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The Rule of Law in the New EU Member States

edited by
S. Baldin and G. Ieraci

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Introduction

Serena Baldin and Giuseppe Ieraci

This special issue of *Poliarchie/Polyarchies* presents some contributions towards the project "The Rule of Law in the new EU Member States" (EUinCEE; no. 620097-EPP-1-2020-1-IT-EPPJMO-MODULE), which has been coordinated by Serena Baldin at the University of Trieste (Italy) and co-funded by the European Union through the Erasmus+ Action Jean Monnet Modules. Serena Baldin, Davide Strazzari, Giuseppe Ieraci and Mattia Zulianello were directly involved in the project. This special issue also includes essays written by academics invited to the EUinCEE final conference held in Trieste in October 2022, dedicated to "The rule of law in post-socialist countries and the future of the European integration".

The rule of law is listed among the founding values of the European Union (Article 2 of the Treaty of the European Union). It is also mentioned among the principles that should guide the Union's action on the international scene (Article 21). However, the Treaty does not provide a definition of it. In a narrow sense, it includes the principle of the separation of powers and the principle of the independence of the judiciary. In the broader sense, accepted by the European Union, the rule of law also includes the guarantee of pluralism and freedom of the mass media, which are considered to be the guardians of democracy, and the apparatus of anti-corruption rules. The current crisis of the rule of law in the European Union is mainly due to the constitutional and legislative reforms adopted by some Member States which have gradually eroded the pillars of the democratic pluralist state.

The aim of this special issue is not to provide answers to the many concerns that have been raised over the years about the concept of the rule of law and its crisis in the European Union, but to enrich the debate on this topic. Its ultimate aim is to stimulate

further research in order to develop theories and promote comparative analyses capable of assessing the "state of health" of the rule of law in the EU Member States and the candidate countries.

Serena Baldin opens the special issue with an essay on the rule of law crisis in Hungary and Poland (*Acceptance and imposition of the EU values to reinforce democracy and rule of law in the Member States*). Her research aims to illustrate some dynamics of the imposition of European values on Member States as a phenomenon of the EU's "soft" imposition of legal models. In her conclusions, she emphasises the importance of deepening studies on the constitutional pathways in post-socialist countries and the ways to mobilise civil society in support of EU values in order to strengthen democracy and the rule of law in the EU legal space.

The essay written by Davide Strazzari (*Rule of Law, mutual recognition and mutual trust: comparing the EU and the US experience*) focuses on the principles of mutual trust and mutual recognition, as they require a homogeneous level of protection of rights and an independent judiciary in the EU Member States. Mutual trust and mutual recognition are classic principles of horizontal federalism; therefore, the research aims to compare the EU legal framework with US constitutional clauses such as the extradition clause and the full faith and credit clause. The US experience shows that these provisions did not immediately lead to an affirmation of the interest of unity, and it took time for the states to effectively incorporate the rights enshrined at the federal level.

The third essay is authored by Giuseppe Ieraci (*Europeanism within the "bounds of reason". Reflections on the prospects of democracy and of supranational political integration*). He questions whether the European Union can overcome its recent crises without a real political centre and without an effective common identity. Indeed, a fundamental issue is the construction of an effective centre of power in Europe, i.e. the possibility of a new supranational monopoly of violence, with its implementing and administrative levers.

As Mattia Zulianello points out in his essay on *Populist parties in Central and Eastern Europe: Regional trends in comparative perspective*, Central and Eastern European countries are a fertile ground for the success of the so-called valence populism. His research aims to examine the populist phenomenon, characterised by the widespread presence of right-wing populist parties, and to shed light on the controversial relationship between populism and Euroscepticism, as well as the underlying tension between populism and liberal democracy.

In his essay on *Rule of Law in Bulgaria: Semi-Permanent Transitory Experiences on the Edge between Normative Expectations, Pragmatic Imperatives and Constitutional Imaginaries*, Martin Belov traces the establishment of the principle of the rule of law in Bulgaria. After affirming that it is clearly anchored in written law and to some extent

successful in political practice, he stresses, however, that in the postmodern situation of the global, algorithmic and increasingly technocratic society of the XXI century, a deep, broad and profound debate is urgently needed that goes beyond discussions of judicial reform.

The essay authored by Chiara Pizi (*Serbia and Montenegro: challenges of Rule of Law against disinformation and hate speech*) aims to contribute to the literature on the EU enlargement process through the lens of one of the most critical profiles, namely legislation against hate speech. The aim is to analyse the state of the art in Serbia and Montenegro by reviewing the objectives achieved in terms of meeting the criteria for EU membership and alignment with the EU *acquis*. In her conclusions, the author suggests the need to strengthen the education and training of legal practitioners and authorities involved in the enforcement of professional journalistic standards.

In their essay on *Bosnia and Herzegovina on the European Path: The Dynamics of State Functionality and the Rule of Law Reform*, Samir Forić and Davor Trlin provide an account of the recent reforms in the rule of law area. With a particular focus on judicial reform, they provide a comprehensive picture of the forces at work shaping the country's progress on the European path and their respective rationales.

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Acceptance and imposition of the EU values to reinforce democracy and rule of law in the Member States

Serena Baldin

Abstract

This article reconstructs the meaning of the rule of law in the context of the European Union and observes the dynamics of the subjugation of European values by member states as a phenomenon of "soft" imposition of legal models. The mechanism of financial conditionality linked to the rule of law also appears as a case of the imposition of legal models.

Keywords

Rule of law, EU values, Democratic Backsliding, European Integration

Introduction

The so-called rule of law crisis currently affecting the European Union is mainly due to the constitutional and legislative reforms adopted by some member states, notably Hungary and Poland, which have gradually eroded the pillars of the democratic pluralist state. The legal changes that have reduced the space for the exercise of democracy and fundamental rights have taken place in a context that respects formal or procedural democracy, with free (though not fair) elections. As a result, the actions of the two governments are supported by large parliamentary majorities.

Overall, the measures adopted in Hungary (since 2010) and Poland (since 2015) have led to the centralisation and politicisation of executive power, the degradation of the public sphere, and the elimination of political competition and institutional counterweights (Huq and Ginsburg 2018: 117-118). In particular, the subordination of the judiciary to the executive has undermined the independence of ordinary and constitutional judges. The concept of the rule of law in a narrow sense encompasses the principle of separation of powers and the principle of judicial independence, two principles that are at the core of Western democracies. In a broader sense, accepted by the European Union, the concept of the rule of law also encompasses the guarantee of pluralism and freedom of the mass media, considered to be the guardians of democracy, and the apparatus of anti-corruption rules.

The numerous studies devoted to this subject highlight the constitutional decay or democratic backsliding that characterises the current political and institutional life of these two countries. This decline is exacerbated by the fact that these two systems were considered the most advanced among the countries emerging from socialism in terms of the democratic stability achieved in just a few years.

The reference to constitutional degradation is intended to highlight «a series of discrete reforms that singularly could be considered consistent within a democratic scope but summed up together prove to be pernicious for the whole constitutional system. This kind of erosion implies, indeed, a sophisticated and devious use of the legal and constitutional instruments to progressively undermine the substance of constitutional democracy, though maintaining intact its formal appearance» (La Placa 2022: 114).

Democratic backsliding or erosion, on the other hand, indicates «the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy» (Bermeo 2016: 5). This phenomenon can lead to authoritarian regimes, regardless of whether the backsliding involves rapid and radical changes across a wide range of institutions. Conversely, it can lead to ambiguously democratic or hybrid regimes, whether the democratic erosion is the result of gradual change across a more limited range of in-

stitutions (Bermeo 2016: 6). Hungary is emblematic of the latter case, and even the Council of Europe has defined it as a hybrid regime of electoral autocracy.[1]

Acceptance-imposition of the EU values and reconstruction of the meaning of the rule of law

The rule of law is one of the fundamental values of the European Union and the Council of Europe, regional organisations of which Hungary and Poland are members, following the formal acceptance of the values that are part of Europe's constitutional heritage and the principles and rules that give them concrete implementation.

According to some legal scholars, the adoption of the *acquis communautaire* by Central and Eastern European countries after 1989 is an example of the circulation of legal models for reasons of prestige. The reference to prestige implies that a country voluntarily adopts ideas, principles or legal rules established abroad because it believes that they may be useful or effective in its own legal system. Conversely, the phenomenon of the imposition of legal models may result from acts of violence, such as military conquest, or from the political, social, cultural and economic influence of a certain order on others. An example that falls into this category is the Soviet legal model, which was imposed on all socialist countries (Sacco 1988).

Sometimes voluntary transposition for reasons of prestige and transposition by imposition overlap (Graziadei 2006: 458). Indeed, the doctrine questions whether the constitutions of the post-socialist countries adopted in the 1990s were the result of autonomous choices or of pressure from European international organisations (Pegoraro and Rinella 2020: 20). For some scholars, it would be incorrect to speak of the imposition of constitutional doctrines alien to the traditional identity of post-socialist states, precisely because of their free choice to join the Council of Europe and the European Union (Bartole 2018: 297). However, one can argue about the degree of free will of these countries, as the economic and political incentives of being part of the European Union can act as a driver for reforms far beyond considerations of respect for democracy and fundamental rights. The point is that the introduction of a legal reform may be a relatively simple process, but this does not guarantee that the reform will actually be operational. This possible discrepancy is reflected in the expression "law in books" and "law in action".

[1] See European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE).

The democratic backsliding in Hungary and Poland is causing serious alarm in the international community, which sees an increasingly pronounced departure from the pillars of transnational constitutional law. The member state that violates the principle of the rule of law is departing from a value on which the EU is founded. Indeed, Article 2 of the Treaty on European Union (TEU) sets out the founding values of this organisation, referring to «human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities». This provision defines the "constitutional core" of the European Union as a set of values shared by the Member States and forming part of the common European heritage.

According to the European Commission, «The rule of law is the backbone of any modern constitutional democracy. It is one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based. This is recalled by Article 2 of the Treaty on European Union (TEU), as well as by the Preambles to the Treaty and to the Charter of Fundamental Rights of the EU. This is also why, under Article 49 TEU, respect for the rule of law is a precondition for EU membership. […] The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union ("the Court of Justice") and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU. Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law».[2]

Recently, the Court of Justice has had several opportunities to reconstruct this concept in detail. The Luxembourg judges have gradually identified the elements that characterise the rule of law, including both formal or procedural guarantees and guarantees of a substantive nature (including the independence and impartiality of the judiciary). A serious and persistent breach of the values enshrined in Article 2 TEU not only has repercussions within the system concerned, but also has negative consequences for the other Member States, for mutual trust between them and for the very nature of the Union. With regard to mutual trust, the concept has been presented by the Court of Justice as follows: «the principle of mutual trust between Member States is of fundamental importance in the law

[2] Communication from the Commission to the European Parliament and the Council 'A new EU Framework to strengthen the Rule of Law', COM/2014/0158 final.

of the Union, since it enables the creation and maintenance of an area without internal borders» and that «that principle requires each of those States, in particular as regards the area of freedom, security and justice, to take the view, save in exceptional circumstances, that all the other Member States respect the law of the Union and, more particularly, the fundamental rights recognised by the latter» (Court of Justice of the EU, Opinion No. 2/13, 18 December 2014).

A reconstruction of the concept of the rule of law is also offered by the Venice Commission (European Commission for Democracy through Law) of the Council of Europe. In a 2011 report, the Venice Commission provided a common European definition of the rule of law, identifying the essential content common to the various legal systems in order to provide a useful guide for the application and promotion of this principle by national and supranational courts. It entails that «all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts». In this sense, the rule of law also includes accessibility of the law (i.e. intelligible, clear and predictable); questions of legal right decided by law and not discretion; equality before the law; power exercised lawfully, fairly and reasonably; human rights protection; means to resolve disputes without undue cost or delay; fair trials; compliance by the state with its obligations in international law as well as in national law (Venice Commission 2011: 9).

This conceptual convergence between the work of the European Union and that of the Council of Europe confirms the possibility, already suggested by the work of the European regional courts, of deriving a single "pan-European" concept of the rule of law as a synthesis of national experiences. Moreover, according to the Court of Justice of the European Union, the rule of law is conceived as a composite concept, in which the rule of law becomes a "principle of principles", respect for which runs through the promotion and protection of other general principles of the European Union order.

EU's actions to enforce respect for the rule of law

Over time, the EU has taken numerous measures to try to force Hungary and Poland to comply fully with EU law and to respect the values expressed in Article 2 of the EU Treaty. These measures are part of the monitoring, preventive and enforcement mechanisms available to the EU institutions (Diaz Crego, Mańko and van Ballegooij 2020).

The activation of Article 7 TEU, the innovative jurisprudence of the Court of Justice and financial conditionality are the profiles on which legal scholars have focused most attention.

With regard to Article 7 TEU, it should be recalled that at the end of the 1990s, when the accession of the Central and Eastern European states to the EU seemed a sure thing, some EU states raised the problem of what to do if one of the new accession states, once a member of the EU, did not respect the values of Article 2 TEU. The insertion of what was then Article 6 TEU – now Article 7 – responded precisely to the need to guard against the possibility that the new accession states, in view of their recent transition from a socialist to a liberal-democratic state, would subsequently fail to comply with the obligations they had assumed with regard to the principles of the rule of law and respect for human rights. This is why the so-called homogeneity clause was included in the Amsterdam Treaty in 1997 (Strazzari 2014).

The homogeneity clause in Article 7 TEU has a scope that also extends to areas within the competence of the Member States, over which the EU has no competence and in which EU law does not apply. Article 7 TEU contains two separate procedures. Article 7(1) is intended as a preventive mechanism. It allows the Council, acting by a four-fifths majority, to declare that «a clear risk of a serious breach» of Article 2 values by a Member State. Article 7(2) and (3) are designed as a sanction mechanism. Article 7(2) empowers the European Council, acting unanimously, to determine «the existence of a serious and persistent breach» by a Member State of the values referred to in Article 2. Once such a determination has been made, Article 7(3) concerns the sanction. It empowers the Council, acting by qualified majority, «to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council». It is worth noting that, unlike other international organisations, the EU Treaties do not provide for the possibility of expulsion of a Member State.

In December 2017, the Commission initiated the procedure under Article 7(1) TEU against Poland, in order to have the Council find that there is a clear risk of a serious breach of the values set out in Article 2 TEU.[3] In relation to Hungary, the activation of the Article 7(1) procedure was made by the European Parliament in September 2018.[4] However, the monitoring process did not have a positive impact (Aranci 2018; Uitz 2020).

And with regard to Article 7(2), the unanimity requirement means that it cannot be activated as long as Hungary and Poland support each other.

[3] European Commission, 'Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland', COM(2017) 835 final.

[4] European Parliament, Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), P8_TA(2018)0340).

As for the role of the Court of Justice, it has inaugurated a new jurisprudential strand related to respect for the rule of law, so much so that the Court's jurisprudence is considered in terms of transformative constitutionalism (von Bogdandy and Spieker 2023).

In some cases, the Court of Justice has used Article 19 TEU («Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law») as a parameter for innovative case law, paving the way for a judicial review of Member States' respect for the rule of law. According to the Court, Article 19 TEU gives concrete expression to the value of the rule of law reaffirmed in Article 2 TEU. Consequently, it allows the compatibility of national rules with EU law to be examined in cases where national rules are potentially prejudicial to the independence of national courts. This is because national courts are responsible for applying and interpreting EU law. The organisation of the judiciary must therefore be carried out in accordance with the obligations imposed by EU law. It follows that state reforms affecting the guarantees of national courts may be examined in the light of Article 19 TEU (see Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, Case C-64/16 rendered by the Court of Justice on 27 February 2018; and, with specific reference to Poland, see Commission v. Poland, Case C-619/18, dated 24 June 2019).

In addition, if a national court considers that a measure taken within the system is contrary to the rule of law as laid down in Article 2 TEU and concretised by Article 19 TEU, it may make a preliminary reference to the Court of Justice. In this way, the Court of Justice has actively involved national judges in the protection of the rule of law, who will be able to take action against national measures that are likely to infringe their judicial function (Parodi 2018: 991; Pech and Platon 2018).

Another turning point in the search for solutions to enforce compliance with the values of Article 2 TEU is provided by the case Republika v Il-Prim Ministru decided in 2021 (C-896/19). In this case, the Court of Justice introduces the principle of non-regression into the system of EU law, stating that Member States cannot fall below the minimum standard of compliance with Article 2 values that they achieved in the course of the pre-accession process and which qualify them for membership of the Union. In its reasoning, the Court emphasises that «the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them» (point 61). Consequently, compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State. Therefore, a Member State cannot «amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU» (point 63). In other words, the Union's legal order prohibits the regression of values. Article 2 and the principles it em-

bodies are opposed to those who want to stay in power at all costs, with the consequence that authoritarian tendencies cannot be tolerated under any circumstances. The importance of the decision therefore lies in the new way of interpreting Article 49 TEU, linking it with Article 2 TEU to create a principle of non-regression for the Union's values, which could be useful in future decisions (Leloup, Kochenov and Dimitrovs 2021).

Finally, further action by the European institutions to prevent democratic degradation in Member States falls within the scope of financial conditionality, of which Regulation 2020/2092 on the protection of the EU budget is an emblem. In the European Parliament resolution of 17 April 2020 on coordinated EU action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)), paragraphs 46-55 are entitled 'Protection of democracy, the rule of law and fundamental rights', in which the cases of Hungary and Poland are mentioned. The resolution makes respect for the rule of law a condition for the disbursement of funds. This has become a legal requirement with the adoption of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2000 on a general system of conditionality for the protection of the Union's budget. It is aimed at infringements of the principles of the rule of law which affect or seriously risk affecting the sound financial management of the budget or the protection of the Union's financial interests. It is therefore not a sanctions mechanism covering all rule of law issues. The actions brought by Hungary and Poland to annul the regulation were rejected by the EU Court of Justice in two "twin" judgments delivered on 16 February (Gallinaro 2021; Baraggia 2022).

On 18 September 2022, the Commission adopted a proposal for measures to protect the Union budget against breaches of the principles of the rule of law in Hungary, citing concerns about corruption and public procurement. Finally, on 15 December 2022, the Council of the EU adopted a decision suspending €6.3 billion,[5] representing 55% of the budget commitments under the three cohesion policy programmes that are implemented through public procurement (Maurice 2023).

As Scheppele and Morijn point out, in addition to the conditionality regulation, there are other legal instruments to which rule of law conditionality has been attached. They are inserted in other regulations and sometimes emerge in new interpretations of existing EU law. Whether the Commission uses the Conditionality Regulation, the Common Provisions Regulation or the suspension of funds under the EU's Next Generation Recovery Plan, it has a powerful tool at its disposal to curb the illiberal backsliding of EU Member States. All these tools have enabled the European Commission and the Council of the EU to act together to freeze a large amount of EU

[5] Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary.

funds, totalling more than €28.7 billion for Hungary and more than €110 billion for Poland (Scheppele and Morijn 2023: 29 ff.).

Conclusions

The crisis of the rule of law in Poland and Hungary, two countries that have not yet reached the stage of democratic consolidation after the fall of the Berlin Wall, has clearly demonstrated both the weakness of the Copenhagen criteria and the problems inherent in the political mechanisms for enforcing respect for the fundamental values enshrined in Article 2 TEU.

With regard to Article 7 TEU, some scholars point out that the ineffectiveness of the instruments it regulates does not detract from its symbolic character. This is because Article 7, together with Article 2, has the function of recognising the elements of political-institutional affinity that unite the Member States and justify their common experience in the EU (Strazzari 2014: 5). Other scholars, on the other hand, advocate the deletion of Article 7(1) TEU on the grounds that this preventive mechanism lacks concrete effectiveness. At the same time, a procedure for the expulsion of a Member State should be included in the Treaties, although this idea could be even more problematic, as it could clash with the core of the Treaties, i.e. the aspiration for an ever closer union among the peoples of Europe (Circolo 2019: 36 ff.).

One path that has yielded more productive results is the procedural one, thanks to the activism of the Court of Justice. However, this can only resolve individual cases and is not enough to halt democratic regression. As Pitruzzella, Advocate General at the Court of Justice, recently observed, for decades the language used by the European institutions to pursue the goal of integration has been that of law. This is because the identity of the European Union (and before that the European Economic Community) has been defined primarily in legal terms. As a result, major problems have been analysed and resolved as if they were legal problems. With the deepening crisis of the rule of law, however, a phase has begun in which the language of values dominates. The values referred to in Article 2 TEU and applied by the Court of Justice form part of the common constitutional traditions and have been accepted by the States which have joined the Union. Sharing the fundamental values of the national constitutional orders and committing to defend and promote them means creating bonds of solidarity between peoples and Member States that are even stronger than those resulting from the creation of a single market, a single currency, an area of freedom and security and a common judicial system; it means achieving political union (Pitruzzella 2023).

Finally, with the adoption of the conditionality regulation, the EU institutions have shifted the focus from values to economic efficiency, arguing that a more efficient and predictable justice system, namely an independent judiciary, or a stronger fight against corruption is more favourable to the business climate and growth. By calling for legislative reforms aimed at strengthening the anti-corruption framework and ensuring greater transparency in public spending, the EU demonstrates its ability to impose legal models through forms of economic imposition. This imposition comes in the form of conditionality, which seems to have had some positive effects, although the overall framework is still unsatisfactory.

Some fundamental questions remain: what meaning can legislative reforms have if they are not effectively supported by institutions and civil society? Will there be a separation between the law on the books and the law in action, or will the reforms really be useful in making the transition from an autocratic system to a democratic one? Furthermore, it is important to understand whether and to what extent countries with a liberal-democratic tradition can coexist in the EU with countries that do not seem to be able to approach this form of state. Given that expulsion from the EU is not provided for in the Treaties, it is clear that we must continue to act in this direction, using all the preventive mechanisms at our disposal, first and foremost the monitoring procedure in defence of democracy, the rule of law and fundamental rights. This procedure provides for the publication of an annual report on the rule of law, so that the level of democratic standards achieved by each Member State is always kept under review.[6]

If we then look at the phenomenon from the perspective of the internal dimension of states, we need to pay attention to the constitutional path in order to search for possible antidotes against the democratic regression that Poland and Hungary are experiencing and that could also affect other countries. In fact, a leading legal scholar wonders whether the authoritarian drift is the effect of a failed democratic transition or whether there is a kind of contributory negligence on the part of the European institutions, which did not take due account of the historical specificities and cultural traditions of the post-socialist countries in the stages of accession to the EU, nor of the negative impact on the welfare state of the economic requirements of European conditionality. It is therefore necessary to take a critical look at the recent past and to examine the modalities and protagonists of the transition, as well as the subsequent developments, in order to be able to think about how to intervene now in order to stop the authoritarian wave. From a constitutional point of view, the elements for strengthening internal state antidotes revolve around measures to protect democracy,

[6] See at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report_en.

the requirements for the technical-professional competence of judges, the limits of constitutional revision and participatory institutions (Di Gregorio 2019). These are areas that need attention in the near future and in which the Union can intervene with financial conditionality, directing funds to NGOs, cultural associations, universities and schools aimed at promoting the values of Europe's constitutional heritage from below, from civil society, in order to reinforce democracy and rule of law in the EU legal space.

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Rule of Law, mutual recognition and mutual trust: comparing the EU and the US experience

Davide Strazzari

Abstract

The so-called Rule of Law crisis in Central and Eastern European countries has affected the EU's Area of Freedom, security and justice of the EU, which is based on the principles of mutual trust and mutual recognition. These principles require a homogeneous level of protection of rights and the judiciary of EU Member States to be independent. Mutual trust and mutual recognition are classic principles of horizontal federalism. The U.S. also has similar clauses in its Constitution such as the Extradition Clause and the Full Faith and Credit Clause. The U.S. experience shows that the presence of these provisions in the Constitution did not immediately lead to the affirmation of the interest of unity and it took time before the States effectively incorporated the rights enshrined at the federal level. Only when this occurred, mutual recognition was effectively implemented.

Keywords

Mutual trust, Mutual recognition, EU area of freedom, EU security and justice, Rule of Law in USA

Introductory Remarks: Rule of law and mutual trust in the area of Freedom, Security and Justice

The "rule of law" is listed among the founding values of art. 2 TEU; it is also mentioned among the principles that should guide the Union's action on the international scene (art. 21 TEU). However, the EU Treaty does not provide a definition of it. This is regrettable since the "rule of law" is a concept with different meanings according to the legal tradition considered (Salerno 2020). In that regard, as is well known, in the common law countries, the "rule of law" is a principle that refers to the traditional conception of limited government, in which rights precede the state itself and are guaranteed by independent judges. It assumes that the statute is not the sole source of law, but that, alongside it, is the production of law by the courts. In contrast, in the civil law context, the rule of law is a concept that tends to coincide with the principle of legality and thus with the idea that the actions of public authorities and judges are subject to law, produced by Parliaments. The only source of law is thus enacted by political actors. Which conception of "rule of law" has the EU enforced?

The most relevant contribution in the field came from the European Commission. In its 2014 Communication "A New EU Framework to Strengthen the Rule of Law", while recognising that "the precise content of the principles and standard stemming from the rule of law may vary at national level depending on each Member State's constitutional system», the Commission also stated that the rule of law "include(s) legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws, legal certainty; prohibition of arbitrariness of the executive power; independent and impartial courts, effective judicial review including respect for fundamental rights and equality before the law". By emphasizing the judges' independency and the effectiveness of the judicial remedy, it seems that the European Commission has endorsed a conception of the "rule of law" that is more consistent with that of the common law tradition.

The Court of Justice, too, has highlighted this specific component of the rule of law. In *Minister for Justice and Equality v. L.M.*, the Court said: "[…] It must be pointed out that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individual derive from EU law will be protected and that the values common to the Member States set out in art. 2 TEU, in particular the value of the rule of law, will be safeguarded. Indeed, the European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure relating to the application to

them of an EU act".[1] Why then both EU institutions chose to focus on this aspect of the rule of law?

