



JUDICIAL INDEPENDENCE IN THE WESTERN BALKANS: IS THE EU'S 'NEW APPROACH' CHANGING JUDICIAL PRACTICES?

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Abstract

The EU's 'new approach' is a bold attempt to learn the lessons of previous enlargements and to avoid having to initiate a Cooperation and Verification Mechanism after accession. It rests on the principle that issues relating to the judiciary and fundamental rights (Chapter 23 of the *acquis*) and justice, freedom, and security (Chapter 24) “*should be tackled early in the accession process and the corresponding chapters opened accordingly on the basis of action plans, as they require the establishment of convincing track records*” (European Commission 2011b: 5).

This study shows that the EU has indeed learnt a number of lessons from previous enlargements and has gradually applied these in its dealings with candidate and potential candidate countries of the Western Balkans. Most notably, the new approach has placed greater emphasis on supporting change *in practice* rather than just legal compliance. Local stakeholders, including civil society organizations, have been engaged in dialogue and monitoring. It is too early to tell whether the new approach is triggering a long-term transformation of judicial independence, but the EU has clearly eschewed short-termism, an emphasis on formal compliance, and elite-led reforms in favor of a strategy based on ownership, inclusion, and gradual and verifiable change.

However, despite clear evidence of progress in all of the cases studied, the research highlights serious and persistent gaps between European standards for independence and impartiality, and the realities on the ground. These challenges are compounded by a general distrust amongst citizens regarding the work of the judiciary, particularly when important decisions are made behind closed doors. A strong, verifiable track record of adjudication without external interference is required to convince people that there has been a break with the politicized judiciaries of the past. However, in a quest to bolster independence, it is not sufficient for the EU and other external agencies to simply encourage the judiciary to work in isolation from the executive and legislative branches of authority. Political (and party) interference is undesirable, but democratic checks and balances are essential. In its pursuit of independence, professionalism and efficiency, the EU needs to be careful that the reforms and initiatives it pursues in the Western Balkans do not lead to an accountability deficit. Moreover, there is a clear risk that a more powerful judiciary, operating with increased autonomy, will exacerbate rather than reduce the threat of political interference.

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Contents

1.	Introduction	6
2.	Montenegro	9
3.	Serbia	13
4.	Albania	16
5.	Macedonia	19
6.	Bosnia and Herzegovina	22
7.	Kosovo	26
8.	Conclusion	29
9.	References	32

1. Introduction

Drawing on the experience of previous accession processes, particularly the recent experience with Croatia, the European Commission (EC) proposed a “new approach” in October 2011 for future entrants into the European Union (EU). The new approach rests on the principle that issues related to judiciary and fundamental rights (Chapter 23 of the *acquis*) and justice, freedom, and security (Chapter 24)

“should be tackled early in the accession process and the corresponding chapters opened accordingly on the basis of action plans, as they require the establishment of convincing track records. The Commission would report regularly, at all stages of the process, on progress achieved in these areas along milestones defined in the action plans with, where appropriate, the necessary corrective measures. IPA funds will be targeted to support this process” (European Commission 2011b: 5).

The harmonization of issues in these sectors necessitates a significant reform of the judicial system in these territories.

The prioritization of robust judicial systems *within* the EU is already recognized by the European Commission as having important implications for sustainable growth and social stability. This link between political stability and economic certainty is also espoused by a number of international agencies. At the fulcrum of judicial reform is the issue of judicial independence. Following on from the notions of judicial *insularity* and *impartiality* defined by Ishiyama Smithey and Ishiyama (2000: 165), we take judicial independence to mean that: *judges do not have any relation to the parties involved in a case and no vested interest in its outcome; and decisions by judges are not influenced by actors outside the judiciary*. Due to the paramount importance of judicial independence as part of the reform of the rule of law, EU strategies and their effects in the area of developing independent judiciaries will be the focus of this study.

It is acknowledged in the existing literature that the principle of judicial independence, developed in the context of consolidated democracies, needs to be recalibrated for the specific challenges associated with post-socialist transition countries (OSCE-ODIHR/Max Planck Institute 2010; Seibert-Fohr 2012). Judicial independence across EU member states tends to be measured according to the robustness of formal institutions. Critics point out that even in stable, long-standing democracies, this does not necessarily capture the level of political interference in the judiciary, and argue that it is therefore crucial to employ empirical social scientific methods in order to ascertain an accurate picture of judicial independence on the ground (Cameron 2002; Peretti 2002; Seibert-Fohr 2012: 8). This is an even stronger requirement in post-authoritarian states intent on EU accession, where the inter-connectedness between political and judicial elites is greater and where there is no recent legacy of judicial independence whatsoever.

Removing any political interference from the work of judges and prosecutors is now at the root of EU accession strategies. Yet it is increasingly evident that this needs to be pursued with a degree of caution. The challenge is to ensure that independence is achieved whilst simultaneously guaranteeing accountability

and a balance of power across the three arms of government (Canivet et al. 2006; Seibert-Fohr 2012: 4). This has been a particular challenge for new member states (NMS). For example, in Romania measures to bolster judicial independence have resulted in unchecked 'judicial supremacy', which has paradoxically had a deleterious impact on the rule of law (Parau 2012). The other significant lesson from NMS is that it cannot be assumed that formally guaranteeing judicial independence will trigger a change of practice 'on the benches' (Guarnieri 2013).

In this paper, we consider how the EU's new approach seeks to ensure that formal compliance leads to judicial independence in practice. The development of independent judicial councils with responsibility for evaluating, appointing, and disciplining judges and prosecutors is the clearest manifestation of the revised strategy. However, commentators have questioned the EU's approach, and particularly the strategy of developing judicial councils to foster independence (Garoupa/Ginsburg 2008). The concerns are that the approach is too institutional in its focus and that the 'one model fits all' approach ignores the significant variation amongst judiciaries across the Western Balkans, and the sheer complexities involved in triggering substantive change. Evidence from the NMS of Central and Eastern Europe (CEE) and South-East Europe (SEE) would suggest that the differential impact of EU-inspired reforms to improve judicial independence occurred largely because of variation in the relationship between judicial and political actors at the domestic level (Coman 2014). In other words, the domestic context was under-played as an intervening variable (Elbasani 2013). Notwithstanding such criticisms, these institutions will be the starting point of this evaluation of EU strategies for judicial independence in the Western Balkans.

The evaluation and analysis offered below will include each of the candidate and potential candidate countries of the region. It is important to note from the outset that the EU has deployed a bespoke approach to the Western Balkans since 2000, with the launch of the Stabilization and Association Process (SAP), which accounted for the post-conflict contexts and conditioned progress on regional stability, return of displaced persons, cooperation with war-crimes trials, and broad political and economic reforms. The new approach thus draws on aspects of the SAp approach, but incorporates lessons learnt from recent experiences with Bulgaria, Romania and Croatia. The introduction of the new approach coincided with the initial stages of the accession negotiation processes in Montenegro and in Serbia. These countries can be seen to be pilot studies for the prioritization of Chapters 23 and 24 and are particularly useful test cases for the new approach.

Reforms around issues covered in Chapters 23 and 24 provide a particular challenge for the Western Balkans for two reasons (Nozar 2012). First, there are high levels of corruption and a high number of unsuitable judicial practitioners who have been appointed by the previous regime. Second, judicial independence is not subject to 'hard *acquis*', i.e. there is not a single or dominant judicial framework amongst member states. Rather, different solutions work in particular national contexts and it is therefore difficult to identify which models are most suitable for individual Western Balkan territories. It is also important to acknowledge that Western Balkan contexts are varied and are at different stages of EU association and accession processes regarding judicial reform:

- Montenegro: accession negotiations have opened, as have Chapter 23 negotiations.
- Serbia: accession negotiations have opened, and the action plan has been drafted in order to open talks for Chapter 23.
- Albania: given candidate status in June 2014, but accession negotiations have not commenced.
- Macedonia: a candidate since 2009, the start of accession negotiations has been vetoed by Bulgaria (since 2012) and Greece, despite EC recommendations to start membership talks.
- Kosovo: potential candidate, which is complicated by its disputed independence that is not recognized by five of the 28 EU member states.
- Bosnia and Herzegovina: potential candidate; progress has stalled due to a lack of constitutional reforms. The Anglo-German initiative of late 2014 promises to unlock the stalemate and allow for the signing of the Stabilization and Association Agreement (SAA).

The Europeanization of judicial independence in the Western Balkans has recently been examined closely in an edited collection (Kmezić 2014). The contributions provide detailed historical and legal analyses of judicial independence against the background of EU intervention. This analysis complements the collection by linking EU strategies and domestic institutions with an examination of practices on the ground in the Western Balkans.

In mapping EU instruments targeting judicial independence, we illustrate the evolution of EU intervention in the region. The study shows that much of the earlier assistance focused on complementing conditionality for legal harmonization with top-down technical assistance (through twinning and expert visits) and infrastructure development, mostly through Community Assistance for Reconstruction, Development and Stabilization (CARDS) and Instrument for Pre-Accession Assistance (IPA) short-term projects. Although technical assistance and capacity building remain key aspects of the EU toolkit, there have been developments in the way the Commission has sought to improve judicial independence in the Western Balkans. Two over-arching lessons seem to have been learnt (compared with the accession processes in Bulgaria, Romania, and more recently, Croatia):

First, more recent deliberative and consultative instruments initiated by the EU either stipulate or strongly encourage a wider use of actors so as to avoid a closed, top-down European integration process as before. For example, the Structured Dialogue processes in Bosnia and Herzegovina and Kosovo are designed to include stakeholders in addition to domestic governmental officials. Thus, when accession negotiations commence the working groups that draft the action plans for Chapter 23 should include a number of civil society organizations.

Secondly, across the region, Member State peer review missions to monitor progress engage with key non-state actors in addition to state officials. Unlike similar visits during past Eastern enlargement, Member State peer review missions now strive to include a wider array of stakeholders (particularly non-state actors), and not limit the missions to capitals or major urban centers.

Third, and most importantly, the Commission's new approach requires candidates to complete additional steps in order to demonstrate a verifiable track record in the implementation of judicial reforms. This is in response to the experience of poor implementation in Bulgaria, Romania and Croatia. The expectation is that by opening Chapters 23 and 24 relatively early in the process, and only closing them towards the end of the negotiations, there will be more careful monitoring of compliance and the opportunity to intervene if new laws are not being implemented. By contrast, Chapter 23 was opened in June 2010 for Croatia, and closed only a year later when accession negotiations culminated (Council of the EU 2011). Under the new approach, focusing on Chapter 23 at the start of accession negotiations the aforementioned Working Group drafts an action plan based on the EU Screening Report that, if approved by the Commission, represents the opening benchmark. When Chapter 23 negotiations open, instead of setting a closing benchmark as done previously, the Commission offers interim benchmarks that need to be completed before closing benchmarks are set. Throughout this long process, the Commission can also set corrective measures if there is insufficient progress, and can slow or stop negotiations in other chapters so that rule of law reform does not lag behind (Nozar 2012). What the EU is seeking to avoid is the requirement for a post-accession Cooperation and Verification Mechanism to monitor judicial reform, as occurred in Bulgaria and Romania after 2007, or the need for a post-accession safeguard to monitor Justice and Home Affairs as occurred in Croatia after 2013. The EU is thus exercising a degree of flexibility and adapting its instruments so as to respond to the specific domestic contexts of the Western Balkans.

