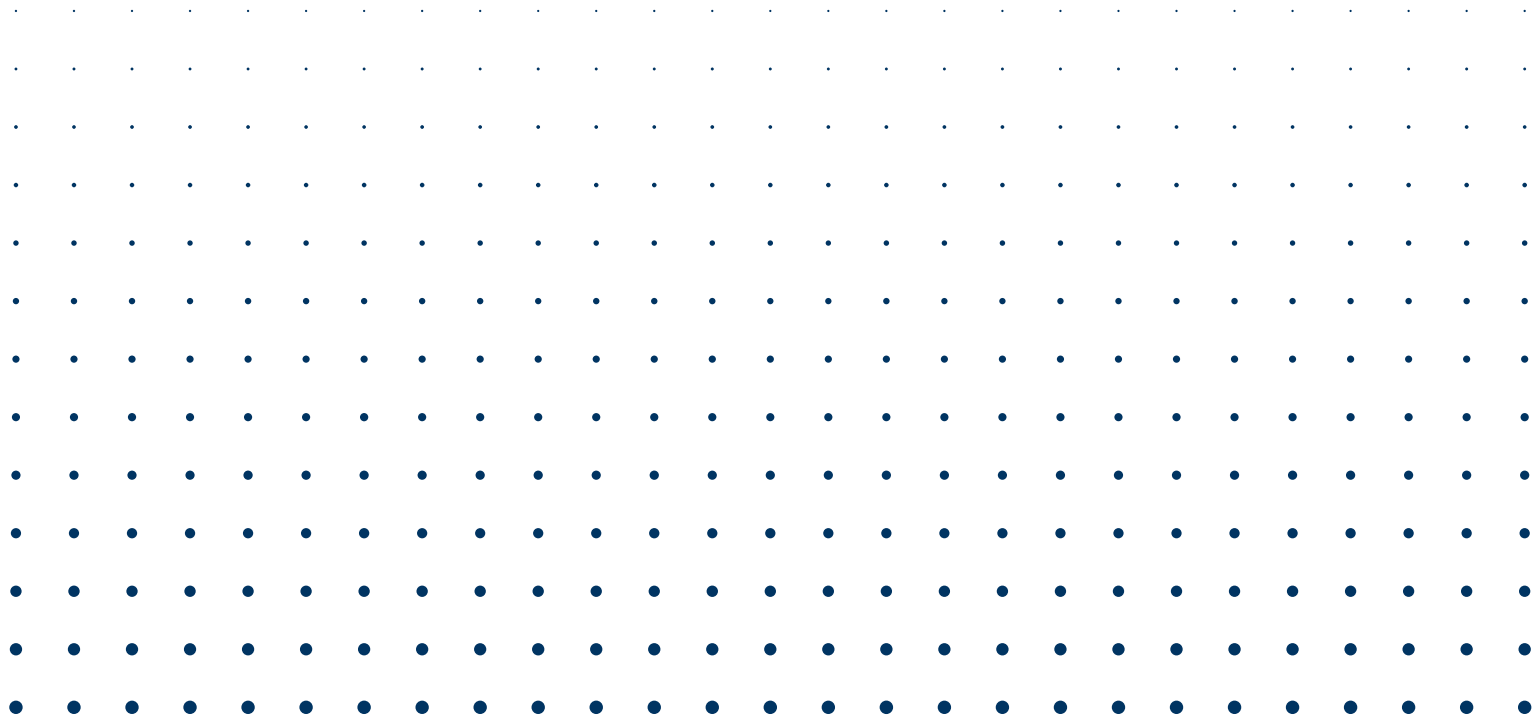


Briefing

Political Trends & Dynamics

Challenges to the Rule of Law in the Western Balkans

Volume 4 | 2020



POLITICAL TRENDS & DYNAMICS IN SOUTHEAST EUROPE

A FES DIALOGUE SOUTHEAST EUROPE PROJECT

Peace and stability initiatives represent a decades-long cornerstone of the Friedrich-Ebert-Stiftung's work in southeastern Europe. Recent events have only reaffirmed the centrality of Southeast European stability within the broader continental security paradigm. Both democratization and socio-economic justice are intrinsic aspects of a larger progressive peace policy in the region, but so too are consistent threat assessments and efforts to prevent conflict before it erupts. Dialogue SOE aims to broaden the discourse on peace and stability in southeastern Europe and to counter the securitization of prevalent narratives by providing regular analysis that involves a comprehensive understanding of human security, including structural sources of conflict. The briefings cover fourteen countries in southeastern Europe: the seven post-Yugoslav countries and Albania, Greece, Turkey, Cyprus, Bulgaria, Romania, and Moldova.

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EDITORIAL

Alida Vračić, Jasmin Mujanović and Ioannis Armakolas

The rule of law is a foundational pillar of constitutional government and representative democracy. Little wonder then that concerns with the scale and pace of political reforms on the path towards EU integration in the Western Balkans — but also democratic backsliding within the EU itself — have increasingly focused on rule of law challenges. Justice delivered, or justice denied; the law enforced, or the law ignored: these are categorical questions in any polity, animating existential questions about equity and social peace. And they are clearly emerging as a major theme of regional and continental politics in the 2020s.

In our last *Political Trends & Dynamics* publication of the year, we turn to examining the struggle to defend the rule of law in the Western Balkans, and the EU's attempt to encourage substantive reforms in the region's judicial and law enforcement communities.

In an interview with Reinhard Priebe, a leading authority on rule of law issues in Europe and the primary author of the EU's so-called "Priebe Reports" on the rule of law among the Western Balkans 6 (WB6), we examine the specific policy priorities which policymakers in Brussels have identified among the region's candidate and aspirant states, focusing in particular on the situation in Bosnia and Herzegovina on the occasion of the 25th anniversary of the signing of the Dayton Peace Accords.

Nedim Hogić, a lawyer and legal analyst, provides a regional survey of the rule of law enforcement mechanisms, finding that both local and EU efforts to this end have too often veered into informal activities, with a lack of meaningful sanctions for actors clearly implicated in eroding the rule of law in their respective countries.

Jovana Marović, the Executive Director of the Politikon Network in Podgorica, examines the role of civic and citizen activism in enforcing and/or demanding stronger commitments to the rule of law. Like Hogić, she concludes that "so far, all efforts to strengthen the rule of law in the Western Balkans have been purely technical, neglecting the political nature of the reform." Instead, Marović argues that a more comprehensive and popular commitment must emerge in the region in the fashion in which the EU has discussed and framed these struggles in its own engagement with the WB6 polities.

While this issue makes for a sobering read, the EU struggle to address the erosion of democratic norms and the rule of law within its existing members recasts the significance of the Western Balkans neighborhood. By continuing the process of enlargement the EU has the opportunity to reinvent and deepen its own rule of law mechanisms, which, in the final analysis, will be restorative for both the bloc and the membership aspirants. Onward.

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Jovana Marović

WHY AND HOW TO REFORM THE EUROPEAN UNION'S APPROACH TO RULE OF LAW PROMOTION IN THE WESTERN BALKANS

Nedim Hogić

Introduction

In 2019, when French President Emmanuel Macron stopped EU integration of the Western Balkans by vetoing the opening of the pre-accession negotiations for North Macedonia and Albania, he remarked that the European enlargement process had failed in transforming these countries. The remark was probably made not so much to express genuine concern for the state of affairs in these countries (of all the European "major" powers, France was least present in the Western Balkans), but rather, to justify the wider French project of reforming the EU.

Still, the remark was true. The interplay between increasingly authoritarian leaders of the Western Balkans and the EU conditionality usually referred to as "stabilitocracy" is an appropriate label for a decade of failure in the democratization and the consolidation of the rule of law in the region. The EU's low expectations for the region (i.e., the maintenance of stability) were coupled with a tendency of regional leaders to engage in state capture. Within the EU, democratic backsliding produced by the ongoing rule of law crisis in Poland or the autocratic tendencies of the Hungarian Prime Minister Viktor Orbán, have produced not only a political crisis but a general crisis of belief in what can be expected to be achieved by the rule of law and the promotion of democracy.

