

Monitoring and Evaluation of the Rule of Law in the Western Balkans

December 2016

NATIONAL STUDIES:
EXECUTIVE SUMMARIES AND POLICY RECCOMENDATIONS



European Fund for the Balkans

Monitoring and Evaluation of the Rule of Law in the Western Balkans

Implemented by:



European
Policy
Institute.
Skopje

institut alternativa

Belgrade
Centre for
Security
Policy



www.epi.org.mk

www.institut-alternativa.org

www.bezbednost.org

Funded by:

European Fund for the Balkans

Publisher:

European Policy Institute – Skopje

Graphic Design and print:

Gaia Design

This policy brief has been produced as part of the research within the Think and Link Regional Policy Programme's project titled MERLIN WB: Monitoring and Evaluation of the Rule of Law in Western Balkans, implemented by the European Policy Institute - Skopje, Institut Alternativa from Podgorica and the Belgrade Center for Security Policy from Belgrade, supported by the European Fund for the Balkans. The views presented in the policy brief are authors' views and do not necessarily reflect the position of the European Fund for the Balkans.

Contents

Introduction	5
MACEDONIA	6
Executive Summary	6
Policy Recommendations	7
SERBIA	10
Executive Summary	10
Policy Recommendations	11
MONTENEGRO	14
Executive Summary	14
Policy Recommendations	16

Introduction

The three national studies on monitoring and evaluation of the rule of law in Macedonia, Serbia and Montenegro reflect on the developments in the areas Political criteria, Chapter 23 and 24 from the European acquis, for the period after the 2015 Countries' Reports by the European Commission. The purpose of these policy studies is to assess the trends in the areas under analysis in the three countries. The studies are conducted within the framework of the project Monitoring and Evaluation of the Rule of Law in Western Balkans (MERLIN WB), implemented by the European Policy Institute – Skopje in partnership with Institute Alternativa from Montenegro and the Belgrade Center for Security Policy from Serbia and funded by the European Fund for the Balkans. Based on the country studies, a policy paper covering the three countries (Macedonia, Montenegro and Serbia) was produced.

It is not our purpose to replicate or interpret findings of the EC report. Rather, our intention is to provide a deeper and more focused, and at the same time - a comprehensive and objective insiders' view on the development on essential issues of rule of law. Consequently, we aimed to give a qualitative assessment for each of the issues under analysis, going beyond addressing technicalities.

We based our studies on the jointly developed methodology. We identified the key areas under analysis: elections; parliament; government; civil society; civilian oversight over security forces; public administration reform; judiciary; anti-corruption; organized crime; fight against terrorism; fundamental rights and protection of minorities; asylum and migration; police reform and regional issues and international obligations. Most of the sub-areas correspond to the EC structure of monitoring and reporting, to ensure comparability. We applied process tracing¹ to determine the trends and examine whether there has been a backsliding or progress for each of the sub-criteria. This being said, we do not seek for rigor causality with the process tracing, but rather identifying the clues which can help affirming or weakening our hypotheses.

¹ David Collier, "Understanding Process Tracing," PS: Political Science & Politics 44, no. 4 (October 2011): 823-30, doi:10.1017/S1049096511001429.

MACEDONIA

Executive Summary

The past year has remained blighted by the political crisis caused by the illegal interception of communications by high-ranking officials. Major breakthroughs in re-establishing the rule of law did not occur, despite the pressure from the civil sector, both informal and formal. The protests by citizens, in the form of the Colourful Revolution, which were most intense during the spring of 2016, are now less frequent following Przhino 2 and the expectations of the early parliamentary elections. The focus on party bargaining during the Przhino negotiation process, albeit ensuring unobstructed work of Parliament further damaged the decision-making process. At the same time, the decision-making process focused on the fast adoption of Przhino-related provisions and mostly controversial laws and amendments put forward by the Government without broader deliberation.

The international community engaged heavily in the facilitation of negotiations involving the main four political parties, narrowing down the focus to ensuring minimum conditions for free and fair elections. Leverage was limited and difficult, more spared on repairing the damage than on pressure for real reforms. The migration crisis impacted on international leverage, shifting the focus and priorities from democracy to security.