However, we also concede that understanding of judicial independence within the EU remains largely institutional or procedural. This is evidenced by the annual EU Justice Scoreboard (European Commission 2015), which provides a comparative survey of mechanisms used (or not used) across EU member states as evidence of 'structural independence'. In other words, the quality of independence is measured by the institutions in place, and similar metrics are reported for the efficiency and quality of judicial systems in the EU. This institutional guiding principle also connotes a narrow approach to understandings of judicial performance *within* the EU, which has fundamental implications for strategies of judicial and (ultimately rule of law) reform deployed during association and accession processes in the Western Balkans.

The following sections will briefly summarize EU strategies used to bolster judicial independence in each Western Balkan case. The configuration of relevant domestic institutions will be sketched, with a particular emphasis on Judicial Councils and Academies. Any salient issues regarding judicial independence will be highlighted. The final section will bring together the material from the individual sections and suggest some crucial challenges to reforming judicial independence that span the Western Balkans. Given the evolution of EU strategies to provide more opportunity for judicial independence reforms to take hold and for non-state involvement in the integration process, the end of the article summarizes the lessons learnt by the EU.

2. Montenegro

Montenegro, which declared independence from Serbia in 2006 after three years of a confederal 'state union' between Belgrade and Podgorica, rapidly completed the necessary requirements for candidacy and

initiation accession negotiations. It was the imminent start of accession talks that drove the EU to develop the new approach to Chapters 23 and 24 of the *acquis*, and so Montenegro is a pilot study for the new methodology for enlargement.

The Constitution of Montenegro was amended in 2013 to include several vital provisions with implications for judicial independence.¹ First, the President of the Supreme Court is selected and dismissed by a two-thirds majority of the Judicial Council, and is confirmed by a two-thirds majority of the Parliament (Amendment VII), which was reviewed positively by the Venice Commission's opinion of the draft provisions in 2012 (Venice Commission 2012b). Second, the Judicial Council consists of nine members (Amendment VIII): the President of the Supreme Court; four judges selected by their professional association; four lay members selected by the Parliament; and the Minister of Justice. The President of the Judicial Council is selected by a two-thirds majority of its members, and the Minister of Justice is ineligible. Although the majority is not explicit in the amendment (a qualified majority is preferable to avoid politicization), the Venice Commission broadly agreed with the new articles (Venice Commission 2013a: 3). Third, the Supreme Court Prosecutor is elected by a two-thirds majority of the Parliament upon the recommendation of the Prosecution Council (Amendment X). The Venice Commission was generally positive towards the amendments, though it questioned having only one candidate considered for the post (Venice Commission 2013a: 4). Finally, the Constitutional Court consists of seven judges who are selected by a two-thirds majority of the Parliament (Amendment XVI). The Venice Commission was largely supportive of the amendments, but suggested alternative mechanisms to avoid deadlock if the two-thirds majority was not reached. Interestingly, the opinion also queried whether confirmation by the Parliament was the best way forward, since it provided democratic legitimacy of the candidate on the one hand, but other arrangements could insulate the process from being solely determined by political actors (Venice Commission 2013a: 4). The Montenegrin Parliament followed the constitutional reform by ratifying four laws related to judicial independence (Milosevic 2013).

Along with the approval from the Venice Commission, the 2013 EC Progress Report deemed that the constitutional amendments reformed the four institutions "in line with the recommendations of the Venice Commission and European standards" (European Commission 2013f: 36). The EU did not push the timing of the amendments, but the chronology was rather determined by domestic political actors. The Venice Commission has worked with Montenegro for a number of years and led the constitutional reform process, so the EU did not offer any substantial technical assistance. However, throughout the drafting process, especially in the summer of 2013, proposed amendments were submitted to the European Commission for comment and advice was given as to which issues were of particular salience for opening negotiations on Chapter 23.²

Though the EU did not take a lead during the Montenegrin constitutional reform process, there is a legacy of assistance being targeted to the rule of law, including judicial independence. For example, during IPA

1 The 2013 amendments to the Constitution of Montenegro are available at http://www.legislationline.org/download/action/download/id/5442/file/Montenegro_Constitution_amendments_of_2013_en.pdf, accessed 2 June 2015.

2 Interview with an official at Unit B1, DG Enlargement, Brussels, 10 September 2014.

planning in 2007, the EU funded three twinning activities, all of which had components that targeted the improvement of judicial independence (developing an action plan for a judicial reform strategy and legislative reform; reforming the judicial budgeting process; and supporting the work of the Judicial Council). More recently, under IPA 2012, the EU funded a project supporting the rule of law that included several objectives related to judicial independence, including the development of judicial performance indicators, a system to monitor trial duration, a system of professional evaluation, and a system for disciplinary proceedings. IPA resources also targeted the capacities of the Judicial Training Center, including improved teaching methodologies and an upgrading of the Judicial Training Center to a fully independent Judicial Academy.

These priorities relating to judicial independence had been identified in a Member State peer review mission to Montenegro at the beginning of 2012. These missions, which are organized by the EC in co-operation with the Technical Assistance and Information Exchange (TAIEX) instrument, are an important mechanism in assessing the situation ‘on the ground’.³ The Council selects member states to carry out the peer review missions, the results of which are not made public. The conversations are confidential in order to make a valuable assessment, and to allow the stakeholders to speak openly. A program for the mission is agreed with the Montenegrin authorities. The missions visit different parts of the country, speak with the judges, look at the conditions, and have dialogues with civil society and other stakeholders. After the end of the mission (which takes approximately one week), one or more member state experts submit a detailed report on the state of play regarding judicial reforms. Montenegro receives a draft of the report, they can make comments, and then the experts finalize it. The EC tries to be balanced in the experts included and mix old and new member states, since the latter can be useful because of their own experiences with accession.⁴

Judicial reform in Montenegro has also been prioritized, and has moved higher up the conditionality and dialogue agenda. Part of the SAA for Montenegro contained a provision for political dialogue, which takes place between Montenegrin parliamentarians and Members of the European Parliament within the Stabilization and Association Parliamentary Committee (SAPC). Montenegro applied to become a candidate for EU membership in December 2008, and it is fair to say that conditionality, tied first to candidacy and then to the commencement of accession negotiations, has acted as the main driver of judicial reform. To assess the country’s readiness for candidacy, the EC sent a detailed questionnaire to Montenegro in July 2009 about the level of harmonization of its legislative framework with the chapters of the *acquis*, which Montenegro completed in December 2009. Based on the replies to the questionnaire and other complementary information, the Commission published an Opinion in November 2010 that Montenegro should be granted candidate status, but negotiations should be postponed until a number of key priorities had been fulfilled. One of the key priorities identified was judicial independence, particularly the need to ensure “de-politicized and merit-based appointments of members of the judicial and prosecutorial councils and of state prosecutors” (European Commission 2010b: 11). After confirming that progress had been

3 The description of the peer review mission was provided by an official at Unit B1, DG Enlargement, Brussels, 10 September 2014.

4 The description of the peer review missions, which the EU uses as an instrument across the region, is from an Interview with an official at Unit B1, DG Enlargement, Brussels, 10 September 2014.

made regarding the rule of law, the Council recommended the start of accession negotiations on 26 June 2012, which was endorsed by the European Council three days later (Council of the EU 2012). The Council recommendation to start negotiations reiterated the new approach to be taken, namely that Chapters 23 and 24 should be prioritized.

The agreed screening report between the EC and Montenegro, published in November 2012, sets out the existing legislative framework related to Chapter 23, including measures that protect judicial independence.⁵ It also identifies gaps in domestic legislation. The report provided key benchmarks for *acquis* negotiations, and formed the basis of the Montenegrin government's action plan for Chapter 23, which was published in June 2013.⁶

The following areas are identified as requirements to improve judicial independence: further constitutional amendments; a transparent and merit-based recruitment process for judicial practitioners; a fair and transparent process for the promotion and evaluation of judicial practitioners; sufficient administrative and budgetary capacities for the Judicial and Prosecutorial Councils; and measures to ensure internal independence of judges and prosecutors. The Chapter 23 action plan was adopted by the Commission in August 2013, with a recommendation to open the chapter and an invitation for Montenegro to submit its negotiating position (European Commission 2013f: 35). In December 2013, Montenegro and the EU opened Chapter 23 negotiations (Council of the EU 2013).

Although the accession process in Montenegro has progressed further than in any other country in the Western Balkans, the EU still expresses concerns about political interference. Given the small population of Montenegro, there have been an unusually high number of presidential pardons, which opens up the possibility of political motives (European Commission 2013f: 36). Although there have been important constitutional and legal reforms to ensure the lack of political interference, there has only been one main governing party over the last twenty years. This means that the existing judges and prosecutors are vulnerable to being under control or pressured by the politicians who appointed them before the current safeguards for independence were in place.⁷ Another concern is the process for the appointment of the President of the Supreme Court. Whilst this is now the responsibility of the Judicial Council rather than the Parliament (as was the case in the past), the incumbent President was re-elected. At worst, this suggests that *de jure* independence cannot prevent *de facto* political interference. At best, even if the structures are in place, the re-election suggests that it takes time for mind-sets and associated behaviors to change.⁸

Through interviews with leading NGOs working on justice and rule of law related issues, a number of procedural gaps and lapses in implementation were highlighted that cast doubt as to how judicial independence operates in practice. For instance, there are no formal mechanisms in place for monitoring the outcome of cases where there have been reported irregularities. Even when this was brought to the attention of the

5 The Chapter 23 screening report for Montenegro is available at http://ec.europa.eu/enlargement/pdf/montenegro/screening_reports/20130218_screening_report_montenegro_ch23.pdf, accessed 2 June 2015.

6 Interview with an official at Unit B1, DG Enlargement, Brussels, 10 September 2014.

7 Interview with Mreža za afirmaciju nevladinog sektora (MANS), 26 August 2014.

8 Interview with an official at Unit B1, DG Enlargement, Brussels, 10 September 2014.

Judicial Council, no action was taken and thus it remains impossible to ascertain the proportion of cases where a challenge was successful and upheld.