For the Western Balkan states, this does not mean a withdrawal from the rule of law conditionality. On the contrary, while the rule of law backslides both globally and regionally, the rule of law conditionality developed by the EU is rising, as is the number of indexes, indicators, and other quantitative measures designed to help in measuring the quality of the rule of law.¹ Paradoxically, this increase in the produc-



Nedim Hogić is a Bosnian lawyer, consultant, and aspiring academic. He holds an LLM degree from Harvard and is finishing his dissertation on anti-corruption campaigns at the Sant'Anna School of Advanced Studies in Italy. Previously, Hogić worked for international and non-governmental organizations, as well as law firms and consulting firms in Bosnia and Herzegovina and the Western Balkans region.

tion of knowledge and the stringency of criteria by which the rule of law is measured does not result in the reduction of challenges to the rule of law or to a better promotion of its underlying values and principles. In fact, as the conditionality expands, so do the challenges. That tells us that efforts should focus not so much on measurements or legal solutions but on obstacles to enforcement and the motives driving noncompliance.

What did the EU promote?

In its previous enlargements, the EU never operated with a clear conception of the rule of law that was to be established as a precondition to enlargement. This was a deliberate choice dictated by circumstances: By limiting itself to one definition of the term so widely used despite its different conceptions, the EU would unnecessarily limit its maneuvering space. The usage of this term evolved during enlargement. In the 2004 enlargement, it meant the creation of the institutions that were to preserve the rule of law and ensure separation of powers. Primarily, this meant the creation of the judicial councils that were to ensure judicial self-governance with little or no interference from the other two branches of government. It also meant the creation of audit offices that were to act as an independent check on public spending, the introduction

¹ For example, the rule of law indicators that are part of the World Bank's Worldwide Governance Index or the World

Justice Project's Rule of Law Index.

of conflict of interest legislation adopted so that party financing was free from illicit influence, and a depoliticized civil service founded on meritocracy.

From institutional strengthening to benchmarking

However, the enlargement to Romania and Bulgaria brought with it new challenges. Due to the higher rate of corruption in these two countries than in those admitted in 2004, institutional strengthening alone was deemed insufficient to ensure the application of rule of law standards and more importantly, prevent the misuse of EU structural funds. Therefore, when they joined, a safeguard clause to ensure that the countries did not backtrack on their commitments to judicial reform and fighting against organized crime and corruption was added called the “Co-operation and Verification Mechanism.” It provided the EU with a chance to closely monitor developments concerning the mechanisms of the rule of law. Reports on the state of the rule of law began to include the numbers of persons prosecuted for corruption and high profile corruption cases, such as that of Croatia’s Prime Minister Sanader, which became an indicator of the country’s willingness to seriously tackle the problem of corruption. However, once the countries became member states it proved extremely difficult to maintain the same standards of prosecution or to hold them accountable to those standards.

To this problem, the EU responded with two solutions. First, it decided to start an intense rule of law policy dialogue even before the official negotiation process and second, it introduced a process of benchmarking for analyzing rule of law standards. Benchmarking entailed defining specific milestones that are considered important to stabilize the rule of law. These milestones were to be included in the national action plans for Chapters 23 and 24 of the *acquis*, which became central to the entire accession process.² In parallel, the EU would continue issuing annual country reports that would highlight major deficiencies and accomplishments in this and other fields pertaining to enlargement.

² Wolfgang Nozar, The 100% union: The rise of Chapters 23 and 24, (2012).

Benchmarking unfortunately created more problems than it solved. First, it added more legal and technical jargon to the explanations of the processes, which made it hard to follow and understand.³ Second, it introduced commitments that instead of being specific, were vague or immeasurable. For example, the Serbian National Action Plan for Chapters 23 envisaged that if the integrity of a judge or a prosecutor was attacked through the media, an adequate response from the council would lead to increased trust in the judiciary. By linking trust, one of the most difficult variables to measure in social sciences, to the general perception of the population concerning the independence of the judiciary, the EU went against the general evidence concerning the perception of the judiciary within the EU itself. Empirical evidence suggests that the formality level of the judiciary’s organization does not correlate with the perception of the independence of these institutions, meaning that the citizens care more about what the judiciary does than about what it says or how it is organized.⁴

A question of time and money?

Benchmarking was not the only thing that set apart the rule of law standards in the Western Balkans from that of previous enlargements. There was also a lack of any sense of urgency that was present earlier. In 1998, it was clear that the big-bang enlargement was to happen in 2004. The decision to include Bulgaria and Romania was made at a later stage, but it was not disputed despite serious doubts about the ability of their state bureaucracies to absorb the EU structural funds effectively and in a transparent manner. It is unclear when EU enlargement will take place and Western Balkan states be given membership. While the rule of law remains present in the speeches of the European officials and in the reports produced by the European institutions and independent observers, its constant invocation without concrete action that would change the paradigm of “stabilitoc-

³ Jovana Marovic, Marko Kmezic, Tena Prelec, Strengthening the Rule of Law in the Western Balkans: Call for a Revolution against Particularism, (2019) BiEPAG. <http://biepag.eu/wp-content/uploads/2019/03/Strengthening-the-Rule-of-law.pdf>.

⁴ See Gutmann, Jerg; Voigt, Stefan, Judicial Independence in the EU – A Puzzle, ILE Working Paper Series, No. 4; For discussion, see Alina Mungiu Pippidi, Unresolved Questions on the EU Rule of Law Report (2020) European Research Centre for Anti-Corruption and Statebuilding.

racy,” threatens to reduce it to an empty signifier. The value of such invocations is lost when they are not followed by actions that challenge state capture. An even greater risk that the elusive timeframe presents is the absence of leverage, which in the case of previous enlargements, came from access to EU structural funds. Aware of this risk, the EU is now trying to duplicate the strategy that it uses to confront the democratic backsliding in the EU proper: The rule of law conditionality in the Western Balkans could be tied to funding that will come from the EU for major infrastructure projects. This is a risky approach because it counts not on strengthening compliance to the rule of law but on buying it.

Policy failures

State capture also allowed corrupt leaders to bypass the policy initiatives that aimed to preserve the separation of powers and the independence of the judiciary. The judicial councils that were established in line with EU recommendations have proven themselves unable to detect certain nuanced but critical aspects of work from judges and prosecutors. For instance, they were unable to punish prosecutors for their fear or unwillingness to investigate serious crimes or for their lack of co-operation with police, as it proved difficult to document such unwillingness on the part of prosecutors. The state audit offices and the political party financing mechanisms have proven themselves ineffective in both identifying and preventing illicit financing. The illicit financing network that bypasses official channels allows political influence to go undetected, making the oversight of political party financing ineffective.

Alternative approaches to rule of law promotion: Building a rule of law constituency

The specific challenges require a more targeted response, which could be fostered through three main interventions: legal mobilization, anti-corruption focused on political actors, and economic development.

Legal mobilization

The EU has been generous in its funding of civil society organizations (CSOs) that are active players in a diverse array of fields, such as the pro-

tection of human rights, defence of the environment, and the development of legislation. Despite this, CSOs often remain ignored by governments or are perceived as enemies, especially in Serbia, where there is resentment against the CSOs among a large part of the population. State capture agents do not stop there: they mobilize large parts of authentic grassroots campaigns to prevent the emergence of a movement that would go beyond their control.⁵

The EU ignores this reality. Its guidelines for civil society in Western Balkans focus on the conditions in which civil society operates with categories such as freedom of expression and assembly featuring prominently. The role, which a civil society may play in countering state capture is not highlighted. Certainly, the CSOs are regularly active in increasing government transparency. However, several of them still operate under the assumption that greater information and transparency is key to citizen and voter behavior: namely, informed voters will vote out corrupt leaders. Unfortunately, empirical evidence from across the world suggests that voters acknowledge the corruption of the politicians that they support.⁶ The population of the Western Balkans proved itself to be no different in this regard.

