

EUROPEAN UNION'S VALUE-BASED APPROACH TO SUSTAINABILITY OF ACCESSION PROCESS (IN WESTERN BALKAN)/ Lucia Mokrá

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This work was supported by the Slovak
Research and Development Agency
under the contract No. APVV-16-0540.

Abstract: *The Union cornerstones are respect for the rule of law and the fundamental rights on which it is founded - as stipulated in Article 2 of the Treaty on European Union. EU law is supreme to national law and has direct effect, as evidence of the significance of mutual trust among its member states and their respective legal systems. The EU promotes a broad and substantive understanding of the rule of law whereby this concept is viewed as intertwined with and mutually reinforcing of the principles of democracy and respect for human rights, all of which underpin political stability and sustained economic and social development. The EU Charter of Fundamental Rights is binding on European institutions' internal and external policies when implementing EU law; it includes a legal obligation to ensure that all EU actions promote and respect human rights and fundamental freedoms, including external policies. Mirroring its internal policies, the EU seeks to prevent violations of human rights and related rule of law throughout the world. This paper analyses the EU's approach to supporting rule of law reforms and human rights protection in candidate countries base on analysis of particular agreements. It first situates European fundamental values to demonstrate how values are embedded in the association agreement and then focus on the assessment of the goals which aimed to be achieved. The paper also examines EU tools applicable in concrete cases. We argue that the EU has consistently putting the rule of law and human rights at the centre of its action and contribute to more effective protection of these values in candidate countries.*

Key words: *Fundamental Rights; Rule of Law; Democracy; External Actions; Candidate Countries; Association Agreement*

Suggested citation:

Mokrá, L. (2022). European Union's Value-Based Approach to Sustainability of Accession Process (in Western Balkan). *Slovak Yearbook of European Union Law*, vol. 2, 75-82. <https://doi.org/10.54869/syeul.2022.2.334>

Published: 31 December 2022

1. INTRODUCTION

The European Commission's Communication on Further strengthening the Rule of Law within the Union – State of play and possible next steps „acknowledged the importance of strengthening the rule of law for the future of democracy in Europe and

the need to reinforce action at all stages – promotion, prevention and response”.¹ The summary assessment of EU Member States refer to the promising practices but do not forget on some isolated cases in which some countries point to interference with their sovereignty.² The underlined importance of the rule of law in the European Union allows the Commission also to transfer rule of law implementation experiences into its policies, including the European Neighbourhood Policy and Enlargement. Rule of law together with the human rights became crucial not only in assessment of the fulfilment of Copenhagen criteria in Enlargement Policy, but are also used as the indicator for the progress of reform priorities in candidate countries. „When supporting rule of law reform and constitution building in other regions, the EU aims to ensure the same level of respect for fundamental values and democratic culture as in its own member states” (Ioannides, 2014, p. 4). This paper analyses the EU's approach to supporting rule of law reforms and human rights protection in candidate countries base on analysis of particular agreements. The assessment is based on the 2020 Commission Communication “Enhancing the accession process – A credible EU perspective for the Western Balkans” and the annual Progress reports in associate countries of Western Balkan. The qualitative content analysis of the applicable EU legislation and policy framework with the annual report will address the centralisation of the rule of law and human rights as EU fundamental values in accession process of Western Balkan candidate countries.

2. FUNDAMENTAL VALUES OF THE EUROPEAN UNION AND ASSOCIATION AGREEMENTS

Respect for human rights and dignity, together with the principles of freedom, democracy, equality, and the rule of law, are values common to all European Union (EU) countries (Article 2 TEU). They also guide the EU's action both inside and outside its borders. Democracy in this sense should be understood as “the framework within which conditions are established for the effective protection of fundamental rights and the rule of law” (de Baere, 2012). Without an effective “direct” remedy, the values of the EU, including the rule of law, are taken into account while being applied in respective rules or dealing with possible violation of rules, duties and rights stipulated by the Treaties” (Kováčiková and Blažo, 2019, p. 222).

Article 49 of the Treaty on European Union now clarifies the general conditions for accession to the European Union: “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union” Article 2(1) of the Treaty on European Union states that “[T]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. The external aspect of the rule of law as regulated in Article 21 of the Treaty on European Union is focused on a mission, that “the EU should not be seen only as an exporter of the values, but most importantly as an organisation which consolidates and supports the rule of law” (Konstadinides, 2017, p. 77). In relation to the enlargement process, the European Commission had presented the non-exhaustive list

¹ European Commission (2019). Communication from the Commission to the European Parliament, the European Council and the Council, Further Strengthening the Rule of Law within the Union State of Play and Possible Next Steps. COM/2019/163 final. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163> (accessed on 29.12.2022).