Furthermore, even when formal mechanisms do exist, such as the complaints mechanism, the proceedings are not transparent. MANS, the Montenegrin Transparency International office, filed a number of complaints using this mechanism, but none of the cases were pursued through the complaints mechanism. Third, and most interestingly, MANS is part of a working group and has attempted to initiate a parliamentary debate on anti-corruption strategies. However, this is being impeded by the judiciary, which is using the principle of independence to block everything coming from the two other branches of authority in Montenegro.⁹

3. Serbia

Serbia has undertaken a remarkable Europeanization journey over the last decade, from a post-authoritarian country blamed for the Yugoslav conflicts in the 1990s that was intransigent in apprehending and extraditing high-profile war-crimes suspects to the most recent country to commence EU accession negotiations (in January 2014).

Although the constitution guarantees an independent Serbian judiciary (art. 3), this is qualified in article 4 by the assertion that whilst the judiciary is “independent” the three branches of power will be able to exercise “mutual control” (art. 4). Of the 15 justices on the Serbian Supreme Court, five are appointed by the President of Serbia from a pool of ten candidates selected by the National Assembly; five are appointed by a majority in the National Assembly from a pool of ten candidates nominated by the President; and the final five are selected to the Supreme Court of Cassation from nominees selected by the Judicial and Prosecutorial Councils. The High Judicial Council consists of the President of the Supreme Court of Cassation, the Minister of Justice, the head of the parliamentary Committee for Justice, and eight members elected by the National Assembly (nominated by judges, attorneys and university deans). An important 2014 amendment to the Law on the High Judicial Council concerns transparency: the proceedings are open to the public, and monitoring reports are published annually. This allows not only other branches of government to remain aware of the work of the Council, but it also allows interested civil society organizations to ensure that the proceedings are free from political interference.

Some of the previous EU assistance both past and present has been in the form of technical assistance under the IPA program. Between 2009 and 2011, the EU funded a project to create a ‘Standardized System for Judiciary Education and Training’ by upgrading the Judicial Training Center into a national Judicial Academy to provide initial and continuing training for judicial practitioners. The IPA 2012 program had a fiche entitled ‘Support to the Rule of Law System’, which included activities related to building curricula at the Judicial Academy, and assisting the Ministry of Justice and High Judicial Council in developing competences for appointments. The Academy can be seen as a positive example of judicial reform in Serbia. Since it

9 Interview with MANS, 26 August 2014.

was established, it has actively involved civil society in its trainings, and it can potentially become a forum where judges openly discuss how they are politically pressured at work.¹⁰ The IPA 2013 program includes a twinning program to further develop the capacities of the Judicial and Prosecutorial Councils.

In addition to twinning programs, the EC works with TAIEX on a number of training activities, some of which are designed to bolster judicial independence. These include study visits, expert missions and detailed peer review missions. Even before candidacy, nominated experts from member states would visit Serbia annually to carry out detailed peer review missions, where they visited various judicial institutions and consulted with relevant stakeholders. The resulting confidential reports are given to the beneficiary country and the member states. With EU candidacy, peer review missions will be organized twice yearly.

TAIEX and the EC also organize expert visits, which have, in the case of Serbia, proved valuable in remedying bureaucratic deficiencies and the lack of concerted action to ensure implementation.

For example, the country published its first Judicial Reform Strategy in 2006, which covered the period up to 2013. However, after the strategy was approved, the legislative framework required for implementation was not enacted (European Commission 2008: 11). This strategy had been drawn up by a relatively closed set of domestic experts who produced the document somewhat detached from practitioners and stakeholders. In contrast, the new reform strategy drafted for the period from 2013 to 2018, involved a number of member state expert visits funded by TAIEX, who engaged local stakeholders directly from the outset in a concerted attempt to augment implementability. The experts also visited Belgrade and met with a number of stakeholders, including state bodies, but also civil society organizations and professional bodies. The experts have also been involved in observing inter-institutional implementation meetings for the strategy, so the whole process, unlike with the previous strategy, has been more open and “interactive”.¹¹ The judicial reform strategy document that has emerged from this process highlights five areas for further reform relating to independence: building capacities for the transparency and accountability in the operation of the Judicial and Prosecutorial Councils; independence and transparency of budgets; building capacities for strategic planning for the Judicial and Prosecutorial Councils; creating clear criteria for duties, selection, and promotion; and creating a standardized system of professional benchmarks (Government of the Republic of Serbia 2013).

The other main driver of judicial reform has been the progress of accession negotiations, albeit somewhat indirectly. Serbia had applied for EU membership in December 2009, and, in order to decide whether to proceed with candidacy, the EC delivered a detailed questionnaire on the country’s legal framework based broadly on Chapters 23 and 24 of the *acquis*. The completed questionnaire was returned to Brussels in January 2011, but prior to the Commission’s Opinion and Analytical Report being published, the two remaining high-profile war-crimes suspects – Ratko Mladić and Goran Hadžić – were apprehended in Serbia and extradited to the International Criminal Tribunal for the former Yugoslavia (ICTY) to face charges in spring 2011. The Opinion on Serbia’s application declared that “Serbia has reached a fully satisfactory level in its

10 Interview with the Lawyers’ Committee for Human Rights (YUCOM), 27 August 2014.

11 Interview with an official at the Ministry of Justice, Republic of Serbia, Belgrade, 31 July 2014.

cooperation with ICTY”, and recommended that Serbia be granted candidate status (European Commission 2011a: 11). However, the document also stated that accession negotiations would only be started when Serbia started the process of normalizing relations with Kosovo (European Commission 2011a). After several rounds of negotiations between Pristina and Belgrade, mediated by the EU, the two sides concluded the Brussels Agreement in April 2013 to initiate normalization between the two governments, and Serbia opened accession negotiations in January 2014. Whilst it could be argued that judicial reform took a back-seat in the decision to offer candidacy to Serbia, the adoption of the EC’s new approach has placed the rule of law and judicial independence squarely at the forefront of negotiations between Belgrade and Brussels. After the explanatory and bilateral meetings, Serbia and the EU jointly published the screening report for Chapter 23 (Judiciary and Fundamental Rights) in May 2014, which analyzes the existing legal framework in Serbia, including the provisions for judicial independence.¹² The aforementioned national judicial reform strategy has been used along with other strategy to formulate a draft action plan for Chapter 23, which, if finalized and approved by the EC, will signal the opening of this chapter of the *acquis* (Tanjug 2014).

Although Serbia has made significant progress in the Europeanization of judicial independence, driven by conditionality and technical assistance, there are several shortcomings to the current approach. The current reforms adhering to ‘European standards’ encourage separation of powers, but this has not been done in Serbia contemporaneously with the development or appreciation of checks and balances. It is potentially risky to remove any oversight by legislative and executive branches in the judiciary, but the current European consensus on self-governance of the judiciary is pushing Serbia in that direction. Moreover, the 2013 EC Progress Report echoes the concerns in earlier documents, stating that “Regarding the independence of the judiciary, the current constitutional and legislative framework still leaves room for undue political influence” (European Commission 2013g: 39). One recent article claimed that members of the Judicial and Prosecutorial Councils in Serbia were reluctant to talk about features of the judicial system that undermine independence, even though political interference has been evident in high-profile cases (Reljanović/Knežević Bojović 2014). There are pressures for judges to act in a certain way, since there is a three-year probation period, and this also affects independence in the judicial system when newly-appointed judges feel as if “they are being watched” before they have an opportunity to become permanent. There is a similar situation in the prosecutorial service.¹³ Cases of corruption involving individuals are not being pursued (Transparency International 2011: 118), and certain court proceedings have taken suspiciously long such that the statute of limitations expires.¹⁴ Another example is that members of the High Judicial Council involved with the controversial reappointment procedure described below complained about political pressure during the process (Andric 2012a).

The Serbian government undertook an ambitious reappointment process for all sitting judges after the ratification of the 2006 Serbian constitution, purportedly to ensure that all of those on the bench fulfilled certain standards of independence and impartiality. The government made a decision to undertake this procedure, though the Venice Commission had strong reservations that such a process would be flawed

12 The Chapter 23 screening report for Serbia is available at http://ec.europa.eu/enlargement/pdf/key_documents/2014/140729-screening-report-chapter-23-serbia.pdf, accessed 2 June 2015.

13 Interview with YUCOM, 27 August 2014.

14 Interview with YUCOM, 27 August 2014.

with a Judicial Council appointed directly or indirectly by political parties (in the Assembly), and without clear criteria for the process. Nonetheless, the government persisted with reappointments, though the EC also voiced its concern in its 2009 Progress Report that the procedure would leave room for political influence, and potentially lead to the long-term politicization of the judiciary (European Commission 2009: 12). When the procedure finally ended in January 2010, 800 of the 3000 sitting judges had lost their jobs, with all of the decision-making by the High Judicial Council done behind closed doors (Andric 2012a). The 2010 EC Progress Report aired its “serious concerns” about the process, including inadequate justification for decisions, a lack of transparency, and first-time applicants who were hired with no merit-based assessment (European Commission 2010d: 10). In fact, none of the decisions for termination made by the Judicial or Prosecutorial Councils were explained (Transparency International 2011). Realizing the problems with the reappointment procedure, the Serbian government changed the law in December 2010 that required the High Judicial Council, which decided on the initial dismissals, to reconsider. Unsurprisingly, the Judicial Council upheld most of its initial decisions, so a number of dismissed judges appealed to the Constitutional Court, who decided in favor of 126 judges to be reappointed (Andric 2012b). Thus, although there have been significant developments in the legislative framework in Serbia around judicial independence, there are examples where the practices on the ground fall short of best practice. However, with the accession negotiations and greater scrutiny by the EU, particularly in judicial matters, there is hope that Serbia will not be able to hide its current judicial shortcomings from Brussels.¹⁵

4. Albania

The Europeanization process in Albania has focused heavily on reforming the rule of law, with specific attention on tackling corruption and organized crime, and reforming the judiciary. Before the involvement of the EU in judicial reform, the situation in Albania was characterized by ‘rough justice’ as exemplified by high-profile cases of corruption by judicial officials alongside widespread distrust of the judiciary and police (Aliaj 2005). However, even with EU assistance to reform Albanian institutions designed to ensure judicial independence, the current constitutional and legal frameworks in Albania still allow for significant interference from the executive and legislature.

The composition of the High Council of Justice illustrates the influence of the two other branches of authority, particularly the Albanian President. The High Council of Justice consists of: the President of Albania; the Minister for Justice; the President of the High Court; three members selected by the Parliament; and the remaining members are judges selected by the National Judicial Conference.¹⁶ Although a majority of the members are selected by the National Judicial Conference, the President of Albania wields a substantial amount of power in the High Council of Justice. The President is the Chairperson of the Council, and the vice-chairman is appointed on her / his recommendation.¹⁷ Moreover, the President of the High Court and other High Court judges are appointed by the President of Albania, with the approval of the Parliament.¹⁸

¹⁵ Interview with YUCOM, 27 August 2014.