In this sense, a legal mobilization is necessary that would focus more on building a constituency for rule of law changes, rather than raising awareness about the wrongdoings of officials. The success story of the legal and societal mobilization that has led to an increase in the rights of the lesbian, gay, bisexual, and transgender (LGBT) population across the region demonstrates that such a change is possible. In the field of rule of law, creating a network of lawyers and experts that are prepared to reach out and protect the rights of those who are being threatened, silenced, or disadvantaged because of their lack of support for ruling elites should be a goal of the promotion.

⁵ We still lack a proper study of how state capture agents do this but anecdotal and empirical evidence suggest a widespread practice. In Serbia, anti-vaccine movement is used to attack the doctors who criticize the handling of the COVID-19 pandemic by the government. In Montenegro, the Serb Orthodox Church played a decisive role in mobilization against Djukanovic's regime. In Bosnia and Herzegovina, many of the traditional organizations such as trade unions, religious institutions and war veterans' associations are either silenced or mobilized to support the governing elites.

⁶ Manzetti, L. and Wilson, C. J., 2007. Why do corrupt governments maintain public support? Comparative political studies, 40(8), pp. 949–970.

Surely, this cannot replace the precious work of judicial institutions. However, in order to confront policy failures, the first step taken should be to mobilize all non-institutional forces against the capture. With regard to institutions, activities should focus on those actors who are willing to seek their own reputation enhancement through the work that they undertake.

Becoming Slovakia

The systemic corruption that exists in the greater part of the Western Balkans is not only a violation of criminal law norms but also a style of governance. Rule of law backsliding in the region correlates with the existence of illiberal projects, such as those operated by the nationalist elites in Bosnia and Herzegovina, Vučić's regime in Serbia, or VMRO in North Macedonia. However, the EU in no way undermines their rule but instead legitimizes them as credible partners. Some member states such as Hungary or Croatia have even refused to hand over those charged with corruption and the misuse of public power to authorities in the Western Balkans. What is needed is an understanding that if the corrupt networks benefit those in power, then their removal and not the framing of the fight against corruption as an apolitical struggle led by the judiciary is not useful. To put it more succinctly, if corruption is a political project, why is anti-corruption not a political project?

The example of Slovakia, a country ruled by an authoritarian nationalist leader (Vladimír Mečiar) who created a vast network of corrupt activities using state resources, is telling. His removal in the 1999 elections paved the way for Slovakia to join the EU together with other states that joined in 2004. Whereas the credit for his removal rests with the people of Slovakia, it was the support received through foreign assistance that strengthened a popular mobilization against a regime that exhibited many features of state capture.⁷

KEY TAKEAWAY

This article argues that the promotion of the rule of law in the Western Balkans by the EU is too formal and not substantive. EU integration of the Western Balkans has been long process, which has created obstacles to the rule of law promotion. At the same time, limiting the role of civil society organizations in promoting transparency and corruption awareness is not necessarily useful in the fight against corruption. The EU should reconsider its successes (and not just its failures) in fighting corruption in Romania and Bulgaria. Given that corruption is considered to be a style of governance and a political project, anti-corruption should also be considered a political project.

A full replication of the strategy deployed in Slovakia, wherein the pro-European and pro-EU forces were mobilized in one camp with a clear goal of defeating an authoritarian government would not necessarily end corruption and other challenges to the establishment of rule of law. However, there is no doubt that a campaign that could join with the EU to mobilize civil society, political life, and institutions towards the achievement of

such goals would be a promising starting point. Emergence of local actors with a clear anti-corruption agenda, such as the North Macedonian government in 2017 and the short lived 2019 Canton Sarajevo government, demonstrate that much can be achieved over a short period of time. By supporting these actors and constraining support to the authoritarian governments with ambitious economic development plans, the EU would clearly support those forces that are in favor of using the rule of law as a tool for ordering societies.

Looking beyond law and politics

It is often overlooked that economic development happens even in conditions when corruption and legal certainty are low. The main assumption on which the free market development in transition countries relied on was that the strength of the rule of law and its institutions would automatically contribute to economic development. However, empirical evidence overwhelmingly suggests that economic growth also occurs despite corruption.⁸ The main difference is who gains from this growth and, accordingly, how the gains are distributed.

By examining the investment plans for the Western Balkans as well as the recent rhetoric of EU leaders, we can conclude that the majority of in-

⁷ Valerie J. Bunce, Sharon L. Wolchik, *Defeating Authoritarian Leaders in Postcommunist Countries* (Cambridge University Press 2011) 53–84.

⁸ Jie Bai and others, "Does Economic Growth Reduce Corruption? Theory and Evidence from Vietnam" (2013) National Bureau of Economic Research Working Paper 19483; Luca Uberti, "The 'Sociological Turn' in Corruption Studies: Why Fighting Graft in the Developing World is Often Unnecessary and Sometimes Counterproductive" (2016) 16 (3) *Progress in Development Studies* 261–277.

vestment from the EU planned for the next few years will be infrastructure investments. While needed and anticipated (also serving the collateral purpose of preventing non-EU influences such as that of Russia and China⁹), they run the risk of further consolidating authoritarian power in the region.

Contrary to this, the EU should look to empower the private sector. The European Bank for Reconstruction and Development as the main investment arm of the EU in the Western Balkans, together with the German Bank for Development (Kreditanstalt für Wiederaufbau [KfW]) and the recently involved United States Development Finance Corporation, may serve as a vehicle for transformation through responsible investments in the private sector. Even more, they can induce corporate social responsibility programs that can transform the culture of legality and human rights protection in the value chains of entrepreneurs. Currently, in North Macedonia and Bosnia and Herzegovina, only 16 % and 18 % of the EBRD's investments goes to the private sector.¹⁰ Finally, if the calls for the regional economic area (also known as mini Schengen) materialize, practices that empower legal certainty for businesses may become a part of the collaboration scheme between this region and the EU.

Conclusion

Whether the EU's intentions are to forever delay the integration of the Western Balkans into the EU or to invent a quasi-membership status, its interests lie in promoting the rule of law in a more meaningful way. Rule of law practices strengthen democracy and ultimately, lead countries towards more credibility and stability. Without the new approach, the current EU programs for the promotion of the rule of law will remain confined to incremental reforms. Such reforms are not without value as they may change the level of corruption in a society. However, they do not have the potential to ignite an anti-corruption

campaign or pursue policy reforms that have succeeded in the past during previous enlargements.

The EU should remember that much of what was done in Romania and Bulgaria was not in vain. For instance, Romania launched one of the strongest judicial anti-corruption campaigns comparable only to the legendary Mani pulite inquiry of Italy in the 1990s. While the Bulgarian judiciary did not follow suit, considerable strides were made in democratic accountability for the public administration. Even in Poland and Hungary, where the judiciary eventually succumbed to the authoritarian surge, it fought a resilient battle that allowed European institutions to initiate many proceedings¹¹ against the two countries, which eventually resulted in the recently adopted rule of law conditionality mechanism.¹² However, if the approach from the EU remains focused on what the judiciary must do we run the risk of giving the judiciary tasks that it is unable to accomplish. As explained above, with a more holistic approach, the rule of law promotion would be more likely to accomplish even greater things.

⁹ See Tena Prelec, Caught in a vicious circle: How corrosive capital perpetuates state capture in the Balkans, <https://scssex.wordpress.com/2019/11/05/caught-in-a-vicious-circle-how-corrosive-capital-perpetuates-state-capture-in-the-balkans/>.

¹⁰ As per EBRD's official data for country portfolios. For Bosnia, see <https://www.ebrd.com/ebd-in-bosnia-and-herzegovina.html>. For North Macedonia, see <https://www.ebrd.com/ebd-in-north-macedonia.html>.