Of course, an obvious explanation is that both Hungarian and Polish authorities took legislatives initiatives aimed to undermine the judiciary independence in their respective legal systems (Di Gregorio 2017). However, there also are more structural reasons. First, the effectiveness of EU law relies on instruments such as the preliminary reference, the primacy, the direct effect, the state liability for breaching EU law whose enforcement require an independent judge. A second explanation, one we would like to focus on in this contribution, is the importance of having independent judges and effective legal remedy within the Freedom, Security and Justice area. In this field, which deals with judicial cooperation in criminal and civil law, the EU had to consider that each of the 27 Member State has its own criminal and civil legal system, which is characterised by deep differences. Thus, rather than focussing on harmonization of the substantial criminal and civil law of all member states, through directives and regulation, the Treaty of EU envisaged a different instrument, namely mutual recognition of judicial decisions.Indeed, mutual recognition is not a new regulatory technique. The CJEU elaborated it in the '70, in the *Cassis de Dijon* case, within the internal market area. According to this principle, a member state must allow goods that are legally sold in an EU state to be sold in their own territory, even if the goods do not respect all the technical requirements that are usually required for that type of goods to be sold in the importing member state.

Within the Freedom, Security and Justice area, however, mutual recognition takes a different and more strategical meaning as it primarily concerns the recognition of judicial decisions rather than administrative ones. Moreover, it generally entails an encroachment upon classical fundamental individual rights (Iglesias Sànchez and González Pascual 2021). The European Arrest Warrant (EAW) is a suitable example of this approach. The EAW is a judicial decision issued by a Member State requiring a judicial authority of another Member State to surrender a person present there for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. The decision provides for the mandatory use of a standardised certificate by the issuing authority. If this certificate is correctly filled, it must be recognised by the judge of the executing Member State as if it were issued by a national judicial authority of his own state. The competent authority of the executing Member State cannot refuse the enforcement of the arrest warrant unless it deems that a ground for non-recognition as specifically listed in the EAW decision occurred. The EAW decision, then, does not allow the executing Member State to refuse recognition on the basis of

[1] CJEU, 25th July 2018 PPU, Case C-216/18, *LM*, § 48-49.

an open-ended clause. More precisely, the Framework Decision does not allow the executing authority of a Member State to refuse the enforcement of an EAW on the ground that the requesting state does not comply with fundamental rights, (Mitsilegas 2015: 466; Bargis, 2017: 178, Cappuccio, 2022: 295)

The mutual recognition is the key functioning principle of many EU legislative act dealing with both criminal and civil matters. The Dublin Regulation can also be added to the list, with a few cautions. As is well known, the Dublin Regulation establishes criteria and mechanisms to determine which Member State is in charge of examining an asylum request. The State that receives an asylum request will apply the criteria set in the Regulation. If it finds that another State is responsible, it may request it to take charge of it. The system is based on the assumption that the responsible state will treat the asylum seeker in line with the relevant international and EU acts in the field of international protection. In this sense, the Dublin Regulation is primarily a mechanism based on mutual trust. However, when the so called "take back" function is involved, one can identify "an informal mutual recognition mechanism for negative decisions" (Majani, Migliorini, 2020: 25). Although there is not a judicial decision, Member State authorities do recognise legal effect to acts issued by another member state, namely the registered request for asylum presented there or the negative decision already issued by a Member State's authorities. As a consequence, they proceed to transfer the person concerned, irrespective of his/her will. Art. 3of the Regulation set the principle according to which the application for Asylum shall be examined by a single Member State.[2]

The principle of mutual recognition has been recognised by EU institutions as the cornerstone of judicial cooperation in both civil and criminal matter. It is the European Council in Tampere in 1999 that inaugurated this mechanism. It has been confirmed and further developed by the Hague programme in 2004 and by the Stockholm programme in 2012. The Lisbon Treaty explicitly mentions it at art. 67, 81 and 82 of TFEU. In order to make efficient the mutual recognition system, it is important that States and more precisely the judiciary of each EU Member State trust each other. The link between the two concepts – mutual recognition and mutual trust – is explicitly highlight-

[2] Majani and Migliorini (2020: 25) observe: "Indeed, the applicant whose claim is rejected by the responsible State, and moves to another State to file anew request, may be transferred back without the second State having to examine their claim. In a way, the second Member State "recognises" the negative decision issued by the first". However, even when a "take back" situation is involved, the second Member State is never under an obligation to recognise and transfer the person concerned. Both Dublin Regulation II (Council Regulation No 342/2003) and III (Reg. No 604/2013) provide for a clause allowing the Member State which is in charge of determining which Member State is competent to decide to examine the asylum request, even if it were not competent according to the criteria set forth in the Regulation. This decision is fully discretionary and can be based on humanitarian, compassionate or political grounds. The Dublin Regulation III (see art. 17, par. 1) renamed this clause "discretionary clause", whereas under the Dublin Regulation II it was known as "sovereignty clause".

ed in the Conclusions of the European Council of Tampere, The Hague and Stockholm and in the recitals of many EU legislative acts taken in the field. But on what elements is this mutual trust based?

Each EU Member State is part of the European Convention of Human Rights (ECHR) and consequently is under the jurisdiction of the European Court of Human Rights (ECtHR). All EU Member States are bound to respect the Charter of Fundamental Rights of the European Union (CFREU). All EU Member States must respect the values enshrined in art. 2 of the TEU, which includes, as already noted, the rule of law principle. Moreover, the Stockholm program mentioned two further measures aimed to strengthen mutual trust. One is the training of judges, the other is developing European judicial networks.

Is this enough? Is the judge of the executing Member State under the legal obligation to assume that always his colleague sitting in another EU Member State is respecting EU fundamental rights? What if the executing Member State grants a more favourable standard in terms of fundamental rights than that applicable in the requesting State?

In order to provide an answer to these questions, this contribution deems important to compare the EU experience with that of federal states, notably the US. As a matter of fact, in classical federal systems when federated units are granted powers in civil and/or criminal matters and have an autonomous judicial organization, separated from the federal one, the federal Constitution usually contains provisions setting the principle of mutual recognition of judicial decisions or such a result is elaborated by the federal Supreme Courts.[3]

In that sense, mutual recognition is not only an issue of horizontal federalism (Van Den Brink 2016: 921 ss.) – i.e. it does not involve only relations among the authorities of federate units – but to the extent the exceptions must be narrowly constructed and based on the federal Constitution or the federal Supreme Courts case law, it also becomes an issue of vertical federalism. In that regard, mutual recognition requires the federal level to establish minimum rights and minimum harmonizing rules in order to enhance mutual recognition. Mutual recognition is a way to guarantee the unity of the federal legal order rather than to subnational unit's legal system values.

[3] This is the case of Canada in relation to civil law. See Supreme Court, *De Savoye v Morguard Investments* [1990] 3 S.C.R. 1077. Criminal and procedure law, divorce and marriage are federal powers. Moreover, the Supreme Court rules as the last instance on controversies regarding both provincial and federal law, thus representing a unifying element. On the tendency of federal systems to guarantee, the uniform interpretation of the law by the national judiciary, following a logic that reflects the same rationale of supremacy and homogeneity of federal law more generally, see Palermo, Kössler 2017: 159 ss.

Although the EU is not a federal state and its components maintain their statehood, mutual recognition technique within the EU presents strong analogies with that implemented in federal systems. As noted in literature (Rizcallah 2019: 3), mutual recognition is ambivalent with regard to the sovereignty of Member States On the one hand, it excludes the need for a strong vertical harmonization, thus avoiding to strengthen the EU harmonizing powers vis à vis Member States. This is respectful of the State sovereignty. On the other hand, however, in order to allow the system to effectively work, it is necessary that only few exceptions to the recognition of the foreign decisions are admitted. In other words, Member States should not rely on their own level of protection of certain rights or on their domestic legal values to deny mutual recognition. If they did so, the entire system would collapse.

The contribution, therefore, sees a first part devoted to the EU experience. Taking the Dublin Regulation and the European Arrest Warrant as paradigmatic examples, it will show that the Court of Justice of European Union (CJEU) has in fact allowed only limited exceptions to the principle of mutual recognition based on the need to protect fundamental rights and that it did so primarily because pushed by the ECtHR case law. The second part will instead be devoted to the U.S. experience to highlight how, despite explicit constitutionalization of the mutual recognition principle, the system took a significant amount of time before this principle became established and effective homogeneity among federated units, in terms of legal values, reached through the federalization of the fundamental rights protection.

Towards the recognition of a human right exception to mutual trust: the case of Dublin regulation

The importance of mutual trust for the EU construction has been highlighted by the CJEU in its Opinion 2/13. The Court said: "it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law".[4]

The Court explicitly considers mutual trust of fundamental importance for the EU, as if it were a principle having a constitutional material value. In striking a balance

[4] CJEU, 18th December 2014, Opinion 2/13, § 191.

between, on the one hand, the effectiveness of EU law and the reasons of unity, and, on the other hand, the respect for fundamental rights, the Court seems to give precedence to the former. As a matter of fact, only exceptional circumstances may justify derogations to the mutual trust/mutual recognition principles. But what are the exceptional circumstances the CJEU refers to as justifying a derogation to mutual trust and who is in charge of defining them?

In some legislative acts based on mutual recognition and mutual trust there is an explicit link to art. 7 of TEU procedure. For instance, the 10th recital of the framework decision 2002/584 on the EAW holds that the mechanism of the European arrest warrant may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union (now art. 2 TEU), determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

Having regard to asylum, Protocol n. 24 on Asylum for nationals of Member States of the EU says: "Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State". Only if the procedure referred to Article 7(1) of the Treaty on European Union has been initiated and until the Council, or, where appropriate, the European Council, takes a decision in respect thereof with regard to the Member State of which the applicant is a national, this presumption will not apply.

Envisaging art. 7 procedure activation as the only situation justifying derogation to mutual trust would have meant to set a very high threshold. Mutual trust would have become in practical terms a blind trust (see Lenaerts 2017: 805). This view could not stand the ECtHR review. In its famous judgment *M.S.S. v. Belgium and Greece*, the ECtHR called into question the Dublin system's structure. It recognised Belgium's responsibility, for violation of Article 3 ECHR, since Belgium had not prevented the transfer of an asylum seeker to Greece, despite the fact that it was known that there were systemic deficiencies in the examination of applications and the reception of asylum seekers in that country.[5]

According to the ECtHR Court, the circumstance that an EU Member State is called upon to execute requests from other Member States, based on the principle of mutual trust, does not exempt the requested State from verifying that the rights of the ECHR, and specifically art. 3, are effectively respected in the requesting State. The failure to

5 ECtHR, *M.S.S. v. Belgium and Greece,* [GC] 21 January 2011.

do so may result in an indirect violation of the Convention. The mechanism which, according to the ECHR, allows the principle of mutual trust to be considered compatible with the obligations imposed on EU States under Article 3 of the ECHR is the so-called sovereignty clause, now re-named discretionary clause. It allows the Member State determining the competence to rule on the application for international protection, even if it would not be competent on the basis of the criteria established in the Dublin Regulation, and this for political, humanitarian or even mere expediency reasons.

The subsequent case-law of the CJEU has partially taken on board the objections of the ECtHR (see Morgese 2012: 146; Moreno-Lax 2021: 92; Ferri 2021; Battjes, Brouwer 2015: 183 ss). In *N.S.*,[6] the Court imposes the prohibition of transferring the asylum seeker to the country responsible, but only if there are reasonable grounds to believe that there are systemic deficiencies in the asylum procedures or in the reception conditions in that country that entail the risk of inhuman and degrading treatment, within the meaning of Article 4 of the Charter of Fundamental Rights of the EU, for the asylum seeker transferred.[7]

More precisely, the Court stated that the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of Dublin regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the so-called sovereignty clause.

The *N.S.* decision was given in pursuance of Council Regulation No 342/2003, so-called Dublin II. The currently in force Dublin III Regulation (No. 604/2013) codified the *NS* decision at art. 3.2. Subsequent CJEU decisions enlarged the scope of the derogation to mutual trust beyond the systemic situation characterized by various deficiencies. In *C.K.*[8] and then in *Jawo*[9] the Court held that the transfer of an applicant to

6 CJEU, 21st December 2010, case C-410/10 and 493/10, *N.S. and others*.

7 This decision was given in pursuance of Council Regulation No 342/2003, so-called Dublin II. The Dublin Regulation currently in force (No. 604/2013) codified the *NS* decision at art. 3.2.

8 CJEU, 16th February 2017, C.578/16/PPU, *C.K.*

9 CJEU, 19th March 2019, C-163/17; *Jawo*.

a Member State is ruled out in any situation in which there are substantial grounds for believing that the applicant would run a risk during his transfer or thereafter to be exposed to a substantial risk of suffering inhuman or degrading treatment within the meaning of Article 4 of the Charter. Thus, the test can be satisfied even if a concrete risk of breaching art. 4 of CFREU is to be referred in relation to a single person, irrespective of any finding of systemic or structural deficiencies.

The case of the European Arrest Warrant

A similar path was followed by the CJEU in relation to the Framework-Decision on the European Arrest Warrant. In a first stage, the CJEU adopted an approach contrary to admit derogations based on the need to avoid a breach of fundamental rights (Cappuccio 2022: 293 ss; Carlino, Milani 2019; Mitsilegas 2012: 319.; Mitsilegas 2016: 213). In *Radu,*[10] the executing authorities doubted about the legitimacy of an EAW issued for the purposes of conducting a criminal prosecution on the grounds that the requested person was not previously heard in the issuing Member State. While the AG Sharpston suggested that an exceptional refusal to execute EAW should be possible when the fundamental rights of the person are involved, the Court concluded differently, highlighting that the requested person could be heard after the surrender. In *Melloni,*[11] the CJEU concluded that the executing judicial authorities may not require that the surrender of a person convicted *in absentia* is made conditional upon the review of the process in his presence. This is so even if the executing State invokes that this procedural safeguard is mandated by its Constitution. According to the CJEU, the primacy of EU law would preclude this possibility: the Framework Decision, which codified ECtHR case law on this issue, admits the possibility to give effect to convictions *in absentia* provided that some procedural safeguards have been respected, which was effectively the case in *Melloni*.

The restrictive approach initially followed by the CJUE has been partially relaxed later on, starting with *Aranyosi.* The *Aranyosi* case originated from a preliminary reference proposed by a German judge who was in charge of giving execution to the surrender of Mr. *Aranyosi* to Romanian authorities in pursuance of an EAW. The German judge relied on previous ECtHR decisions, which have repeatedly condemned Romania for violation of art. 3, since it imposed the applicants in cells, that were too small and overcrowded, that lacked adequate heating, that were dirty and lacking it water

10 CJEU, 29th January 2013, C-396/11, *Radu*.

11 CJEU, 26th February 2013, C- 399/11, *Melloni.*

for showers. The issue the CJEU was asked to clarify was whether a requested judge could refuse the enforcement – or made it conditional upon specific assurances – of a surrender for the purposes of prosecution whenever there are strong indications, grounded on previous ECtHR decisions, that the detention conditions in the issuing Member State infringe the fundamental rights of the person concerned, namely art. 3 of the ECHR and art. 4 of the CFREU. The CJEU admitted that a possible derogation to the mutual trust principle can be accepted even lacking a textual basis for it in the Framework decision. However, the threshold the Court set is very high.

The requested judge must conduct a two-step analysis. First, there must be objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrate that there are systemic or generalised deficiencies. Second, the executing judge must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by an EAW will be exposed to a real risk of inhuman or degrading treatment in the event of his surrender being executed. In order to satisfy this two-pronged test, the judge can postpone its decision on the surrender until it obtains supplementary information from the issuing judicial authority that allows to exclude such a risk. The *Aranyosi* test was confirmed in the *Dorobantu* decision where the Court highlighted that a real risk of breaching art. 4 CFREU, because of the conditions of detention, cannot be weighed with considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.[12]

A further important development directly linked with the rule of law crisis in Central-Eastern Europe is the *LM* decision. The Court held that a requested judicial authority might in principle deny execution to an EAW, issued by a Polish judge, on the ground that there is a real risk of breach of the fundamental right to a fair trial, guaranteed by the second paragraph of art. 47 of the Charter of Fundamental Right of the EU, on account of systemic or generalised deficiencies so far as concerns the independence of Polish judiciary. In this regard, a reasoned proposal of the European Commission adopted pursuant to art 7(1) TEU, is good ground to make such an assumption.

However, this finding does not entail that the requested judge must automatically deny any EAW requests. As in *Aranyosi,*[13] a second condition must be fulfilled: the requested judicial authority must determine, specifically ad precisely, whether having regard to his personal situation as well as to the nature of the offence for which he or she is being prosecuted and the factual context that form the basis of the EAW, and in the light of the information provided by the issuing Member State, there are substan-

12 CJEU, 15th October 2019, C-128/18, *Dorobantu*.

13 CJEU, 5th April 2016, C- 404/15 and C-659/15, *Aranyosi Caldararu*.

tial grounds for believing that the person will run such a risk if he or she is surrendered to that State.

Thus, in both the Dublin Regulation and the EAW Framework Decision case-law, the CJEU finally recognised "a human right exception" (Majani, Migliorini 2020: 41) to the mutual trust principle, despite no explicit textual basis in the relevant EU secondary acts. However, this exception is very limited. All cases were preceded by ECtHR decisions that found in the relevant Member State a systemic failure in the protection of human rights. Second, this "human right exception" seems to apply only when the prohibition of inhuman or degrading treatment is at stake and not when other human rights are involved. This may be consistent with the fact that art. 3 of the ECHR is an absolute right, not subject to any form of balancing. In *LM,*[14] however, the CJEU applied the exception in a case involving a risk of violation of the right to an independent judge, although this finding must be contextualized in a wider context related to the failure of the rule of law principle, which in itself has a structural relevance. Finally, the human right exception seems to apply only when structural deficiencies are at stake.[15] In that case, at least in relation to the EAW, these structural deficiencies must also entail a concrete risk for the specific person involved in the EAW procedure of breach of his human rights. In order to ascertain this aspect, the requested judge may ask collaboration with the issuing judge.

Mutual trust and mutual recognition in the US experience

In US, every federate State has its own criminal and civil law system, although it must be highlighted that all State legal systems have a common ground rooted in the common law tradition. The federal level is not granted powers allowing to harmonise the different sub-national units legal system. Mutual recognition is thus the way the federal constitution provides for guarantee federal unity. The latter contains two mutual recognition clauses, set in art. 4. The so-called "Full Faith and Credit clause" states: "Full faith and credit shall be given in each State to the public acts records and judicial proceeding of every other State. And the congress may by general laws prescribe the manner in which such acts records and proceedings shall be proved and the effect thereof». The second mutual recognition clause is the so-called extradition clause: "A person charged in any State with treason felony or other

14 CJEU, 25th July 2018 PPU, C-216/18, *LM.*

15 See, however, the *CK* and *Jawo* decisions, mentioned in the text, where the CJEU admitted that even a substantial risk of violation of art 4 CFREU referred to individuals is enough to hinder the transfer of the person concerned.

crime who shall flee from justice and be found in another State shall on demand of the executive authority of the State from with he or she fled, be delivered up, to be removed to the State having jurisdiction of the crime". The two provisions have different scopes of application not only because the Full Faith Clause concerns civil and administrative acts, while the extradition clause deals with criminal matters. The former is also a basis for federal legal measures enhancing mutual recognition. Congress has rarely taken legislative steps in that regard. The Supreme Court held that at least regarding definitive judicial decisions a State cannot oppose public policy exceptions to the recognition of a sister State decision. Thus, the interest of the federal unity prevails over State autonomy.

Same sex marriage represented a possible breach in this framework. After the Hawaii Supreme Court recognised the right for same sex couple to marry, the Congress passed the Defence of Marriage Act (DOMA) allowing States not to recognise same sex marriage celebrated in other States. As a matter of fact, a same sex couple could get married in a State allowing same sex marriage and get there a judicial decision declaring the couple married, thus forcing other sister States to recognise the marriage. In order to avoid this, the DOMA stated: "no State shall be required to give effect to any public act, record, or judicial proceeding of any other State [...] respecting a relationship between persons of the same sex that is treated as a marriage under the laws of that other State ... or a right or claim arising from such relationship".

Many legal scholars doubted about the legitimacy of the DOMA. According to their view, the Full Faith clause would authorise the federal congress to intervene in order to enhance the mutual recognition, but not to constrain and limit recognition of acts issued by other sister State (Kramer 1997: 1965 ss.). However, other scholars sustained an opposite view: the Full Faith clause would grant Congress more discretion in defining a balancing between the protection of the State interest and federal homogeneity (Schmitt 2013: 485 ss., Engdahl 2009: 1584 ss.). The *Obergefell v. Hodges* decision, recognising the federal fundamental right to same sex marriage, has solved the dispute, setting aside the issue whether the federal Congress had the power to take measures aimed to defend state autonomy in private law.[16]

As for the so-called state-to-state extradition clause is concerned, it applies to any type of crime in relation to which a person has been convicted, remanded for trial or is otherwise under investigation for criminally relevant acts committed in a State from which he or she has subsequently departed. The procedure is particularly complex and unlike the European Arrest Warrant model, it necessarily involves political rather than judicial bodies, a clear legacy of a model focused on the discipline of international extradition.

[16] Corte Suprema, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

It begins with a request made by the governor of the State that the accused person has fled to return the fugitive, a request that must be made to the governor of the State where the fugitive is. Once the request is received, the governor of the executing State generally asks the assistance of his chief prosecutor in order to verify the authenticity of the documents and the identity of the person involved.

Once these verifications have been completed, the governor of the executing State proceeds to issue an arrest warrant against the persons sought. The latter may apply to the judicial authority, through a habeas corpus petition, in order to challenge the legality of the return to the authorities. Currently, the interstate extradition process ensures high rates of effectiveness. On the one hand, in relation to the political phase, the governor has a constitutional obligation to proceed with the execution. This obligation is justiciable in case of non-compliance before a federal judge who can therefore order the governor to proceed with the extradition. On the other hand, in relation to the possible involvement of the courts of the executing State in the habeas corpus adjudication, the Supreme Court has essentially reduced this stage to a very formal adjudication in which the court must satisfy itself that the State's extradition documents are formally correct, that indeed the person is being tried or convicted of a crime in the requesting State, of the person's identity; that the person is a fugitive within the meaning of the constitutional clause.

This is the result of a judicial process that took time before being definitely settled. To retrace the salient stages of this development is the purpose of this section. As is well known, each of the 50 federate States has developed its own criminal law system although the common adherence to common law principles, on the one hand, and the development of federal constitutional rights, on the other, have allowed a legal homogeneity to develop. Nevertheless, partly because of historical events related to slavery and later institutional discrimination against Black people, the constitutional obligation to give near-automatic recognition to extradition requests from other States has been slow to take hold.

After the formal abolition of slavery imposed by the Thirteenth Amendment, the slaveholding States had in fact adopted criminal legislation that was highly discriminatory against Black people, making them often liable for various criminal offenses (so-called Jim Crow legislation). Since the expiation of punishment was often through a sentence of hard labor, to be served even with private parties, the mechanism tended to perpetuate the condition of substantial slavery of the black population. In addition to this, there also were the frequent lynchings which black people, accused of certain crimes, were subject to; the prohibitive conditions of detention in prisons or the violation of defence rights set forth in the constitutional charters of the country of execution.

In this context, there were two situations that could in fact lead to a non-execution of the request by the governor of the requesting state: the failure of the governor of the executing State to act and the cancellation of the warrant of arrest imposed by the judge of the executing State eventually called upon to rule on the writ of *habeas corpus*. The first of these situations is at the heart of a significant jurisprudential evolution of the Supreme Court. In 1861, the governor of Kentucky had appealed directly to the Supreme Court in order to obtain a writ of mandamus requiring the Governor of Ohio - Dennison - to give effect to his request for the surrender of a free black man accused of aiding and abetting the escape of a person into slavery. The governor of Ohio had refused to enforce the request, relying on the legal opinion of his minister of justice, who held that the execution of a request under the extradition clause was a discretionary power that the governor could legitimately opposed when the extradition related to conduct that was not judged to be a criminal offense by the common law or by the laws of civilized nations.

The Supreme Court, while holding that the governor does not exercise any discretion regarding the extradition request, being obliged to give it effect, nevertheless stated that the obligation to execute this obligation was not justiciable. In fact, according to the Court, the absence in the Constitution and in federal acts of any reference to a possible judicial remedy vis-à-vis the governor's makes it impossible to configure a federal judicial remedy that would impose a submission of State administration to federal intervention in areas fully reserved for the former.[17]

The practice subsequently followed by the States shows precisely how the governors have also made use of their discretion in order to obtain guarantees in the manner of execution of the sentence and/or reductions of conviction. Indeed, apart from federal intervention in 1793, Congress refrained from further regulating this area, and the extradition between States was and still substantially is governed by harmonizing interventions spontaneously taken by the States. It is particularly noteworthy to mention the Uniform Criminal Extradition Act of '36 drafted by the National Conference of Commissioners on Uniform State Laws which has been substantially implemented by the majority of States (Murphy, 1983: 1063 ss.).

Only in 1983 the Court overturned the Dennison precedent and recognized that the constitutional obligation to comply with an extradition request may be justiciable in the federal courts.[18] According to the majority opinion written by J. Marshall, the Dennison ruling must be contextualized in the peculiar historical moment that shortly before the outbreak of the Civil War saw the powers of the federation seriously challenged and

17 Corte Suprema, *Kentucky v. Dennison*, 65 U.S. 66, (1861).

18 Corte Suprema, *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

the premise on which the ruling rests - that the States and the federal government are to be considered co-equal sovereigns - no longer relevant. Recalling, not surprisingly, *Brown v. Board Education* and *Cooper v. Aaron*, the Court affirmed that it was incumbent on federal courts to prevent constitutional violations by State agents or to require them to enforce constitutional obligations. Since the extradition clause imposes a clear obligation, no discretion can be accorded to the governor, who is obliged to implement the requirement, and in this context no weight can be given to the enforcement practice generated between States where it is inconsistent with constitutional precept. Thus, the constitutional obligation meets only two exceptions: that the person charged is not a fugitive, meaning that he or she was not materially present in the territory of the State at the time of the commission of the criminal conduct, and that the fugitive must be subject to criminal proceedings in the State of execution. Similarly, the Court denied that the judges of the executing State - called upon to rule on the writ of habeas corpus by the fugitive – can review the extradition requests based on the violation of federal rights in the proceeding of the requesting State. The executing judge must conduct a deferential review, without entering the merits.