¹⁶ Constitution of the Republic of Albania, art. 147.

¹⁷ Constitution of the Republic of Albania, art. 147.3.

¹⁸ Constitution of the Republic of Albania, art. 136.

The only counterweight to the influence of the legislative and executive branches of government on the High Council of Justice are the members selected by the National Judicial Conference (the main body of self-governance by judges), but international evaluations of this institution have deemed it to be “not operational for years”, “which had a negative impact on the selection, career progression, training and disciplinary proceedings against judges, and [...] ownership and controls of the [sic] judicial ethics” (Council of Europe GRECO 2014: 4). Despite the gradual reform of relevant legislation and professionalization of the courts, the lack of judicial independence is still present in the Albanian constitution, and shortcomings in the High Council for Justice, the High Court, and the Constitutional Court have been highlighted in the EC Progress Reports (European Commission 2012a, 2013a).¹⁹

The lack of independence in the High Council of Justice has knock-on effects for other judicial institutions. The process by which judges are appointed, transferred, or promoted allows for wide discretionary powers to the High Council of Justice, and the EC has recommended that this be reduced (European Commission 2013a: 38). In July 2013, many of the judges who were promoted to the appeals court were widely perceived to be influenced by the right-leaning Democratic Party, and the head of the High Council of Justice was a former minister in a Democratic Party-led cabinet (Likmeta 2013). The other organ for gradual socialization and professionalization of the judiciary is the School of Magistrates, which is responsible for initial education and continuing professional training for judges and prosecutors in the Albanian judicial system.²⁰ Although the institution was established to create a new cadre of judicial practitioners adhering to European standards based on revised legislation in 2005, the School continues to face challenges due to insufficient budgetary allocations (European Commission 2013a: 38). More worryingly, the law that established the School indirectly institutionalizes political influence over the training of current and future judicial practitioners through the composition of the Steering Council of the School and the appointment procedure of the School’s Director. The Steering Council of the School includes the President of the High Court, the vice-chairman of the High Council of Justice, the national General Prosecutor (all of whom are appointed by the Albanian President), two appointees by the Minister of Justice, and the Director of the School.²¹ The Director is appointed by the High Council of Justice, whose composition, as shown above, is heavily influenced by the Albanian President.²²

Despite these ongoing problems with judicial independence, the EU has had a long engagement with Albania in the area of judicial reform. Under the 2002 CARDS program, the EU established the European Assistance Mission to the Albanian Justice System (EURALIUS). The first phase of the mission, EURALIUS I, ran between 2005 and 2007 and sought to assist with a number of issues related to judicial reform, including drafting harmonized legislation. EURALIUS II (under CARDS 2006) extended the mandate of the mission until 2010. The third phase of EURALIUS had a budget of €2.3 million and was funded from the 2009 IPA program; it aimed to provide further consolidation of the legal and institutional frameworks related to the judicial system in Albania. EURALIUS III, which concluded in May 2013, involved high-level experts from the

19 The nine-member Constitutional Court is appointed by the President, and approved by a simple majority in the Parliament (art. 125).

20 Law on the Magistrates’ School of the Republic of Albania, art. 2.

21 Law on the Magistrates’ School of the Republic of Albania, art. 6.

22 Law on the Magistrates’ School of the Republic of Albania, art. 7.

judiciaries of Spain and Italy, who worked with the Ministry of Justice and other judicial officials through trainings in order to work on a number of reforms. These included improving the transparency of High Council of Justice procedures. One of the main objectives of EURALIUS III was to encourage politicians in Albania to “abstain from political interference or pressure on the judiciary and allow for credible judicial processes” (EU Delegation in Albania 2013). The fourth phase of EURALIUS started in 2014, and will continue along the lines of the previous stages of the mission: the EC will award a service contract to a consortium of agencies based in EU member states²³ to provide mainly long-term and mid-term engagement with judicial bodies in Albania, which include the School of Magistrates, High Council of Justice, and National Judicial Conference. The consortium will organize a number of trainings to promote further efficiency, independence, and accountability of the judiciary. In addition to the EURALIUS trainings, there have been two relevant twinning programs relevant to judicial independence. Under the 2005 CARDS program, the Council of Europe implemented an EU-funded twinning program to improve the sustainability of the School of Magistrates between 2007 and 2009. Moreover, under CARDS 2004, a twinning program focused on improving the operation of the High Council of Justice and its Inspectorate.

EU-funded technical assistance to improve judicial reforms has been complemented by different mechanisms related to conditionality. In addition to the annual EC Progress Reports that monitor the situation in each of the Western Balkan territories, the EC underlined 12 key priorities – including the strengthening of the rule of law – that Albania needed to fulfill to achieve candidacy and start accession talks (European Commission 2010a). These key priorities were narrowed to five areas listed in the 2013 Enlargement Strategy (European Commission 2013c: 32): public administration, judicial reform, fighting corruption, tackling organized crime, and ensuring human rights. In order to maintain momentum in addressing these five issues, the EC developed an inclusive High Level Dialogue on the key priorities, with the first meeting in November 2013. At the second meeting in March 2014, the EU and Albanian government agreed on a roadmap in order to tackle the key priorities. In parallel with this process, the EC published a report on Albania’s progress in tackling corruption and organized crime, as well as judicial reform. It summarized the initiation of the drafting of the 2014-2020 judicial reform strategy, but stressed that Albania would need further cooperation with the Venice Commission in order to focus on accountability and independence of the judicial system. The report concludes, however, that on the basis of the progress on tackling corruption, organized crime, and reform, Albania should be given candidate status for EU accession (European Commission 2014b). The publication of the report coincided with the third High Level Dialogue meeting, which reaffirmed that Albania should be given candidate status, and praised Tirana for adopting the roadmap to address the key priorities in the previous week (European Commission 2014a). On 27 June 2014, after three previous failed attempts, Albania was deemed an EU candidate (Verbica 2014). The High Level Dialogue meetings between the EU and Albania have continued in order to continue the focus on the five priority areas (European Commission 2014a). The fourth High Level Dialogue meeting included a summary of domestic Joint Working Group conclusions that have been established for each key priority, including the judiciary. The judiciary Joint Working Group concluded that the judicial reform process should proceed via a conference with all stakeholders, including civil society, and that the Venice Commission should also be

23 The implementing partners are: the German Foundation for International Legal Cooperation (IRZ); the Dutch Center for International Legal Cooperation (CILC); and the Austrian Agency for Economic Cooperation and Development (aed).

in attendance. Related to independence, random allocation of cases should be a priority, and the independence of judicial institutions should be the focus of the 2015 EU peer review mission.²⁴

Despite the progress on achieving candidacy and establishing an inclusive process to achieve the key priorities, there are still some serious underlying weaknesses with judicial independence that need to be addressed. The Council of Europe Commissioner for Human Rights found a number of shortcomings regarding independence: appointments should be affirmed by a qualified majority in parliament instead of the current practice of simple majority; the Minister of Justice should not be involved in disciplinary cases against judges; and a further strengthening of the independence of the High Council of Justice is required (CoE Commissioner for Human Rights 2014). Interestingly, another commentator said that a lack of independence is not the problem, but rather, it is in the interest of judges to ensure that corruption remains “endemic”. It is thus necessary to have strong international support to bring corrupt judges to justice, not just build further measures for independence (Rozenberg 2014). It is this delicate balancing act between independence and scrutiny that will characterize the judicial reform process in Albania.

5. Macedonia

The European Commission recommended candidate status for Macedonia in November 2005, and wrote that the opening of negotiations would commence if progress was made in a number of sectors, including justice (European Commission 2005b). The EC endorsed the start of negotiations in October 2009 (Marusic 2009). However, Greece vetoed the start of accession negotiations in December 2009, and has done so every year, despite repeated EC recommendations to start accession talks (Marusic 2013). Greece has blocked further progress because of a naming dispute, since it posits that the name ‘Macedonia’ without any qualification implies an irredentist claim by Skopje over the Greek region with the same name adjacent to the Western Balkan country (Economist 2011). Bulgaria joined Greece in vetoing the start of negotiations in 2012, citing a lack of good bilateral relations (Marusic 2012). Thus, although the EC has deemed Macedonia ready to continue towards membership, the accession process has been at a standstill since 2009.

Although opening of accession negotiations is at an impasse, the reform process has continued. In August 2014, the Macedonian Parliament adopted seven draft amendments to the constitution (Venice Commission 2014b: 3). Whilst the amendment to constitutionally define marriage as between a man and woman (and thus make same-sex marriage unconstitutional) has garnered international headlines (Marusic 2014b), there are also two important draft amendments that have implications for judicial independence. First, the 2006 Law on the Judicial Council defines the body as having 15 members, eight of whom are elected by judges, three by the Parliament, two nominated by the President, and the Minister of Justice and President of the Supreme Court as *ex officio* members. The proposed amendment would be to remove the two *ex officio* members of the Judicial Council, and increase the number elected by judges to ten with the remainder

²⁴ The conclusions from the fourth High Level Dialogue are available at http://ec.europa.eu/commission_2010-2014/fule/docs/news/2014/20140929-4th-hld-conclusions.pdf, accessed 2 June 2015.

of the members drawn from law professors (elected by the Parliament). This would remove the executive from the body, and although this is not necessary under Venice Commission guidelines, an assessment by a coalition of Macedonian NGOs concluded that “bearing in mind the perception about the politicized nature of the judiciary in RM [Republic of Macedonia] of the citizens, the domestic and foreign organizations, the proposed Amendment is an important step towards prevention of the influence of the executive authority over the judiciary”.²⁵ Moreover, some commentators are still concerned about the transparency and accountability of the body, even if the proposed constitutional amendments are approved. The Judicial Council will still hold its meetings behind closed doors, and so citizens and civil society organizations will not be aware of what the Council is doing and how it reaches its decisions.²⁶

The second amendment related to judicial independence is to bestow the Constitutional Court with the power to hear appeals for decisions of the Judicial Council. On the one hand, this amendment would create some checks and balances within the judiciary without the influence of institutions from either the legislative or executive branches of authority. However, the aforementioned NGO assessment concluded that due to its election by the Assembly and closed-door proceedings, it might cause citizens to distrust the appeal process and suspect political interference.²⁷

After approval by the Parliament, the draft constitutional amendments were then put forward for 30 days to collect opinions from citizens, including representatives from civil society. After collecting the feedback from the consultation, the draft amendments are sent to international actors, including the EU and the Venice Commission for their feedback. In October 2014, the Venice Commission Opinion gave a positive evaluation of the changes in the composition of the Judicial Council, particularly the removal of the Minister of Justice and President of the Supreme Court from the body (Venice Commission: 20).