¹¹ Martin Michelot, The "Article 7" Proceedings Against Poland and Hungary: What Concrete Effects? (2019) Institut Jacques Delors.

¹² European Parliament, Rule of law Conditionality: MEPs strike a deal with Council (2020), <https://www.europarl.europa.eu/news/en/press-room/20201104IPR90813/rule-of-law-conditionality-meps-strike-a-deal-with-council>

INTERVIEW WITH REINHARD PRIEBE

FES SOE: *The report you wrote for North Macedonia was seen as quite impactful. It was concrete, it was actionable. Many expected some changes after you issued the Bosnian report, but there was not much follow up. Could you comment on that?*

RP: Let me first of all underline that the report on rule of law issues in Bosnia and Hercegovina (BiH) that was published last year, as well as both reports on rule of law issues in North Macedonia published in 2015 and 2017 were prepared by a group of senior rule of law experts from several European countries and with different professional backgrounds. I chaired this group, but the reports are the result of a common assessment of the rule of law situation in the two countries by all members of the group.

On the basis of our findings, we made recommendations and indeed, we were keen on making them "concrete and actionable". Obviously, some of our recommendations will need time to be implemented, while others could be implemented rather quickly.

I am aware that expectations were very high in BiH when we prepared our report. The "Right to Justice" public debate of 20.11.2019, which gathered representatives of the judiciary and other institutions, civil society and academia from across the country, not only provided valuable insights into the rule of law situation in BiH, but also demonstrated in an impressive way the broad interest of the wider public in the rule of law situation in the country.

The experts' group is not in charge of assessing the follow up of its 2019 report. This is first and foremost the task of the European Commission in the framework of the Stabilization and Association Process. In reading the Commission's 2020 Communication on EU enlargement policy and the BiH report attached to it in particular, I have the impression that no great steps have been undertaken since late 2019 to address the rule of law shortcomings, which we highlighted in our report. For example, the Commission stated "that BiH made no progress in the area of the judiciary." Therefore, "obstructions to justice reform



Reinhard Priebe is a German lawyer and visiting professor at the European Center for Peace and Development in Belgrade. He was a judge at a German administrative court (1977–1984) and official of the European Commission (1984–2014). Between 2001 and 2006, Dr. Priebe was the Director for relations between the EU and the Western Balkans and chaired a group of senior rule of law experts, which assessed the rule of law situation in North Macedonia in 2015 and 2017 and in Bosnia and Herzegovina in 2019.

from political actors and from within the judiciary, and the poor functioning of the judicial system continued to undermine citizens' enjoyment of rights and the fight against corruption and organized crime." The recent public debate on the rule of law in BiH, which was held in Sarajevo on 24.11.2020 as a follow-up of last year's "Right to Justice" debate, confirmed the assessment of the Commission. As one participant at this debate put it: "No progress is the trend."

FES SOE: *Two specific cases were in the spotlight when it comes to Bosnia (David. D and Memić) and expectations were high. Since the report was published, nothing has moved forward in those two unresolved cases. How do you comment on that?*

RP: Our experts' group looked at "systemic" shortcomings in the area of rule of law. From the outset, we made it very clear that our mandate was not to evaluate individual pending cases. We by no means intended to interfere in the handling of such cases by the BiH judiciary. Of course, we were well aware of the two cases you refer to.

FES SOE: *The report outlines many systemic, long lasting deficiencies related to the rule of law in BiH (and the region at large). Are you optimistic that the report will serve as a basis for change? If so, why and how do you see the role of the citizens in this process?*

RP: I very much hope that our report will help to address the systemic rule of law shortcomings in BiH. The report has to be read in the context of recent analyses and recommendations provided by

the EU, but also in the context of many other useful analyses of various aspects of the rule of law.

In our report we underline that promoting rule of law reforms is primarily in the interest of the citizens of BiH, that "it is essential that everybody understands that such reforms are in the first place in the interest of the country and its citizens." Reforms are needed to improve living conditions, and not least of all, to ensure a stable environment for economic development. Moreover, as we have put it, "reforms are primarily needed to bring the country forward, to contribute to a better, more reliable and safer life for its citizens and not just to tick off the boxes in to-do-lists in the framework of the EU accession process."

In this context, the role of citizens and non-governmental organizations is absolutely essential. When people realize that the rule of law falls short in their country, that corruption is widespread, that the judiciary cannot be trusted to be independent and efficient, and when people speak up on such shortcomings, then there is a chance for progress and change. When we prepared the report, we noted how many initiatives had already been launched by civil society that pushed for improvements in the functioning of the rule of law. The public debate of 24.11.2020, which I mentioned earlier, has once again demonstrated that people in BiH seriously engage to make progress in the area of rule of law. This is a good sign and makes me optimistic about the possibility of change. I should add, that the role of independent media is also very important to improving the transparency and accountability of the judiciary. Here again, I noted certain positive developments.

FES SOE: *What role is there for the EU to play beyond the accession process and opening/negotiating chapters? EU presence in the region is significant, what other rule of law mechanisms are there in place to accelerate change?*

RP: Like the entire region of the Western Balkans, BiH has a European perspective with the ultimate goal of becoming a member of the European Union. Therefore, the instruments of the EU designed to make the country fit for joining the EU are central. For example, under the Stabilization and Association Agreement between the EU and BiH, the sub-committee for Justice Freedom and Security is intensively working on rule of law issues.

We should also note the tremendous support that EU member states and other countries have provided to BiH in this area. The Council of Europe and its Venice Commission in particular, have over the years looked into various constitutional and rule of law issues. In our report we have referred to their valuable work. And to be frank, not implementing for years, even longer than a decade, a ruling of the European Court of Human Rights is simply unacceptable and cannot be justified by any political constraint.

I should also mention that EU engagement in the area of rule of law includes considerable financial support, which is largely targeted at improving the functioning of the judiciary and modernizing public administration on the basis of democratic and rule of law standards. By the way, I am a great supporter of a rule of law conditionality for EU funding for both the Western Balkans, as well as its own Member States. It is important to understand that the EU does not (and should not) apply different rule of law standards to countries aspiring to join the EU versus its current Member States.

Overall, I have the impression that support from the outside is not missing and that mechanisms are in place. We do not need new instruments or new institutions. What we need is more engagement from inside the country, a credible political determination to move things forward and to overcome constitutional complications and rule of law shortcomings, as well as maybe sometimes to simply overcome bad habits.

FES SOE: *In comparison to the North Macedonia report, the rule of law in BiH was understood too narrowly, mostly in regard to the judiciary and independent institutions. Similarly, the EU has repeatedly been criticised for focusing too much on the smart design of formal institutions while neglecting the larger undemocratic context and the informal practices that can undermine these institutions. Can the rule of law be considered disconnected from democracy in the Western Balkans?*

RP: No doubt, rule of law and democracy are connected. There is no democracy without rule of law and there is no rule of law without democracy.

The main purpose of our report was indeed to focus on rule of law institutions, first and foremost, the judiciary. This does not mean that shortcomings do not also occur in other areas. Even in the

area of rule of law, we had to make choices regarding the issues we would focus on.

In my understanding, a “smart design of formal institutions” as you put it, is not the main focus. The main focus is to ensure the respect of basic rule of law principles, such as the independence of the judiciary, judicial protection against administrative decisions and the respect and enforcement of fundamental rights and freedoms. In this context, having clear rules regarding the tasks and competences of public institutions, including judicial bodies, and their democratic accountability is more than just a formality. Such rules and their full and transparent implementation are a prerequisite to overcoming non-transparent, “informal,” or even corrupt governance practices, and are the basis for rebuilding trust of people in state institutions and in the judiciary in particular.