² European Commission (2019). Strengthening the Rule of Law in the Union - Stakeholder contributions. Available at: https://commission.europa.eu/system/files/2019-07/ruleoflaw_summary_150719_v3.pdf (accessed on 29.12.2022).

of the principles enshrined in the notion of the rule of law, which should be evaluated under these criteria:

- "legality
- legal certainty
- prohibition of arbitrariness of the executive,
- independent and impartial courts,
- effective judicial review including respect for
- fundamental rights.
- equality before the law."³

Based on the treaty requirements and the Commission assessment tool, there had been introduced chapters 23 and 24 as the fundamental part of any association agreement related to the rule of law and the human rights application. Chapter 23 "judiciary and fundamental rights" together with the chapter 24 "justice, freedom and security" cover "key rule of law issues, in particular reform of the judiciary and the fight against organised crime and corruption. The creation of chapter 23 and the use of opening and closing benchmarks in the accession negotiations have proved to be a powerful tool to push reforms within the enlargement process and throughout the whole pre-accession period" (Nozar, 2012, p. 2).

The elements compiled under chapter 23 and 24 are linked to the political Copenhagen criteria and have to be fulfilled before the overall negotiations begin. The Commission has been regularly confirming the importance of the rule of law and human rights protection in Enlargement policy documents and strategies. The 2009 Enlargement Strategy stressed the rule of law as one of the key challenges within the enlargement process: "[T]aking into account experience from the fifth enlargement, the rule of law is a key priority which needs to be addressed at an early stage of the accession process. With EU assistance some progress has been made in putting into place effective legislation and structures to fight corruption and organised crime, but rigorous implementation and enforcement of laws are necessary to achieve tangible results" (European Commission (2009). EU Enlargement Strategy, in: Nozar, 2012, p. 2). The implementation needs to assess the state of rule of law and human rights as the first point in the accession process was supported even more in the 2011 Enlargement strategy, when "extending the timeframe of negotiations on the two chapters and would strengthen the use of benchmarks through the introduction of interim benchmarks. It would be applied to all candidate countries starting accession negotiations" (European Commission (2011). EU Enlargement Strategy, in: Nozar, 2012, p. 3). The same approach had been confirmed in the later adopted Enlargement strategies and particularly for the Western Balkan in the strategic document "A credible enlargement perspective for and enhanced EU engagement with the Western Balkans".⁴ Two years after, the European Commission adopted the 2020 Communication "Enhancing the accession process – A credible EU perspective for the Western Balkans",⁵ with ambition to better define the conditions for

³ European Commission (2014). Communication from the Commission to the European Parliament and the Council. COM/2014/0158 final. A New EU Framework to Strengthen the Rule of Law. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158&from=EN> (accessed on 29.12.2022).

⁴ European Commission (2018). A Credible Enlargement Perspective for and Enhanced EU Engagement with the Western Balkans. COM(2018) 65 final. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-01/communication-credible-enlargement-perspective-western-balkans_en.pdf (accessed on 29.12.2022).

⁵ European Commission (2020). Communication "Enhancing the accession process – A Credible EU Perspective for the Western Balkans" COM(2020) 57 final. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2020-02/enlargement-methodology_en.pdf (accessed on 29.12.2022).

enlargement and the connection to demanding reforms. As stated in the Communication, the more candidates advance in their reforms, the more they will advance in the process. Equally, the Commission proposes more decisive measures, proportionally sanctioning any serious or prolonged stagnation or backsliding in reform implementation and meeting the requirements of accession process.

As the enlargement process is initially connected with the fulfilment of reforms required in chapters 23 and 24, the following analysis refers to the initial assessment of the rule of law and human rights in candidate countries of Western Balkan.