The EU has provided support for judicial independence through its programs over the last decade. Under CARDS 2004, the EU provided technical assistance in order to provide support to the creation of an institution for the training of judges and prosecutors, the Academy for Judges and Prosecutors. Further assistance to strengthen the Academy was provided between 2010 and 2012 under IPA 2008, which aimed to improve the training system, establish e-learning, and improve the institution’s library and website. One of the NGO respondents noted that the EU has been involved in making statements about the weaknesses of the judicial system, but monitoring and conditionality should have been more actively coupled with projects. In fact, in the area of judicial independence, other international actors have taken the lead, particularly the Organization for Security and Co-operation in Europe (OSCE), the United States Agency for International Development (USAID), and the American Bar Association.²⁸ Specifically, the USAID Judicial Strengthening Program, implemented by Tetra Tech DPK, ran until the end of 2014 and included components to strengthen

25 On 29 September 2014, a coalition of NGOs submitted a set of recommendations to the Macedonian Government. The NGOs were: the Helsinki Committee in Macedonia, Open Society – Macedonia, The Coalition for Sexual and Health Rights of Marginalized Communities, The Macedonian Center for European Training, and the LGBT Support Center. Their recommendations are available at http://www.mhc.org.mk/system/uploads/redactor_assets/documents/799/2014_Amendments_Macedonian_Constitution.pdf, accessed 2 June 2015.

26 Interview with an official at the Helsinki Committee in Macedonia, 15 September 2014.

27 This conclusion is part of the set of recommendations mentioned in note 25.

28 Interview with an official at the Helsinki Committee in Macedonia, 15 September 2014.

the professional judicial associations and capacities for budgeting, both of which contribute significantly to judicial independence.²⁹

The impact of EU conditionality has been diminished in Macedonia, since the continued progression of the country towards membership has not been stymied primarily by domestic inaction, but rather the aforementioned vetoes on opening negotiations by Greece and Bulgaria. This deadlock has led to unnecessary delays in commencing accession talks, and the detailed conditionality that comes with the screening process and drafting of action plans prior to the opening of the chapters of the *acquis*, particularly Chapters 23 and 24 prioritized by the new approach. This has obvious implications regarding the pace and effectiveness of changes that the EU can push in the area of judicial independence. Despite the disempowerment of conditionality, the EU is still able to shape the reform process through the High Level Accession Dialogue (HLAD). The inaugural HLAD meeting in March 2012 underlined a commitment in the definition and implementation of the EU reform agenda, with all relevant stakeholders including civil society around the table and to draft and implement ‘roadmaps’ in five key policy areas, including the rule of law. It is important to note, however, that despite the commitment to inclusion, civil society input has had little effect on reform outcomes. Despite the stalled start of negotiations, the HLAD conclusions remained committed to commencing a technical dialogue between the EU and Macedonia as set out in the new approach on Chapters 23 and 24 of the *acquis*.³⁰

The continued stasis in the EU integration process may have contributed to political instability in the country, in which the EU has had to intervene. In December 2012, the Social Democrats (the main opposition party) walked out of the Parliament over disagreements over the ratification of the national budget (Casule 2012). During the ensuing political stalemate, the Enlargement Commissioner cancelled a visit to Macedonia in February 2013, warning that the situation could have consequences for the start of accession talks (Casule 2013). After involvement by the EU to bring together the two sides, the opposition ended its boycott in March 2013 (Gardner 2013). However, after elections in April 2014 that returned the ruling party, the opposition parties boycotted the Parliament, though some MPs disagreed with the abstentionist policy (Marusic 2014a). As of spring 2015, the opposition was still boycotting the Parliament, so the aforementioned constitutional reforms will lack legitimacy if only governing parties support them.

Against this backdrop of domestic political turmoil and inertia in the accession process in Macedonia, there are several problems in the implementation of judicial independence. The Judicial Council prefers to take the more severe option of dismissing judges, instead of deciding on measures short of removal. Moreover, the Judicial Council usually does not provide specific reasons for dismissals, and uses the catch-all justification “unprofessional and un-conscientious exercise of judicial office” in most cases (European Commission 2013d: 39). Crucially, the operation of the Judicial Council remains vulnerable to partisan pressures in its current form. In 2012, the body failed to appoint four Supreme Court judges and the President of the Court. The reason was that, according to a member of the Judicial Council speaking under the condition of

29 More details about the USAID project are available at <http://www.usaid.gov/macedonia/fact-sheets/judicial-strengthening-project>, accessed 2 June 2015.

30 The conclusions from the 15 March 2012 HLAD are available at http://ec.europa.eu/commission_2010-2014/fule/docs/news/20120315_conclusions.pdf, accessed 2 June 2015.

anonymity: “Until the two ruling parties agree who should be elected, we cannot elect judges and the president of the Supreme Court”, whilst an opposition MP added that whilst the governing coalition partners disagreed, “the judiciary is a hostage to politics” (Dimovski 2012).

An NGO respondent who specializes in responsible media and media legal reform finds that there are “double standards” in defamation cases involving high-profile political and government officials as plaintiffs, where they allegedly receive favorable verdicts. Coupled with the harsh financial sanctions for libel, the respondent claimed that many individuals in the media practiced self-censorship towards political elites.³¹

The respondent from the Helsinki Committee in Macedonia summarized the current shortcomings of the complaints mechanisms. The Helsinki Committee is quite involved in trial monitoring to ensure that they are fair and that there are no undue influences. There is a formal mechanism to file a complaint with the President of the Court and the Judicial Council if one is not satisfied by the initial decision by the President. The complaints procedure to the President is conducted in a courtroom where the public is usually not present, so citizens rarely use this instrument for complaints. One example cited by the respondent is that the police prevented one of their trial monitors from entering a courtroom, which is against the law. The Helsinki Committee complained to the President, who nonetheless agreed with the police actions. The NGO then filed a complaint with the Judicial Council, which again agreed with the police, so the whole process seemed unsatisfactory.³²

Thus, despite the blocked accession in Macedonia, the EU continues to support the reform agenda through dialogue and technical assistance, though other international actors have been more visible in capacity building to bolster judicial independence. There has been some limited progress in building judicial independence. However, the stalled membership process may have led to political instability by delaying the strong conditionality in the rule of law that the EU can deploy during accession negotiations. This has led to de facto one-party rule in Macedonia with the parliamentary boycott of the opposition, which has important implications for judicial independence. There remain a number of concerns with political influence over judicial matters, as evidenced by failed judicial appointments, defamation cases of political officials, the lack of transparency in the work of the Judicial Council, and obstruction in effective trial monitoring and complaints processes.

6. Bosnia and Herzegovina

Bosnia and Herzegovina provides a stern challenge for the transformative power of Europe. As a result of the post-conflict settlement in the 1990s, the country has a weak, ineffective central government, with most power located at the sub-state entities: the Federation of Bosnia and Herzegovina (FBiH), which has a Bosniak (Muslim) majority and Croat minority; and the predominantly Serb Republika Srpska (RS) (Keil 2014). The disputed Brčko District in the northeast of the country is ruled as a condominium between

31 Written communication from an official from Media Development Center (MDC), 15 September 2014.

32 Interview with an official from the Helsinki Committee in Macedonia, 15 September 2014.

RS and the FBiH with international administration. Governance in the FBiH is further fragmented, since it is comprised of ten semi-autonomous cantons. Progress in Bosnia and Herzegovina has largely been driven by international imposition through the High Representative, though the reform process has stalled since 2008 due to the intransigence of ethno-nationalist leaders unwilling to compromise in enacting necessary constitutional changes. This impasse has been compounded by the EU demand that Bosnia and Herzegovina comply with the 2009 Sejdić-Finci decision by the European Court of Human Rights, which found that the existing constitutional configuration is discriminatory towards groups not defined as one of the three constituent peoples of Bosnia and Herzegovina (i.e. Bosniaks, Serbs, or Croats).

The High Judicial and Prosecutorial Council (HJPC) is a state-level body established by law in 2004, and was accompanied by a transfer agreement by the entities whereby authority would be, uniquely for Bosnia and Herzegovina, vested at the state level (Venice Commission 2014a: 3). Thus, the HJPC is not explicitly written into the constitution, but uses the constitutional provisions to justify its establishment. The 2005 EC Progress Report commended the Bosnian authorities, saying that initial teething problems had been solved (European Commission 2005a: 17). Unlike the centralized HJPC, the training of judicial practitioners in Bosnia and Herzegovina follows the entity-centric governance of the country, with two separate institutions responsible for this aspect of judicial independence: the Public Institution Center for Judicial and Prosecutorial Training of the FBiH; and the Public Institution Center for Judicial and Prosecutorial Training of the RS. People from Brčko can attend either Training Center.

Despite the aforementioned gridlock regarding constitutional reforms and further progress in EU integration, there is a pragmatic approach by EC officials that the momentum of fundamental reforms, particularly in the rule of law, cannot remain dormant, since there is clear “infiltration by political interference” in Bosnia and Herzegovina.³³ The priorities for judicial independence reforms were set out in the Bosnian Justice Sector Reform Strategy (JSRS) 2008-2012, drafted with input from relevant stakeholders (including civil society), including: more streamlined systems of budgeting and a more transparent process for appointing justices to the Constitutional Court (Ministry of Justice - Bosnia and Herzegovina 2008: 18). Moreover, the importance of rule of law, particularly judicial independence, was recognized as a “hinge” for political and economic issues. In other words, without judicial independence, there is no legal certainty, and it is not possible to create a business environment and ensure long-term growth.³⁴

To this end, the HJPC has been subject to EU technical assistance. A twinning light program under CARDS 2006 was designed to train the then newly-established HJPC to fulfill “its role in safeguarding the independence of the judiciary and promoting its efficiency”.³⁵ More recently, under IPA 2010, the EU has funded technical assistance to develop curricula for the two entity-level Judicial Training Centers and the Judicial Commission in Brčko to provide a more structured training program in important aspects of the law tailored

33 Interview with an official at Unit C1, DG Enlargement, Brussels, 4 September 2014.

34 Interview with an official at Unit C1, DG Enlargement, Brussels, 4 September 2014; this resonates with the rationale for the Justice Scorecard for member states published by the EU.