Let me mention one other aspect, which we highlighted in our report. It is generally known that the constitutional set-up of BiH is complicated, to say the least. We are all aware of the reasons as to why this is so. Perhaps at the time, there were no realistic alternatives to the arrangements laid down in the 1995 “Dayton Constitution”. However, already fifteen years ago, the Council of Europe’s Venice Commission stated that a constitutional reform in the country “is indispensable since present arrangements are neither efficient nor rational and lack democratic content.” There is no reason to see this differently today. We insisted in our report that constitutional weaknesses have to be overcome. Some might object, claiming that this is wishful thinking and that it will never happen. However, it is clear to me that reforming the current BiH Constitution is an indispensable task. Simply, it is in the interest of the country and its population. Nevertheless, nobody should hide behind the current constitution and its complications while waiting for change. As stated in the report: In parallel to working on con-

stitutional reforms, every possible effort should be deployed to address rule of law shortcomings within the current constitutional framework.

FES SOE: *Clear EU demands presuppose that the target governments know precisely what they are expected to do should they decide to comply with the EU’s conditions. Are EU policies in the field of rule of law unambiguous and coherent at the moment?*

RP: If you look at the recommendations in our report and more importantly, at the recommendations of the European Commission in their recent report, I do not think that governments or administrations could pretend that they do not know what they are expected to do. These recommendations are precise and specific. In any case, if any recommendation is unclear, clarifications can always be provided.

The broad “rule of law” notion covers many aspects and in particular cases, there may be different views on what exactly is required to respect this basic European principle. This is the reason why we formulated our recommendations as specifically and as precisely as possible. Moreover, if you look at recent European Court of Justice rulings in rule of law matters, you will gain quite a clear idea on what is essential for respecting this basic principle. Full independence of the judiciary certainly is. I also recommend looking into the ongoing EU-internal rule of law debate. The regular reports issued by the European Commission regarding rule of law in EU Member States and infringement procedures against particular Member States only confirms the importance of this principle.

Finally, let me reiterate with emphasis once again: improving the rule of law situation should be a priority for BiH because it is in the very interest of its population and in my view, what the people of the region are demanding more than ever.

A blue-tinted photograph of a concrete wall. In the upper left, a white dove is painted on the wall, facing right. In the lower right, a large, colorful kite is painted on the wall, featuring various patterns and colors. The kite is also facing right. The background is a textured concrete wall with some shadows and a metal railing visible on the right side.

POLITICAL TRENDS & DYNAMICS

OVERVIEW

THIS SECTION AIMS TO PROVIDE A COMPREHENSIVE ANALYSIS AND UNDERSTANDING OF HUMAN SECURITY, WHICH INCLUDES STRUCTURAL SOURCES OF CONFLICT SUCH AS SOCIAL TENSIONS BROUGHT ABOUT BY UNFINISHED DEMOCRATIZATION, SOCIAL OR ECONOMIC INEQUALITIES OR ECOLOGICAL CHALLENGES, FOR INSTANCE. THE BRIEFINGS COVER FOURTEEN COUNTRIES IN SOUTHEAST EUROPE: THE SEVEN POST-YUGOSLAV COUNTRIES, ALBANIA, GREECE, TURKEY, CYPRUS, BULGARIA, ROMANIA, AND MOLDOVA.

HOPES AND DREAMS

As much of the rest of the world, Southeast Europe watched with keen interest and a dose of trepidation, to see what the outcome of the US presidential elections would be on November 3rd. During the course of the election – and its aftermath – many came to know more about the US electoral system for choosing presidents than they do about the systems of their own countries.

The victory of Joe Biden was welcomed in most – though not all – corners of the region. Those countries and ethnic groups within the region who are more pro-American, for one reason or another, also tended to cheer for a Biden victory. In the more anti-American corners of the region, wary of US interventionism, Trump was seen as the preferable candidate.

Nowhere could this be seen more clearly than when looking at Kosovo and Serbia. Encouraged by pro-government media, most Serbian citizens saw Trump as the clear lesser of ‘two evils’ in the US presidential elections. Such a perception was strongly encouraged by the Serbian government, which sought to paint a picture of a Trump White House finally open to seeing the Serbian point of view on the territorial dispute with Kosovo. By contrast, Kosovo Albanians saw the return of a Democrat to the White House as a clear win, particularly after a year of heavy handed pressure on Pristina by the Trump administration.

Zooming out from the local prism, it seems that the way that nations in the Balkans viewed the two US candidates had more to do with projecting their hopes and wishes than any realistic political expectations. The reality is that the Balkans would not have been high on the list of priorities of either candidate who was seeking to be elected into the White House. In Trump’s case, this was due to a wider lack of interest in foreign policy interventionism, while in the case of Biden there are much more pressing matters around the world.

This reality of course, has not and will not stop those both inside and outside the region from projecting their wishes and ideas onto the incoming Biden administration. This December saw the quarter-century anniversary of the signing of the Dayton Peace Agreements, which ended the war

in Bosnia-Herzegovina. Along with the good that Dayton brought, all of its imperfections are once again being analysed, along with hopes and suggestions for how it might be revised. However, peculiarly enough, rather than focusing energy on thinking about and realizing how a local consensus may be built to improve the ‘post-Dayton order’, many local and international minds are overly preoccupied with how the new US administration could be harnessed to push their preferred solutions. Much the same holds true when it comes to resolving disputes such as the one between Belgrade and Pristina. The reality is that there are no such shortcuts. External mediation can help push local actors towards bridging their divides, but those bridges have to be locally built.

SURPRISE RESULTS

The run of surprising election results seems to more or less continue in the region, making the lives of political analysts both more interesting and more difficult.

In **Romania**, most opinion polls had predicted a head-to-head race between the the ruling centre-right National Liberal Party (PNL) and the Social-Democrats (PSD) in the December 6th parliamentary elections. At the beginning of the year, the PNL had been ahead of the PSD in opinion polling by as much as 15–20 %, even though this lead had gradually shrunk since the onset of the pandemic. While PNL seemed to bleed support as a result of controversial decisions made especially during the last month before the elections, such as closing down markets for local producers and prohibiting important religious procesions, the Social-Democrats appeared to recover rapidly in all opinion polls. Nevertheless, it came as a surprise to most political observers when the PSD pulled ahead of the PNL by no less than 4 % once the votes were counted. The discredited former ruling party managed to secure around 29 % of votes to the PNL’s roughly 25 %.¹ The liberal-reformist USR-PLUS alliance came third, with around 15 % of the votes, contrary to their loudly proclaimed expectations to break the 20 % threshold. The biggest surprise was the entry of the right-wing populist Alliance for the Unification

1 The percentage of votes cast for the parties is not identical when comparing the Chamber of Deputies and the Senate.

of Romanians (AUR) into Parliament: a concoction of COVID19-denialists, souveranists, Euro-skeptics, ultra-religious conservatives and ultra-nationalists who agitate against the Hungarian minority and for the unification of Romania with the Republic of Moldova. Observers explained the PSD's success and the PNL's failure as being in part due to the ongoing coronavirus pandemic, which has in turn contributed to a historically low turnout. Despite the fact that the PSD came first, it seems unlikely that the party will be able to form the next government. Instead, a coalition between the PNL and USR-PLUS seems like the most probable outcome.

Presidential elections took place in **Moldova** in the first half of November. While reliable opinion polling was scant, most pundits seemed to think that incumbent Socialist candidate Igor Dodon had better odds of winning re-election than any of his challengers. Yet in the first round of voting held on November 1st, Dodon won only 32.6 % of votes, being pushed to second place by Maia Sandu of the pro-European Party of Action and Solidarity who won 36.2 % of the votes cast. In the second round, held two weeks later, Sandu won an even more decisive victory, securing 57.7 % of votes cast to Dodon's 42.3 %. In the aftermath of Dodon's defeat, there were calls in some quarters for early parliamentary elections, while the ruling Socialists began maneuvering in order to attempt and strip the future president of some of the competences enjoyed by Dodon at present.

The current leader of the Party of Action and Solidarity, and former Prime Minister of Moldova, Maia Sandu votes for the second round of 2020 Moldovan presidential election.