Conclusions

The US experience is interesting to compare with that of the EU. In the former, mutual recognition as a principle is explicitly set in the Constitution and its concrete functioning has been progressively defined by the Supreme Court case-law. It is this institution rather than political federal actors that has progressively struck the balancing between the protection of fundamental rights and the promotion of the federal cohesion. The Supreme Court has finally excluded that exceptions based on fundamental rights can derogate to both the full faith and the extradition clauses. However, at least in relation to the extradition clause, this result took time before being affirmed. Mutual trust among federate units has been enhanced thanks to the progressive definition of common legal standard based on the incorporation doctrine of fundamental rights and on the sharing of the common law tradition. Despite all this, until the 1983 Supreme Court's decision, the experience showed that infringement of fundamental right was a relatively common ground to deny enforcement of an extradition request advanced by a sister State. Moreover, until the 1983 Supreme Court's decision, mutual trust, as a principle, functioned within the limits and the procedures set by horizontal agreements among States.

The EU experience does not rely on a mutual recognition clause enshrined in the Treaty. Rather, each EU secondary act provides for a different level of harmonization

within which the mutual recognition principle must work. Thus, the role played by the political actors in setting the limits and the legal context for the functioning of mutual trust is more significant than the practice in US. Moreover, in Europe, the judiciary is not shaped as a sole federal court, as in US. The CJEU must balance its role with the ECtHR and the national courts, especially constitutional courts. In that regard, the initial CJEU approach, favouring mutual trust over recognition of fundamental rights, has been partially attenuated mainly because of the ECtHR case-law.

However, the threshold the CJEU has set is very high: potentially only systemic violations of Article 3 of ECHR can justify a derogation from mutual recognition.[19] Such a rigid and strict approach may be difficult to implement at the national level. As the U.S. case shows, mutual trust is grounded on homogeneity of legal values shared among territorial units, a process that requires time and constitutive national moments, as effective incorporation of federal rights. In this context, we may evaluate the crisis of rule of law in Central and Eastern European countries and the approach taken by the CJEU.

On the one hand, it is true that the Court of Justice has admitted that a violation of the right to an independent judge can justify an (unwritten) derogation from mutual recognition, thus assuming that a breach of this right is comparable, in terms of seriousness, to that of art. 3 ECHR. This may highlight the strategic importance for the EU to have national independent judiciaries. However, the CJEU did not consider the presence of systemic violations in the judiciary organisation system of a Member State to be sufficient, in order to derogate from mutual trust and mutual recognition The CJEU required the judge of the requested State to verify that such a situation of abstract risk results in concrete risk to the person concerned of violation of the rights of the defence. This is a requirement very difficult to meet and thus presumably destined not to be practically implemented. While this approach of the Court undeniably favours mutual recognition, it does not help to promote effective mutual trust among judges of EU Member States. The logic of promoting "blind trust", re-echoing somehow federal-state structure, does not seem to work and must be reconciled with the fact that the protection of human rights within the EU Member State also involves the role of the ECtHR and national constitutional courts. This judicial pluralism, which has not comparable examples in federal-state structures, makes difficult for the CJEU to strictly pursue the goal of unity and imposes it to adopt a more lenient approach with regard mutual trust and mutual recognition mechanisms.

[19] See, however, in Dublin Regulation field, the *CK* and *Jawo* decisions, mentioned in the text, where the CJEU admitted that even a substantial risk of violation of art 4 CFREU referred to individuals is enough to hinder the transfer of the person concerned.

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Europeanism within the "bounds of reason". Reflections on the prospects of democracy and of supranational political integration

Giuseppe Ieraci

Abstract

The current crisis of the EU and the "clash of nations" within it make it necessary to question the functioning of democracy and the future of the EU. Nations try to reassert themselves and, pressured by internal public opinion, the national political classes react by demanding a return to the past. Without a political center and without a community identity, can the EU overcome these recent crises?

Keywords

European Union, Democracy, European integration

Introduction

The crisis of the European Union (EU) and the clash of nations within it call for questions about the functioning of democracy and the future of the EU. The two aspects are closely intertwined, as the crises of recent times have shown. Classical democratic theory describes the political process as a voter-representative-decision-making circuit. Voters elect representatives, who form a government that makes decisions in relatively impermeable national arenas. Democracy as a political method to solve the struggle for the governmental power (Schumpeter 1942; Sartori 1957) or as a regime of responsiveness (Dahl 1971), has normally been thought of within the confines of well-defined "communities of destiny", which we have called States or Nations, that are entities often combined together in the concept of nation-state, each of which is a relatively separate world, with its own cultures, language and custom. This functioning has been shaken by the affirmation of the global actors as decision-makers in the domestic arenas. These global actors are outside the national democratic voter-representative-decision-making circuit. Those who decide (or strongly condition the decisions) are not part of our community of destiny, perhaps they do not speak our language or follow our customs. After World War II the national decision-making arenas have lost part of their sovereignty, as a result of supranational integration processes, as in the case of Europe, or the emergence of international regimes such as the UN, or the action of other global players such as the World Bank or the International Monetary Fund. These global actors have increased their interference in the domestic politics of the nation-states mainly by resorting to economic sanctions, such as conditional lending, the threat of trade embargoes, and the control of economic and financial exchange mechanisms. The questions we would like to address are twofold: firstly, how has democracy changed in the contemporary world? Secondly will the EU be able to survive this phase of reassertion of national sovereignties?

Accountability and responsiveness in contemporary democratic theory

A few clarifications are necessary before proceeding further. In the democratic process, the accountability of the political class is strongly linked to its responsiveness, because the mechanism of electoral competition for the governmental power is based on the evaluation of the results of its past exercise or the prospects of its future use. Thus, to become accountable, the political class must answer to the demands of the citizenry, or promise to do so. In turn, these demands cannot be met except by transferring support to portions of the political class. Thus, aspiring to become accountable, the fractions

of the political class in competition must respond to someone; for its part, to have its demands satisfied, the citizenry must transfer its support to any of these fractions and make one of them the winner of the competition (Ieraci 2021: 27-46).

Nonetheless, as a result of the transformations of the contemporary world and the ever-deepening interdependencies of nation-states, those who are called upon to make decisions because they have been made politically accountable by the national electorates are not always able to respond sympathetically to the demands, and indeed their responses may be to some extent hetero-directed. Democracy, as a sovereign regime, suffers nowadays from the effects of some external limitations, stemming from global socio-economic interdependencies, which condition the scope of the political response, its content and its ends. This phenomenon has been variously recognized in the social sciences. Already Lasswell (1951) observed how politics today has become globalized, in the sense that the decisions of the individual national political classes influence each other and bring about unexpected effects on a large scale. Politics today would produce insecurity and uncertainty in individuals, precisely because the decisions of the national governing classes have repercussions on a global level, nor can they be taken in total isolation, even when they are the decisions of a world power, as in the case of the United States of America. Mankind, Lasswell concludes, is in such a condition that decisions made within a single political community have an impact on the lives of all other individuals, or at least a very large portion of them, and for this reason, policy science should adopt a world perspective: "The perspective of a policy-oriented science is world-wide, because the peoples of the world constitute a community. They influence each other's destinies" (Lasswell 1951). The globalization of politics (accompanied by the phenomenon of the growth of state apparatuses and functions) prompts Lasswell to argue that the decisions taken by rulers, with respect to the objectives to be pursued and the relative use of resources, should be scientifically scrutinized. In the contemporary era, world relations are characterized by a previously unknown interdependence, whereby what happens or is decided in America affects what happens or is decided in Europe and vice versa; while, in the domestic sphere, the elephantine size of the government, its apparatuses and functions, makes us realize how every single political decision can potentially produce effects on every individual in the community.

More recently, Ionescu (1975) links the ungovernability of industrial states to the presence of two potentially destructive centrifugal drives: from within the state, there are corporations (trade and industrial unions, multinationals and large corporations, local and regional government administrations); from without the state, there are the effects of the interdependence of representative governments, caused by the techno-

logical revolution, which place international developments beyond the control of the national political classes.

These two contributions identify well the problems inherent in the functioning of the electorate-representative-government-decision-making circuit. Firstly, the presence of interfering elements that originate within advanced industrial societies (i.e. the affirmation of corporations) and, secondly, the globalization of the flow of decision-making, which displaces - or simply makes it difficult to locate - the place of decision-making and makes the decision-makers less identifiable.

Market and Democracy

Political science has dealt with the first horn of the problem (the corporations - in the sense of Ionescu (1975) - and their impact on the internal representative circuit) with such a vastness of contributions and a multitude of theoretical and empirical research that it would be futile to attempt to account for it here. The other phenomenon, that of the displacement of the decision-making center from the domestic and national arena to the supranational one, has been less explored and deserves therefore more attention.

In Schumpeter (1942) the theme is practically absent. The capitalist process of "creative destruction" is threatened by monopolies, to which paradoxically Schumpeter attributes a positive function. In fact, creative destruction can manifest itself against a monopoly, to break it once and for all, whereas a hypothetical situation of perfect competition would make any new entry into the market unlikely. Schumpeter emphasizes a transformation of relevance to our problem, namely the progressive decline of the function of entrepreneurs, because the work of offices and committees tends to supplant personal action and as a consequence the economic progress tends to depersonalize and to automate itself. That means that the industrial bourgeoisie has been reduced to an administrative class and tends to disappear, thus an extraordinary phenomenon unfolds:

> "the perfectly bureaucratized giant industrial unit supplants not only the small and medium-sized company and dispossesses its owners, but ultimately supplants the entrepreneur and dispossesses the bourgeoisie [...] The real outriders of socialism were not the intellectuals or agitators who preached it, but the Vanderbilts, Carnegies and Rockefellers" (Schumpeter 1942, 130).

Dahl and Lindblom (1953) and later Lindblom (1977) treated the relationship of the economic sphere to democracy more directly, but within the framework of an inter-

nal regime. Dahl and Lindblom (1953: 3-6) rejected the approach of Schumpeter and others, based on the opposition of "great mythical alternatives", such as capitalism/socialism, and trace the possibilities of controlling social action back to the "choice between specific social techniques", in a very broad field of opportunities for political and economic intervention.[1] With regard to the relationship between democracy and the market, Lindblom emphasized the public role of the business managers, as "a large category of leading decisions [on every fundamental aspect of production and distribution] is reserved for entrepreneurs, large and small, and is removed from the government's sphere of influence", thus "entrepreneurs become a kind of public servants, exercising what, in a broad view of their role, are public functions" (Lindblom 1977: 181). In other words, entrepreneurs occupy a privileged position in the polyarchic political system that is quite different from that of interest groups and other actors who exert pressure on the government: "they [form] a second group of prominent leaders in government and politics" (ib.: 186). Thus, systems based on private enterprise are characterized by a "duality of leadership" (ib.: 191).

This last is a very relevant passage of Lindblom's analysis, because if on the one hand there are effective controls on public officials by the polyarchic mechanisms - we know them: accountability and responsiveness -, there are at the same time controls exercised by entrepreneurs who exploit their privileged position and exercise leadership. However this second group of leaders is not subject to polyarchic control, that is "the privileged controls of corporations are largely independent of the electoral controls of the polyarchy" (ib.: 201). In our terms, entrepreneurs are neither accountable nor responsive. This leads to a "conflict between electoral and privileged controls" which results in a restriction of the "reach of the polyarchy" (ib.: 203). We observe a "rivalry between privileged corporate controls and polyarchic controls" and a "struggle of entrepreneurs to dominate polyarchic politics, in which they acquire a greatly disproportionate influence" (ib.: 211).[2]

Although these classical contributions do not directly answer our question about the decline of polyarchy sovereignty due to international interdependencies, three phenomena relevant to it are clearly illustrated. Firstly, we observe the duality of leadership in contemporary polyarchies when we look at the role that international elites play in

[1] Price system, hierarchy, polyarchy and bargaining are the four basic socio-political processes for exercising rational choice and control in economic life (Dahl and Lindblom 1953, 99-109).

[2] Lindblom also analyzed the propensity of government and business leaders to develop alliances not only internally, but also externally between "second-tier roles in business and government, administrators and teaching staff at universities, media managers, younger people who aspire to improvements, and parents who harbour ambitions for their children" (Lindblom 1977: 242). It is well known that Lindblom (1977) and later Dahl (1985) looked at the Yugoslav self-management model as a possible answer.

conditioning the choices of domestic elites. As in the case of the privileged position of entrepreneurs described by Lindblom, international elites and officials operating through international organizations and regimes exercise effective control over the reach of polyarchies, so these elites and officials play a public role. Secondly, this public role is played by a management framed in bureaucratic roles and, similar to the case of the entrepreneur in contemporary capitalism described by Schumpeter, the conditioning action becomes depersonalized and automated. Thus, control over the reach of polyarchies takes on the character of inescapability and objective intervention above partisan interests. Thirdly, no polyarchic electoral control acts on these international elites, they are not accountable for the decisions they impose or strongly condition.

How to measure the relative decline of polyarchical control?

To avoid reducing the debate on the relative decline of polyarchic control to a sterile complaint about the "democratic deficit", one should reflect on the implications for research arising from the three phenomena mentioned above (duality of leadership; automation of decision-making; absence of accountability).

Regarding the first aspect, granted that the expression 'duality' is merely denotative, since one should ultimately speak of a dynamic of leadership stratification from the national to the global level, the decisive point remains the position and role of national (hence elective) governing elites in the very complex network of interactions at the global level. Here we encounter, of course, international regimes and organizations,[3] in which sovereign states participate according to a mainly intergovernmental logic. Thus, in international regimes and organizations, member states are represented by delegations of their governments, but they also contribute by promoting and recruiting civil servants and officers who operate in a relatively autonomous way within the scopes of those international regimes and organizations. Already Dahl and Lindblom (1953: 467-468) observed how the United States was involved in a multiplicity of agencies to serve the purposes of cooperation and development with other nations, providing a provisional list of them that they themselves described as incomplete. In a general sense, a state's membership in an international agency entails a variable degree of ceding sovereignty, or at least a disposition to recognize the role of other leaderships in defining national political ends. When states coordinate among themselves, Huntington's (1968) solution to the problem of public interest no longer

[3] On the concept of the international regime and for an analysis of the binding nature of its rules, see Clementi (1999).

applies: "What benefits the presidency benefits the country", or "What benefits the presidium benefits the Soviet Union". Presidency, in one case, presidium, in the other, are no longer in a position to define independently the public interest and are subject to conditioning to which they have deliberately surrendered themselves by joining various international agencies.

From this point of view, we are indeed in the presence of a stratification of state-national and international authority that deserves to be investigated. Following the suggestion provided by Dahl and Lindblom (1953: 467-468), a first research step could be to analyze the degree of inclusion/integration of state governments in international regimes, organizations and agencies.[4] The hypothesis underlying this type of test has a simple formulation: the greater the number of international organizations and/or agencies in which a state participates, the lesser the capacity of its leadership to autonomously define the 'public' or 'national' interest. The latter concepts should be understood precisely in Huntington's sense, referred to above, as the leadership's relatively autonomous capacity to identify the political objectives to be pursued. The decline of this capacity depends on the propensity of member states of international bodies to enter into end-agreements with other states and to select policy objectives on the basis of supposed interests of the international community, so that the national political agenda is set elsewhere and the possible domestic policy response is severely limited by that involvement.

Of course, the weight of each member state in any given international organization or agency can vary greatly, depending on the position occupied within them and the influence exercised in decision-making flows. For example (and a well-known example to all), being a member of the United Nations Security Council gives certain states a capacity for influence and, therefore, greater weight in the deliberations taken, even better if one is a member by right or a permanent member of that Council. Here the research hypothesis is: given the same inclusion/integration of two or more states in international organizations and/or agencies, the relative weight of each varies as the roles and positions occupied in international organizational structures vary. This hypothesis balances the previous one, in the sense that we can accept that a state's willingness to cede shares of sovereignty over the national 'public interest' is commensurate with its expectations of immediate power, or simply control over the activities carried out by the body in question.

Both of these research directions serve the purpose of arriving at a morphology of the distribution of power in international organizations and agencies and could be

[4] A very useful starting directory is provided, for example, by Schiavone (1997), which indicates for each state the international organizations it participates in.

carried out using a purely 'positional' methodology, i.e. recording the positions occupied by each state and assigning a score to each record so as to arrive at an initial measurement of the stratification of international leadership. To refine the investigation, however, it would also be necessary to empirically address the other two phenomena, namely the automation of decision-making and the absence of accountability. Underlying all this is the perception that the 'policy arenas' or 'arenas of power' (Lowi 1964, 20) have changed profoundly in contemporary times, not only because of the increasing weight of administrative groups and structures, but also because of the globalization of decision-making processes. Policy science has adequate tools at its disposal to develop a new season of research on international decision-making processes: from network analysis ('policy network framework') to its sub-specifications, such as the analysis of policy communities ('policy communities') and advocacy coalition theory ('advocacy coalition framework') (Ieraci 2016; Lanzalaco e Prontera 2012), but above all the 'international political economy' approach (Ferrera 1989).

Through the study of decision-making processes, the actual incidence of international organizations and agencies, as well as their apparatuses, in the process of selecting political values should be verified. Political decision-making appears automated and domestic leaderships lack accountability because they play a marginal role in defining the political values to be pursued.

An example may serve to clarify this point (Ieraci 2019). In 1999, the European Union issued a directive (EC 30/1999) aimed at imposing no- tolerance limits on the dispersion of 'particulate matter' or fine dust (PM_{10}) in the atmosphere of urban areas. By the end of the 1980s, within the framework of Community policies, environmental policy had gradually attained its own specificity and, above all, a relative degree of autonomy guaranteed to it by the role of the Commission, at the proposal stage, and by the organizational growth of DG XI and the European Environment Agency (EEA). The Commission, DG XI and its working groups, EEA and other agencies acting in the field of environmental policy constitute a sort of inner circle in the formulation of the policy problem, due to their technical expertise and management of the relevant data in its definition. These actors seem to constitute a kind of advocacy coalition of environmental policy.

In the case of the Directive (EC 30/1999), at least two actors from outside the EU apparatus also intervene in the identification of the policy problem. These are the World Health Organization (WHO) and some European governments (the "green troika" made of the German, Danish and Dutch governments). The WHO, through studies and research, moral suasion, indicates minimum requirements for health protection, while the governments of the "green troika" stand as guarantors of the targets set by the WHO and provide virtuous examples of environmental protection that the Commission adopts as a reference. The enforced no-tolerance limits for particulate air

pollution (maximum daily and annual thresholds) were the result of these influences and were imposed without much consideration for the geographical differences in Europe and the different development patterns.

Finally, the ancillary function of the European Council of Ministers and the European Parliament should be noted, especially on the basis of the cooperation procedure adopted here. In the European Parliament, the influence exerted by the "green troika" and the ecological parties is pronounced, the Parliament and the environment committee within it offer support for legislative proposals on environmental issues. The case of Directive 30/1999 would seem to show how the intergovernmental character of the EU decision-making process declines (Fabbrini 2013) when it comes to strongly autonomous policy arenas, and how the European Council of Ministers in these cases fails to balance the impulses coming from the Commission and its agencies, as well as - in the specific case studied here - from outside the EU itself.

If we look at the impact of Directive 30/1999 on Member States and local and urban governments, with particular reference to Italy, the effect of the automation of decision-making and the absence of accountability is very evident. On the one hand, the communities and leadership on which the implementation burden falls have in no way contributed to the definition of the maximum permitted limits of particulate pollution; on the other hand, they see themselves as directed by external actors, who are sometimes even difficult to identify, and very demanding and difficult to comply with, under the given conditions. In this way they expose themselves to the effect of the sanctions forced on non-compliant states.

EU as a global actor and the future of Europe

Having thus defined the current crisis of democracy, we can now turn to the second set of problems. What is the role of the EU today? Can the EU survive the current crisis? We have observed the duality of leadership in contemporary democracies, because of the growing role of the international elites and officials operating through international organizations and regimes. These international elites are not accountable for the decisions they impose or strongly condition, they are not submitted to any democratic electoral control. Today's populist vein has the familiar characteristics of revolt against the political classes, against national and supranational political institutions, and now therefore against the EU.

This revolt presents itself as a clash of nations within the EU. The management of migration, the question of whether it is exclusively up to the nation of arrival of the migrants to provide assistance and asylum to them (Dublin Convention), the rigidi-

ties introduced in 2012 by the Fiscal Compact (which is still an international treaty), the government of the public debt of the PIGS (Portugal, Italy, Greece, Spain) and recently the debated possibility of derogating from the rules of the Fiscal Compact to cope with the pandemic emergency and above all to redistribute income to the social classes that suffered direct economic damage due to the lockdown, in all this the EU member-states have rediscovered themselves as sovereign nation-states, and national public opinions see in the EU an enemy.

Will the EU survive this? I think there are reasons to believe that it will, but things may never be the same again. Let us start from the assumption that the EU is a very articulated institutional complex and which has become stabilized over time. A basic principle is that political institutions, when they have stabilized, are very resilient and change by adapting to new circumstances. To understand how this happens, one has to question the functions that institutions perform (Ieraci 2021: 39-43). A neo-contractual school of thought thinks that political institutions are voluntary constructs aimed at solving coordination problems or even at reducing - in economics - transaction costs, as well shown by Douglass North (1990). Another school, which we could call neo-realist, looks at the political struggle and without reticence says that in politics there are winners and losers (see for example Terry Moe 1990). Institutions would serve to mitigate what we might call the "costs of exclusion" from the enjoyment of political power, whether it be for ideal, personal or collective gain (Ieraci 2021). In both perspectives, one understands why institutions are resilient and die hard. Individuals, political and social actors, groups, parties, governing classes benefit from institutions, either because they make exchanges and relations predictable and sustainable (neo-contractual perspective), or because they guarantee the losers against the selfishness of the winners (realist perspective). In other words, given a set of relatively established institutions, when something no longer works and the toy breaks, everyone has some interest in putting it back into operation, modifying it as necessary.

The EU, as a political-institutional complex, is more a mechanism for coordinating certain national policies than an instrument for resolving the political struggle. Philippe Schmitter (1996) called it a "condominium", not a true supranational state, and in the European condominium there are some common parts (e.g. currency, agrarian policy, cohesion policies) and many important private parts (e.g. armies and police, justice and taxation, labor market policies). The attempt to make the EU an institution to also settle the political struggle - an old dream of Altiero Spinelli and Jean Monet - has never really got off the ground and recently foundered again with the European Constitution prepared by the European Convention in 2003 and buried by the French and Dutch referenda in 2005. European integration, after all, has mainly followed functionalist, i.e. condominium, and never political lines of development.

Many argue that the EU will not survive because it does not have a political center, but I argue that instead it can overcome even these recent crises despite not having a political center. The reason lies in the double value of the institutions mentioned above. A multitude of coordination problems between the policies of the European states can still be solved by the mechanisms of the EU. The gigantic transaction costs generated by a neo-mercantile turn of the national economic systems frighten everyone, especially entrepreneurs and significant portions of the political class, as the Brexit case. It may be that in the future the "variable geometry" of European integration will be accentuated, with some states maintaining their current ties and perhaps forging new ones, while others will slip away on this or that issue. After all, this is how it all started, with multilateral agreements on coal and steel, then on agriculture. All of this could still continue indefinitely, because by staying out you lose more. Europe could continue to survive, without governing its major problems, and the "toy" could be readapted to more immediate and functional purposes for the states.

Pressurized by the eagerness for a return to the sovereign states – a trend which should be called by its name: nationalism – Europe's future is therefore uncertain, even though the prompt response to the recent economic crisis caused by the COVID-19 pandemic has shown that the UE is far from useless. Can a European interest be opposed to conflicting national interests? Does it make sense to speak of a European interest? At first glance this is problematic, given that there are 27 states in the EU with as many freely elected governments. I would therefore suggest starting with the question of whether there is a national interest at all. Since I will argue that there is no such thing as a tangible national interest, I come to the paradox that if we accept the term national interest, it is incomprehensible why we cannot *a fortior*i use the term "European interest" in reference to a "Union of sovereign nation states".

To support this seemingly paradoxical argument, I start from the observation that common sense personifies the nation, treating it as something existing in reality. Many profound studies on nationalism (see above all Goio 2021), starting with Mario Albertini's *Lo Stato nazionale* (1960) and Federico Chabod's *L'idea di Nazione* (1961), have posited that the nation is not something that exists, it is not a thing. "The idea of nation is, first and foremost, for modern man, a spiritual fact, it is soul, spirit", wrote Chabod (1961: 11). More explicitly, Albertini reduces the nation (and nationalism) to the ideology of a particular form of power, that of the state (on this point, see Goio 2021). The obvious conclusion, in line with certain arguments of S.P. Huntington (1968) on the public interest and the Realpolitik school, is that the national interest is only a declination of the nationalist ideology, it is what the ruling class determines it to be.

Some might argue that, as a spiritual or ideal fact, the nation pre-exists the political classes, it would be something inherent in the original political communities that are living. This organicist argument blatantly ignores that that spiritual fact is created with blood and tears by state power. The language and culture of a nation are often pointed to as indicators of the spiritual fact. Many are unaware, for example, that even between the 16th and 18th centuries in parts of today's Great Britain (Cornwall, Wales, Scotland) English was neither understood nor spoken, and that the English government forced the use of the English language in a very blunt manner: suppressing indigenous languages (the case of Welsh, abolished for four centuries, is well known) and inflicting heavy punishments, even physical punishment, on those who persisted in speaking them. Similar evidence can be excepted from the history of French as a national language and France as a political community. The nation state artfully creates a single cultural, ethnic and linguistic identity, and conditions us to believe that it has always existed and that it is in our interest to defend it. On this basis, the nation-state - i.e. its political class - defines the national interest as the necessary defense of the identity it has artificially created.

The argumentative leap is now bold, but consequential. If the state has created the community we call nation and the ideology of national interest, what is to prevent a "European community of destiny", which we could perhaps call "Union", and a European interest as an ideology that mobilizes the defense of that community? If the nation-state has succeeded in its ideological manipulation, imposing a language, homogenizing ethnic and anthropological traits, creating the character of the nation (to use Federico Chabod's language again), why could not Europe, or another supra-state entity, one day, succeed in doing so, if it were to rely on different elements of integration and identification, such as the individual, or law, or social justice, or "being European"?