35 More details available at http://www.esteri.it/mae/gemellaggi/CARDS/BOSNIA%20E%20HERZEGOVINA/CAR_BOS_BA06IBJH01TL_ToR.pdf, accessed 2 June 2015.

for all levels of governance.³⁶ The EU has also paid for the hiring of judicial staff, in cooperation with the OSCE. In general, there is a high level of synergy amongst international actors involved in judicial reform, which also include the United Nations (UN) agencies and the ICTY.³⁷

Beyond these more traditional forms of EU assistance, the EC has undertaken a coordinated approach focused around the Structured Dialogue on Justice. The mechanism has been evaluated as delivering “concrete results with an increasing number of recommendations being either fully implemented or on the right track” (European Commission 2013b: 12). The starting point of the thinking behind the Structured Dialogue is the intransigence of certain officials, particularly from RS, in ceding powers to state-level authorities, especially in security sector reforms such as policing (Juncos 2011). However, instead of pushing reform via conditionality, the current EU approach is built around technical reasoning and dialogue to achieve progress in judicial reform via “local steering” instead of “prescription”.³⁸ The approach follows a number of strategic steps: problem identification, stock-taking by experts, and a short-term expert mission. The EC took the unprecedented step of working closely with the Venice Commission in order to request opinions about important draft laws. After the Venice Commission publishes its opinion, it is present at expert seminars in Brussels in order to answer questions by Bosnian stakeholders, and to facilitate a productive discussion. There are also regular plenary Structured Dialogue meetings held in Bosnia and Herzegovina. The Venice Commission has provided three opinions at the request of the EU. The first opinion did not follow the pattern of thematic meetings and had a wider scope. In 2012, the Venice Commission published a general opinion on legal certainty and judicial independence in Bosnia and Herzegovina, recommending greater centralization of budget, creation of a national Supreme Court or similar body, and harmonizing legislation in line with the *acquis communautaire* (Venice Commission 2012a).³⁹ The corresponding Structured Dialogue meeting was held in Mostar in July 2012.⁴⁰ The second Venice Commission opinion, published in June 2013, examined the draft law on the courts, and concluded that, regarding independence, the law should be more compatible with the HJPC (Venice Commission 2013b). The accompanying thematic meeting was held in July 2013. In March 2014, the Venice Commission published its third opinion, on the draft law on the HJPC, and concluded that legislative power should be curbed in appointing HJPC members, not transferring competences to the entity level, removing parliamentary power to dismiss the President of the HJPC, creating a process to appeal HJPC decisions, and not selecting members along ethnic lines (Venice Commission 2014a).

In the second thematic meeting in April 2014, the recommendation reaffirmed the opinion of the Venice Commission regarding the draft law on HJPC, and also linked it with the findings from a TAIEX expert seminar in December 2012, quoting: “When it comes to recently formed democratic states, the system of formal

36 More details available at http://ec.europa.eu/enlargement/pdf/bosnia_and_herzegovina/ipa/2010/part-1/pf_07_ipa_2010_judiciary_2010.05.11_en.pdf, accessed 2 June 2015.

37 Interview with an official at Unit C1, DG Enlargement, Brussels, 4 September 2014.

38 Interview with an official at Unit C1, DG Enlargement, Brussels, 4 September 2014.

39 The interviewee from Unit C1, DG Enlargement added that the 2012 Venice Commission opinion was a “statement of intent” that set the judicial reform agenda for Bosnia and Herzegovina.

40 The recommendations are available at <http://europa.ba/News.aspx?newsid=5389&lang=EN>, accessed 2 June 2015.

guarantees for the independence of the judiciary has to be possibly more rigorous”.⁴¹ Recommendations in other structured dialogue meetings refer back to the Venice Commission opinions, when they still need to be actioned, such as the insistence that the draft law on the HJPC needs to consider their suggestions when redrafting the HJPC law in May 2014.⁴²

The procedures seem to be delivering some positive results, and there are examples of inclusive judicial reform processes. According to an NGO involved in the drafting of the Bosnian JSRS, some of their recommendations were included in the final document. Moreover, five of the seven civil society organizations that participated in drafting the JSRS later took part in the Structured Dialogue meetings.⁴³ The EU has also been able to assist to significantly reduce the backlog of war crimes cases (European Commission 2012b, 2013b), and this is one of the real achievements of their intervention.⁴⁴

During the research, there was a mixed response regarding existing measures for monitoring and arbitration. One NGO respondent was unaware of mechanisms for monitoring, and briefly mentioned the arbitration through the Appellate Disciplinary Commission.⁴⁵ By contrast, the other NGO respondent mentioned that there were “transparent” mechanisms both for monitoring and arbitration in which the organization takes part. They went on to add that though not all citizens are aware of these institutions, Bosnia and Herzegovina are not “last in the region” regarding the establishment of mechanisms to monitor and file complaints against the judiciary.⁴⁶

Despite signs of progress in securing judicial independence, there is no doubt that political interference in the judiciary remains a serious problem in Bosnia and Herzegovina. Instead of moving towards independence, some political parties have suggested an increase in the executive and legislative influence in appointing HJPC members (European Commission 2013b: 12). Moreover, politicians from RS have interfered with the legitimacy of the state-level courts by attempting to pass a bill repealing the law on courts and the prosecutor in February 2012 (Transparency International 2013: 75), although this was “contrary to the spirit of cooperation agreed in the Structured Dialogue on Justice” (European Commission 2012b: 13). The adoption of the law proposed by the RS politicians did not ultimately proceed.

The most serious weakness, identified in the JSRS, is the lack of progress on the judicial budget in Bosnia and Herzegovina, particularly in the FBiH (European Commission 2013b: 12). The need to reduce budgetary fragmentation was highlighted in the aforementioned 2012 Venice Commission opinion, and was reaffirmed in the July 2012 Structured Dialogue Recommendations. One of the NGO respondents works mainly in the area of judicial budgeting, and said that they had conducted 15 meetings with officials from different levels of the judiciary. The main problem is that making the necessary reforms requires constitutional

41 The recommendations from the thematic meeting are available at <http://europa.ba/News.aspx?news-id=6868&lang=EN>, accessed 2 June 2015.

42 The full recommendations are available at <http://europa.ba/Download.aspx?id=1431&lang=EN>, accessed 2 June 2015.

43 Interview with an official from Asocijacija za demokratske inicijative (ADI), 15 September 2014.

44 Interview with an official at Unit C1, DG Enlargement, Brussels, 4 September 2014.

45 Written communication from an official at Analytica, 10 September 2014.

46 Interview with an official from ADI, 15 September 2014.

changes, not only at the FBiH level, but also for each of the ten cantonal constitutions.⁴⁷ The respondent from DG Enlargement also indicated that this was an important issue, but admitted that ceding cantonal autonomy to the entity level was a sensitive issue, so it could only proceed gradually.⁴⁸

Bosnia and Herzegovina is one of two cases in the Western Balkans in which the EU is undertaking state-building (along with Kosovo), and there are many challenges regarding the development of judicial independence. However, there are some signs that there are institutions in place for external oversight of the judiciary, and several opportunities for relevant NGOs to be involved in consultative processes. Moreover, after a legacy of imposing progress in a so-called 'European Raj' (Knaus/Martin 2003), the EU Structured Dialogue on Justice rests on principles of domestic steering and ownership, rather than prescription and ultimatums.

7. Kosovo

As in the case of Bosnia and Herzegovina, the challenge for the EU and other international actors supporting reforms in Kosovo is that there are simultaneous objectives of peace-building alongside state-building. The goals for the latter mission are particularly challenging and peculiar to Kosovo, where the EU is involved in state-building, although five member states do not recognize the *de jure* statehood of the territory. The war in Kosovo ended in 1999, at which time an international UN-led administration, the United Nations Interim Administration Mission in Kosovo (UNMIK), was established under UN Security Council Resolution 1244. The UNMIK mission also set up the Provisional Institutions of Self-Government, which included the Presidency, Assembly, and the judicial system. However, the Assembly declared independence in February 2008, outside the terms of the provisional institutions. The independence of Kosovo was recognized by a number of countries, including the United States (US) and 22 of the 27 EU member states. Notably, Russia, China, and five EU member states (Cyprus, Greece, Romania, Slovakia and Spain) have not recognized Kosovan independence (Beta 2012). The multilateral International Civilian Office (ICO) was headed by the International Civilian Representative (ICR) in 2008. Until 2011, Peter Feith simultaneously held the role of ICR and EU Special Representative (EUSR), who coordinates EU activities in Kosovo through the EU Office in Pristina. Feith held the post of ICR until the International Civilian Office (ICO) closed its doors in 2012, whilst the EUSR and EU Office continue to operate in Kosovo.

An important part of the EU presence in Kosovo is the EU Mission for the Rule of Law (EULEX), which underlines the prioritization of the rule of law in EU strategies for the stabilization and transformation of Kosovo. EULEX started its work in 2009, and will continue to function until 2016 at the earliest. It consists of an Executive and Strengthening Division. The Executive Division is staffed by international judicial practitioners and law enforcement officers, and is responsible for the investigation and prosecution of war crimes and high-level corruption cases. This Division also aims to build capacities for rule of law in the north of Kosovo, where the Serb minority is predominant. The work of the Executive Division will gradually be

47 Interview with an official from ADI, 15 September 2014.

48 Interview with an official at Unit C1, DG Enlargement, Brussels, 4 September 2014.

ceded to local authorities.⁴⁹ The Strengthening Division is staffed by legal specialists, correctional officers, and law enforcement officers. The objectives include monitoring and technical assistance to Kosovan authorities to guarantee an independent, 'multi-ethnic' judiciary.

In addition to the executive and capacity building role of EULEX, the EU has also provided extensive assistance through the IPA program.⁵⁰ The IPA priorities are defined by the findings from Member State peer review missions, combined with the input from the country desk at DG Enlargement.⁵¹ Although Kosovo is far from the screening process for accession negotiations, the EU Office in Kosovo identifies gaps along the lines of the *acquis*, which has meant an increased focus on judicial independence.⁵² The prioritization of judicial independence is further bolstered by the aforementioned work at EULEX, which has a strong focus on improving judicial independence in Kosovo.⁵³ Under IPA 2010, the EU funded a service contract to implement a program between 2011 and 2014 to strengthen the Judicial and Prosecutorial Councils. This project has been extended to 2016 under IPA II 2013 in order to bring the Judicial and Prosecutorial Councils up to European standards. The IPA 2011 has a supply and service contract for a program running until 2015 which aims to strengthen the legal education at the Kosovo Judicial Institute, and to strengthen the capacities of the Judicial Institute more generally. This will be further supported under IPA 2014 via a twinning program running from 2015 to 2018. Under IPA 2012, an ongoing grant-based project (running until 2016) will strengthen the role of civil society in the overseeing operation of judicial institutions, which has implications for the transparency, accountability and independence of the judiciary. Under IPA 2014, the EU will fund a twinning program running from 2015 to 2017 to strengthen the legislative framework related to the rule of law in Kosovo, which will include measures to enhance the effectiveness of the Judicial and Prosecutorial Councils. Officials at the EC felt that the new approach to accession negotiations also gave more momentum to rule of law reform in places further away from candidacy such as Kosovo. The ongoing focus on strengthening the Kosovo Judicial Institute in the IPA programs is part of a long-term strategy to ensure the independence of judicial training in Kosovo. Previously, the Minister of Justice proposed changing the Institute into an Academy, though these reforms have since been halted. Officials at the EU felt that the amended provisions for the Academy would undermine the autonomy of judicial training, and were wary of the unsuccessful reforms in Macedonia along the same lines.⁵⁴

Outside the confines of IPA, the EU also uses the Structured Dialogue in the Rule of Law with officials from the Kosovan authorities to encourage judicial reforms to promote greater independence. The first Structured Dialogue meeting took place in May 2012 and indicated that budgeting issues, organization of the prosecutorial office, and the backlog of cases need to be tackled in order to improve the efficiency and independence of the judiciary.⁵⁵ The third meeting in January 2014 also touched on issues related to judicial

49 Available at <http://www.eulex-kosovo.eu/en/executive/>, accessed 2 June 2015.

50 An official from the EU Office in Kosovo provided a table of IPA activities in the rule of law on 8 October 2014, which is the basis for the review of IPA activities in that sector.