At the end of the same month, Moldova's break-away region of **Transnistria** also held elections,

to elect its 'Supreme Council' (Parliament). The elections were the seventh such to be held in the breakaway province since 1992. At 27.8 %, turnout was abysmally low, perhaps not surprising given that in 22 of 33 constituencies only the ruling party fielded candidates.

The second round of voting in the presidential elections in Turkish-controlled **Northern Cyprus** confirmed the first round victory of Ersin Tatar of the National Unity Party. Tatar won a narrow victory, however, gained 51.7 % of votes to incumbent Mustafa Akinci's 48.3 %. Tatar, who was also the Prime Minister of Northern Cyprus, is seen by many as a nationalist and more hard-line when it comes to relations with the Republic of Cyprus. His victory is also a victory for Turkish President Recep Tayyip Erdoğan, who offered him a strong backing during his campaign.

Amidst an escalating coronavirus pandemic, **Bosnia and Herzegovina** held its (delayed) local elections on November 15th. The elections were perhaps most important as a mid-term test for the main ruling ethno-national parties, the Bosniak Party of Democratic Actions (SDA), the Bosnian Serb Alliance of Independent Social Democrats (SNSD) and the Bosnian Croat Croatian Democratic Union (HDZ). In the end, the SDA and SNSD saw a lacklustre performance. The SDA's result was particularly worrying for the traditionally dominant Bosniak party, as it lost control of several municipalities in the capital Sarajevo, and the city itself. The party also failed to regain control of major urban centres such as Tuzla and Zenica. In Sarajevo in particular, the party seems to have

Citizens arrive at polling stations for voting in Bosnian local elections with novel coronavirus (Covid-19) pandemic measures, in Sarajevo, Bosnia and Herzegovina. 2020 Bosnian municipal elections held with total of 3,283,380 citizens registered to vote to elect mayors and assemblies in municipalities.



been defeated not so much thanks to high support for the opposition as the decision of its own traditional supporters not to come out and vote, and in doing so expressing their feelings towards the party leadership. In particular, political observers see the defeat of the SDA in Sarajevo as a blow to party leader Bakir Izetbegović, who is increasingly unpopular due to the extensive interference of his wife, Sebiha Izetbegović, in the running of the party. Izetbegović may now face an imminent challenge for the party leadership.

Meanwhile, in the Bosnian Serb dominated RS entity, the ruling SNSD largely held its ground, but suffered a crucial defeat in the Bosnian Serb capital Banja Luka. There, the young Draško Stanivuković of the opposition PDP managed to dislodge sitting SNSD mayor Igor Radojičić. The move was a blow to the SNSD and its leader, Milorad Dodik, for whom Banja Luka is a traditional stronghold. Dodik even threatened retribution against Banja Luka voters, threatening to cut state subsidies for city heating for example. While it had been clear all along that Banja Luka would be tightly fought, it came as more of a surprise that the SNSD lost the mayor's post in Bijeljina to the opposition, given that it had co-opted long-serving mayor Mićo Mičić to its side. All in all, only the HDZ had a relatively good day of it during the elections, avoiding major debacles. All eyes will now turn to **Mostar**, which is due to elect its local representatives on December 20th for the first time in more than a decade.

HARD WORK

After much suspense and delay, new governments were elected in several countries of the region.

In **Serbia**, the second cabinet of Ana Brnabić was elected on October 28th. With this move, a drawn-out period of artificial suspense came to an end. In the June 21st parliamentary elections, the ruling SNS won a record majority of 188 seats in the 250 seat Parliament. The thumping victory was as much a reflection of the party's popular support as the fact that the opposition largely boycotted the elections, citing the lack of free and fair conditions. Given the size of the SNS victory, there seems to be no clear explanation as to why the formation of the government took so long, nor

did the final outline of the new Brnabić cabinet offer any clues. The new government once again includes the Socialist Party of Serbia (SPS), the ruling SNS' traditional ally, as well as the small centre-right SPAS, and several ethnic minority representatives. By virtue of the fact that it includes almost all parties in the Serbian Parliament, it was dubbed a government of 'national unity' by Serbia's President and SNS leader Aleksandar Vučić. In reality, it was more of a government of national division, something firmly underscored by the monolithic nature of the new Parliament, which has no opposition presence. In a sign that he recognizes that the new Government's legitimacy is dented due to the opposition election boycott, Vučić declared that the new government would have a curtailed mandate, and that early parliamentary elections would be held by April 2022 so as to coincide with presidential elections.

By contrast, the drawn out process of government formation in **Montenegro** was a more genuine reflection of the disagreements within the winning opposition coalition over how to form the next government. The voting in of the Cabinet of Zdravko Krivokapić on December 4th was indeed a historic moment, marking the end of three decades of rule by the DPS and indeed – as some observers noted – perhaps the first transition of power at the ballot box in Montenegro's history.

A view of Parliament as the new Prime Minister Zdravko Krivokapić is making a speech after new coalition government received the vote of confidence after general elections held on August 30th, in Podgorica, Montenegro.



Yet behind this historic rhetoric, the election of the new government was no easy process. There were deep disagreements between the three main opposition coalitions – and indeed

Krivokapić's own For the Future of Montenegro (ZBCG) – over the composition of the new government. As the nominal leader of the winning coalition – ZBCG – Krivokapić pushed for the formation of an 'expert government'. This was not welcomed by the Democratic Front, the biggest block within ZBCG, which rightly saw in this plan an attempt to exclude its people from ministerial positions. For most of the months running up to December, a tug of war played itself out between the winning opposition parties over who would or would not get ministerial posts in the new government. Despite being the biggest opposition grouping, the DF was effectively excluded from the division of ministerial posts in the end. This left the group bitter, but nevertheless not in a position to refuse to support a government which meant the removal of the DPS from power. While a new government is now in place in Montenegro, just how long it will last is very uncertain. An agreement seems to have been reached to go to early elections in roughly a year. Yet maintaining internal coherence even for that long may be a struggle for the new ruling coalition. The embittered DF in particular will feel motivated to rock the boat of the new parliamentary majority, given its exclusion from the government.

Kosovo and with it, the Government of Prime Minister Avdullah Hoti, are also entering a period of political turbulence for which the outcome may well be early parliamentary elections next year. On November 5th, Kosovo President Hashim Thaçi resigned from office after the Kosovo Specialist Chambers in the Hague confirmed a war crimes indictment against him. Parliamentary Speaker Vjosa Osmani of the LDK stepped in to act as caretaker. However, Osmani cannot remain caretaker president for more than six months. If the next president is not elected within the next six months, Parliament must be dissolved and new elections called. Yet the requirements for electing a new president are high: two thirds of MPs must be present in the parliamentary chamber for a vote on electing a new president to take place. In the first two rounds, a two-thirds majority is needed to elect a new president. If that fails, then a simple majority is sufficient in the third round, yet two-thirds of MPs must still be present in the parliamentary chamber for the vote to take place. In effect, this means that the co-operation of two-thirds of MPs is needed to elect a new president. Yet the current government can barely

muster a simple majority in Parliament. The odds of the current Parliament electing a new government are not good, though a mitigating factor is that only the opposition Vetëvendosje stands to benefit from early elections. Consequently, if anything, it is the desire to avoid an early election, which could force together a majority capable of electing a president if for no other reason than to avoid elections.

STAYING AFLOAT

A new wave of COVID-19 infections is sweeping the region and none of its countries seems to be immune. In terms of the number of deaths per million inhabitants since the start of the pandemic, the worst affected countries appear to be Bosnia and Herzegovina (1,057 deaths per million), North Macedonia (1,031 deaths per million) and Montenegro (950 deaths per million). Cyprus (68 deaths per million), Turkey (199 deaths per million) and Slovenia (229 deaths per million) seem to have had the lowest number of fatalities, relative to population size, according to official figures, which in some countries have proven questionable at best.

The region has for the most part, not seen the kinds of harsh lockdowns imposed during the spring when the epidemic first hit the region. Governments are clearly trying to keep economic activity alive and hoping that societies and public health systems will be able to handle the latest pandemic wave at their feet. Whether this will be possible or not, or to what extent, remains to be seen.