3. RULE OF LAW AND HUMAN RIGHTS IN WESTERN BALKAN - WHAT PROGRESS CANDIDATE COUNTRIES STIPULATES?

Many of the current enlargement countries, namely those situated in the Western Balkan region, are still undergoing a political transition period. Although there is pending association agreement with Turkey and the EU had granted the candidate status also to Ukraine and Moldova in 2022,⁶ the presented analysis focuses on the assessment of the annual progress of the Western Balkan countries, which had been involved in the annual Commission's Progress report, i.e. Montenegro, Serbia, Albania, North Macedonia, Bosnia and Herzegovina, Kosovo.

For **Montenegro**, according to the Commission's assessment,⁷ limited progress has been made in the area of the judiciary, with stagnating implementation of key judicial reforms and a limited track record on accountability. The corruption remains prevalent in many areas and still an issue of concern. On fundamental rights, Montenegro continued meeting obligations from international human rights instruments and legislation; however, challenges remain in ensuring the effective implementation of national legislation on human rights. There was limited progress in the area of freedom of expression. "The priority for further overall progress in negotiations remains the fulfilment of the rule of law interim benchmarks set under chapters 23 and 24. To reach this milestone, the authorities need to demonstrate in practice their commitment to Montenegro's EU reform agenda. Montenegro needs to further intensify its efforts to address the outstanding issues, including in the critical areas of freedom of expression and media freedom and fight against corruption and organised crime, without reversing earlier achievements in the judicial reform".⁸

For **Serbia**, according to the Commission's assessment, an overall balance is currently ensured between progress under the rule of law chapters and normalisation of relations with Kosovo, on the one hand, and progress in the accession negotiations across chapters, on the other. Serbia needs to continue and to accelerate and deepen reforms on the independence of the judiciary, the fight against corruption, media freedom, the domestic handling of war crimes and the fight against organised crime. In particular, the Serbian authorities should finalise the constitutional reform process in the area of the

⁶ European Parliament (2022). European Parliament resolution of 23 June 2022 on the Candidate Status of Ukraine, the Republic of Moldova and Georgia (2022/2716(RSP)). Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0249_EN.html (accessed on 29.12.2022).

⁷ European Commission (2021). Communication on EU Enlargement Policy. Commission Staff Working Document. Montenegro 2021 Report. SWD(2021) 293 final/2. Available at: <https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Montenegro%202021%20report.PDF> (accessed on 29.12.2022).

⁸ European Commission (2021). Enlargement Package: European Commission Assesses and Sets Out Reform Priorities for the Western Balkans and Turkey. Available at: https://neighbourhood-enlargement.ec.europa.eu/news/2021-enlargement-package-european-commission-assesses-and-sets-out-reform-priorities-western-balkans-2021-10-19_en (accessed on 29.12.2022).

judiciary which has been started in 2021 as the current legal framework does not provide sufficient guarantees against potential political influence over the judiciary. Serbia's progress on the rule of law and the normalisation of relations with Kosovo is essential and will determine the overall pace of the accession negotiations. In area of fundamental rights, the existing legislative and institutional framework compliant to international standards and treaties should be consistently and efficiently implemented. The vacant position of human rights bodies as well as the lack of transparency and consistency in applied procedural guarantees raised the EU awareness in this area constantly.⁹

Albania and North Macedonia continue to fulfil the conditions to open accession negotiations and both countries advanced steadily on the EU reform path. **Albania** made good progress in continued implementation of the comprehensive justice reform. The legislative framework has been further strengthened to ensure a more efficient delivery of justice. In the area of fundamental rights, progress was assessed in most areas, however the need for transparent and inclusive approach related to the right to property was underlined. An additional by-law was adopted on minority education, but remaining by-laws are still pending adoption. The population census law was adopted. The legal framework on anti-discrimination further improved and progress is visible in other aspects of fundamental rights, for instance on the enforcement of the rights of persons with disabilities and on gender equality.¹⁰ The **North Macedonia** assessment¹¹ underlines moderate progress in area of judiciary, mainly addressing police impunity and strengthening judicial independence. Corruption is prevalent in many areas and remains an issue of concern. The country continues to meet its general obligations on fundamental rights, but there are challenges in implementing the existing legislation, such as the new Parliament re-adoption of the Law on the Prevention and Protection against Discrimination after constitutional review; the limited progress in relation to granting freedom of expression in compliance with professional standards of journalism. Important progress was achieved with the adoption of the Law on Prevention and Protection from Violence against Women and Domestic Violence.