Of course, there is a big difference and a big obstacle. The former is the centuries-old habit of thinking of us in terms of national characteristics (who remembers George Orwell's (1941) fine pages about the bad-toothed English and the rowdy Italians?),[5] but let it be said that even the peoples that pre-existed England and France had their own atavistic and inalienable characters, which they then lost or forgot over the centuries. The latter, on the other hand, is given by the fact that states build their nations using the monopoly of violence, thanks to which they can "soften the pain of childbirth": they have suppressed languages that already exist, inflicted severe punishments on those who used them, de-

[5] "National characteristics are not easy to pin down, and when pinned down they often turn out to be trivialities or seem to have no connexion with one another. Spaniards are cruel to animals, Italians can do nothing without making a deafening noise, the Chinese are addicted to gambling. Obviously such things don't matter in themselves. Nevertheless, nothing is causeless, and even the fact that Englishmen have bad teeth can tell something about the realities of English life."

ported populations, even physically eliminated them in some tragic occasions. The state is not a benevolent creature, it is a Leviathan. Obviously, the EU would not do this, even if it were able to. Today, many argue that a supranational entity is impossible or difficult because it could not or would not deliver and guarantee the same rights and services as the state. However, there is no reason why those same services and rights offered today by the nation-state (health protection, pension scheme, education, housing and similar) should not and could not be guaranteed by supranational bodies or "continental states" (which have existed in the past and still exist in the world today). The nation-state has progressed by unifying territories and services, it is hard to see why a larger entity cannot do the same. Of course, the problem is - as the early European federalists well knew - the construction of an effective center of power in Europe, i.e. the possibility of a new supranational monopoly of violence, with its implementing and administrative levers. We know, it is a cyclopean and today probably unrealistic endeavour, but it is not illogical to think so, nor is it absurd to speak of the European interest, as if it were an ideal less worthy of being defended than the national interest.

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Populist parties in Central and Eastern Europe: Regional trends in comparative perspective

Mattia Zulianello

Abstract

This paper explores the populist phenomenon in Central and Eastern Europe (CEE) by highlighting the key similarities and differences compared to Western Europe. Both regions are marked by the widespread presence of right-wing populist parties, which exist in nearly every European country. However, the two areas differ in two important respects. First, left-wing populism is virtually non-existent in CEE countries. Second, unlike Western Europe, CEE is a fertile ground for the success of valence populism, a distinct populist variety that has emerged in various countries of the region. This paper also sheds light on the controversial relationship between populism and Euroscepticism, as well as the underlying tension between populism and liberal democracy. By examining these topics, it provides insights to understand the populist phenomenon in CEE, and its broader implications for the European political landscape.

Keywords

Populism, Populist parties; Central and Eastern Europe

Introduction

Since the fall of communism and the establishment of liberal democracy, the countries of Central and Eastern Europe (CEE) have witnessed significant electoral volatility and political instability. Tim Haughton and Kevin Deegan-Krause (2020) accurately described this pattern as "enduring disruption", which is characterized by the sudden collapse of seemingly established parties, the emergence of new parties and their equally rapid disappearance. This cycle of instability has contributed to a turbulent political landscape in the region. CEE has also registered the rise and fall of several populist parties that gained significant electoral support, entered national governments, and even became dominant players in the political arena in various countries, as exemplified by prominent cases in Bulgaria and Hungary.

This article provides a comparative overview of the essential ideological features of populist parties in CEE, contextualizing them within the broader European context. It aims to offer insights on populism in CEE, highlighting its key similarities and differences compared to Western Europe. By the means of this comparative exercise, it becomes evident that both the East and West of the Old Continent are characterized by the widespread presence of right-wing populist parties, which have achieved success in a majority of European countries. However, two important differences emerge.

First, left-wing populism is almost non-existent in contemporary CEE, with the exception of Slovenia. This sets CEE apart from Western Europe, where successful left-wing populist parties can be found in countries such as Germany, Greece, France, Ireland, and Spain. Second, CEE proves to be a fertile ground for the emergence of valence populism, a distinct form of populism that has gained traction in various countries within the region. This is different from Western Europe, where valence populism can be identified only in Italy.

By conducting a comparative analysis, this article provides valuable insights into the diverse characteristics and manifestations of the populist phenomenon in CEE, while placing it within a broader European perspective. It also explores the relationship between populism and Euroscepticism, as well as the controversial interaction between populism and liberal democracy.

Defining populism

Populism is certainly one of the buzzwords of our times (Hunger and Paxton 2022). However, despite the multitude of perspectives found in the literature (for an over-

view, see Rovira Kaltwasser *et al.* 2017), the so-called "ideational approach" to the study of populism has become increasingly popular among scholars. As Cas Mudde (2017: 47) underlines "even though it is still far too early to speak of an emerging consensus, it is undoubtedly fair to say that the ideational approach to populism is the most broadly used in the field today". According to this approach, populism is understood as a particular set of ideas characterized by a moral and Manichean conflict between the "pure people" and the "corrupt elite" that glorify the "general will of the people" (Mudde 2004: 543). The key point is that populism essentially refers to a moral struggle between the goodness of "the people", on the one hand, and the evil nature of "the elites", on the other. Most notably:

> populism is moralistic rather than programmatic. Essential to the discourse of the populist is the normative distinction between 'the elite' and 'the people', not the empirical difference in behavior or attitudes. Populism presents a Manichean outlook in which there are only friends and foes. Opponents are not just people with different priorities and values, they are evil! Consequently, compromise is impossible, as it 'corrupts' the purity (Mudde 2004: 544).

Populism essentially refers to a moral understanding of politics and society, and is commonly attached to other additional ideological features ("thick" or "thin") that are crucial for its capacity to convey political meaning to the voters (Mudde and Rovira Kaltwasser 2017). While populists always emphasize the moral and Manichaean conflict between the people and the elite while exalting popular sovereignty, the specific meaning taken by these terms is shaped by its interaction with other, additional, ideological and/or programmatic elements. This is possible because of the "protean" nature (Stanley 2008: 100) of populism itself, which is only a "thin-centred", incomplete, ideology (Mudde 2004). Consequently, from populism alone does not necessarily follow a pre-determined political agenda or program:

> while populism should be conceived of as a specific set of ideas, it is distinct from classical ideologies such as fascism and liberalism because it has a limited programmatic scope[…] In fact, populism almost always appears attached to other ideological elements, which are crucial for the promotion of political projects that are appealing to a broader public (Mudde and Rovira Kaltwasser 2018: 1669).

The ideational varieties of populism

The thin-centred nature of the populism explains its capacity to be "highly chameleonic" (Taggart 2004: 275). In the real world, populism never exists in isolation, and is always found in combination with other ideological and programmatic elements. Accordingly, populist actors are found across the political spectrum, and it is appropriate to speak of varieties of populism (e.g. Caiani and Graziano 2019; Gidron and Bonikowski 2013; Norris 2019). Although it is possible to identify more specific subtypes, it is sufficient to note that from an ideological or ideational point of view, contemporary European populist parties can be divided into three main groups: right-wing, left-wing and valence populism (Zulianello 2020; Zulianello and Larsen 2021; Zulianello and Larsen 2023). Each of these three groups displays the core "the people *vs* the elite" distinction at the heart of populism, but they do so in very different ways, according to the interaction between the "thin" ideological feature (populism itself) with other ideological and/or programmatic elements.

Following Norberto Bobbio (1996), the major distinction between right and left can be operated on the grounds of their different propensity towards egalitarianism. Right-wing populist parties are themselves a broad church, and are characterized by an exclusionary notion of "the people" (Mudde & Rovira Kaltwasser 2013). Inequality is seen as something natural, and is legitimized in either socio-economic or cultural terms, according to the specific interaction of populism with other ideologies, such as nationalism or neoliberalism. Within the broad group of right-wing populist parties is found the populist radical right sub-type, which blend nativism, authoritarianism and populism (Mudde 2007). These parties are "the most successful new European party family since the end of the Second World War", and the most-studied European party family as well (Mudde 2013: 4).

In comparison to right-wing populism, left populism is still relatively little-studied. This variety of populism is often analysed in its radical left manifestation (March 2011; Kioupkiolis and Katsambekis, 2018), which presents an inclusionary understanding of the 'pure people' and combines it a critique of capitalism (March and Mudde 2005). As Luke March underlines (2011: 122): left-wing populism 'emphasizes egalitarianism and inclusivity rather than the openly exclusivist anti- immigrant or anti- foreigner concerns of right- populism (i.e. its concern is the demos not the ethnos)'. Left-wing populists embrace some vague form of socialism and include in their understanding of the "pure people" the "socioeconomic underdog" (Mudde and Rovira Kaltwasser, 2018: 1670).

Finally, a third variety is represented by valence populism (Zulianello 2020; Zulianello and Larsen 2021; 2023), While left-wing and right-wing populism are, by

definition, positional in nature, valence populists are intrinsically "non-positional". Most notably, valence populists are characterized by deliberate positional blurriness on key economic and cultural issues (Zulianello and Larsen 2023) because they lack a 'thick' ideology (e.g. nativism or socialism). Indeed, their ideological core is a 'thin' one, being constituted by populism itself. Hence, valence populists primarily engage in non-positional competition and focus on (valence) issues that are widely shared by voters, such as the fight against corruption, moral probity in politics and the call for democratic transparency and performance (Yanchenko and Zulianello 2023; see also Pytlas 2022).

Varieties of populist parties in CEE

The previous section has suggested that populist parties come in different shapes and forms. At this point, it is useful to assess the geographical diffusion of the different varieties of populism in Europe, especially by comparing CEE with Western Europe. Are there substantial differences between the two regions? This question can be tackled by using the dataset by Zulianello and Larsen (2021), which provides fine-grained information on the electoral results of populist parties in European elections (1979-2019).

By focusing on the results of the 2019 European Parliament (EP) elections some very interesting patterns about the geographical distribution of the three main ideational varieties of populism can be identified. Table 1 shows that right-wing populism was, at that time, present in the vast majority of EU countries, with Croatia, Ireland, Latvia and Romania being the only exceptions. Right-wing populists also obtained two-digits results in seventeen countries out of twenty-eight, and managed to get at least one per cent of the votes in eight out of eleven countries in CEE. In the 2019 EP elections, Hungary emerged, by far, as the most fertile ground for right-wing populism in Europe, as this populist variety obtained a remarkable 62.2%. Such an outcome was due to the success of Fidesz (Hegedüs 2021), the party led by Prime Minister Viktor Orbán, which collected 52.6% of the votes, but also to the performance of the two smaller right-wing populists found in the country (Goldstein 2021), that is Jobbik (6.3%) and Our Homeland Movement (3.3%). While Italy takes the second position (49.5%) among the countries with the strongest performance of right-wing populists, especially because of the performance in that occasion of Salvini's League (34.3%) (Albertazzi *et al.* 2021; Zulianello 2021), Poland is another country from CEE to get on the podium of right-wing populist success (49.1%), thanks to the result of Law and Justice (45.4%) and, to a lesser extent, Kukiz'15 (3.7%) – see, respectively, Gwiazda (2021) and Lipiński and Stępińska (2019).

Table 1 - Aggregate electoral performance of right-wing populist parties in the 2019 EP parliament election (decreasing order). CEE countries are shown in *italics*.

Country	**Vote share (in %)**
Hungary	*62.2*
Italy	49.5
Poland	*49.1*
Great Britain	34.9
Slovenia	*30.3*
France	26.8
Austria	17.2
Sweden	15.3
Netherlands	14.5
Belgium	13.8
Finland	13.8
Bulgaria	*13.5*
Estonia	*12.7*
Germany	11.0
Denmark	10.8
Luxembourg	10.0
Czech Republic	*10.0*
Slovakia	*7.3*
Greece	6.2
Spain	6.2
Lithuania	*2.7*
Portugal	1.5

Source: own elaboration from Zulianello and Larsen (2021)

While right-wing populism is widespread in Europe, both West and East, table 2 shows that left-wing populists were found only in six EU member states. Among them, the top performer was Greece (28.4%) thanks to the combined result of three left-wing populist parties (see Tsatsanis *et al.* 2021): SYRIZA (23.8%), the European Realistic Disobedience Front (3.0%) and Course of Freedom (1.6%). Beyond the Greek case, left-

wing populist parties obtained more than 10% of the votes only in Ireland (11.7%) and Spain (10.1%), thanks to the Sinn Fein and Unidas Podemos, respectively (Stockemer and Amengay 2020). Table 2 also signals an important point: with the exclusion of Slovenia, left-wing populism was absent in CEE at the time of the 2019 EP elections. Indeed, the only instance of a left-wing populist party in the region was represented by the Slovenian The Left (6.4%), which "combines a strong ideological core of democratic socialism with a light populist appeal" (Toplišek 2019: 89). The very limited appeal of left-wing populism in CEE is confirmed by extending the perspective to cover the entire history of EP elections in the area (2004-2019). Indeed, if we exclude Slovenia, the only country in the region that had a relatively successful left-wing populist party was Poland, with Self-Defense (10.8% in 2004, for details, see Krok-Paszkowska 2003).

Table 2 - Aggregate electoral performance of left-wing populist parties in the 2019 EP parliament election (decreasing order). CEE countries are shown in *italics.*

Country	**Vote share (in %)**
Greece	28.4
Ireland	11.7
Spain	10.1
Slovenia	*6.4*
France	6.3
Germany	5.5

Source: own elaboration from Zulianello and Larsen (2021)

While left-wing populism is virtually non-existent in CEE, table 3 suggests that the region represents a fertile ground for valence populism. Most notably, six out of the seven countries where valence populist parties took part in the 2019 EP elections are located in CEE: Bulgaria, Croatia, Czech Republic, Latvia, Lithuania, Slovakia and Slovenia. The only contemporary exception to this geographical trend is represented by the Italian Five Star Movement (see Angelucci and Vittori 2021; Manucci and Amsler 2018; Mosca and Tronconi 2019), which was described as "the purest form of populism" (Tarchi, 2015: 338).

Within the CEE context, in the 2019 EP elections valence populists proved to be particularly successful in Bulgaria, the Czech Republic and Slovenia. In the Bulgarian case, valence populist success was due to the performance of Citizens for European Development

of Bulgaria (GERB, 31.1%), which had been in power for more than a decade, between 2009 and 2021, and that of the small National Movement for Stability and Progress (1.1%, see Stoyanov and Ralchev 2021). Interestingly, GERB is a paradigmatic example of this populist variety as it "is not based on a specific ideology or political profile, even though it is a part of the European People's Party (EPP) and defines itself as 'centre-right' and 'Christian-democratic' party" (Todorov 2018: 52). In the Czech Republic, valence populism was embodied by the Action of Dissatisfied Citizens (ANO 2011, 21.2%), founded and led by Andrej Babiš. Most notably, especially during his period as Prime Minister "Andrej Babiš represent[ed] the 'ordinary man' who can get things done by running the state as an 'efficient' political firm, doing away with democratic deliberation, pluralism, and compromise" (Buštíková and Guasti 2019: 303). In line with defining features of valence populism, ANO 2011 focused on presenting itself as "a technocratic and competent party, successfully managing the state finances and acting to resolve people's problems effectively" (Hloušek *et al.* 2020: 52). In this respect, it is important to underline that valence populists in CEE often relies on messages grounded on technocratic appeals to problem-solving (Havlík 2019). Finally, in the 2019 EP elections valence populism was successful in Slovenia too, thanks to the result of the now defunct List of Marjan Šarec (LMŠ, 15.4%). Marjan Šarec was Prime Minister between 2018 and 2020, and his party benefitted, in its initial phase, from a message focused on "the need to fundamentally revise the political game" (Krašovec and Deželan 2019: 317).

Table 3 - Aggregate electoral performance of valence populist parties in the 2019 EP parliament election (decreasing order). CEE countries are shown in *italics*.

Country	**Vote share (in %)**
Bulgaria	32.2
Czech Republic	21.2
Italy	17.1
Slovenia	15.4
Croatia	10.4
Slovakia	5.3
Lithuania	5.1

Source: own elaboration from Zulianello and Larsen (2021)

The tendency of CEE countries to present right-wing and valence populist parties but not left-wing ones is confirmed by adopting a longer-term perspective encompassing

the history of EP elections held in the region (Zulianello and Larsen 2021). In this respect, while right-wing populist parties managed to obtain at least one per cent of the votes in at least one EP election in all CEE countries (with the exception of Croatia), valence populists had been present in six CEE countries: Bulgaria, Croatia, Czech Republic, Lithuania, Romania, Slovakia and Slovenia.

Finally, it is worth to spend a few words on a persisting misconception, namely that populist parties are Eurosceptic (almost) by definition even though the literature has stressed the importance of avoiding treating populism and Euroscepticism as synonyms (Rooduijn 2019). Following the conceptualization by Paul Taggart and Aleks Szczerbiak (2004), Euroscepticism can be used to refer to the parties that:

> express the idea of contingent or qualified opposition, as well as incorporating outright and unqualified opposition to the process of European integration. This includes both 'hard Euroscepticism' (i.e., outright rejection of the entire project of European political and economic integration, and opposition to one's country joining or remaining a member of the EU) and 'soft Euroscepticism (i.e., contingent or qualified opposition to European integration) (Rooduijn 2019: 2, online appendix).

In this respect, it can be noticed tht populist parties in CEE tend to be more Europhile than their counterparts in Western Europe. Using data from Matthijs Rooduijn *et al.* (2019) it can be seen that while 59.3% of populist parties in CEE are also Eurosceptic, the results are much different in the rest of Europe, where a remarkable 85.5% of populist parties embrace Euroscepticism. A possible explanation for this divergent pattern between the West and the East is the concentration of valence populist parties in the latter area which tend to favour non-positional competition, such as anti-corruption appeals, call for political transparency and competence, rather than positional competition, for example socio-cultural, economic and EU-related issues (Zulianello and Larsen 2023; see also Engler *et al.* 2019). Finally, it is worth adding that, similarly to Western Europe, various parties in CEE are Eurosceptic but not populist, such as the Communist Party of Bohemia and Moravia in the Czech Republic (Kaniok Hloušek 2018) and the extreme right Kotleba in Slovakia (Kluknavská and Hruška 2019).

Concluding remarks

This article outlined the main features of populism in CEE, especially by comparing them with the other European countries. It suggested that in CEE the populist phenomenon primarily manifests itself in the form of right-wing and valence populism,

while a third variety, left-wing populism, is virtually non-existent in the area. At this point, it is useful to briefly discuss why the rise of populism remains a challenge to "real existing" democracies (cf. Schmitter 2011).

Populism is in tension with key elements of liberal democracies, particularly the legitimacy of intermediate institutions, the foundational value of pluralism, and the protection of minority rights (e.g. Bartha *et al.* 2019; Blokker 2019). This is due to the predominant emphasis placed by populism on the glorification of popular sovereignty and its hyper-majoritarian conception of democracy. As Cas Mudde and Cristobal Rovira Kaltwasser (2012: 17) underline, "after all, 'the general will of the people' cannot be limited by anything, not even constitutional protections, that is *vox populi*, *vox dei*".

However, despite the intrinsic tension between the core ideational features of populist parties and that of liberal democracy, such actors are no longer just "new outsider-challenger parties, but also as institutionalized and integrated members of the political system" (Mudde 2016: 16). In fact, more than two-thirds of contemporary populist parties are integrated into their national party systems, and only one-third are still perceived as not coalitionable (Zulianello 2020). The pattern is even more pronounced if we focus on CEE countries, where 82.6% of populist parties took part in coalition governments and/or electoral coalitions with mainstream parties (*ibidem*). Populist integration in CEE is even more frequent and rapid than in Western Europe, primarily due to the emergence of new parties that experience tumultuous electoral performances shortly after their launch. In particular, these parties can become pivotal players in government formation during the very early phase of their lifespan.(see Bergman *et al.* 2020; Haughton and Kevin Deegan-Krause 2020).

While until a few decades ago populist parties, especially populist radical right ones, were at the margins of their national party systems, they are now increasingly accepted as coalition and/or government partners throughout Europe and have become "mainstream" in many European countries (Zulianello 2020; see also Moffitt 2022; Wolinetz and Zaslove 2018). In other words, the incorporation of such parties has enabled the extension of the area of government (see Ieraci 1992; see also Ieraci 2021), making possible the inclusion of actors that were previously considered as being unfit for coalitions. Nevertheless, differently from the past (e.g. Sartori 1976) the integration of antagonistic parties has not been accompanied by their throughout ideological reform: on the contrary, populist parties remain different from more traditional, established parties. Tjitske Akkerman (2016: 268; 277), explains that right-wing populist parties have often changed "their anti-establishment behaviour", meaning that they have abandoned "their lone opposition and increasingly cooperate with other parties"; however, they usually do so while maintaining their radical positions and without "moderat[ing] their anti-establishment ideology".

The integration of populist parties in fully-fledged liberal democracies is, by definition, 'negative' (Zulianello 2020), precisely because of the enduring tension between populist ideas and the values of liberal democracy. This is the predominant pattern found in Europe: however, precisely CEE suggests that populism can also undertake a different path of integration as shown by the Hungarian case. In 2018 Hungary took the "final step towards a (competitive) authoritarian regime" (Mudde 2018) following the abolition of independent judicial control over the government. Indeed, the illiberal values of Viktor Orbán's Fidesz, the dominant party in the country, are fully enshrined in the Hungarian political regime (Batory 2016; Kim 2021), despite being in open contradiction with the fundamental values of the European Union (Kelemen 2017). It is important to underline that the use of the adjective "positive" does not imply a judgment of value (just as it does not the concept of "negative integration"), but it simply refers to the mutually reinforcing and symbiotic relationship that can unfold between the ideas of the populist party itself, on the one hand, and the key values, and practices enshrined in the political regime, on the other. This what happened in Hungary, where Orbán's Fidesz has altered "the sources of legitimation upon which the political regime itself is built" (Zulianello 2018: 660) transforming the system and shaping it to match an illiberal model. Certainly, Hungary is an extreme case in Europe, but it should remind us that liberal democracy cannot be taken for granted, not even in the very heart of the Old Continent.

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Rule of Law in Bulgaria: Semi-Permanent Transitory Experiences on the Edge between Normative Expectations, Pragmatic Imperatives and Constitutional Imaginaries

Martin Belov

Abstract

This paper explores the evolution and the historic and contemporary challenges to rule of law in Bulgaria. It allocates rule of law within a grid of issues resulting from the semi-permanent transition in Bulgaria. It assesses rule of law as a phenomenon on the edge of normative expectations, pragmatic imperatives and constitutional imaginaries. The paper offers critical analysis of rule of law from the viewpoint of constitutional traditions and constitutional transitions. The paper opens with an outline of the rule of law in the Bulgarian constitutional history. Then, it shows the permutations and phenomenological appearances of rule of law in times of transition. Rule of law is presented as a transgenerational project, a strategy for Europeanization and Modernization, a legal pillar of the constitutional order and a political narrative of society in semi-permanent transition. Finally, the rule of law deficiencies in the contemporary Bulgarian constitutional model are explored with a particular focus on two concrete groups of issues. These are the quasi-eternal reform of the judiciary and the somewhat restricted access to constitutional justice for citizens claiming the infringement of human rights.

Keywords

Rule of law, constitutional traditions, constitutional transitions, Bulgaria

Introduction: Rule of Law in the Bulgarian Constitutional History in a Nutshell

Bulgaria has gone long way in the establishment of the principles of Western constitutional modernity. The Bulgarian constitutional system has been established with the 1879 Tarnovo Constitution. This constitution has been direct borrowing from Western constitutional prototypes. This borrowing includes the principle of rule of law and its supportive normative ideologies and key elements. The Belgian Constitution has been based on the French Constitutional Charter of 1830 being itself the liberal variant of the 1814 French Constitutional Charter that was generally influenced by the first French Constitution of 1791. In that regard, the first Bulgarian Constitution has been an element in the long chain of export of the conceptual and institutional heritage of liberal constitutional monarchy centered on the 1830 Belgian Constitution. The 1879 Tarnovo Constitution has borrowed the Belgian constitutional design via its Balkan variants – the 1864 Greek Constitution, the 1866 Romanian Constitution and the 1869 Serbian Constitution.

In fact, the 1860ies-1870ies were period of massive transplantation (Watson 1993) of Western constitutionalism in the form of constitutional monarchy on the Balkans. Rule of law was an important element of the liberal constitutionalism that was spread on the Balkan societies as part of the promotion of their political, socio-legal and constitutional modernization.

Rule of law has been extensively developed in the first Bulgarian Constitution. The Tarnovo Constitution provided for wide range of constitutional rights including the full spectrum of personal rights available at the end of the XIX century. It has served as a basis for the establishment of a system of the judiciary that gradually became capable of serving as a tool for promotion of the rule of law.

Naturally there have been huge problems in the practical performance of rule of law in Bulgaria. Until the beginning of the XX century there have been empirical impediments in the establishment of professional and independent judiciary as well as an administrative system capable of maintaining a sustainable rule of law. The predominantly authoritarian regimes that governed Bulgaria were not favorable to sufficiently independent judiciary and administration. Human rights, although provided in a modern and liberal manner by the 1879 Constitution, have been massively violated by both ordinary legislation and in the political and social practice (Belov 2015).

Thus, during the period 1879-1947 rule of law in Bulgaria was normative ideal and strategy for constitutional, political and legal modernization of a country that has just been reintegrated with the European constitutional civilization. Nevertheless, the

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Bulgarian constitutional order has remained rule of law in transition system and a peripheral European jurisdiction. Rule of law has been impetus for political and legal development and strategy for constitutional modernization. However, the mismatch between the rule of law in books, rule of law in action, and rule of law as imagination remained rather visible (Belov 2022a). Until the establishment of the communist regime in Bulgaria in the period 1944-1947 rule of law has become key element of the constitutional design and label for belongingness to the European constitutional and legal Modernity. However, the rule of law practice has been largely remoted from the normative ideals of the Tarnovo Constitution.

Rule of law has been abolished during the period of communism and Soviet type constitutionalism (1947-1991). Rule of law has been rejected as a bourgeois doctrine incompatible with the ideology of Marxism-Leninism and inadequate in the context of Soviet type constitutional system based on democratic centralism, dictatorship of the proletariat, and socialist legality. The doctrine of socialist legality has replaced the principle of rule of law. Socialist legality was a variant of formal rule of law. It was insensitive to politically influenced judiciary and authoritarian regimes but was providing for legality of the everyday life. The overall concept of the principle of socialist legality has been that the people must be given a sense of security and paternalist protection based on forms and procedure guaranteeing fear from non-adherence to law. Since the 1947 and 1971 communist constitutions have been more political declarations of reformist intentions for the achievement of a communist utopia rather than legal acts with real impact on the legal order socialist legality was mainly based on legislation.