A view of chocolates prepared by Tassos Vazakas, owner of a patisserie, ahead of Christmas in Lykovrysi, Athens, Greece. The patisserie remain open during the country's second lockdown to stop the spread of coronavirus (COVID-19), which has been extended to Dec. 14.



On the economic front, the latest forecasts by the European Commission also show a great deal of variation. Serbia and Turkey appear on course to be among the countries least affected by the crisis. Serbia's forecast economic contraction of -1.8% of GDP is the smallest in Europe, while Turkey is at -2.5% of GDP, also among the lowest. However, the region also contains the country which seems on course to be the worst hit in Europe in terms of GDP contraction: Montenegro's GDP is predicted to contract a whole -14.3% in 2020. Other severely affected countries in the region include Croatia (-9.6% contraction) and Greece (-9.0% contraction).

(UN)NEIGHBOURLY RELATIONS

Neighbourly relations in the region remained prone to turbulence, punctuated with the occasional piece of good news here and there.

Most surprising perhaps was the turn for the worse in relations between **Bulgaria** and **North Macedonia** over the last few months. Indeed, most observers might be forgiven for forgetting that the two countries had signed a friendship treaty just over three years ago in August 2017. A hint that all was not friendly in these relations came in October 2019, when Bulgaria put forward its 'framework position,' which amounted to a threat that Sofia would block Skopje's EU accession process unless North Macedonia scrapped what Sofia claims is an 'anti-Bulgarian ideology' and recognize Bulgaria's point of view regarding the origins of the Macedonian identity. In the simplest of terms, Bulgaria expected North Macedonia to accept that – ethnically – the roots of the present Bulgarian and Macedonian nations were the same, even if, as a result of Yugoslav-era policies, they had since developed into separate nations. Not surprisingly, such a position was unacceptable to Skopje and most citizens of North Macedonia. On cue, Bulgaria refused to approve the EU's negotiating framework with North Macedonia on November 17th, blocking Skopje's accession path. Macedonian Prime Minister Zoran Zaev attempted to placate Sofia in an interview to Bulgarian media on November 20th, arguing that Bulgarian troops who occupied Macedonian territory in the Second World War could not be called 'fascist occupiers' and that much of the common history of the two nations had been

distorted during the Communist period. Zaev's gesture infuriated many back in North Macedonia, but failed to please Bulgaria, which again continued to block adoption of the negotiating framework at an EU meeting in December. In the aftermath of this, Macedonian President Stevo Pendarovski argued that the idea that today's Macedonians suddenly woke up one day in 1944 and decided they were no longer Bulgarians but Macedonians was 'historical stupidity.' Quite where this dispute will go next is very unclear. To date, German mediation has failed to defuse it. Some observers in Skopje hope that it has more to do with the domestic political problems of the Borisov government in Sofia and that Bulgaria may soften its position once these domestic problems are resolved.

Montenegro and **Serbia** engaged in yet another diplomatic skirmish in November, which yet again seemed to be much ado about nothing. Vladimir Božović, the Serbian ambassador to Montenegro, was declared *persona non grata* by his Montenegrin hosts on November 28th. According to Podgorica, the reason was that he had repeatedly interfered in the domestic affairs of Montenegro, most recently by referring to the decision of the 1918 Podgorica Assembly to unite the country with Serbia as an act of 'liberation' and 'free expression', contrary to the outgoing Montenegrin government's position. Serbia initially responded in kind, by declaring Montenegro's ambassador in Belgrade, Tarzan Milošević, *persona non grata*, yet revoked the decision a day later, on November 29th. Podgorica however, refused to revoke its decision, despite calls from EU Enlargement Commissioner Oliver Varhelyi to do so. Given that the current Montenegrin government is on its way out, many observers of Serbian-Montenegrin relations saw the move as a final 'poke in the eye' to Belgrade, something that would not stop an improvement of relations between the two countries following the election of the new, Krivokapić government in Podgorica.

Turkish individuals and companies found themselves on the receiving end of EU sanctions in December. In the latest twist in the saga regarding ongoing oil and gas exploration in disputed waters of the East Mediterranean by Turkey, the EU balked at the idea of more hefty sanctions being pushed by France, Greece and Cyprus, but nevertheless decided to impose sanctions on individ-

uals and companies carrying out oil and gas exploration in the East Mediterranean. All in all, December has not been a good month for Turkey, with the US Congress also voting to impose sanctions against Turkey over the NATO ally's decision to purchase the Russian S-400 air defence system back in 2017. The sanctions imposed by the US primarily target companies and individuals in the Turkish defence industry.

Amidst all this, a rare piece of good news – at least when it comes to regional relations – came on November 10th, when the leaders of **Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia** met in Sofia, under the auspices of the Berlin Process. The regional leaders agreed an action plan for creating a common economic market, as well as a joint environmental agenda for the region. While most observers were not holding their breath over the implementation of these plans, they at least sent a positive message. Likewise, the agreement between the leaders of **Albania and Serbia** to allow their citizens to enter the other's country with only their ID cards also sent a positive message when it comes to improving freedom of movement in the region. This decision was the latest product of the 'mini-Schengen' regional initiative. In reality, however, the number of Albanian and Serbian citizens visiting each other's countries is incredibly small.

DIFFICULT PAST

Kosovo is the latest corner of Southeast Europe, which is being forced to confront the more difficult and dark corners of its recent past. Having been established in 2017 to investigate and prosecute crimes committed by the Kosovo Liberation

Army (KLA) between 1998 and 2000 during the course of 2020, the Kosovo Specialist Chambers in the Hague and the Specialist Prosecutor's Office raised their first indictments against key KLA figures. Some of these individuals, such as former Kosovo President Hashim Thaci were senior government figures, while others such as Jakup Krasniqi and Kadri Veseli were senior political figures.

President Hashim Thaci announces that he resigns after Prosecutor's Office accepts war crimes indictment.



Accepting the legitimacy of the Tribunal and its task has been tough for Kosovo Albanian society, which largely sees the KLA's fight in positive terms and has not been willing to contemplate the idea that the KLA committed war crimes, even if there has been dissatisfaction with the post-war role of some ex-KLA leaders. The legitimacy of the court has repeatedly been challenged, including charges of ethnic bias, coupled with attempts to undermine its work and even threats to abolish it. The tensions generated in Kosovo by the start of its work are unlikely to go away quickly and trials themselves may not start for more than a year, let alone come to a conclusion.

THE POWER OF DISSENT: THE ROLE OF THE CITIZENS IN STRENGTHENING RULE OF LAW IN THE WESTERN BALKANS

Jovana Marović

Thirty years after the establishment of a multi-party system in the Western Balkans, the region has not seen much progress in democratization. From an outside perspective looking in, elections are held regularly, but they are only an illusion of democracy as they are not fair and the ruling parties tend to have an unfair advantage; freedom of the media is guaranteed by the constitution and law, but in practice journalists face numerous restrictions, pressures, and attacks; transparency has improved over time, but the more complicated the issue on the agenda, the more closed the institutions are; and the environment for civil society action remains unfavourable, despite sound legislative framework governing participation in decision-making. In recent years in the Western Balkans, we have encountered numerous examples of law evasion and lack of accountability for corruption. In short, where politics takes precedence over regulations, there is no rule of law in place. According to the latest Freedom House report, no country in the Western Balkans is a democracy, with Montenegro and Serbia backsliding this year.¹ This is due to the fact that the countries of the Western Balkans are facing widespread corruption and the close entwinement of political parties and the administration, resulting in clientelism and a lack of accountability, integrity, independence, and transparency within the public administration. The links between the political elite and organized crime groups and the protection they enjoy from the state are a serious threat to stability. As a result, citizens do not believe they are equal before the law.²

The concept of rule of law is difficult to explain and there is no single set of indicators to apply and measure the level reached in countries, but there is a common understanding that it is a mode of governance where laws are equally enforced and independently adjudicated, while



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respecting certain standards that guarantee human rights and freedoms, the instruments and ability for civic engagement, and an accountable government. This includes transparency and a separation of powers, as well.