51 Written response from an official at Unit C3, DG Enlargement, 21 August 2014.

52 Interview with an official at the EU Office in Kosovo, 16 September 2014.

53 Written response from an official at Unit C3, DG Enlargement, 21 August 2014.

54 Interview with an official at the EU Office in Kosovo, 16 September 2014.

55 The May 2012 conclusions are available at http://ec.europa.eu/commission_2010-2014/fule/docs/news/20120530_rolld_conclusions_30_may.pdf, accessed 2 June 2015.

independence, namely: public officials should not give opinions about high-profile cases, which is a form of political interference; statements in the media about the Judicial and Prosecutorial Councils affect the independence of these bodies; and the personal security now afforded to judicial practitioners should be extended to bailiffs, witnesses, and other parties involved in trials to prevent external pressure and interference.⁵⁶ Threats of intimidation against judicial practitioners and the security of courts were highlighted in the 2012 Analytical Report (European Commission 2012c: 9), but the situation has been significantly improved since then.⁵⁷ The EU Office in Kosovo is involved in the Structured Dialogue by sending suggestions for topics to be discussed, and is sometimes present at the meetings. Related to judicial independence, the EU Office has encouraged discussion on the composition of the Judicial Council and the tenure of judges.⁵⁸

An important procedure with long-term consequences for judicial independence was the process of re-appointment, which was initiated by the UN-led mission in Kosovo in 2009 and 2010. The EC supported this process by contributing €5 million.⁵⁹ The process was meant to ensure that those sitting on the bench fulfilled criteria to conduct their work in line with European and international standards. The re-appointment process was conducted by the Independent Judicial and Prosecutorial Commission, which consisted of experts from Europe and the US (Baland/Wood 2010). The re-appointment process resulted in a new cadre of judicial practitioners. From the 898 preliminary applications, 334 were appointed, of whom 60 percent were newly appointed to their roles (Baland/Wood 2010: 17). The re-appointment process has been followed by capacity building of the Judicial and Prosecutorial Councils, which are now responsible for future appointments. The 2010 EC Progress concluded that the “vetting process of judges and prosecutors has been successfully completed” (European Commission 2010c: 10). However, there were a number of concerns regarding this vetting process (Kosovo Law Institute/Forum for Civic Initiatives 2011): the President of Kosovo interfered with a number of candidates being removed from the Judicial Council list without explanation; there was a lack of explicit criteria developed in deciding on the appointments; and the appointees were given a three-year probationary period instead of permanence, which may undermine independence.⁶⁰ Moreover, there was an insufficient number of candidates from minority communities, and there were reports of intimidation within the Serb community (European Commission 2010c: 10).

In addition to these threats to judicial independence, there are additional modes of potential political interference in the operation of the Kosovan judiciary. The Judicial Council should have a “substantial majority” of its membership from the judicial profession, which is not yet the case (European Commission 2013e: 11). Another issue is the present system of arbitration, which only allows parties involved in a trial to file a complaint. This configuration excludes NGOs from being able to fulfill a monitoring role in Kosovo.⁶¹

A much more pressing problem is continued interference by political leaders who make public statements during sensitive, high-profile war-crimes trials in Kosovo, which has been criticized by the EU (European

56 The January 2014 conclusions are available at <http://www.md-ks.org/?page=2,8,1238>, accessed 2 June 2015.

57 Interview with an official at the EU Office in Kosovo, 16 September 2014.

58 Interview with an official at the EU Office in Kosovo, 16 September 2014.

59 Interview with an official at the EU Office in Kosovo, 16 September 2014.

60 Changing the fixed-term probationary period for judges was also identified as a priority for reform during the interview with an official at the EU Office in Kosovo, 16 September 2014.

61 Interview with an official from the NGO Group for Legal and Political Studies, 10 September 2014.

Commission 2013e: 10). For example, when five ex-paramilitaries and a local mayor – known as the Drenica group – were arrested on charges related to abuses of prisoners at a detention center during the Kosovo War, Kosovo Democratic Party members and former politicians joined a demonstration to secure their release (Peci 2013b). Another example was the acquittal of defendants charged with mistreating detainees at another wartime detention center, Klecka. When the verdict was given, the Prime Minister made a public statement that the case vindicated the actions of the paramilitary Kosovo Liberation Army during the conflict (Peci 2013a).

A further concern is one of ownership over judicial independence. Because most of the sensitive cases are now being tried by EULEX, there is a lack of domestic actors involved in the proceedings overseeing independence, since the EU-supported mission has an executive function – which means domestic actors have little or no stake.⁶²

Notwithstanding the significant challenges in reforming the judiciary in Kosovo, there is a recognition – in line with the new approach to enlargement – that reform of judicial independence cannot be completed overnight. Once EU-compliant institutions are in place, it is necessary for domestic actors to ascertain “what judicial independence means, since that has never really been part of the judicial culture in the past”.⁶³ The NGO respondent also emphasized the need for gradual, fundamental changes in the cultural and political understandings of the judiciary, which also pervades the attitudes of both judges and prosecutors.⁶⁴ Thus, there is an appreciation that there is still a long road ahead for judicial independence in Kosovo.

8. Conclusion

Despite the different domestic challenges and legacies, and the varying pace of EU integration, it is nevertheless possible to draw some overriding conclusions about EU instruments and strategies for judicial reform deployed across the Western Balkans.

In all of the cases there has been a gradual evolution in the instruments used, particularly after the accession processes in Bulgaria, Romania, and Croatia. The lessons learnt from previous accessions have led to a new approach that prioritizes the rule of law in the integration process as being the foundation on which all other reforms are then built.

The impact of the new approach can be shown and tested most clearly in the case of Montenegro and Serbia, but it has also had a strong agenda-setting effect elsewhere in the region, where the start of accession negotiations are further away. But the new approach is not simply about a re-calibration of priorities; it has also involved the deployment of new instruments (structured dialogue) designed to consolidate judicial independence in practice as early as possible. The inclusion of NGOs in the drafting of Action Plans to open chapters of the *acquis* and as stakeholders in the detailed Member State peer review missions is

62 Interview with an official from the NGO Group for Legal and Political Studies, 10 September 2014.

63 Written response from an official at Unit C3, DG Enlargement, 21 August 2014.

64 Interview with an official from the NGO Group for Legal and Political Studies, 10 September 2014.

also an important innovation. EU instruments used to reform judicial independence in the Western Balkans are summarized in Table 1.

Table 1: Modes of EU political integration related to judicial independence in the Western Balkans

Targets Instruments	State actors	Non-state actors
<i>Direct</i>		
Enforcement (<i>leverage</i>)		
Conditionality (<i>leverage</i>)	<i>acquis</i> conditionality ('new approach' to Chapter 23) pre-accession conditionality (signing SAA, granting candidacy, opening accession negotiations) other political conditionality (tied to IPA funding)	
Political dialogue (<i>linkage</i>)	Pre-SAA Structured Dialogue High-Level Political Dialogue (SAA) Working Groups for Chapter 23	Pre-SAA Structured Dialogue Working Groups for Chapter 23
Assistance (<i>linkage</i>)	Direct budgetary support (IPA) Infrastructure support (esp. case management systems) Member State peer review missions Seminars and training (TAIEX, Twinning)	Member State peer review missions
<i>Indirect</i>		
Competition	regatta principle (SAA)	
Lesson-drawing		
Mimicry		

Source: Authors.

The study has shown that the EU has learnt a number of lessons from previous enlargements and has gradually applied these in its dealings with candidate and potential candidate countries of the Western Balkans. *First*, there has been a move away from short-term project grants in favor of twinning and interlinking projects as the main modes of support under IPA, both in the judiciary and more generally. For example, initial capacity building for judicial councils and academies is quickly followed up with further assistance and

twinning. *Second*, the new approach has placed greater emphasis on supporting change in practice, rather than just legal compliance. The multiple stages of screening and interim benchmarking ensure that there is sufficient time to verify a track record of increased judicial independence. *Third*, although the reports are not publicly available, the EC organizes detailed peer review missions, where those shaping programs from the EU can observe the working conditions of the judiciary and consult with all stakeholders, including civil society. Moreover, these missions aim to remove the geographic bias by also including places outside the capital. *Fourth*, the EU has deployed a number of dialogue mechanisms - even in places where the trajectory of association / accession has stalled (e.g. Bosnia and Herzegovina and Macedonia) - designed to allow for considerably greater input from local stakeholders. *Fifth*, starting from the screening process through the negotiations, civil society organizations and other non-state actors participate in the working groups involved in the harmonization of the chapters, and in the various dialogue mechanisms.

Progress in reforming the judiciary and laying the foundation for change was observed in all of the cases studied. However, the research has also highlighted serious and persistent gaps between European standards for independence and impartiality and the realities on the ground. These challenges are compounded by a general distrust amongst citizens regarding the work of the judiciary, particularly when important decisions are made behind closed doors. A strong, verifiable track record of adjudication without external interference is required to convince people that there has been a break with the politicized judiciaries of the past. However, it is not sufficient for the EU and other external agencies to sever all influence from executive and legislative branches of authority. As mentioned above, one of the Serbian interviewees worried that independence is being bolstered throughout the region without concomitant measures to build robust checks and balances. A similar problem was highlighted with regard to EU strategies for tackling corruption amongst judges in Albania. It would therefore appear to be critical that stronger judicial independence does not result in “judicial supremacy” in the Western Balkans, as has been alleged to be the case in other post-socialist states such as Romania (Parau 2012).

It is too early to tell whether the new approach will trigger long-term transformation of judicial independence, but encouragingly, the EU has played a strong state-building and democracy promotion role by eschewing short-termism, formal compliance, and elite-led reforms in order to follow a strategy based on ownership, inclusion, and gradual and verifiable change.