The fall of the communist regime in Bulgaria on 10 November 1989 has been followed by years of intense debate on the reestablishment of Western type rule of law in the country embedded in a democratic context. These debates have been largely steered by the former communist party. They have served to an extent as a smoke screen for the preservation and transformation of power of the (post)communist elites in the context of a façade democracy and tendential constitutionalism (Gutan 2018). Nevertheless, in the context of irreversible global trends towards the establishment of rule of law and democracy in the Central and Eastern European region (hereafter the CEE region) – at least in terms of legal reform, if not immediately also as a social fact – the early post-communist Bulgarian elites did not have the option of deviating from this imposed Europeanisation. Thus, the 1991 Constitution that has been adopted by the VII Grand National Assembly has provided for the most important elements of rule of law.

The intermediate conclusion is that rule of law has been established in late XIX century in Bulgaria. It was result of package transplantation of Western liberal constitutionalism. It was part of an enormous effort for legal and socio-legal modernization and Europeanization of Bulgaria and its integration in the European constitutional civ-

ilization. The constitutionalization of Bulgaria has been part of a general and broader geopolitical decision for modernization and Europeanization of South-Eastern Europe including Greece, Serbia, Romania, and the Ottoman Empire.

This effort has been generally successful on legal level. The socio-legal practices related to rule of law have been partially successful resembling the famous metaphor of the 'half full-half empty glass'. The establishment of fully professional justice and administration systems, the general adherence to rule of law standards in politically insensitive cases, the creation of an independent attorneys' profession are important achievements for pre-communist Bulgaria that became visible with the advancement of the XX century. Regretfully, the standards of the rule of law have been biased and even massively violated at times. Rule of law was in disregard in the periods of moderate or radical authoritarian regimes of the monarchs or some of the Prime Ministers (especially Stefan Stambolov, Alexander Stamboliyski, Alexander Tsankov and Bogdan Filov).

The rule of law has been reestablished in the post-communist period after 1989-1991. It has been the result of a second massive geopolitical push for Europeanization and modernization after the first one that culminated in the adoption of the first Bulgarian constitution – the 1879 Tarnovo Constitution. Thus, the two waves of modernization via Europeanization (Mishkova 2015) through the establishment of rule of law took place with one century difference – the first one occurred at the end of the XIX century and the second one – at the end of the XX century.

Permutations and Phenomenological Appearances of Rule of Law in Times of Transition in the Light of the Bulgarian Context

Rule of law as a Transgenerational Project

Rule of law in Bulgaria may be conceptualized and perceived as a transgenerational project. The establishment of rule of law has been among the key modernization and Europeanization strategies in Bulgarian modernity, as shall be explained below. The legal provision of the main elements of rule of law has been partially successful experiment with legal transplantation in the period of constitutional monarchy (1879-1947). The legal institutionalization of rule of law was to an extent successful. Nevertheless, there were periods of severe violation of rule of law entrenched in the Tarnovo Constitution by the ordinary law, e.g. in the time of the authoritarian regimes of knjaz Alexander I (the plenipotentiary powers regime of 1881-1883) and Tsar Boris III (1934-1943). The rule of law has been massively infringed in the political practice throughout most of the period with few exceptions. Hence, until the end of the period when the Tarnovo Constitution has been replaced by the first Communist Constitution of 1947

rule of law was constitutional project that has been only partially implemented in the 'law in books' while generally disregarded and weakly established in the 'law in action'.

Rule of law was part of the constitutional imaginaries (Přibáň 2020a and 2020b; Komárek 2020 and 2021) of the Bulgarian intellectual, legal and political elite although not always and not necessarily mixed with democracy. Hence, rule of law has been an appealing idea in its capacity as modernization strategy but even the elite has not developed the adequate constitutional culture that naturally embeds rule of law in the context of democracy. This led to constitutional anthropology with strong authoritarian bias and inclination to formal rule of law.

The first 70 decades of constitutional government in Bulgaria have been subsequently used in post-communist rhetoric as imagined model of appreciation. Thus, they have served to an extent the function of invented history and invented tradition (Hobsbawm and Ranger 2012). Indeed, neither the post-communist elites nor the people were really convinced that the experiences of the constitutional monarchy are usable in the context of the late XX century. Parts of the political elite and the people were even hostile to this period of the past due to concerns related to the abundance of authoritarian regimes that blossomed at that time. In fact, constitutional monarchy was rather an example of various models of authoritarianism and rule of law violations instead of a 'golden age' of democracy and rule of law.

Nevertheless, the 'return to the roots' modernization strategy has been partially implemented in the post-communist period. Thus, an 'invented and imagined tradition' (Hobsbawm and Ranger 2012) of rule of law in pre-communist Bulgaria has been to an extent employed in the promotion of rule of law not just as principle of European civilization at the end of the XX century to which Bulgaria shall belong but also as symbol of national pride of the own Bulgarian history in the pre-communist era.

In that regard, rule of law in Bulgaria has served the role of a transgenerational project. It performed the function of linking the constitutional past with the constitutional present and the constitutional future. It legitimized the transition from socialist legality (a type of formal rule of law employed for maintenance of the order in an authoritarian context) to modern European democracy based on substantial rule of law.

Rule of Law as a Strategy for Europeanization and Modernization

The Bulgarian society has experienced several phases of constitutional and political modernization. During most of them the Europeanization has usually been the strategy for modernization. The idea of Europe has influenced Bulgarian constitutionalism in various manifestations (Belov 2017). It first came in the form of liberal constitutionalism and constitutional monarchy. Then, Bulgaria was brutally detached from its European belongingness in order to be integrated in 'alternative European modernity'

based on Marxist visions of enhancement of the historical development via communism and forced equalization and industrialization. Finally, Bulgaria started new transition towards socio-legal Europeanization which *de facto* took a turn towards neoliberal global Modernity. All these phases of transition have been triggered mostly due to geopolitical reasons.

In the first and the third phases of the Bulgarian modernization Europe has served as a normative ideal. Europe presented itself as a multifaceted, multi-discursive and bulky ideal. Initially it contained national traditions. During the period 1879-1947 these were the traditions of France and Belgium (that massively influenced the constitutional project) later on complemented and partially replaced by Austro-Hungarian and German normative concepts, ideals, and paradigms. Since 1989 a multitude of traditions – mostly the traditions of the South European states that underwent a transition from authoritarianism to democracy and rule of law (Italy, Spain, Greece, Portugal etc.) - were used as prototypes. These national traditions have been mixed up with EU values and constitutional design – especially in the pre-accession (1997-2007) and the EU membership (2007 – until now) phases.

In that bulky mixture of elements of constitutional design containing values, principles, rights, and institutions rule of law has played very central role. Rule of law was conceived as a marker of belongingness to Western Modernity in general and to European (liberal) constitutional civilization in particular. A truly established rule of law has been deemed to have a quasi-automatic and quasi-magical healing power of the problems of the society and the misfortunes of constitutional transition.

The full implementation of rule of law in books and in action has grasped the imagination of the Bulgarian society in times of constitutional transition. It was utilized as strategy for modernization and as promise for being the ultimate instrument for the achievement of social prosperity and social justice. Reversely, the failures of the political, economic and cultural transition from the authoritarian past to the European future were frequently framed in terms of rule of law.

The predominant neo-liberal political story in the times of the post-communist transition gradually shaped the narrative that a rule of law reform – if sufficiently deep and properly accomplished – will have immediate and profound effect on society. Thus, rule of law has gradually been transformed from transgenerational project for Europeanization and Modernization into a narrative of a specific version of neoliberal success story impeded by the post-communist constellations of power in the context of masqueraded and thus only superficial and instrumental transition to proper European rule of law and democracy. That is why, special attention to rule of law as a narrative shall be offered in the next part of the paper.

Rule of Law – Legal Pillar of the Constitutional Order or Political Narrative of Society in Semi-Permanent Transition?

Rule of law is conceptual and legal pillar of two of the phases of the Bulgarian constitutional history. This is a principle that has been laying at the core of the constitutional axiology of the first (1879) and the fourth and at the moment last (1991) Bulgarian constitutions. Rule of law is cornerstone of constitutionalism in general, but is of crucial importance for liberal constitutionalism in particular. Thus, it is not a coincidence that the proclamation, legal and practical implementation of rule of law in Bulgaria in the periods 1879-1947 and 1991 until now is at the epicenter of all the efforts for legal reform and political modernization of both the state and the society in terms and the context of liberalism and neo-liberalism. Rule of law is part of the core normative ideology of Western Modernity. It is conceptual prerequisite for the human rights' protection, proper functioning of the judiciary and the construction of constitutional design capable of securing and promoting freedom, liberty and personal autonomy (in all its dimensions) as core values of liberal constitutionalism.

The 1991 Constitution proclaims rule of law as part of the contemporary Bulgarian constitutional axiology. The current Bulgarian constitution provides for most of the elements of rule of law: an extensive set of human rights largely inspired by the European Convention on Human Rights and the UN human rights acts, system of independent courts with general and special competence, a powerful Constitutional Court, ombudsman, independent attorney's office etc. All key principles of the rule of law related to the judicial protection of human rights such as the fair trial, the *nullum crimen sine lege praevia*, *non bis in idem*, the equality before the law, the right to protection and the right to appeal, the *habeas corpus*, etc., are constitutionally provided.

Nevertheless, there are some important deficiencies of the constitutional model of the rule of law that shall be explored below. They are related mainly to the state prosecutor's office and the access to constitutional justice. Other less important issues that shall not be discussed here concern the rather redundant model of the jury court (Belov 2014), the already abolished specialized criminal courts for organized crime and some possible improvements of the system of constitutional rights which has evolved beyond the constitution in the last 30 years – a tendency that may need an explicit reflection in the text of the 1991 Constitution.

In general, the constitutional model of the rule of law, apart from the issues that shall be outlined below, as such is not very problematic. The main problems concern the way this model is implemented in the ordinary legislation and especially the empirical application of the rule of law in the political practice and in the practice of the courts, state prosecutor's offices and the other institutions empowered to be its safeguards.

The main issues concerning rule of law in action during the last more than three decades can be summarized as follows. The state prosecutor's office being centralized and extremely hierarchical sub-system of the judiciary creates the impression of an institution that can be politically controlled by the power centers capable of appointing its leaders and especially the state prosecutor general. The state prosecutor's office is largely criticized to either initiate prosecutions for political or other reasons not entirely related to the aim of protection of legality or, reversely, it is blamed for not initiating such prosecution in cases when this seems necessary (a political umbrella argument). Moreover, the constitution did not really become directly applicable supreme law despite the proclamation of constitutional supremacy and direct effect of the constitutional provisions by article 5, paragraph 1 and 2 of the Constitution. This is due to the lack of clear empowerment to the courts to apply it instead of unconstitutional act of Parliament and the severely limited access to constitutional justice. Furthermore, the right to fair trial has been infringed due to the rather lengthy procedures and range of shortcomings of the judicial process. Last but not least, the overall impression is that corruption, nepotism and other forms of bias of equality and fairness are wide spread thus compromising the proper application of rule of law.

The improvement of the practical performance of rule of law in post-communist Bulgaria seems to be a very difficult task for the Bulgarian political elites, for the expert elites of the judiciary and for the citizen. Despite the enormous public energy that has been spent, the permanent focus of both governmental institutions and the NGO's, the multitude of academic events (conferences, seminars, round tables etc.) that have been devoted to the rule of law in Bulgaria and the numerous recommendations by international and supranational organizations and their institutions (e.g. the monitoring reports of the EU or recommendations by the Venice Commission of the Council of Europe) it seems that the rule of law reform is an ongoing and still pending issue with huge constitutional, political and social importance.

The rule of law improvement and especially the reform of the judiciary is one of the core issues of the Bulgarian electoral campaigns. All political parties are devoting huge attention to this issue in electoral campaigns, in public debates, in media appearances, in parliamentary debates etc. Some of the parties have even established their core political message around promises for judicial reform with particular attention to the reform of the specialized criminal courts (reform that has been already accomplished) and reform of the state prosecutor's office (reform which is still pending).

The result is that Chapter VI of the 1991 Bulgarian Constitution that is devoted to the Judiciary has been amended four times – in 2003, 2006, 2007, and 2015. Nevertheless, these numerous constitutional amendments did not lead to overall socio-political satisfaction of the Bulgarian political elite and society. Some of these

amendments (e.g. article 129, paragraph 4) have been declared unconstitutional by the Bulgarian Constitutional Court while other (e.g. article 130, paragraphs 5-7) have been even abolished by a subsequent constitutional amendment. The chaotic character of the judicial reforms in Bulgaria can also be demonstrated with the introduction of the special criminal courts for organized crime in 2011 that were praised as important tool for fight against corruption. These courts started to be perceived as inefficient instrument that was used for oppression of political opponents and thus for securing the grip of some circles in the judiciary over improper use of power. Thus, they were soon abolished in 2022.

This all shows that the quasi-permanent rule of law improvement consisting mainly in almost eternal judicial reforms has achieved limited and controversial results. These reforms have been accomplished in rather chaotic manner and some of them have been promoted as a healing pill for the deficiencies of rule of law in order to masquerade the incapacity of the Bulgarian politicians to implement real reforms on the ground.

Subsequently, rule of law, its shortcomings, and the judicial reform have become a slogan for reformism which however became devaluated since it has been employed and (mis)used by all political and institutional players. Since everyone in Bulgaria is in theory in favor of the reform of the judiciary and even multitude of constitutional and legislative reforms have been accomplished without feasible effect on the rule of law in action and the rule of law in public imagination then it seems that the reform stagnates and has reached a stalemate. It remains to be seen whether rule of law and the judicial reform shall go beyond the political narratives and the chaotic legal reforms and will finally lead to some practical and feasible results.

Rule of Law Deficiencies in Bulgaria: Two Concrete Cases

There have been many challenges to rule of law during the last three decades. Some of these challenges have been conceptual. They were related to the construction of the constitutional infrastructure of rule of law on constitutional and legislative level, the establishment of proper patterns of functioning of rule of law in the socio-legal discourse and the emergence and stabilization of appropriate constitutional anthropology, including constitutional imaginaries, capable of supporting rule of law in collective imagination.

Apart from these framing issues that predetermine the legal, socio-legal and socio-imaginary design and context of the rule of law, there have been range of pragmatic challenges. The Bulgarian legal order had to adjust to the context of neoliberal

globalism. In that regard, the Bulgarian institutions and more precisely the courts, had to accommodate the diversity of normative standards stemming from the EU law, the international law and the domestic law related to human rights' protection. Special attention deserves the implementation of the human rights' standards derived from the European Convention of Human Rights and Fundamental Freedoms (ECHR) and the case-law of the European Court of Human Rights (Belov and Fartunova 2017). They produced massive internationalization of the Bulgarian constitutional law. This process has been paralleled by many verdicts against Bulgaria for infringement of human rights provided by the ECHR.

Moreover, there have been some deficiencies in the constitutional infrastructure of rule of law, e.g. the lack of ombudsman or the lack of direct access to the Constitutional Court by the citizen. The first issue has been solved in 2005 when the institution of the ombudsman has been created. This institution got its constitutional standing in 2006. The second issue however has been only partially improved, as it will be shown below.

However, the major problem of the rule of law in Bulgaria seems to be the judiciary. The reform of the judiciary has been of paramount importance for almost all political parties. It has even become a sacred mantra for healing the deficiencies of the rule of law in Bulgaria. Nevertheless, despite the incredible media and political attention to this issue, the several constitutional and the almost uncountable legislative reforms the judiciary still remains the Achilles heel of the Bulgarian 1991 Constitution. Thus, in the remaining part of this paper I shall focus my analysis on these two major deficiencies of the contemporary Bulgarian constitutional order – the rather restricted access to constitutional justice and the problems of the judiciary.

The Issue in Permanent Focus: The Eternal Reform of the Judiciary

The reform of the judiciary is the constitutional issue that has been permanently in the focus in Bulgaria in the last three decades. The judicial reform is the point of intersection of multitude political, legal and socio-legal discourses. It predominates the constitutional politics discourse since it is at the core of the agenda of many political parties (predominantly from the liberal specter). These parties have raised the issue to a key priority of their reformist promises. Their activity together with pressure from outside – mostly from the EU and the Council of Europe – as well as from some states (most notably the US) have made the reform of the judiciary the most topical issue of Bulgarian constitutional law.

Multitude of reforms on constitutional, legislative, and practical (empirical) level have been suggested. Some of them have also been already implemented. Most of the implemented reforms have had limited, partial and fragile success.

Currently there are several issues that have been at the epicenter of the debates. The most important and visible is the reform of the state prosecutor general's office. Several other reforms related to the Supreme Judicial Council, the status of the magistrates, the self-governance of the judiciary, the system of specialized courts have already been implemented. Unfortunately, they did not produce the results which the society was expecting. In fact, the society has long forgotten about the intense political and legislative battles that have been led in the name of these reforms despite the fact that they have preoccupied the political agenda for years at certain periods of the transition.

Here are some examples. In the first years of the XXI century the absolute immunity of the magistrates was deemed as an unjustified privilege. Indeed, it was conceived as a tool for prevention of political and other forms of pressure on the magistrates. However, it was also blamed for protecting corrupt magistrates from prosecution and for promotion improper influences on the judiciary. The replacement of the absolute with functional immunity of the magistrates did not produce any feasible effect on the malperformance of the judiciary.

Furthermore, the unitary character of the Supreme Judicial Council that comprised representatives of both the judges and the state prosecutors was blamed for impeding judicial independence and for allowing improper influence of the state prosecutors over the career development of the judges. Thus, in 2015 the Supreme Judicial Council has been reorganized. Now it is structured in plenum comprising all its members and two collegiums – one for the judges and one for the state prosecutors. In theory, this reform was supposed to limit the mutual influence of both legal professions on their career development. Thus, it should have enhanced the separation of powers within the judicial power. In practice, however, this reform has led to encapsulation of the state prosecutors' office additionally strengthening the power of the state prosecutor general and limiting the checks and balances between the judicial and state prosecutors' quota in the Supreme Judicial Council. This reform is an example of theoretically logical idea that has led to contradictory and even contrary results in the practice.

Currently, the institution of the state prosecutor general is in the focus of the debates for judicial reform. There are personal, political and conceptual reasons behind this debate. The personal and political reasons address the figure of the current state prosecutor general Mr. Ivan Geshev who is considered to be using his huge competence in ways that are detrimental for the rule of law by parts of the Bulgarian political elite and the Bulgarian population. However, criticism has been expressed also to some of the previous state prosecutor generals, although too much lesser extent.

The conceptual reasons behind the reform aim at diminishing the constitutional powerhouse of the state prosecutor general consisting in the principle uncontrollability of this institution. The state prosecutor general in the Bulgarian constitutional or-

der is omnipotent chief of the whole state prosecutors' office. He is not simply chief of a Supreme State Prosecutors Office similarly to the chairmen of the Supreme Court of Cassation and the Supreme Administrative Court who are just administrative directors of the two supreme courts. He is able to direct the activity of each and every state prosecutor in Bulgaria thus having extremely strong influence over the destiny of criminal prosecution in Bulgaria. Moreover, he is generally uncontrollable. Thus, several ideas are currently launched for limiting the power and introducing some control over the state prosecutor general. It needs to be seen in the near future whether they shall be implemented and will produce any positive practical effect. It also debatable whether legislative reform shall suffice or a constitutional reform should be accomplished. Such constitutional reform requires constitutional majority in Parliament that is currently hardly achievable.

The Neglected Problem: The Access to Constitutional Justice

The 1991 Constitution provides for a model with severely restricted access to constitutional justice for citizens. The Constitutional Court can be approached only by state institutions and not by individuals or juridical persons. This is normal and wide spread solution when it comes to institutional issues and constitutional interpretation, but is rarity in the case of human rights protection.

Initially only the President, the Council of Ministers, 1/5 of the MPs in the National Assembly, the Supreme Court of Cassation, the Supreme Administrative Court and the State Prosecutor General could have approached the Constitutional Court in human rights' related cases. Two constitutional amendments allowed also the ombudsman (since 2006) and the Supreme Attorney's Council (since 2015) to approach the constitutional court if they believe that an act of Parliament is infringing constitutional rights.

The empowerment of the ombudsman and the Supreme Attorney's Council to approach the Constitutional Court is limited in twofold way. First, they can approach the Court only in case of infringement of constitutional rights – rights provided by the 1991 Constitution. Thus, they cannot serve as safeguards for human rights stemming from international treaties. Second, the rights must be infringed only by an act of Parliament. This prevents the use of this protective mechanism against infringements with other acts of state institutions.

The very restrictive approach of the constitutional legislator to the access to constitutional justice is almost stunning with regard to the ordinary and specialized courts. The 1991 Constitution allows only the Supreme Administrative Court and the Supreme Court of Cassation to approach the Constitutional Court. All other courts – first instance or appellate courts, courts of general competence or specialized courts - do not

have such competence. If an act of Parliament that is applicable in the case pending in front of them is infringing constitutional or other human rights these courts can only put the case on hold and approach the supreme courts with the demand to launch a complaint for unconstitutionality in front of the Constitutional Court. Such grave mistrust of the constitutional legislator in the Bulgarian courts seems unreasonable and very poorly justifiable. It creates the paradoxical situation that the Bulgarian courts can approach the Court of Justice of the EU but not the Bulgarian Constitutional Court. Hence, it seems that the human rights stemming from the EU law are better protected by the Bulgarian courts than the human rights provided by the Bulgarian Constitution.

The Bulgarian citizen and the juridical persons have no right to directly approach the Constitutional Court in case of infringement of their constitutional or other human rights. Thus, there is no direct constitutional complaint in Bulgaria. There are two versions of the indirect constitutional complaint due to the fact that the people and the juridical persons can approach either the ombudsman or the Supreme Attorney's Council with the claim for violation of constitutional rights by an act of Parliament. These two institutions serve as intermediaries and have the full and unrestricted discretion to reject such motion. Thus, they serve as filtering institutions for indirect constitutional complaints.

The extremely restrictive Bulgarian model for access to constitutional justice that is a rarity in comparative perspective seems as one of the most important rule of law related issues in Bulgaria. This problem has been addressed in the Bulgarian academic debate. Most of the Bulgarian authors recommend broadening of the access to constitutional justice (Belov and Dimitrova 2021; Penev 2013; Drumeva 2013; Karagyozova-Finkova 2001). Nevertheless, this issue is largely remoted from the agenda of the Bulgarian political elite and is not even part of the priorities of the political parties which are most insisting on rule of law reforms. Thus, the judicial reform seems to be the topic of political debate on rule of law in Bulgaria while regretfully the access to judiciary remains an issue of rather marginal importance.

In my opinion the broadening of the access to constitutional justice requires immediate attention. The granting of competence to all courts to direct access to the Constitutional Court on human rights issues and the broadening of the scope of the competence of the ombudsman and the Supreme Attorney's Council to approach the Constitutional Court for violations of all types of human rights (including rights provided in international law) seem as reasonable first step in such reform (Belov 2021a).

Conclusions

Rule of law seems to be among the hottest topic of Bulgarian politics. During the last decade but especially in the last couple of years it became one of the main phenomena for forming political coalitions or drawing red lines the Bulgarian politics, social life and public debate. Especially in the last 2-3 years the constitutional standing of the state prosecutor general is the coalition making and coalition breaking issue. Such situation may give way to range of contradictory interpretations. It may indicate a degree of maturity of the rule of law in Bulgaria where it is already an established principle that needs some final adjustment and polishing. However, it may also demonstrate deep structural cracks of the constitutional foundations of rule of law that must be urgently and finally addressed with the necessary seriousness. Last, but not least, it may also be a sign that the debate has been instrumentalized for political purposes thus being transformed into rhetoric epicenter of the socio-legal discourse of contemporary Bulgarian politics.

Many promises have been made to improve the rule of law and to make it substantial and well-functioning element not just of the law in books but also of the law in action. Thus, the tension between rule of law in books and rule of law in action has actually formed, shaped and molded the rule of law in collective imagination. The representation of the rule of law has been at play predetermining the terrain for political battles. Some of these imaginaries have been defined in negative. This is particularly true for the figure of omnipotent and autocratic state prosecutor general. Imaginaries of constitutional salvation were also launched in the socio-legal discourse. The most important of them were the imaginaries of independent judiciary capable of healing the chronic disease and malperformance of rule of law in Bulgaria.

The judicial reform is the core of rule of law debates in Bulgaria. In fact, while the debates on future and pending reforms of the judiciary is permanently ongoing, several waves of such reform have already been accomplished. The reforms started in the early XXI century with amendments related to the separation of the criminal investigation between the state investigators and the investigative police officers as well as the magistrates' immunity of criminal prosecution. Then, reforms continued with reforming the system of the courts related to introduction of specialized courts for organized crime, administrative courts. Moreover, powerful executive power institutions for national security and confiscation of improperly acquired property have been established as institutional partners of the courts. The results of their activity are considered to be dubious. Furthermore, the system for judicial power management has been amended with the structural reorganization of the Supreme Judicial Council.

Most of these amendments did neither improve the functioning of the judiciary, nor created the feeling of efficiency, transparency, impartiality and justice.

Thus, Bulgaria seems to be doomed to continue with a semi-permanent reform of the judiciary overshadowing other important improvements that need to be made in the 1991 Constitution, e.g. related to reform of the system of human rights and the model for access to constitutional justice. Interestingly, this almost eternal reform of the judiciary continues even after the end of the political transition to democracy. Bulgaria can hardly still be considered as 'democracy in transition' since transition cannot last for more than thirty years. However, this does not mean that Bulgaria has established democratic roots and practices while the deficiencies of its constitutional order concern the rule of law and particularly the judiciary. In fact, both rule of law and democracy in Bulgaria are fragile and to an extent façade phenomenon.