Analytical efforts assessing challenges to the rule of law most often take into account the strengthening of rule of law on account of external influences. In this sense, the European Union (EU) and its transformative power are often examined, such as the possibility of improving its conditionality policy, as well as the influence of non-Western actors and the ways in which corrosive capital threatens democracy and the rule of law in the region. Yet the internal dimension tends to be overlooked, most often because of the belief that change cannot come from within given how deeply rooted undemocratic practices are in the political systems of the region. Nevertheless, this is particularly problematic as developments in the Western Balkans in 2020 have shown that there exists a homegrown appetite for change. The most interesting case of this is Montenegro, which will be used here to reflect on possible solutions to influence the rule of law from within.

At the end of August 2020, Montenegrin citizens ended the 30-year rule of one party, the Democratic Party of Socialists (DPS), in their democratic elections. The DPS had an institutional advan-

1 "Dropping the Democratic Façade: Nations in Transit 2020", Freedom House, April 2020, https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf.

2 Balkan Barometer, 2020, <https://www.rcc.int/balkanbarometer/home>.

tage in the elections through various forms of misuse of state resources, and with an undue lead in the campaign this party used pressure to influence the will of the voters.³ This pressure was well-documented and included offers of employment in the public administration for those expected to vote for the ruling party, payment of additional social benefits to vulnerable populations, etc. The DPS also had dominant coverage on publicly funded state media. Despite the lack of conditions for fair political competition, a democratic change of government did happen, and it was influenced by several factors. First, the opposition banded together to prevent spillover of votes to the ruling party. Second, the opposition had a tacit agreement on mutual non-accusations during the campaign and a common understanding on priority activities, while putting the fight against corruption and organized crime at the forefront. Third, the great dissatisfaction of the citizens with the situation in the country regarding widespread corruption and an inability to exercise their rights was a key factor. No less than 69.8% of citizens in Montenegro did not believe in March that the law was equally applied to all, according to Politikon Network.⁴ Such dissatisfaction was fueled by controversial, and in the opinion of a large number of citizens, discriminatory implications of the new Law on the Freedom of Religion, which provoked months of protests in 2020. Even the situation caused by the coronavirus pandemic did not prevent a voter turnout rate of 76%.

What have the recent elections in Montenegro taught us? In short, though the fight for the rule of law is always difficult and the conditions are never ideal, every individual should participate in it. Democratic change is possible even when the democracy is at an extremely low level, and it "requires the active engagement of all members of society to uphold rule of law principles and to assist the government in creating a social and institutional rule

of law culture."⁵ What was unthinkable just a few months ago in Montenegro has now transformed into a growing belief that democracy and the rule of law depends on the citizens. 80% of Montenegrin citizens now believe that the government can be changed by democratic means through elections, according to a public opinion poll conducted for the Balkans in Europe Policy Advisory Group (BiEPAG) in October and November 2020.⁶

KEY TAKEAWAY

The Western Balkan countries' efforts to foster rule of law reform are extremely limited at the moment. Since it is a complex and challenging process, which requires the active engagement and commitment of all members of society, citizens must take it upon themselves to build a rule of law culture in the Western Balkans by expressing their dissatisfaction, participating in policymaking and applying rule of law principles.

In addition to the citizens' growing awareness that they can influence election outcomes and create political change, the role played by civil society through watchdog activities and advocacy is also important. Regardless of the fact that the governments in the region are constantly trying to limit the voice and influence of civil society, its role in the democratization of societies

is significant and visible. Still, despite the proper capacities that exist at the national level, local NGOs, in addition to the lack of necessary knowledge and skills, do not have sufficient financial resources for their activities. Their systemic empowerment can be achieved by continuous regranting and a fair distribution of funds, but also networking and transfer of know-how. The past few years have seen only a few social movements emerging in the Western Balkans demanding justice. Another positive example from Montenegro occurred during protests in the coastal municipality of Bar in 2019, when dozens of hundred-year-old cypresses in the yards of two high schools were felled due to the construction of kindergartens.⁷ As a result, the cypresses were planted again. Other mass protests took place that year in Montenegro and were organized by the civic movement called "Resist 97,000". The inspiration for the name came from the "envelope affair" which broke on January 11th 2019, after the release of a video clip showing a local tycoon handing an envelope to the former Mayor of Podgor-

3 "Montenegro Parliamentary Elections 30 August 2020, Limited Election Observation Mission", Final Report, OSCE, ODIHR, Warsaw, 11 December 2020, <https://www.osce.org/files/f/documents/5/2/473532.pdf>.

4 "Dissatisfaction and apathy are the main tools of Montenegrin citizens", Politikon Network, 9 June 2020, <https://politikon.me/2020/06/09/dissatisfaction-and-apaty-are-the-main-tools-of-montenegrin-citizens/>.

5 "Towards a Rule of Law Culture – Exploring Effective Responses to Justice and Security Challenges", United States Institute of Peace, 2015, https://www.usip.org/sites/default/files/Toward-a-Rule-of-Law-Culture_Practical-Guide_0.pdf.

6 To be published in January 2021.

7 "Cypresses caused a riot", RFE, 16 February 2020, <https://www.slobodnaevropa.org/a/cempresi-bar-vrtic-pobuna/29776867.html>.

ica which contained €97,500 for the then-ruling DPS, originally intended for us during the 2016 parliamentary election campaign.⁸

Parliaments also play a key role in rule of law at the institutional level by not only fulfilling legislative tasks but also overseeing government. While MPs have a significant set of mechanisms and instruments at their disposal to request information from institutions, this does not happen to the necessary extent in practice. Successful rule of law reform requires MPs finding pressure points to change the laws, practices and narratives. After Montenegro's new government took out a loan of 750 million euros to cover gaps in the state budget,⁹ representatives of both the ruling majority and the opposition jointly requested supporting documentation, something we have not often had the chance to see. It also remains to be seen whether this is a step towards a democratic maturation and understanding of the role that parliaments should play.

Building a popular culture that supports the rule of law should be the result of a broader approach of social transformation. Such efforts should cover both formal and informal education channels and can be most easily achieved through the joint efforts of governments and civil society. The aim would be to foster the understanding that corruption can be addressed, and that it is not worthwhile in the long run, but also the understanding that building rule of law is a process that requires reinforcement on a daily basis. Such an approach also requires working with educational institutions and media involvement via sponsored posts and television programs and even local newspapers. State institutions should make additional efforts to bring regulations closer to citizens in order to improve their participation in policymaking, explaining why it is important for their voice to be heard. It is worrying that as many as 88.1 % of Montenegrin citizens have never requested data based on a request for free access to information.¹⁰

To conclude, so far all efforts to strengthen the rule of law in the Western Balkans have been purely technical, neglecting the political nature of the reform. The legislative improvements and capacity building are not enough to strengthen it, while an effective fight against corruption, which is the basis for the rule of law, is not possible without enduring control of the government. Citizens need to have sufficient knowledge, interest and trust in order to influence the rule of law and apply its principles on a daily basis.

8 "Elections in Montenegro: Stuck in an Envelope", Politikon Network, July 2019, https://politikon.me/wp-content/uploads/2019/12/pin_elections-in-montenegro_stuck-in-an-envelope.pdf.

9 "Cash-Strapped Montenegro Borrows Biggest Loan in Decades", Balkan Insight, 10 December 2020, <https://balkaninsight.com/2020/12/10/cash-strapped-montenegro-borrows-biggest-loan-in-decades/>.

10 "Dissatisfaction and apathy are the main tools of Montenegrin citizens", Politikon Network, 9 June 2020, <https://politikon.me/2020/06/09/dissatisfaction-and-apaty-are-the-main-tools-of-montenegrin-citizens/>.

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