Despite the “constructive participation” in the negotiations, the ruling parties took further action in countervailing the very essence of the agreement, as well as the basic principles of the rule of law, demonstrating a clear lack of political will along with a consistent strategy to postpone political and criminal responsibility by all means possible. The most flagrant example was the abolition by the President of a large number of persons involved in the wiretapping scandal, only one of the means for obstructing the work of the SPP. Furthermore, numerous partisan appointments and recruitments strengthened the linkage between state and party. Finally, following a minimized version of the Przhino Agreement, known as Przhino 2, which narrowed down the conditions for elections to the voter lists and an interim body controlling media reporting in the campaign period, early elections are scheduled for 11 December 2016.

Civil society engaged in more joint actions of advocacy; however, these efforts did not result in an adequate response from the governing parties. Still, the pressure has been increased and actions are more articulated.

It is indubitable that there has been no progress in respect of the rule of law within the past year. Nevertheless, this study indicates that progress in the different areas is varied: only one area has seen some progress and in other areas it has stagnated, while in majority of the covered areas we have noted backsliding. The overall assessment, however, is that, in order to deal with the political crisis and move forward on the Euro-Atlantic path, the incoming government must abandon the trend towards legislative changes and focus on substantial reforms and their proper implementation, while clearly separating the party from the state.

► Policy Recommendations

None of the recommendations is addressed to the Government currently in power, as a precondition for re-establishing the rule of law in the country is that Government representatives take on political and other responsibilities with regard to the illegal interception of communications, as indicated by the wiretapping scandal in 2015.

To the political parties:

■ To ensure that free and fair elections take place:

- Not to list, as candidates for elections, persons against whom an investigation has been launched by the SPP

■ To take on a public commitment before the elections to re-establishing the rule of law and ensuring the separation of state and party, especially through:

- Ensuring independence of independent and supervisory bodies, with immediate focus on the Constitutional Court, Judicial Council and Council of Public Prosecutors
- Providing support to the SPP
- Ensuring the professionalism of the state security services
- No political interference in the recruitment and career advancement of public administrators
- Ensuring freedom of expression, with banning government advertisements in the private media as the most important priority, and professionalism of the Audiovisual Agency
- Constructive and sustainable cooperation with the civil sector

To EU institutions:

- To focus again on the findings and recommendations of the Priebe Report and, consequently, the implementation of the URPs in the country
- To take into account the fact that EC leverage is decreasing, while the EU should not further abandon the instruments of the EU accession process without developing relevant and effective new instruments for promoting the rule of law
- Not to further compromise basic democratic values and trade democracy for security
- To avoid technicization in their reporting and recommendations and focus on assessing the actual, substantive progress in the different areas

To civil society:

- To continue and further strengthen the watchdog role in order to put more pressure on the institutions
- CSOs should continue to work together, articulate the priority issues and jointly advocate before political agents for the essentials and priority actions leading to the re-established rule of law in the country, before and immediately after the elections
- CSOs should continue to develop their actions of monitoring, cooperation and advocacy targeted at the independent, supervisory and regulatory bodies in order to motivate the latter to be more transparent and professional

To the independent supervisory and regulatory bodies:

► To the SEC:

- To be fully prepared for the forthcoming elections and play an active role; ensure objectivity in the work of the SEC and respond promptly to complaints; regularly and comprehensively inform the public on the preparations for the elections and publish the results of the election in a timely manner; ensure transparency through open sessions
- To present a detailed report to the public on the implementation of the amended Electoral Law, especially providing answers to the issue concerning the „cleansing of voter lists, presenting lessons learned and options, and open up a public debate

► To the Judicial Council and Council of Public Prosecutors:

- To regain citizens trust by bringing back their integrity and not relenting under governmental pressure
- To include the media and the CSOs in their work, so as to increase their transparency
- To be transparent with regard to the elections and the advancement of judges and public prosecutors