Bulgaria is in permanent transition. However, transition currently expands well beyond the transitory dichotomy between communist authoritarianism and liberal democracy. The current multitude of transitions which I define as 'constitutional polytransition' concerns shifts between Westphalian, post-Westphalian and neo-Westphalian constitutionalism (Belov 2022b); human, post-human and transhuman constitutionalism (Belov 2021b), offline (physical) constitutionalism and digital constitutionalism (Pollicino 2021; De Gregorio 2022). It is also affected by the interplay between democracy, autocracy and oligarchy with the visible trend towards global algorithmic technocracy (Belov 2023).

In this regard, the quasi-eternal reform of the judiciary has gained the status of a neo-liberal mantra. Reform is definitely needed and it can produce improvements in the constitutional law in books and in action. The state prosecutor general is indeed omnipotent figure that must be better fitted into a proper separation of powers model. The judiciary is inefficient and slow. The corruption and nepotism are visible and constitute huge problem with multiple negative repercussions for rule of law, separation of powers, democracy and market economy. The predictability and proportionality are the most infringed elements of rule of law especially in the context of constitutional polycrisis (Belov 2023). The lack of direct constitutional complaint and direct access of the courts to the Constitutional Court are inadmissible shortcomings of the Bulgarian constitutional model of rule of law. Nevertheless, the permanency of the debates on the judicial reform typically leading to impasses is quite discouraging for the citizens (apart from some mobilized social fractions and political parties making career out of the eternal promotion of some kind of reform). It induces distrust in the magical healing of all social problems by reforms focused predominantly on some institutional issues entrenched in Chapter VI 'The Judicial Power' of the Bulgarian Constitution.

Rule of law in Bulgaria is already established principle that is clearly entrenched in written law and is to some extent successful also in the political practice. However, a deep, wide and profound debate stretching beyond the discussions on the reform of the judiciary is very much needed. It should address the main challenges to rule of law (and democracy) in the post-modern situation of the global algorithmic and increasingly technocratic society of the XXI century.

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Serbia and Montenegro: challenges of Rule of Law against disinformation and hate speech

Chiara Pizi

Abstract

The objective of this article is to analyze the state of the art of the EU enlargement process — scheduled for 2025 — to the most advanced candidates, Serbia and Montenegro, through an overview of the achieved objectives as regards the satisfaction of the political criteria for EU membership, the economic criteria and the alignment with the EU acquis. A particular attention will be given to one of the most critical profiles within the process: the lack of legislation against hate speech, and, in comparative perspective, the ways in which the two countries face the issue. The areas in which the two countries seem to have achieved encouraging results in terms of progress in the process of joining the EU will be analyzed, as well as those in which there are still critical aspects. Without claiming to be exhaustive and focusing on the content of the Reports on the subject, some possible hypotheses for solutions to the problem will be mentioned.

Keywords

Hate speech, Serbia, Montenegro, European Union, Comparative Methodology, Regulatory Framework

Introduction

The purpose of this contribution is to analyze the state of the art of the EU enlargement process to the advanced candidates, Serbia and Montenegro, through an overview of the objectives achieved regarding the fulfillment of political and economic criteria, and, more generally, the overall alignment with the *acquis communautaire*. Specific attention will be given to one of the profiles that, as emerging from studies in the field, appears particularly critical within the process: the enforcement difficulties of the legislation regulating the subject of preventing incitement to hatred and the spread of disinformation, with a particular emphasis on hate speech, which is recognized by Serbian and Montenegrin legislation as a form of discrimination.

The analysis is based on an exploratory inquiry still in progress, and does not offer an exhaustive answer as to what might represent feasible ways to speed up the accession process of the two mentioned states. The choice to investigate Serbia and Montenegro aims to provoke reflection on how, despite being the most advanced candidates in the EU accession process (demonstrating moderate advancements in sectors such as administration and economic policy, according to the reports to be analyzed), they still raise concerns in areas such as freedom of information and hate speech.

Within the broader framework of Serbia and Montenegro's achievements with regard to compliance with the Rule of Law, this survey aims to offer an overview of the various steps taken in the direction of combating distortion of information and the dissemination of content that incites intolerance towards minorities.

First of all, an attempt will be made to offer a definition to the notion of hate speech, reporting some studies that have investigated the specific terrains on which it develops, its potential consequences and the motivations that lead certain figures who enjoy a certain popularity to instrumentalize it for their own purposes. In the knowledge that talking about hate speech inevitably leads to the issue of freedom of expression, and that discerning the boundaries between these two dimensions is very complex, the European regulatory framework on hate speech will be summarily analyzed, up to focusing on how this phenomenon is regulated by the candidates Serbia and Montenegro. Subsequently, attention will be directed towards the European Commission's Annual Reports, which indicate that these states have achieved a moderate level of preparedness across numerous domains, positioning them as highly promising candidates in the European Union accession process. However, despite this progress, the realm of freedom of expression and information, which bears a hazardous link to the problem of hate speech, remains a cause for concern.

Hate speech between attempts at definition and gray areas: a survey of the international and European regulatory framework

The rise of the online dimension of communication has extended to private subjects, therefore different than professional and institutional ones such as televisions and newspapers or universities, the possibility of participating in discussions of public interest and sharing a great deal of content on a daily basis, and on a wide variety of topics. These are sometimes published in the form of discourses steeped in intolerance and prejudice, often included in comments to articles on social networks, or within blogs or television programs. Currently, hate speech is often defended under the guise of upholding freedom of expression on social media platforms, thereby exacerbating its impact (Noriega and Iribarren 2011). It is also exploited by the political sphere as a means to garner support, distorting the truthfulness of facts for propagandistic objectives (Cerquozzi 2018). In this regard, while the media can be victims of authoritarianism, some studies (Kosho 2019) confirm that just as often they can be useful tools for promoting populism and authoritarianism, even speaking of a "populism industry" (Kosho 2019: 103). In the Balkans, the media's lack of economic independence leads them to be inevitably *captured* by business and political elites in order to gain control of information. These authorities exploit the media's financial weakness to spread, through an unabashedly populist style and rhetoric, germs of intolerance and incitement to hatred; a "mediated populism" (Kosho 2019), aimed unilaterally at gaining power or simply maintaining and consolidating the status quo. All of this is done by exploiting what some (Felberg and Šarić 2020) have referred to as the "gray areas" between hate speech and impoliteness, simple linguistic unkindness, seemingly harmless.

Since there is a lack of a clear and unambiguous definition of "hate speech" (for an overview of definitions, Titley *et al.* 2015), which seems to be only sketched out on the international and European legal level, it is very challenging to measure against said gray areas. In these, incitement to hatred (usually aimed at groups of people and legally regulated) is often implicit, and it is also very complex to distinguish it from offensive language (aimed at a particular person and often without legal consequences), leading to uncertainties in the application of laws and regulations governing the matter. With the inevitable consequence that vagueness is also employed as a means of controlling free speech.

Extensive studies on the subject (Ivanović 2020) observe that hate speech finds fertile ground to proliferate through the medium of social networks, as the Internet medium easily manages to reproduce the dynamics of the individual's behavior in the

crowd. The individual, in the mass, manages to hide in it, loses his individuality because he tends to accept his ideas without question, but above all to adhere to the emotions of the majority, enjoys his protection and anonymity, losing the sense of responsibility for his actions, which can take on more extreme connotations. The Internet, and within it social networks, make it possible to mobilize with a greater speed a very large number of people who — at least in appearance — think alike, or among whom there is in any case a sense of closeness due, paradoxically, precisely to the physical distance, and thus to the *deresponsibilization* given by interactivity.

According to a number of studies on the subject (*ex multis*, Ivanović 2020), there are three main actors in online discourse on social media: the sender, i.e., the one who sends the information; the recipient of the information; and an intermediary, who acts as a conduit between the sender and the recipient and is usually the service provider., some common forms of hate speech on social networks can also be identified. The first consists of the creation of content on one's profile, in the form of text, audio or video, without hiding behind anonymity. This form of hate speech is often employed by public figures, such as politicians or journalists, who enjoy a certain respect in social communities and therefore want to impose their opinions in order to consolidate position or gain new support. This pattern can also be adopted by those who are unknown to the general public in order to draw attention to themselves. The second form of hate speech, on the other hand, involves the anonymous publication of intolerance and hate content, and the motive for anonymity lies in the desire to avoid the legal consequences of one's words. The third model, on the other hand, involves sharing content produced by others that contains hate speech, and thus is closely related to the promotion of incitement to intolerance, and this is a peculiarity of social networks, which guarantee this opportunity. Finally, the fourth form of hate speech is commenting, and that is making comments on content made public or shared.

Shifting the focus again to how the phenomenon declines in the political dimension, hate speech can be considered closely related to the phenomenon of populism. When it is not reduced to mere "valence populism," some studies on the language of politics (Vujić 2021) argue that populist rhetoric is characterized precisely by being pervaded by more or less explicit hate speech, by a distinct political *subdiscourse* which uses the semantics of racism, homophobia, patriarchy, drawing a lexical separation between the concept of "us," instrumentally narrated as "victims," threatened by "others," from "them," represented as evil, unwanted and different. And while it is true that the ultimate goal of political propaganda is to induce, directly or indirectly, consent and adherence, (Scekic 2015), the potential risks that arise from insinuating the germ of intolerance and hatred into the subconscious have to be seriously addressed.

In countries such as Serbia and Montenegro, which according to the annual reports of the European Commission are moderately advanced in terms of achieving the goals in economic policies and in the administrative field for alignment with the *acquis communautaire*, the field of freedom of expression and disinformation still raises concerns. The latter, as we will see below, turns out to be often linked to the phenomenon of hate speech in these countries, employed by the world of politics for the purpose of distorting the objectivity and truth of information, creating polarization and a climate of widespread intolerance, especially toward minorities, for purely political purposes of acquiring consensus.

In the 1970s, U.S. jurisprudence elaborated the concept of hate speech, as a category indicating a set of words unilaterally aimed at expressing intolerance and hatred towards a person or group of people, with the risk of triggering violent reactions against that group or on its part (Pino 2008). As mentioned, there is no unambiguous and generally agreed definition; nevertheless, European institutions have attempted to reconstruct at least a definitory framework. On the subject of "hate speech," European countries use the definition contained in Council of Europe Recommendation 97(20), according to which

> The term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.[1]

It is interesting to remind the call for member state governments to recognize that public authorities and public institutions at the national, regional and local levels as well as their officials, have a responsibility to refrain from statements — particularly in front of the media — that can reasonably be understood as hate speech, or that may legitimize, spread or promote racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance. On the international level, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)requires member states to prohibit incitement to racial-ethnic hatred and discrimination, as well as the International Covenant on Civil and Political Rights. At the European level, on the other hand, Article 10 paragraph 2 of the European Convention for Human Rights and Fundamental Freedoms states that freedom of expression, precisely because it entails duties and responsibilities, may be subject to formalities, re-

[1] Council of Europe. Committee of Ministers. Recommendations 97(20) on "hate speech", October 30, 1997.

strictions and penalties prescribed by law; and such restrictions must be considered necessary measures in a democratic society (since they deal with curbing discrimination and hostility). Moreover, Council Framework decision No. 913/2008 which binds European states to recognize hate speech as a hate crime and to provide an aggravating circumstance for this type of crime. It is relevant to mention the Additional Protocol to the Convention on cybercrime, signed in 2011, which aims to harmonize criminal law among states in the fight against xenophobia and racism on the Internet. It is also important to mention the Victims' Rights Directive, which offers special attention to victims of hate crimes, who are considered vulnerable (for an in-depth reconstruction on international definitions and recommendations, Cerquozzi 2018); and the EU Code of conduct on countering illegal hate speech online, which, although having the nature of soft law, still represents an authoritative source that also focuses on the specific 'digital' dimension. At last, it is necessary to mention the recent Digital Services Act, which is the new regulation on digital services, approved by the European Parliament on July 5, 2022, along with the Digital Markets Act. These two measures make up the Digital Services Package, which aims to promote the proper functioning of the EU's internal market for digital services. The Digital Services Act has modified existing rules according to the principle: "what is illegal offline should also be illegal online." The DSA was published in the Official Gazette on October 27, 2022, and came into effect on November 16, 2022; it will be directly applicable throughout the EU and will apply fifteen months or starting from January 1, 2024, if later, after the entry into force[2].

Serbia: compliance with Rule of Law between progress and uncertainties

The Serbian government is consistent in stating that EU membership is a strategic objective and one of the priority goals. We will report here data on some of the areas that are analyzed annually by the European Commission Report.

According to the European Commission's 2022 Report,[3] Serbia's progress as to its ability to assume the obligations of EU membership continues at a moderate pace. The country is continuing to work on alignment with the EU *acquis* in many areas, such as company law, research, intellectual property rights, innovation and financial control. Regarding the fulfillment of the political criteria for EU membership, it appears that during the report's study period all political actors took an active part in the April

[2] For more informations, https://digital-strategy.ec.europa.eu/it/policies/digital-services-act-package.

[3] https://neighbourhood-enlargement.ec.europa.eu/serbia-report-2022_en.

3, 2022 early parliamentary elections, leading to a more pluralistic parliament. The elections themselves were held in a calm and peaceful atmosphere with respect for fundamental freedoms. However, international observers noted some shortcomings; therefore, according to the report, it would be necessary for Serbia to fully implement the new recommendations of the Office for Democratic Institutions and Human Rights (ODIHR) and Council of Europe bodies in order to ensure maximum transparency in the process leading up to the elections. As mentioned, a new, more pluralist parliament has been elected on August 1, 2022; however, it is necessary, according to the Commission, to employ the code of conduct more effectively in order to prevent and sanction the use of offensive and inappropriate language during the sessions. Serbia appears to be moderately prepared as far as public administration reform is concerned, with progress being made in tax administration and privatization of state-owned enterprises; however, recommendations from past years have only been partially implemented. The state still maintains a strong footprint in the economy, and the private sector is struggling to develop due to shortcomings in the implementation of the rule of law, mainly involving corruption, judicial inefficiency, and failure to enforce fair competition. A certain level of preparedness is also found in relation to the judiciary; a decisive step toward its strengthening of independence and accountability was achieved through the approval of relevant amendments to the Constitution. Serbia also appears to be moderately prepared in the area of anti-corruption: the Council of Europe's Group of States against Corruption (GRECO) in March 2022 noted that the adoption of amendments to the Law on Prevention of Corruption had the merit of addressing previously identified shortcomings. However, the areas most vulnerable to corruption require specific risk assessments and targeted actions. Serbia is also reasonably well prepared in the fight against organized crime, although the Commission suggests moving from a case-by-case strategy — which has nevertheless made progress — to a high-profile strategy aimed at dismantling large, internationally widespread criminal organizations.

Regarding economic criteria, Serbia is between a good and moderate level of preparedness and has made progress in developing a functioning market economy; a slight increase in the unemployment rate in 2021 appears to be a consequence of increased market participation, reflecting a post-pandemic crisis recovery from COVID-19. The green agenda appears, then, to be closely linked to the reform and economic development agenda. In terms of good neighborly relations, Serbia is an active participant in regional cooperation, and is overall committed to improving bilateral relations with other candidate countries, potential candidates and EU member states. However, relations with Croatia and Montenegro remain strained, but particularly with the latter, the parties are showing an increasing willingness to resolve open issues and improve

relations. The EU-assisted Dialogue on Normalization of Relations with Kosovo continued throughout the reporting period, with regular monthly meetings and a High-level meeting in Brussels on August 18, 2022; both countries were urged to engage constructively to avoid further delays in negotiations. As far as external relations are concerned, Serbia has not aligned with the Union's restrictive measures against Russia and most of the High Representative's statements, so it is expected to engage in priority alignment with the EU's Common Foreign and Security Policy. It has, however, actively cooperated with its neighbors and member states in managing mixed migration flows to the Union, including granting Ukrainian citizens who fled the war temporary protection for one year. With regard to the legislative and institutional framework for the protection of fundamental rights, this is largely in place; although it is late in adopting an action plan against violence against women, Serbia has introduced new anti-discrimination and pro-Roma inclusion strategies, as well as action plans on gender equality.

Although the overall picture analyzed shows a fair amount of progress the area of freedom of expression does not seem to be making significant advancements; this affects the proliferation of hate speech and the transparency of information, inevitably departing from the values and principles enforced by the European Union.

Freedom of expression in Serbia and its relationship to disinformation and hate speech

"Freedom of expression is a complex right encompassing a wide range of social relations and containing multiple legal institutes and guarantees. Media freedom is an integral part of this right and a condition for its uninterrupted enjoyment" (Teofilović, Zahirović, Stojanović and Popović 2018).

According to the aforementioned 2022 Report of the European Commission, Serbia shows some level of preparedness in the area of freedom of expression, but no progress seems to have been made in the analyzed time frame. Threats and violence perpetrated against journalists continue to cause concern; recurrent statements by senior state officials about the work of journalists creates an environment in which freedom of expression cannot be exercised unhindered. Investigative journalists suffer constant refusals by government agencies in authorizing them to disclose information, or receive no response. The start of consultations on amendments to the Law on Public Information and Media and the Law on Electronic Media is delayed; for the latter, the amendments should also address the independence of the media regulator. The Law on Access to Information of Public Importance was amended in November 2021, aligning

with international standards, but still did not fully incorporate proposals made by the working group monitoring the media strategy.

One of the most critical profiles Serbia faces, and which inevitably has an impact on the speed of its accession to the Union, is that of the regulation and implementation of provisions on the prevention of disinformation and hate *speech*

The Commission Report notes that discriminatory terminology is often used and tolerated in the media, and it is rarely followed by intervention by regulators or prosecutors. Hate speech in Serbia is mainly directed at Roma, LGBT, women, and migrants (Jokic, Danka & Stanković, Ranka & Krstev, Cvetana & Šandrih Todorović 2021). The legal framework governing the issue of hate speech in Serbia starts with the Constitution, with its Article 18 stating that "provisions on human and minority rights shall be interpreted for the benefit of the promotion of the values of a democratic society, in accordance with valid international standards on human and minority rights."[4] Not only that, in Article 46, the Constitution guarantees freedom of opinion and expression, defining the legitimate objectives that may limit it. Finally, Article 50 states that there is no censorship in Serbia, but the competent court may prevent the dissemination of information and ideas through the media if it is necessary to prevent incitement to racial, ethnic or religious hatred, discrimination, hostility or violence.

The most important law on hate speech in Serbia is the Law Against Discrimination,[5] which recognizes hate speech as discriminatory practices. Article 11 imposes a ban on expressing ideas and opinions or disseminating information that incites discrimination, hatred and violence against an individual or a group of people because of personal characteristics, in any place accessible to the public. The Law on Public Information and Media[6] also contains provisions that directly or indirectly prohibit hate speech, specifying that there is no violation of the prohibition of hate speech if certain information is published as part of an objective news report. It is worth mentioning the Law on Electronic Media,[7] which imposes an obligation on the Electronic Media Regulatory Authority/REM to ensure that the content of programs does not violate human dignity and other personal rights, including providing for specific cases of restriction of freedom of reception and broadcasting in case of serious violations.

The Criminal Code provides penalties for acts that constitute hate speech, such as incitement to national, racial and religious hatred and intolerance (Article 317), racial

4 Ustav Republike Srbje [Ustav], 2006. Hereafter, all English translations of the reported provisions are by the author.

5 Zakon o zabrani diskriminacije, 2021.

6 Zakon o javnom informisanju i medijima, 2016.

7 Zakon o elektronskim medijima, 2016.

discrimination (Article 387), recognizing as specific crimes those against honor and reputation (Articles 170, 172 and 174)[8]. The 2012 reform provided for better regulation of *hate speech* by introducing, in Article 54a, hate crime as a special aggravating circumstance for the imposition of a criminal sanction (Blagojevic 2016).

In Serbia, media self-regulation is a means of ensuring greater professionalism and accountability in journalism. The supreme self-regulatory authority for print and online media is the Press Council, established in 2006, whose activities are based on the Code of Ethics for Serbian Journalists.[9] This code contains a number of provisions stating that a journalist must combat all forms of discrimination, incitement to hatred and violence, taking all necessary means to prevent them. The first chapter emphasizes the duty of journalists to report information accurately, timely and objectively, stressing that concealment of facts that could significantly affect public perception of an event is equal to their distortion. It is crucial to emphasize the importance of self-regulatory authority because, compared to judicial proceedings, self-regulation is free and faster.

The Press Council has already discussed several cases of code violations, such as the action brought by the Gay Lesbian Info Centers against a text published in Informer magazine. Indeed, the Council issued a warning to the magazine for violation of the journalists' code of ethics, as the author had not complied with the principle of the journalist's responsibility to counter *hate speech* and the principle of professional diligence in preventing any possible danger of discrimination spread by the media (Blagojević 2016).[10]

Also very important is the work of the Electronic Media Regulatory Authority, which is in charge of preventing the spread of hate speech through electronic media, providing directives to broadcasters and even going so far as to impose the temporary or permanent revocation of the broadcasting license. Consider the case of TV PINK, which received a warning in November 2013 when statements by some participants in a reality show broadcast on the station incited discrimination on the basis of nationality (Blagojević 2016).

It is worth mentioning that hate speech as a form of discrimination is not expressly treated as a crime in the Serbian Criminal Code; however, there are a few court cases on hate speech, two of which involved politicians. The first judgment deals with discriminatory statements against the LGBT+ population in the text "The 2nd October 2011"

[8] See https://www.mirovni-institut.si/en/overview-of-the-hate-speech-and-disinformation-regulation-in-the-eu-and-in-theeu-enlargement-countries/ (fact sheet on Serbia).

[9] Kodeks novinara Srbje, 2015.

[10] Savet za štampu, žalbeni postupci: Gej lezbejski info centar protiv dnevnog lista Informer, Odluka Komisije za žalbe Saveta za štampu od 24.9.2015.

written by Nebojša Bakarac; the second is based on derogatory statements against the LGBT+ population made by Dragan Marković Palma to the media. These are the first rulings in Serbia for which the courts found that politicians had violated the right to sexual orientation, and for which orders were issued prohibiting them from repeating that conduct, paving the way for other such rulings by the Belgrade Higher Court[11] (Blagojević 2016).

Thus, it is evident that Serbia has made significant strides in bringing its national legislation in line with European and international standards. However, the main critical issue noted in the implementation of hate speech regulation relates to the fine line between freedom of expression and speech inciting intolerance.

Citizens in Serbia can personally exercise their rights by initiating a civil action or through a criminal complaint. However, the lack of statistical data on the number of cases and their outcomes makes it very difficult to investigate the actual enforcement of hate speech legislation; this information can only be deduced from data published in state or civil society human rights organizations' reports. Here we have chosen to report on a case that may reflect the typical attitude of the courts towards hate speech (Krstić 2020), and the way in which the delicate boundary between prohibited speech and freedom of expression is treated. In 2020, the Equality Protection Commissioner took legal action against the author of the text "Domestic Violence and Violence Against the Family"[12] for violating Articles 12 and 20 of the Law on the Prohibition of Discrimination. The commissioner complained that, in his article, the author conveyed the message that protection from domestic violence would not be justified in all cases, but only against "weak women," stereotyping and generalizing the role of women. But that's not all: listing possible causes for the increase in domestic violence, it cites police protection to "homosexuals walks" through the city streets, during which violent, naked and vulgar primitive sexuality is openly celebrated, supporting — not too implicitly — the restriction of guaranteed rights of freedom of movement and assembly. The Novi Sad Court of Appeals[13] overturned the High Court's 2018 ruling, which had recognized the perpetrator's commission of an act of discrimination based on gender and sexual orientation, prohibiting him from expressing attitudes that demean women and the LGBT+ population, including in the media and in public places in general.[14] In fact, the

[11] Such as: Prva presuda za govor mržnje prema LGBT, 7. 6. 2011. [First judgment for hate speech against LGBT, November 2011]. Presuda zbog govora mržnje na internetu, 2. 3. 2012. [First judgment for hate speech on the Internet, March 2012].

[12] http://www.nspm.rs/kuda-ide-srbija/nasilje-u-porodici-i-nasilje-nad-porodicom.html?alphabet=l

[13] Apelacioni sud u Novovm Sadu, 2018.

[14] Poverenik za zaštitu ravnopravnosti, 2019a.

Court of Appeals held that the author's statements and the article itself could not be considered hate speech against women or members of the LGBT+ population because the author's statements had the value of mere judgments and were not published in a tense social environment. The ruling was also upheld by the Supreme Court.[15]

A further critical profile lies in the issue related to the autonomy and independence of journalists, who are often subjected to pressure and attacks. According to the aforementioned European Commission Report 2022, during environmental protests in November and December 2021, some journalists reported being charged with petty crimes and receiving fines for blocking roads, even though they were there for news reports. "Although the Transparency International's Corruption Perception Index (TICPI) shows more encouraging trends, Serbia, together with other Western Balkan states, still demonstrates significantly lower levels than those achieved in the post-communist states which joined the EU in 2004" (Petrovic 2018).

Far from outlining proposals for resolving the listed issues, some recommendations that have been put forward by scholars in the field are given below. As suggested by the 2021 report by Jelena Jovović and Dubravka Valic Nedeljković,[16] an acceleration to the resolution of the above critical profiles, which potentially contribute to slowing down the accession to the Union, could be provided by enabling the implementation of the Strategy for the Development of the Public Information System for 2020-2025 and its action plan, improving media self-regulation with the support of the Ministry of Culture and Information. A training plan could be provided to the judiciary on freedom of expression and hate speech, as well as educating members of the REM Council and the Press Complaints Commission on unlawful expression, with financial and professional support from the relevant ministries. Finally, an effective strategy could be to amend the Journalism Code so that useful interpretive tools can be provided to prevent disinformation, *fake news* and *hate speech*. With regard to criminal law challenges, on the one hand, Serbia should harmonize the provisions of substantive criminal law with ECRI's Recommendations on National Legislation to Combat Racism and Racial Discrimination; on the other hand, it should ensure police training on the methodology of detecting hate crimes, with a focus on the context in which they occur (Ivanović 2020) and offering counseling and legal assistance to victims, ensuring their effective access to justice (Jokanovic

2018).

[15] Vrhovni kastracioni south, 2020. See https://www.mirovni-institut.si/en/overview-of-the-hate-speech-and-disinformation-regulation-in-the-eu-and-in-theeu-enlargement-countries/ (fact sheet on Serbia).

[16] See https://seenpm.org/wp-content/uploads/2021/11/Resilience-Factsheet-Serbia.pdf (fact sheet on Serbia).