Based on the Commission assessment¹² of **Bosnia and Herzegovina** (BiH), the strategic goal of EU integration has not been turned into concrete action. BiH needs to address the 14 key priorities, including electoral and constitutional reforms, and will have to deliver on a critical mass of reforms before the Commission could recommend granting candidate status to the country. Significant reforms are needed as requested in chapter 23 to ensure that all citizens are able to effectively exercise their political rights and thus bring the country's constitutional and legislative framework in line with the case-law of the ECtHR. Segregated education needs to end in order to ensure non-discriminatory, inclusive and quality education for all. Gender-based violence, ill-

⁹ European Commission (2021). Communication on EU Enlargement Policy. Commission Staff Working Document. Serbia 2021 Report. SWD(2021) 288 final. Available at: <https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Serbia-Report-2021.pdf> (accessed on 29.12.2022).

¹⁰ European Commission (2021). Communication on EU Enlargement Policy. Commission Staff Working Document. Albania 2021 Report. SWD(2021) 289 final. Available at: <https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Albania-Report-2021.pdf> (accessed on 29.12.2022).

¹¹ European Commission (2021). Communication on EU Enlargement Policy. Commission Staff Working Document. North Macedonia 2021 Report. SWD(2021) 294 final. Available at: <https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/North-Macedonia-Report-2021.pdf> (accessed on 29.12.2022).

¹² European Commission (2021). Communication on EU Enlargement Policy. Commission Staff Working Document. Bosnia and Herzegovina 2021 Report. SWD(2021) 291 final/2. Available at: <https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Bosnia%20and%20Herzegovina%202021%20report.PDF> (accessed on 29.12.2022).

treatment of detainees and the protection of minorities, including the Roma, are also issues of concern. The country needs to develop a comprehensive strategic framework on human rights and on the protection of minorities, including on transitional justice. In relation to chapter 24, very limited progress was made. The legislation is not harmonised across the country and institutional cooperation and coordination are weak. Against all previous efforts and missions, BiH is in the early stage of preparation of the fight against organised crime. Criminal organisations operating in the country take advantage of legal and administrative loopholes. The police are vulnerable to political interference. Financial investigations and asset seizures are largely ineffective. There was an improvement in the mechanisms for collecting, sharing, and analysing statistics on migration in the Information System for Migration, however Violent collective expulsion (pushbacks) of migrants and asylum seekers back into Bosnia and Herzegovina continued to be reported in 2020 and 2021.

In **Kosovo**, the early parliamentary elections in February 2021 resulted into new government with parliamentary majority. Full and effective implementation of the reform action plan over the coming period will be essential as stressed in the Commission's assessment¹³, because the country is still at an early state of preparation for applying the EU acquis and the European standards in the area of the judiciary and fundamental rights. Limited progress had been made, including in functioning of the judiciary and the investigation and prosecution of some organised crime and high-level corruption cases. The capacity of the judiciary and prosecution, including for handling cases in a timely manner, remains weak. The positive highlight is the adoption of the Rule of Law Strategy and Action Plan, which outlines the main challenges in the rule of law system. As regards fundamental rights, the government needs to ensure oversight of the implementation of legislation, streamlining of strategies and better coordination of policies. The need to address minority protection law and strengthening the institutional dialogue should contribute to advancing the human rights in the country.

4. CONCLUSION

The rule of law is the fundamental value of the European Union and together with human rights are essential for the proper functioning of a state and for the fulfilment of the political criteria in the accession process. EU accession requires from the point of the rule of law, the implementation of complex reforms in order to take on the obligations of membership. As the Commission assessed in its annual Progress report, "the current accession candidates need, as a matter of priority, to deliver genuine and sustainable results on key issues: the rule of law, justice reform, fight against corruption and organised crime, security, fundamental rights, functioning of democratic institutions and public administration reform, as well as on economic development and competitiveness".¹⁴

¹³ European Commission (2021). Communication on EU Enlargement Policy. COMMISSION STAFF WORKING DOCUMENT. Kosovo 2021 Report. SWD(2021) 292 final/2. Available at: <https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Kosovo%202021%20report.PDF> (accessed on 29.12.2022).

¹⁴ European Commission (2021). Enlargement package: European Commission Assesses and Sets out Reform Priorities for the Western Balkans and Turkey. Available at: https://neighbourhood-enlargement.ec.europa.eu/news/2021-enlargement-package-european-commission-assesses-and-sets-out-reform-priorities-western-balkans-2021-10-19_en (accessed on 29.12.2022).

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