9. References

- Aliaj, I. (2005) 'Albania: Rough Justice', *Balkan Crisis Report*, 6 September.
- Andric, G. (2012a) 'Jury out on Serbia's Botched "Reform" of Judges', *Balkan Insight*, 23 March.
- Andric, G. (2012b) 'Sacked Serbian Judges to Return to Courtrooms', *Balkan Insight*, 13 July.
- Baland, T. and Wood, K. N. (2010) 'Report on the Work of Kosovo's Independent Judicial and Prosecutorial Commission'.
- Beta (2012) 'EU 5 "Less Likely than Ever" to Recognize Kosovo', *B92*, 26 November.
- Cameron, C. M. (2002) 'Judicial Independence: How Can You Tell It When You See It? and Who Cares?', in S. B. Burbank and B. Friedman (eds.), *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, London: Sage, pp. 134-147.
- Canivet, G., Andenas, M. and Fairgrieve, D. (eds.) (2006) *Independence, Accountability and the Judiciary*, London: British Institute of International and Comparative Law.
- Casule, K. (2012) 'Macedonia Opposition Ejected from Parliament in Row', *Reuters*, 24 December.
- Casule, K. (2013) 'EU Raps Macedonia over Political Impasse, Cancels Visit', *Reuters*, 15 February.
- CoE Commissioner for Human Rights (2014) 'Corruption and Political Interference Burden Albania's Judicial System', available at <http://www.coe.int/en/web/commissioner/-/corruption-and-political-interference-burden-albania-s-judicial-system>, accessed 2 June 2015.
- Coman, R. (2014) 'Quo Vadis Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe', *Europe-Asia Studies* 66(6): 892-924.
- Council of Europe GRECO (2014) 'Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors, 4th Evaluation Round', Greco Eval IV Rep (2013) 9E.
- Council of the EU (2011) 'Accession Conference at Ministerial Level Closes Negotiations with Croatia', 12332/11 PRESSE 219.
- Council of the EU (2012) 'Council Conclusions on Montenegro, 3180th General Affairs Council Meeting', Luxembourg, 26 June.
- Council of the EU (2013) 'Third Meeting of the Accession Conference with Montenegro at Ministerial Level

- Key Rule of Law Chapters Opened among Others', 17964/13 PRESSE 594.

Dimovski, S. (2012) 'Macedonian Politics Blamed for Failed Election of Judges', *Balkan Insight*, 19 July.

European Commission (2005a) 'Bosnia and Herzegovina 2005 Progress Report', SEC(2005) 1422.

European Commission (2005b) 'Commission Opinion on the Application from the Former Yugoslav Republic of Macedonia for Membership of the European Union', COM(2005) 562 final.

European Commission (2008) 'Serbia 2008 Progress Report', SEC(2008) 2698 final.

European Commission (2009) 'Serbia 2009 Progress Report', SEC(2009) 1339.

European Commission (2010a) 'Commission Opinion on Albania's Application for Membership of the European Union', COM(2010) 680.

European Commission (2010b) 'Commission Opinion on Montenegro's Application for Membership of the European Union', COM(2010) 670.

European Commission (2010c) 'Kosovo 2010 Progress Report', SEC(2010)1329.

European Commission (2010d) 'Serbia 2010 Progress Report', SEC(2010) 1330.

European Commission (2011a) 'Commission Opinion on Serbia's Application for Membership of the European Union', COM(2011) 668 final.

European Commission (2011b) 'Enlargement Strategy and Main Challenges 2011-2012', COM(2011) 666 final.

European Commission (2012a) 'Albania 2012 Progress Report', SWD(2012) 334 final.

European Commission (2012b) 'Bosnia and Herzegovina 2012 Progress Report', SWD(2012) 335 final.

European Commission (2012c) 'Commission Staff Working Document Accompanying the Document Commission Communication on a Feasibility Study for a Stabilisation and Association Agreement between the European Union and Kosovo', SWD(2012) 339 final/2.

European Commission (2013a) 'Albania 2013 Progress Report', SWD(2013) 414 final.

European Commission (2013b) 'Bosnia and Herzegovina 2013 Progress Report', SWD(2013) 415 final.

European Commission (2013c) 'Enlargement Strategy and Main Challenges 2013-2014', COM(2013) 700 final.

European Commission (2013d) 'The Former Yugoslav Republic of Macedonia 2013 Progress Report', SWD(2013) 413 final.

European Commission (2013e) 'Kosovo 2013 Progress Report', SWD(2013) 416 final.

European Commission (2013f) 'Montenegro 2013 Progress Report', SWD(2013) 411 final.

European Commission (2013g) 'Serbia 2013 Progress Report', SWD(2013) 412 final.

European Commission (2014a) 'EU-Albania: 3rd High Level Dialogue', Press Release / Memo, Tirana, 4 June.

European Commission (2014b) 'Report from the Commission to the Council and the European Parliament on Albania's Progress in the Fight against Corruption and Organised Crime and in the Judicial Reform', COM(2014) 331 final.

European Commission (2015) 'The EU Justice Scoreboard: Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions', COM(2015) 116 final.

Economist (2011) 'Macedonia's Name Dispute: Call It What You Want', *The Economist*, 10 December.

EU Delegation in Albania (2013) 'EURALIUS III Concluded Its Mission', available at <https://eudelegationalbania.wordpress.com/2013/05/13/euralius-albania/>, accessed 2 June 2015.

Gardner, A. (2013) 'EU Ends Macedonian Deadlock', *European Voice*, 2 March.

Garoupa, N. M. and Ginsburg, T. (2008) 'Guarding the Guardians: Judicial Councils and Judicial Independence', *The American Journal of Comparative Law* 57: 201-232.

Government of the Republic of Serbia (2013) 'Action Plan for the Implementation of the National Judicial Reform Strategy for the Period 2013-2018', Belgrade, August.

Guarnieri, C. (2013) 'Judicial Independence in Europe: Threat or Resource for Democracy?', *Representation* 49(3): 347-359.

Ishiyama Smithey, S. and Ishiyama, J. (2000) 'Judicious Choices: Designing Courts in Postcommunist Politics', *Communist and Post-Communist Studies* 33: 163-182.

Juncos, A. E. (2011) 'Europeanization by Decree? The Case of Police Reform in Bosnia', *JCMS: Journal of Common Market Studies* 49(2): 367-389.

Keil, S. (2014) *Multinational Federalism in Bosnia and Herzegovina*, Farnham: Ashgate.

Kmezić, M. (ed.) (2014) *Europeanization by Rule of Law Implementation in the Western Balkans*, Skopje: Institute for Democracy SOCIETAS CIVILIS.

Knaus, G. and Martin, F. (2003) 'Travails of the European Raj', *Journal of Democracy* 14(3): 60-74.

Kosovo Law Institute and Forum for Civic Initiatives (2011) 'Reappointment Process, Independence and Influences', Prishtina: National Endowment for Democracy.

Likmeta, B. (2013) 'Albania Judicial Appointments Cause Controversy', *Balkan Insight*, 8 July.

Marusic, S.-J. (2009) 'Macedonians Celebrate EC Endorsement', *Balkan Insight*, 15 October.

Marusic, S.-J. (2012) 'Bulgaria's Brussels Blockade Leaves Macedonia Bitter', *Balkan Insight*, 14 December.

Marusic, S.-J. (2013) 'Howitt Alarmed by Macedonia's EU Prospects', *Balkan Insight*, 23 May.

Marusic, S.-J. (2014a) 'Boycott of Macedonian Parliament Starts to Fray', *Balkan Insight*, 17 June.

Marusic, S.-J. (2014b) 'Macedonia Moves to Rule Out Same-Sex Marriage', *Balkan Insight*, 1 July.

Milosevic, M. (2013) 'Montenegro Parliament Backs Judicial Independence Laws', *Balkan Insight*, 25 September.

Ministry of Justice - Bosnia and Herzegovina (2008) 'Bosnia and Herzegovina Justice Sector Reform Strategy 2008-2012', Sarajevo, June.

Nozar, W. (2012) 'The 100% Union: The Rise of Chapters 23 and 24', Clingendael, Netherlands: Institute of International Relations.

OSCE-ODIHR and Max Planck Institute (2010) 'Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia', Kyiv, 23-25 June.

Parau, C. (2012) 'The Drive for Judicial Supremacy', in A. Seibert-Fohr (ed.), *Judicial Independence in Transition*, Heidelberg: Springer, pp. 619-666.

Peci, E. (2013a) 'Kosovo Commander Limaj Acquitted of War Crimes', *Balkan Insight*, 18 September.

Peci, E. (2013b) 'Kosovo Protests over Ex-Guerrillas' War Crimes Arrests', *Balkan Insight*, 27 May.

Peretti, T. J. (2002) 'Does Judicial Independence Exist?: The Lessons of Social Science Research', in S. B. Burbank and B. Friedman (eds.), *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, London: Sage, pp. 103-133.

Reljanović, M. and Knežević Bojović, A. (2014) 'Judicial Reform in Serbia and Negotiating Chapter 23 - a Critical Outlook', *Pravni Zapisi* 5(1): 241-253.

Rozenberg, J. (2014) 'Albania's Untouchable Judges', *The Law Gazette*, 7 April.

Seibert-Fohr, A. (2012) 'Introduction: the Challenge of Transition', in A. Seibert-Fohr (ed.), *Judicial Independence in Transition*, Heidelberg: Springer, pp. 1-15.

Tanjug (2014) 'Draft Action Plan for Chapter 23 Sent to EC', *Tanjug*, 11 September.

Transparency International (2011) 'National Integrity System Assessment: Serbia Country Report 2011', Belgrade.

Transparency International (2013) 'National Integrity System Assessment: Bosnia and Herzegovina 2013', Sarajevo / Banja Luka.

Venice Commission (2012a) 'Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina', CDL-AD(2012)014.

Venice Commission (2012b) 'Opinion on Two Sets of Draft Amendments to the Constitutional Provisions Relating to the Judiciary of Montenegro', CDL-AD(2012)024.

Venice Commission (2013a) 'Opinion on the Draft Amendments to Three Constitutional Provisions Relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council', CDL-AD(2013)028.

Venice Commission (2013b) 'Opinion on the Draft Law on Courts of Bosnia and Herzegovina', CDL-AD(2013)015.

Venice Commission (2014a) 'Opinion on the Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina', CDL-AD(2014)008.

Venice Commission (2014b) 'Opinion on the Seven Amendments to the Constitution of "the Former Yugoslav Republic of Macedonia" Concerning, in particular, the Judicial Council, the Competence of the Constitutional Court and Special Financial Zones', CDL-AD(2014)026.

Verbica, A. (2014) 'Albania on the Rocky Road to EU Membership', *Deutsche Welle*, 27 June.



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