Montenegro and alignment with the *acquis communautaire:* the state of the art

As a comparison, it is useful to point out that also another advanced candidate for accession to the Union, Montenegro, despite steady progress in many areas in aligning with the *acquis communautaire*, still raises concerns regarding the full implementation of freedom of expression and the issue of curbing the proliferation of hate speech and fake news. With regards to the political criteria for accession to the Union, the European Commission's Report 2022[17] shows the proper functioning of Montenegrin institutions has often suffered from political instability, as well as tensions within the majority, paralyzing the implementation of reforms and decision-making processes in general. Although the Parliament has made progress in strengthening its transparency, the Commission notes that it would be necessary to implement the regulation of cooperation between the Government and Parliament in order to improve participatory and oversight mechanisms. Montenegro appears moderately prepared in the area of public administration, where limited progress has been made, including the adoption of the 2022-2026 strategy for public administration. It also appears moderately prepared in the area of the judiciary, although the Commission notes that legislative changes consistent with European standards would need to be adopted in order to strengthen the independence, integrity, and accountability of the judiciary. Montenegro has achieved some level of preparedness in the fight against corruption, in particular due to the positive performance of the work of the Anti-Corruption Agency, although, in the Commission's view, the legal and institutional framework for financial investigations, seizure and confiscation should be made more uniform with the EU *acquis*. Montenegro also appears to be moderately prepared in the fight against organized crime: although the Commission calls for addressing some systemic deficiencies in the criminal justice system, the country's achievements include the adoption of a new strategy for the prevention of terrorism and money laundering, as well as achieving another record number of drug seizures and increasing the number of final convictions in organized crime cases. Montenegro has also made good progress on meeting economic criteria, with a strong recovery in 2021 and steady growth in the first half of 2022, thanks to the removal of restrictions from COVID-19; external imbalances have decreased significantly thanks to the recovery of tourism, the banking system appears stable, and the labor market situation is on the upswing. As with Serbia, the green agenda appears to be closely linked to the economic reform agenda. Regarding good

[17] See https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/Montenegro%20Report%202022.pdf.

neighborly relations and regional cooperation, Montenegro maintains good relations with EU member states and is actively working on regional cooperation; relations with Serbia remain complex, but both states are cooperating to resolve open issues. The country also continues to align with the Union's Common Foreign and Security Policy, including restrictive measures resulting from Russia's aggression against Ukraine. In the area of migration, Montenegro is the Western Balkan country that has hosted the highest number of Ukrainian citizens fleeing war; it has also signed a roadmap for cooperation with the European Asylum Support Office (now the EU Agency for Asylum), joining the European Migration Network as an observer member. Montenegro appears moderately prepared in the area of fundamental rights, as its legislative and institutional framework is almost fully in place and the country continues to comply with international human rights obligations. With regard to freedom of expression some critical issues appear evident: although the legal framework on the protection of journalists and other media workers has been improved through the adoption of amendments to the Criminal Code that provide for harsher punishments against attacks and threats to journalists, as well as obstruction of their work, the absence of effective judicial follow-up on old important cases remains a matter of concern. Without unduly restricting freedom of expression, continued efforts to counter disinformation and curb online hate speech would be necessary, according to the European Commission, in light of the fact that both the review of the legal framework and the drafting of a new media strategy seem to remain on hold.

The consequences of the lack of a self-regulatory body in Montenegro

During the long crisis of the COVID-19 pandemic, the spread of disinformation and hate speech has intensified; the state's lack of a strategic approach to the problem inevitably produces inaccurate information and conspiracy theories that influence citizens' decisions (Bogdanović 2021). Disinformation is conveyed through the media, the favored means for spreading propaganda and hatred. The proliferation of content that does not meet the standards of the journalistic profession is mainly due to the fact that, unlike in Serbia, the issue of promoting disinformation is not explicitly mentioned in the Journalists' Code. The issue of hate speech has been explicitly mentioned only in the guidelines that journalists must adhere to: these state that the media should not publish material that could contribute to the spread of hostility. It is true that the new media law requires online media to remove problematic comments from readers and that the Journalists' Code obliges such media to inform users of the rules and moderate their comments. But practice shows that moderation is inadequate compared to

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the scope of readers' comments, which abound with insults against ethnic, religious and sexual orientation minorities, as well as insults against political or ideological opponents. According to some studies (Bogdanović 2021), the Office of the Protector of Human Rights and Freedoms stated that there has been an increase in the number of complaints filed due to hate speech in recent years. In 2019, only one complaint was filed due to ethnicity-motivated hate speech, and then followed with seven in 2020 and thirteen in 2021, concerning hate speech against ethnicity, gender identity or gender reassignment, or against political affiliations and opinions. And in most cases, citizens do not file a formal complaint, but only inquire about the mechanisms available to have hate comments removed on social networks; however, the Ombudsman points out that social networks' response to such reports is often slow and nonexistent, and even in cases where the Police are involved, it is very difficult to identify the source IP addresses, which are often located outside Montenegro.

Freedom of expression is certainly enshrined in the Montenegrin Constitution, which provides that the competent court may prevent the dissemination of information and ideas through the media where this is deemed necessary to prevent the propagation of war, incitement to violence or the commission of crimes, and the spread of racial, national and religious hatred. Likewise, it prohibits inflicting or encouraging hatred, intolerance, while also imposing the prohibition of discrimination.[18]The Law on the Prohibition of Discrimination offers a definition of hate speech as any form of expression of ideas, statements, information, and opinions that spread, foment, or justify discrimination, hatred, and violence on the basis of intolerance, considering discrimination to include harassment carried out through mobile devices, social networks, and the Internet that has the goal or effect of violating personal dignity or causing intimidation. Thus, Montenegro has explicitly legislated hate speech as a special form of discrimination, providing that it is punished with a fine ranging from 500 to 20,000 euros. The Criminal Code also refers to hate speech, punishing anyone who incites violence and hatred on the basis of race, skin color, religion, national or ethnic origin and affiliation, and also punishing those who spread ideas of racial superiority. These issues are also addressed by the Law on Public Order and Peace, while the Media Law, among other provisions against incitement to hatred, obliges all media outlets to remove a comment with illegal content within 60 minutes of becoming aware of it or receiving notice of it. Well, despite the robust regulatory framework, certain enforcement difficulties survive. And these stem from the fact that there is no self-regulatory body in Montenegro to develop and maintain professional standards. Several years ago, the Media Self-Regulatory Council suspended its activities and complaint han-

[18] Article 50 Constitution of Montenegro.

dling due to lack of funds. As a result, many private media decided to appoint their own Ombudsman. In several cases, the ombudsman ordered the newsroom to disable the visibility of the comments section of some websites to protect readers from hate content. Before the legislative changes, it was the Committee on Petitions and Complaints that dealt with issues related to compliance with professional standards; in 2019, the body ruled on as many as 60 complaints, relating to lack of objectivity, biased and unverified information. However, opinion polls reveal that the majority of citizens have full confidence in the accuracy of information disseminated by the media. Civil society organizations have consistently condemned the dissemination of insults and hate speech over time; but there have been no initiatives by the media community to change self-regulatory documents and provisions on "inflammatory" rhetoric and misinformation. Moreover, there are no platforms in Montenegro where hate speech can be reported to the relevant authorities or self-regulation. The spreading of insults and incitement to violence against various ethnic and religious groups is also implemented by political actors who often enliven parliamentary sessions with mutual accusations and hate speech. A regulation that provided penalties for those who disrupt the order of parliamentary sessions was repealed in 2020, and the Code of Ethics for Members of Parliament does not appear to be an adequate tool to discourage disparaging and discrediting behavior (Bogdanović 2021).

Some studies[19] also note an additional factor of concern, and that is the political independence of the media. Although politicians are prohibited from having media ownership, indirect influences are very evident; mainstream media in Montenegro are mostly politically affiliated, often depending financially on political figures. These studies show that the link between politics and the media became even more evident in 2021, immediately after the August 2020 elections and the fall of the Democratic Party of Socialists; an example of this is the fact that immediately after the elections the new management of the national public broadcaster RTCG, which was previously close to the Đukanović regime, was appointed.

Montenegro's political, economic, and social situation is ultimately reflected in the conduct of the media, which is also influenced by outdated regulations, the absence of proper self-regulation and a regulated market, to the point of producing an increasing tendency for hate speech, dissemination of disinformation, and propaganda. Such content is also spread through right-wing online media and social pages whose sources of funding are not publicly accessible (Bogdanović 2020).

[19] Monitoring Media Pluralism in the Digital Era: Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia & Turkey in the Year 2021: Country Report: Montenegro. (2022). (n.p.): EUI.

To assist in the development of the legislation and its effective implementation, the Montenegro Media Institute has developed a list of recommendations for the media community and civil society. According to these, a self-regulatory body should be created to begin the process of amending the Montenegro Journalists' Code to include the prevention of the spread of disinformation and incitement to hatred. Online media should have comment moderation systems in place; relevant institutions should react to the spread of disinformation and hate speech by preparing intermediate measures between arrest and an overly passive approach. The Criminal Code should also be amended, as its lack of precision makes it easy to deviate from internationally expected standards on freedom of expression. Finally, the government should work on raising awareness through a comprehensive media literacy strategy.

Conclusion

According to the 2016 Eurobarometer survey on Media Pluralism and Democracy[20] , at least 75 percent of people who follow or have taken part in online discussions and conversations say they have heard, read or otherwise been involved in debates that have incited or justified intolerance, xenophobia and other forms of hatred. According to studies in the field (Cerquozzi 2018), it would be mandatory, on a general level, to introduce self-regulatory tools into the web, leading the community to become aware of the phenomenon and to trigger a preventive response of behaviors at risk of deprivation of rights. It is clear that this issue concerns the networked space as a whole, and is not only an issue to be addressed by candidates for accession to the Union. On closer inspection, the countries of the Union are well aware that they face similar issues every day, and that they are by no means a distant problem. Against the backdrop of the legal framework analyzed above, it must be acknowledged that there are some good practices in this regard; among the various, one thinks of the online youth campaign for human rights "No Hate Speech Movement"[21] , run by the youth sector of the Council of Europe, which aims to provide young people and associations with the necessary skills to raise awareness of the problem of hate speech and help them recognize possible violations of human rights. In Italy, with a view to enhancing digital literacy (Cerquozzi

[20] See: http://ec.europa.eu/justice/fundamental-rights/files/media-pluralism-factsheet_en.pdf ;http://data.europa.eu/euodp/en/data/dataset/ S2119_86_1_452_ENG.

[21] See http://www.coe.int/en/web/no- hate-campaign/objectives-and-priorities-2016-2017 and http://www.nohatespeech.it.

2018), the manifesto of Parole O_stili[22] , the first decalogue in Italy aimed at neutralizing hate speech by appealing to common sense and education, is very important.

Extending the discourse to the EU candidate countries the contribution presented a survey of the advances of selected candidates, Serbia and Montenegro, in aligning with the *acquis commaunitaire*, seeking to highlight how despite the fact that European Commission Reports and sector studies show steady progress in many areas, such as the economy, good neighborly relations and public administration, that of the implementation of freedom of expression remains an area of concern for both countries. Both countries are faced daily with the problem of the instrumentalization of information for political purposes and the spread of fake news, issues that are inevitably linked to the incendiary rhetoric of hate speech in the media, including electronic media. From the analysis conducted, Serbia, thanks to its self-regulatory mechanisms, seems potentially ready to deal with the growing phenomenon of hate speech, being supported also by a body of law that treats the phenomenon as a form of discrimination and punishes it as such. According to the aforementioned European Commission's 2022 Report, however, it would be necessary for Serbia to implement its media strategy and action plan without further delay and in a transparent manner, focusing on strengthening the safety and security of journalists and ensuring that high-level officials refrain from labeling or making verbal attacks against them, and that in any case any threats and forms of physical and verbal violence are swiftly prosecuted. According to the Commission, Serbia should also implement media pluralism by ensuring transparent and fair co-financing for public interest content.

Unlike the Serbian context, in Montenegro, the absence of self-regulatory mechanisms and a single body to which appropriate petitions can be submitted makes it more difficult to address the phenomenon of hate speech, contributing to slowing the advancement of an area, such as freedom of expression, whose implementation would be necessary to accelerate the process of accession to the European Union. According to the European Commission, Montenegro should optimize the review of the legal framework and the drafting of the media strategy through an inclusive dialogue with the media and civil society to align with the EU *acquis*, as well as support further efforts to establish effective self-regulatory mechanisms. It should strengthen the effective protection of journalists and other media practitioners by ensuring the prosecution of crimes against them; finally, it should refrain from any political, legislative or administrative action that threatens to undermine the editorial, institutional or financial independence of the public broadcaster.

[22] See: http://www.paroleostili.com/.

Then, in both countries, with appropriate differentiations, it appears necessary to take action on the training and education of legal practitioners and authorities involved in enforcing professional journalistic standards. In order to ensure, once and for all, more effective and tangible enforcement of hate speech legislation, and to prevent incitement to hatred, violence and discrimination of minorities, in order to implement sensitivity on the issue of spreading intolerance and promoting hatred, first and foremost within civil society.

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Bosnia and Herzegovina on the European Path: The Dynamics of State Functionality and the Rule of Law Reform

Samir Forić and Davor Trlin

Abstract

Bosnia and Herzegovina has travelled along a turbulent path, overcoming the burdens of the past such as the war in the early 1990s and the lack of any historical democratic experience. But there are also burdens in the present that include internal political disagreements over crucial issues such as the nature of the state, as well as the geopolitical complexities of the Western Balkans Region, to arrive to the point of obtaining the EU membership candidacy in the late 2022. While the local political elites often played the part of veto players, impeding state functionality in this process, most recently in a period prior to obtaining the candidacy, the international community has played the opposite role, actively engaging in the peacebuilding and state-building processes, and positively influencing the country's progress on the European path. The paper explores this dynamic and looks at recent reforms in the rule of law area, in particularly the judiciary, in an attempt to provide a comprehensive picture of the forces at work that shape the country's progress on the European path, and their respective rationales.

Keywords

Bosnia and Herzegovina, European Union, International Community, Judicial Reforms

Introduction

To claim that Bosnia and Herzegovina ("BiH") is on the European path is undisputed. Still, its progress on this path, as well as its own nature as a state, is the subject of dispute, filled with numerous challenges and obstacles, and based on the complex external/internal dynamics that is sometimes hard to understand and even harder to navigate.

Out of many complexities that come to define BiH since its independence in 1992, owing to wider and regional geopolitical, internal political and constitutional arrangements, peace- and state-building endeavours, as well as multicultural societal composition that translates into delicate power-sharing system permeated by dissensus, the European path understood as European Union ("EU") accession – stands out "as the only cohesive objective and strategic issue for which there is a broad political and social arrangement in the country" (Turčalo, Sadiković and Fejzić 2022: 246). Even if the process started formally in 2008 by signing of the Stabilisation and Association Agreement ("SAA"), BiH was on this trajectory ever since the war between 1992-95 ended by signing of the General Framework Agreement for Peace, or as is commonly known, Dayton Peace Agreement ("DAP" or "Dayton") in 1995. Peacebuilding and state-building endeavours were carried out in the DAP framework, most notably through Annex IV that is the Constitution of BiH. Initially designed as a temporary and transitional solution with prospects of constitutional transformation that would see BiH develop into modern constitutional state and the future member of the EU, and transit from so-called 'Washington' to 'Brussels' phase (Hitchner 2006), the constitutional system would in fact make limited progress from the ceasefire logic under which it was developed, showcasing the challenges that arise from bringing 'conflicting groups together through federalism', involving continuous and strenuous attempts from the external actors for the constitutional system to be functional and achieve discernible results on the way forward (Woelk 2022: 252).

The actions of the external and internal actors are the nexus of the external/internal dynamics that shape both the country, and its European path. The actions were supposed be coherent and convergent but proved to be incoherent and divergent, leading to distortion and asymmetry of the relation between forces in play. Still, this dissonance is not simply an outcome of such dynamics but rather seems to be its inherent trait. For instance, it can be traced to the text of the Constitution. While Article II introduced elements of the Western constitutional values (practically acting as Bill of Rights) with declaration of 13 international and European human rights catalogues having priority over all other law, Article IV retained constitutional principles of collective representation from the former Yugoslavia and asserted that constituent peoples

(Bosniacs, Croats and Serbs) are the only subjects endowed with rights of representation in the three-member Presidency and the House of Peoples of the Parliamentary Assembly BiH (Woelk 2022: 258). This contradiction was identified as discriminatory and in violation of the European Convention of Human Rights ("ECHR"), by the European Court of Human Rights ("ECtHR") in the ruling of *Sejdić and Finci vs. Bosnia and Herzegovina* case in 2009 (see Marko 2010). The contradiction remains unresolved to this day, presenting a clear obstacle on the BiH's European path. As Jens Woelk (2022: 259) notes, the elements belonging to two different constitutional traditions and presenting themselves as non-discrimination, constitutional inclusion, and democratic state that prioritizes individual over collective rights – on one side, and ethnic federalism, power-sharing arrangement, and primacy of collective over individual rights – on the other "do not harmonize, but rather create tension as their objectives contradict each other".

The logical contradiction is not merely a legal antinomy, but an allegory of divergence that marks the very nature of the state – hence the contestation – and that significantly adds to the dissonant character of external/internal dynamics. It revolves around external and internal actors, where the former are actively engaging in processes that aid or push BiH on its turbulent European path, and the latter are purportedly doing the opposite. The picture painted by this description is a simplistic one and portrays local political power elites as gatekeepers and veto players whose basic political consensus seems to be retaining of the *status quo*. Its origins can be traced to the initial ceasefire logic where peace and stability appeared as primal imperatives, resulting in the freezing of facts on the ground and formalizing the existing power relations into the new constitutional structures. The initial stabilisation process was an opportune moment for establishing a pervasive patronage and entrenched system made possible through the "combination of rigid ethno-national power-sharing structures and authoritarian patterns" (Bieber 2020: 67). On the other hand, international actors are portrayed as playing an opposite role and actively engaging in driving the country on the European path. Even if simplistic, the picture is not that much divorced from truth. The truth is that both local and international actors are aggregates that include variety of actors with different agendas, adding the layer of complexity to the external/internal dynamics.

For instance, local institutional actor of the Constitutional Court of BiH ("CC BiH") played an instrumental role in the process of constitutional evolution by asserting the major constitutional principles of: multiculturality, constituency of constitutional peoples across the whole territory, and principle of non-discrimination in its seminal Partial Decision III on the Constituency of Peoples from 2000 (see Begić and Delić 2013). Actions by the CC BiH cannot be isolated from the events of the first decade of

post-Dayton stabilisation that saw numerous reforms take place, most notably in the rule of law area that will be discussed in the third part of the paper. The reform agenda was driven by the international community, including efforts for innovated constitutional structure better known as the "April package", but also including "Butmir" and "Prud" agreements between 2006 and 2009. While some reforms, i.e., security sector (see Juncos 2018), were successful, attempts for broader and structural changes were met with the resistance of the local actors (see Balić and Izmirlija 2013: 125-129). Also, some international actors such as the Russia often "broke ranks" from its Peace Implementation Council ("PIC") Steering Board partners by dissenting on the texts of press releases, abstaining from meetings, and even suspending participation in the financing of the United Nation's Office of the High Representative ("OHR") in 2021 and 2022 respectively. These actions from Russia cannot be isolated from its own agenda to "empower and invigorate a Eurasian political perspective that situates Russia as a valuable political and cultural alternative to the West", where BiH's neighbour Serbia and BiH's Entity Republika Srpska ("RS") serve as a conveyor belt for that influence (Turčalo, Sadiković and Fejzić 2022: 255).

The EU, in the last decade, showed limited interest into playing an engaged role of aiding BiH on its European path, opting for so called 'sit and wait' policy, until the changes of the geopolitical landscape in Eastern Europe resulted in shift of their own strategic interest and newly found enlargement optimism. As Bieber and Tzifakis (2019: 20) note, the approach of the EU in the Western Balkans was focused on the norms driven policy (external rule of law promotion, prioritization of economic and social reforms) that not only yielded limited results due to gatekeeping of the local elites, but also facilitated rise of the external actors (Russia, China, Turkey, and the Gulf States) that sought to exploit the situation and exert their own influence in the region, influence perceived as negative and in requirement of containment. The dynamics between EU enlargement and the external actors' containment adds another layer to already complex of external/internal dynamics shaping BiH's European path and will be discussed more in the next part of the paper.

Despite the ambiguities surrounding the concept of external/internal dynamics, it is heuristically valuable and analytically viable for understanding of BiH's progress on the European path since it helps in pinpointing the key forces that shape it. In the following parts we will present the most recent developments in which these forces have manifested, starting with the strategic shifts in the EU's enlargement policy, and functionality crisis in BiH that ended with obtaining of the candidacy status. From there we will move to present the progress in the rule of law arena, namely in the judiciary, based on various reports in which progress in the area is evaluated. While discussion of the key points is limited, some of them are additionally illustrated with references

on quantitative indicators that display some general trends in the 2011-2021 decade, and some specific data related to judicial effectiveness in BiH. Finally, we reflect on the BiH's European path as a necessity. Both for the country's own sake and for the sake of the regional stability that represents the EU's strategic interest.

Dynamic of State Functionality and EU Accession: The Crisis and the Opportunity

The SAA that BiH signed in 2008 entered into force in 2015, and the following year saw BiH submitting its application for EU membership followed by the Opinion of the European Council ("EC 2019"), endorsed by the Council of the EU ("EU Council") in 2019. In late 2022 the EU Council granted candidacy status to BiH, the event that saw BiH European path moving into the next phase. The Opinion holds 14 key priorities that BiH will need to fulfil to proceed further in the EU accession negotiation phase. Out of the Western Balkan ("WB") countries, only BiH and Kosovo did not start negotiations, and BiH was the latest in the region to be granted the candidacy status, following the same status being granted to Ukraine and Moldova in mid-2022.

There is a strong belief that all three countries were granted the candidacy status due to the geopolitical reasons marked by the Russia's aggression on Ukraine in February 2022. At the same time, Ukraine applied for membership and was granted candidacy status in the course of four months. Moldova, like BiH, applied in 2016 and was granted candidacy in 2022. The dynamic was pushed by geopolitics, not merit, it is understood. But the geopolitics played a role in shifting the EU enlargement even before the events of February 2022, namely in the Western Balkans Region ("WBR"). As noted earlier, this was a shift in the rationale of EU enlargement that recognized the influence of external actors and sought to effectively contain it. The rationale shifted from consolidation of stability, and full implementation of liberal political and economic reforms toward containment of negative influences of external actors (Bieber and Tzifakis 2019: 5).

The new rationale is expressed in terms such as 'geostrategic investment' and 'geostrategic priority', and is noted in the strategic communication by the bodies of the EU. Following the European Commission ("EC") communications in 2020, the European Economic and Social Committee ("EESC") in its Opinion from 2021 (EESC 2021), stated that the integration of the WBR "represents a geostrategic investment in the peace, stability, security and economic growth of the entire continent. The Western Balkans are an integral part of Europe and a geostrategic priority for the EU". The EC Communication on EU Enlargement Policy from 2022 (EC 2022: 33) repeated that the

"enlargement policy is more than ever a geostrategic investment in long term peace, stability, and security of the whole of our continent and is consequently featuring high on the EU's political agenda", that the EU is "fully committed to the EU integration of the Western Balkans", and that this is "a shared strategic objective that unites the whole region and the EU". Josep Borell, High Representative of the European Union for Foreign Affairs and Security Policy ("EEAS") asserted that accession negotiations "can only happen if there is more progress on reforms and on their implementation" but that the EU needs to increase its own "efforts to bring the region closer to the European Union".

Clearly, the external part of the dynamics of the BiH's European path was revitalized after the relatively longer period of hibernation. But when one looks at what was happening in the internal part of the dynamics, one can hardly escape the simplified picture of divergence between the local and international actors in BiH. The international community was heavily involved in ending of the war in BiH and remained involved in the subsequent peacebuilding and state-building processes. PIC is the formal representation of the international community comprising of 55 states and its most important body is the Steering Committee whose members are Canada, France, Germany, Italy, Japan, Russia, United Kingdom, United States, the Presidency of the European Union, the EC, and the Organisation of the Islamic Conference ("OIC"), which is represented by Turkey. Another representative of the international community is the OHR, envisaged as a moderator of the peace implementation process but, since 1997, endowed with extraordinary or 'Bonn powers' (see Banning 2014) to make direct interventions into the constitutional system by extensive legislative, judicative and executive decisions aimed to secure stability and functionality of the said system. These powers were used extensively in the first decade after the war, strengthening the state functionality and driving reform agendas, but the intensity of their use gradually ceased – since they aggravated local political elites and created impression that the style of government resembled that of colonial rulers (see Woelk 2022: 261). For the period between 2015 and 2020 no decision was made. Only in the autumn of 2021 OHR issued the Decision on Enacting the Law on Amendment to the Criminal Code of BiH, criminalizing genocide denial and glorification of convicted war criminals. The decision was an impetus for crisis of state functionality and the year was "one of the most turbulent years since the end of war in 1995, with severe political crises challenging the very existence of the state", even if it "was widely seen as an opportunity for comprehensive reform" (Woelk 2022: 267-268).

What happened in the aftermath of this decision was detrimental to state functionality. The RS blocked central-level institutions from August 2021 until spring 2022 "leading to an almost complete standstill in reforms during that period" (EC 2022: 61).

During this period, RS pursued to "unilaterally take over state competences (including on taxation, the judiciary, defence and security) and dismantle state institutions, endangering the country's EU accession perspective as set out in the Commission Opinion" (EC 2022: 61). The process also involved taking legislative action to withdraw RS from the key state bodies and establish parallel bodies on the entity levels, and unilaterally pass legislation that regulates immovable property used for functioning of public authority. Also, the Entity's Government was instructed by the RS National Assembly to draft the new constitution that would withdraw powers from the central level in the judicial sphere. Practically, this meant that the High Judicial and Prosecutorial Council of BiH ("HJPC"), the institutional apex of post-war judicial reforms, would be dismantled and the new one on the Entity level would be established instead, leading to disintegration of the judicial apparatus as a whole and significantly hampering the progress of the country on the European path. These actions, accompanied by harsh and secessionist rhetoric by Milorad Dodik, then member of the three-member Presidency and now a President of the RS Entity, "were widely interpreted as preparations for RS secession" (Woelk 2022: 269). Said laws and declarations were eventually annulled by the CC BiH in 2022, and the OHR continued to issue decisions – 14 in total between April 2022 and April 2023, out of which three curtailed the attempts of the RS Government to legally regulate matters of the immovable property used for functioning of public authority. Both the OHR and the CC BiH affirmed that the regulation of this property should be done on the central, and not on the Entity level.

The other BiH Entity – Federation of BiH ("FBiH") – experienced major functionality problems since the Government spent the whole 2018-2022 period in the technical term, due to inability of political elites in power, namely two major political parties whose electorate include two major constituent peoples in the Entity: Croats (HDZ) and Bosniacs (SDA), to reach the governmental coalition agreement. This was caused by the dissensus on the state electoral law that would introduce more adequate mechanisms of political representation of constituent peoples, namely Croats, in the form of guarantee of so called 'legitimate representation' (see Pepić and Kasapović 2022). Dissensus over electoral reform reflects the wider dissensus on three crucial issues in BiH: a) the nature of the state, b) the nature of political representation and c) assuming stance over the Ukraine-Russian conflict. While the first issue is one of the most contested that stifles BiH's progress on the European path – manifested in unilateral and obstructionists action taken by the RS Entity, as mentioned above, the second issue was prominent for the dysfunctionality of the FBiH Entity. Dysfunctionality was again addressed by through international intervention, manifesting in the series of decisions of the OHR between autumn 2022 and spring 2023. Six of those decisions constituted so called 'transparency package' (allocating funds that enabled the general elections

of October 2022 to be conducted, amending the law on financing of state institutions, amending the electoral law, and amending the Constitution of the FBiH Entity) which made organization and conduct of elections possible. Once the elections were completed the additional obstacle appeared that put the process of implementation of electoral results and forming of the new FBIH Government in the standstill. Hence, the OHR intervened once again in spring 2023 with the so called 'functionality package', a set of temporary solutions and mechanisms designed to unblock the appointment of the FBiH Government. Nevertheless, the requirement for electoral reform remains one of the top priorities for the new Government on the central level and is expected to finalise by the end of 2023.

Final interventions by the OHR were made in late April 2023. The decisions were issued to amend the criminal codes on the central and Entity levels, introducing new criminal offences of bribery in elections and duty financed by public funds, some of which are punishable by imprisonment for a term between one and 10 years, aimed to curtail and prevent widespread corruption, as well as to enhance the integrity of the electoral process and the functioning of the public administration. The recent intensification of interventions, including those in the first phase of peacebuilding and state-building, demonstrate that post-Dayton achievements, both in terms of state functionality and progress on the European path, are proportional to the intervention of the international community, mostly via the decisions by the OHR (Turčalo, Sadiković and Fejzić 2022: 246).

Even if this type of intervention, direct and coercive, did manage to pass the obstructions laid by the political elites in power, an additional, this time indirect and diplomatic, intervention was needed so that the cycle of dysfunctionality and effective state paralysis could be broken. This happened couple of months after the work of the BiH Parliamentary Assembly was unblocked and representatives from the RS Entity returned to their posts. On June 12, 2023, leaders of the of political parties represented in the Parliament and the Presidency of BiH held a meeting in Brussels, hosted by the President of the EU Council Charles Michel and the High Representative of EEAS Josep Borell, where they adopted a Political Agreement on principles for ensuring functional Bosnia and Herzegovina that advances on the European path (EU Council 2022). What followed was the period of relative functionality where, aided by the mentioned OHR decisions, the general elections were held on October 2022, the BiH Government was formed in the record time in late January 2023 (Balkan Insight 2023), marking the sign of new times to come.

Signs positive for the BiH's European path were generated primarily externally by granting the candidacy status to BiH by the EU Council one month earlier. Internally generated signs cannot be reduced only to internal actors' newly found optimism for

cooperation but also in BiH's alignment with the Common Foreign and Security Policy ("CFSP") that was reportedly at 81% during the reporting 2022 period (EC 2022: 36). With the FBiH Entity Government forming in spring 2023, the overall institutional puzzle was (almost) complete and the functionality of state, in almost all of its administrative levels (except two Cantons in FBiH by the time of the writing), was formally secured. However, the main challenges of functionality are yet to appear, most notably in form of dealing with the eight urgent steps outlined by the EC Communication on EU Enlargement Policy from 2022 (EC 2022: 38-39), and 14 key priorities outlined in the EC Opinion on BiH's application for the EU membership from 2019 (EC 2019: 14-16), not to mention the contested issues relating to electoral law reform.

Eight urgent steps substantially correspond to eight of the 14 key priorities that BiH will have to deal with during the post-candidacy and pre-accession negotiation phase. Out of these eight, first five correspond to the rule of law priorities (6, 7 and 8). Improvement of the functionality of judiciary by adopting new legislation on the HJPC, with introduction of integrity amendments, and of the legislation on Courts of BiH in line with European standards pertains to priority number 6. Strengthening the prevention and fight against corruption by adopting the legislation on prevention of conflicts of interests and taking decisive steps to prevent and fight against corruption and organised crime by demonstrating progress towards establishing a track record of proactive investigations, confirmed indictments, prosecutions and final convictions against organised crime and corruption, including at high-level, pertains to priority number 7. Finally, ensuring effective coordination, at all levels, of border management and migration management capacity, as well as ensuring the functioning of the asylum system, pertains to priority number 8. In its BiH Report for 2022, the EC (EC BiH 2022) noted minimum to no progress in all of the 14 key priorities stating that BiH is overall in the early stage regarding its level of preparedness. Dysfunctionality of the state in the period between 2021 and 2022 does account for the lack of progress in the reporting period, but it is indicative that BiH made virtually no progress between 2019 and 2022 but was still granted with the candidacy status.

What was a major crisis not even two years ago turned into a tremendous opportunity for BiH's advancement on the European path. But why did this happen? Was it simply because the EU shifted the rationale behind its enlargement policy to address new geopolitical challenges and contain the negative influences of the external actors? Was this influence a factor in actions by the local political actors to obstruct and undermine the state functionality? While the first OHR decision in summer 2021 was an impetus for the secessionist politics exerted by RS that politics did not cease despite progress made and state functionality restored. The summer of 2021 saw High Representative ("HR") Valentin Inzko replaced by Christian Schmidt, former minister,

and parliamentary member in Germany. The appointment of new HR was contested by Russia and China at the UN's Security Council and is for that very reason highly contested by the RS representatives and officials in BiH (Sito-Sucic 2021). The contestation of the new HR is closely linked with contestation of the BiH's statehood by the RS political actors and, despite the progress on the European path, remains a significant source of challenges for future EU accession progress and state functionality. The intensification of external/internal dynamics in BiH could, in this case, be seen as result of BiH becoming a site of geopolitical conflict. In that sense, the EU's more engaged approach manifested in granting of the candidacy status could be seen not merely as a good will gesture but as geostrategic investment. It is important for that investment to come in a form of credible and realistic membership and utilize EU conditionality in a manner that maximizes its transformative potential for BiH, namely in the rule of law area. That it the real opportunity for BiH.

Dynamic of Rule of Law Reform: The Uncredited Progress

In this part, our attention turns to the rule of law reform in BiH, primarily to key priorities number 7 and 8 that were reassigned as urgent steps 1 to 4 in the latest EC Report on BiH and pertain primarily to reforms of the judiciary.

Key judicial reforms took place in the early 2000s, with international community playing an instrumental role in the process. The Court of BiH was formed in 2002, with jurisdiction on labour disputes of civil servants in BiH institutions, adjudication of war crimes, determination the responsibility of the BiH state for damage, etc. Prosecutor's Office of BiH ("PO BiH") was established in the same year. This implied a different organization of the judiciary, as well as the organizational, material, and procedural regulations that would be applied in the process of the judicial system reconstruction on all levels of government. The next year saw the formation of Independent Judicial Council, the central and Entity level HJPC bodies, along with the Entity level centres for judicial and prosecutorial training. The new, central level HJPC was formed in 2004, while the previous three bodies ceased to exist. The HJPC is an independent and autonomous state institution tasked with securing independent, impartial, and professional judiciary in BiH. It is based on the judicial council model introduced by the constitutional reform phase to new post-socialist countries of the former Eastern bloc during the 1990s tasked to depoliticize judiciaries and implement the constitutional principle of judicial independence (Coman 2014: 893). Law on HJPC was adopted in 2004 and amended on two occasions in 2005 and 2007 respectively. There were two attempts to change and amend the law in 2012 and 2014 but failed to materialize because of

the pressure from both the international community and judicial community in BiH, since they proposed changes that would reduce HJPC's autonomy in appointment of prosecutors (Sali-Terzić 2013: 20). The law is expected to be amended with provisions on integrity plans, but also new law is expected to be adopted in the line of EC Opinion 2019 key priority 7. The Opinion was accompanied by the Expert Report on Rule of Law issues in BiH from 2019, also known as the 'Priebe Report' (ERRL BiH 2019).

The report was prepared by a team of several experts, headed by Reinhard Priebe, a German lawyer and associate of the EU Commission. The report focuses on the rule of law, the judiciary, and related institutions. It links the constitutional structure of the state as a prerequisite for the rule of law, but also the lack of political will for reforms. The problem of lack of responsibility and transparency of judicial institutions was also emphasized (i.e., insufficiently explained decisions, procedures and decision-making closed to the public). It was pointed out that the laws are not a problem, especially since most of them are already harmonized with European standards, but a gap between the legal norms and factual reality, in terms of non-application and erroneous application, but also due to dogmatic and formalistic interpretation of regulations by officials of all branches and levels of government. Termination of the previous convocation of the HJPC was recommended, along with the change of the appointment process (changing ethnic to merit criteria). Evaluation should be carried out more on the grounds of qualitative criteria rather than quantitative. The system of statements by judges and prosecutors, without control, about assets has been criticized, and rigid external supervision was recommended. Improvements in criminal and civil proceedings are recommended, for the sake of their efficiency, as well as appropriate implementation and sufficient legal remedies against human rights violations, and it was specifically pointed out that non-implementation of judgments of the ECtHR is unacceptable for an aspiring EU candidate country.

What follows next in this paper is presentation of some key points from four distinct reports, two made by HJPC detailing their accomplishments for the reporting period for 2019 and 2020 respectively; one made by the BiH's Parliament from 2022 and the last one from the EC Report on BiH for 2022. It is our intention to, by outlining reported points, present a more comprehensive picture of the work done in the BiH's judicial sector, reflected on from two different perspectives belonging to three actors: one of which is internal and two that are external to judiciary. We will first present major points from HJPC annual reports, and then proceed to present the relevant ones from the second two.

The annual report of the HJPC from 2020 (HJPC 2020) for the 2020 period contains an overview of the implemented activities which resulted from the previously mentioned reports, and the content of which was largely formed by Peer review missions

(judges and prosecutors from EU countries that had visited BiH and made an overview of the situation in key areas, which all enabled the EC to assess the situation in BiH and to help the institutions of BiH in implementing further reforms). Although a number of priorities presented to the HJPC by the EC required changes to the Law on the HJPC, certain recommendations could be implemented by amending the Rules of Procedure of the HJPC (rights and obligations of HJPC members, the role of the HJPC Presidency, exemptions of members the HJPC, and improving the transparency of the work of the HJPC). A large number of recommendations also referred to: disciplinary procedures in the judiciary of BiH (adopted amendments to the Code of Judicial Ethics and the Code of Prosecutorial Ethics in order to harmonize them with the Guidelines for Suppressing Conflicts of Interest in the Judiciary as well as the Manual for the Application of this Code), evaluation procedures and criteria of judges and prosecutors (amended acts concerning qualification and written tests, interviews; introduction of the difference between the first appointment and promotion), personal financial reports of judges and prosecutors (created an electronic system for submitting and processing financial reports of judges and prosecutors, on the website the HJPC published the financial reports of judges and prosecutors who gave consent for publication), evaluation of the work of judges and prosecutors (provided support to courts and prosecutors to conduct performance evaluations for 2019), initial training for newly appointed judges and prosecutors (training sessions for consultative prosecutors were held , and in two first-instance courts it is tentative implemented mentoring program) and the fight against corruption, organized crime, including money laundering (amendment of the Rulebook on orientation standards for the work of prosecutors in BiH prosecutor's offices, in which for the first time the work on high-level corruption cases according to the definition of the HJPC was evaluated, a two-year specialist program was developed and implemented training for prosecutors, etc.).

The annual report from 2021 (HJPC 2021) highlighted the efficiency, quality, and transparency of court work as significant achievements during 2021. Strategic planning system was introduced in all courts in BiH, more efficient processing of cases of corruption and organized crime, improvement of enforcement procedures in BiH, application of SOKOP - Small system for more efficient processing of communal cases, improving the efficiency of bankruptcy proceedings, creating a draft Strategy for Alternative Dispute Resolution, improving the efficiency and quality of litigation proceedings, implementing the Strategy for Improving Gender Equality in the Judiciary of BiH, improving the position of vulnerable groups in contact before the court, improving quality verdicts in civil proceedings, initiating the reform of civil legislation, an analysis of independence, responsibility and quality in the judiciary was carried out, according to ENCJ standards (application of all European standards), construc-

tion and renewal of judicial institutions, greater transparency (new documents, such as Communication Strategy of the HJPC). Furthermore, efficiency, quality and transparency of the work of the prosecution offices was noted (prosecution of criminal offenses of corruption, prosecution of criminal offenses of organized crime, support to the prosecution offices in their work on cases of economic crime, organized crime and corruption, analysis of the situation and measures for solving old cases in the prosecution offices, activities of the Permanent Commission for the Efficiency and Quality of Prosecutor's Offices, improvement of cooperation between prosecutors' offices and law enforcement agencies, improvement of specialization of prosecutor's offices and expanded categories of participants, providing support to the Coordinating Body of Chief Prosecutors of PO BiH, Entity prosecutor's offices and the PO of Brčko District BiH, strategic planning in prosecutor's offices, support in prosecutors' offices in the implementation of archive digitization activities, transparency, public relations in prosecutor's offices and cooperation with the non-governmental sector). Additionally, reports were made on evaluation of the work of the judicial function holders, their training (coordination of the process of equalization with judicial practices, increased transparency of the judicial system), implementation of the Revised State Strategy for work on war crimes cases and monitoring of the work of courts and prosecutor's offices on war crimes cases.

Even if many of the reported achievements made during the 2020 and 2021 period, made in the aftermath of the 'Priebe Report' may be attributed as technical and pertaining to issues of judicial capacity, they are nonetheless significant for the overall functioning of the judiciary. As some quantitative indicators presented in the end of this part show, the achievements of incremental judicial reform made by the HJPC, and that mostly followed EC recommendations, have resulted in higher effectiveness as measured by the Judicial Effectiveness Index. However, some wider and more structural shortcomings identified by the 'Priebe Report' would be reiterated by the first report that resulted from the parliamentary oversight in the post-Dayton BiH's history, albeit much more detailed.

In June 2022, the long-awaited report on the state of the judiciary, saw the light of day. The report (HRPA BiH 2022) was prepared by the Investigative Commission established in May 2020, based on the conclusion of the House of Representatives of the Parliamentary Assembly of BiH from 2019. The Commission's work was supported by numerous international organizations such as the OSCE and the Council of Europe. The Commission detected that the problems that exist are the result of the actions of a corrupt minority in leadership positions in the judiciary.

The Commission emphasized that it is important to expand the conflict of interest mechanism because the current bans on employment of close relatives of judges and

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prosecutors in the same courts and prosecutor's offices in which they perform their duties are not sufficient. They stressed that it is necessary to expand the ban in such a way that it includes the ban on political appointments of close relatives of judges and prosecutors. It is stated that the OSCE, in its own report, raised concerns about the "impunity syndrome", indicating that the key positions in the judiciary are very often allocated according to the reward system, rather than merit and professional qualifications. When it comes to the Office of the Disciplinary Counsel of the HJPC ("ODC"), the Commission found that the number of procedures initiated in relation to complaints is satisfactory and that it exceeds European and global averages. The Commission concluded that in 2019 and 2020, the majority of complaints referred to acts of negligence or inattention, i.e. delays in making decisions or other actions, while less than one third referred to particularly worrisome acts, such as behaviour that harms the reputation of the judiciary or prosecutorial functions, intentionally providing false or misleading information, failing to seek exemptions in the event of a conflict of interest, making decisions that clearly violate the law, and the like. However, the Commission did contend with the idea that the root of this problem is to be found in the management or staff of the ODC, but rather caused by the extremely unequal and unfavourable position of the ODC in relation to the judiciary as a whole, including both institutional and professional inequality.

Unlike the findings related to judges and prosecutors, including members of the HJPC, where corruption, manifested through the informal networks between political and the judicial actors, and conformity are the key to the problem, the inadequate activity of the ODC to prosecute disciplinary offences results from a combination of justified fear, lack of institutional and professional independence, inadequate resources, the unequal position of the ODC staff in relation to judicial functions holders, and to some extent the inadequate legal regulation of their professional status. The Commission accepted the point of view of certain judges who testified before it, that the chief disciplinary prosecutor should have stronger references and that the criteria for appointment to this position should be equal to the criteria for appointment to the highest positions in the judiciary in BiH. In the report, it was pointed out that the Case Management System ("CMS") system is also connected to the ODC, where it is indicated that certain chief prosecutors were subject to disciplinary action and dismissed from their positions due to the non-implementation of that system, and the lack of transparency in the use of CMS in determining disciplinary commissions, which are not a legal category. The final report presented in this part (EC BiH 2022) touched upon this issue but omitted to note the structural reason behind the problem highlighted in the HRPA BiH report.

The next problem that the Commission identified related the unlimited duration of the mandate in managerial positions in the judiciary, because it is stated that the presidents of courts and chief prosecutors can renew their mandate, but not how many times. Important findings referred to attacks on journalists, the number of which has increased in recent years, and to unauthorized filming, where it was proposed to change the relevant legal provisions, but also that they should not be applied without the simultaneous application of the practice of the ECtHR, i.e., detailed consideration of public interest, as well as the location where the video was taken, in each individual situation. Part of the report also referred to the public procurement system, where it was concluded that the problem is not only in the illegal behaviour of public authorities during the public procurement procedure, but also within the judiciary.

When compared to the 'Priebe Report', the HRPA BiH 2022 report appears to be more concrete both in terms of identifying roots of the problem and mechanisms of its maintenance, as well as solutions for dealing with them. Unlike the HJPC reports, the HRPA report is more critical yet affirms some accomplishments, namely those related to judicial accountability and disciplinary procedures. When compared to the latest EC Report on BiH (EC BiH 2022) in which it is noted that independence and impartiality has not improved since 2019, causing the public trust in judicial institutions to remain low, and that CMS is vulnerable to abuses which negatively impacts impartiality, the HRPA BiH report appears much more comprehensive and nuanced. EC BiH report, on the other hand, appears to be more straightforward. It notes that the level of external, namely political, pressure on judicial office holders has increased; that there is no progress on establishing a robust system to verify asset declarations of judges, prosecutors and HJPC members; that integrity plans, even if in place, yield limited results; and that disciplinary procedures continue to have little dissuasive effect. The most troubling finding pertains to the position of the chief prosecutors of the PO BiH and PO RS respectively. Both were demoted from their positions for disciplinary offences of manipulation of case assignment.

The presented reports are taking the 'Priebe's Report' as a reference point and are oddly affirmative and critical, depending on the authorship coming from inside or outside of the judicial system. Aside from the HJPC reports, others paint a bleak picture of judicial system in BiH and presents its accomplishments as very limited. Therefore, it should not come as a surprise that the BiH's progress on the European path is conditioned by the substantive judicial reform that will address the structural issues to be resolved by the HJPC, and the wider issues relating to corruption. Prior to conclusion of this part, we want to present some quantitative indicators that provide more comprehensive picture BiH's shortcomings in terms of general governance trends, but also

some that demonstrate limited progress in the work of judiciary, even if not accompanied by public recognition.

First of those are the World Bank's Worldwide Governance indicators (The World Bank 2023) for BiH for the 2011-2021 decade. The curvature based on the specific set of indicators (regulatory quality, rule of law, control of corruption, governance effectiveness, and political stability) is on the rise between 2011 and 2014, after that it gradually drops down and remains dropping since 2017. For example, rule of law indicator was highest in 2014 (51.92%) and is on a steady decline ever since (42.79 in 2020 and 2021). Control of corruption indicator was highest in 2013 (50.71) and is also on the steady decline (28.85 in 2021). Governance effectiveness indicator was highest in 2013 (41.23) and is also declining steadily (12.98 in 2020, 13.46 in 2021). Political stability indicator was highest in 2014 (44.76) and dropped to 33.79 in 2021. These trends correspond to the period where the international intervention, or external part of the external/internal dynamics, was decreasing and is best showcased by the lack of any decisions by the OHR until Summer of 2021. This trend alone may serve as basis for argumentation that the progress on the European path is proportional to the level of international intervention, as stated earlier (Turčalo, Sadiković and Fejzić 2022: 246)

The second set of indicators is more specifically related to judiciary, namely the Judicial Effectiveness Index BiH ("JEI BiH"), a monitoring and evaluation instrument annually conducted since 2015. The report from 2022 (JEI BiH 2022) for the previous year shows relative deterioration of -0.38 points relative to 2020 value; its overall value for 2021 being 56.10/100 – mostly caused by the indicators of public perception being worse for -0.88 relative to 2020 value. Out of five dimensions, two of them deteriorated (Efficiency and Quality) while three of them improved (Accountability and Transparency, Capacity and Resources, Independence and Impartiality). Negative public perception of BiH judiciary is mostly related to "judiciary's handling of corruption matters" that is "the poorest since the inception of the JEI, and that judicial professionals' own perceptions about judges and prosecutors' susceptibility to bribery keep worsening" (JEI BiH 2022: xiv). This perception remains negative despite the inflows of corruption cases increasing in 2021 relative to 2020 by 33% (1.053 to 833), "an increase not observed since the inception of the JEI-BiH" (JEI BiH 2022: 56). It is worth noting that prevention and fight against corruption stands out as one of the key priorities that BiH will have to address in the foreseeable future. In its latest report (EC BiH 2022: 23-25), EC noted that there is alarmingly low number of convictions in high-level corruption cases; that there is no effective track record for proactive investigations, prosecutions and final convictions for corruption; that plea-bargaining are frequent and sanctions are lenient; that there is no harmonisation of legislative and coordination between anti-corruption bodies across the country, and, finally, that the

rejection of central-level law on prevention of conflict of interests demonstrates the lack of genuine political commitment to rule of law on the European path.

Critical assessments of the rule of law progress are certainly substantiated. Negative perception on the judicial work and virtual omission of recognition of incremental reforms taken by the body that represents radical change to tradition of relations between law and politics in BiH is perhaps not substantiated. Certainly, shortcomings and aberrations of judicial apparatus identified by named reports cannot be ignored and are legitimately on top of the priority list for the new BiH Government. Still, some level of recognition for BiH judiciary is due given that it finds itself in unprecedented degree of autonomy and the need so manoeuvre between simultaneously appearing imperatives of maintaining the existing order while acting as agents of its change, and between autonomy and accountability. Portraying judiciary as yet another facet of BiH's state dysfunctionality should be accompanied by realization of its relative inexperience, general self-reliance and at least limited progress in delivering required reforms. Still, in order for the EU's new approach to BiH to work, the geostrategic investment should come in form of investing further in the rule of law area and strengthening of the BiH's judiciary. It is no surprise that these matters top the list of the post-candidacy EU accession path priorities, and one should not expect for the EU to be inconsistent with this policy, nor should it be expected that the international community, namely the OHR, to be passive observer in this process.

Conclusion

The aim of this paper was to provide accounts, based on the development of BiH post-Dayton statehood inextricable from its EU path trajectory, as well as on relevant reports evaluating the progress in the rule of law area, that display how dynamics that shape the BiH progress on the European path, most notably the external/internal dynamics, work. Complexities associated with these dynamics are indeed plentiful and to present them in a crude relationship and simplified picture where one part (external) is pushing the country ahead while the other (internal) is doing the opposite was by no means a grateful task. Still, however discursively framed, these accounts speak for themselves and pinpoint the roles that external and internal actors play in the process of moving BiH on its European path. They seem to affirm the premise that the progress on the European path is proportionally related to active engagement of the international community. Repercussions of the idea are then, *prima facie*, read in the negative key: if BiH cannot realize its EU membership aspiration alone, without active engagement of the international community, why should it be deserving of such status? Is

the aspiration even real? Or is it just a collectively projected ideal that would give the internally divided society some sense of purpose?

Perhaps the ordeal should be instead understood not as an aspiration, but as a mere necessity, just as the EU membership candidacy should be understood as an investment rather than just a gift. As Jens Woelk (2002: 256) notes, the integration to EU "is less matter of political and economic transition and more, if not *primarily*, an issue of stabilising the peace and creating fundamental preconditions for overall development". Also, as Turčalo, Sadiković and Fejzić (2022: 245) assert, integration to the EU is a necessity in order for BiH to "fully realize its potential as a stable, multi-ethnic and democratic state". This necessity is born out the fact that the EU represents a normative-value framework that is the only capable of effectively dealing with the critical issues over which local political elites regularly dissent. In other words, it is a stabilisation mechanism that is always seemingly required due to its internal divergent forces that continue to undermine that stability. The more this issue is regionally relevant, namely in the optics of 'geostrategic interest' that is now the driving rationale behind the EU Enlargement policy, the more pressing it becomes, consequently increasing the external part of the external/internal dynamics that shapes the BiH's European path. Such observation is explicated in the International Crisis Group Report from 2022 (ICG 2022: 6) where it is said that the situation, regarding the Western Balkans Region, "calls for the two-track approach that separates out urgent crisis and conflict management tasks from long-term planning for EU accession", and that stabilising BiH "is the most pressing need". However, stabilisation is only a minimal requirement and should not constitute the general expectation fostered for BiH by international community, namely the EU, and the country citizens. To fulfil the priorities set out in in EC Report, BiH will have to continue to make efforts in strengthening the rule of law. Only then will its aspiration to be part of the broader normative-value framework that the EU represents be externally and internally recognized and the geostrategic investment will be not an external placeholder but in internal capital that will provide the so much needed stability from within.

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