SERBIA

Executive Summary

Serbia checked most of the boxes that were warranted by its accession process to the EU in 2015, a fact which was recognised on 18 July when negotiations on Judiciary and Fundamental Rights (Chapter 23) and Justice, Freedom and Security (Chapter 24) were opened. The opening of these two chapters was a result of a long process that was characterised by several rounds of consultations regarding drafting of corresponding Action Plans, producing Negotiating Positions, and coordination efforts on the part of line ministries hitherto never seen before. The Belgrade-Pristina dialogue continued, despite the fact that the implementation of the already reached agreements was lagging. Finally, early elections were organised on April 24, when the incumbent Prime Minister's coalition won by a landslide and formed a new, decidedly pro-European Government. Despite the fact that the new parliamentary convocation now gathers parties sceptical toward or against the EU, there seem to be no obstacles when it comes to either support or legitimacy of the Government's pro-EU agenda.

However, if these technical aspects of accession talks are set aside, the current situation when it comes to the rule of law area leaves much to be desired. In the annual World Justice Project's Rule of Law Index for 2016, Serbia holds the same score when compared to the previous year; its ranking, however, fell by four positions, indicating stagnating reforms and no progress.² In their 2016 World Press Freedom index, Reporters without Borders claim that media freedoms declined from 2014 onwards, citing editorial pressure, public attacks against critics and faulty application of the media law package.³ In addition, serious incidents involving law enforcement agencies continue to showcase all troubled spots and failures of state institutions, and disrespect for the rule of law principles. The most prominent one, the so-called Savamala incident, demonstrated that the police, prosecution, both state and Belgrade city authorities, including the media with national coverage, can all be effectively silenced or counted upon not to act when needed, contrary to the law and despite the best public interest.

If any of the areas covered by this study is to be observed separately, the progress achieved differs. For instance, when it comes to handling the migration-refugee crisis,

² Compare: "The Rule of Law Index 2016 Report" (Washington: The World Justice Project, 2016), http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf; "The Rule of Law Index 2015 Report" (Washington: The World Justice Project, 2015), <http://worldjusticeproject.org/publication/rule-law-index-reports/rule-law-index-2015-report>.

³ "Serbia: Europe Still Far Away," RSF, accessed November 1, 2016, <https://rsf.org/en/serbia>.

the actions of Serbian authorities are highly commendable. This is despite the fact that the legal alignment in this area is not taking place as envisaged by the relevant Action Plan due to the ongoing crisis. In some other areas there has only been stagnation, as is the case with elections where OSCE/ODIHR recommendations from 2014 can still be taken and prescribed almost verbatim after the 2016 elections. Finally, there are areas where serious backsliding is evident, as is the case with the external oversight of the security sector.

However, despite the patchy track record, the overall conclusions of the study are that the progress in crucial areas is not sufficient and that more credible efforts are required. What Serbia had so far was mostly mimicry of reforms that were implemented under the mantra of the EU accession process. For these to be sustainable and impactful, the Government must focus on the basics, namely on strengthening institutions and showing full respect to the rule of law principles.

Policy Recommendations

Based on the above presented analysis, the following general recommendations need to be considered for the policy areas covered by this study.

To the government:

■ The Government should remain committed to implementing the Action Plans for Chapters 23 and 24 in good faith and in a timely manner;

■ The Government needs to remain open to the consultation process with all relevant stakeholders, including the civil society organisations, and not only for the purposes of reporting on the achieved progress;

■ Orchestrated attacks on independent state institutions, investigative journalists and civil society organisations need to be investigated and perpetrators prosecuted;

■ A new, comprehensive law on security services needs to be adopted to ensure proper delineation of competences, and coordination and cooperation between them as well as with other institutions;

In order to ensure free and fair elections, a single election law needs to be adopted, with the view to unifying election-related provisions currently spread across and contained in several laws (e.g. the Law on the Election of Representatives, the Law on Local Elections, the Law on Political Parties, etc.).⁴ Key issues to be addressed are: update of the voter register, increasing capacities of REC and its transformation into a permanent body, and implementing necessary measures to assure a more level playing field for the election contestants;

A positive track record needs to be established and demonstrated, including final convictions in high-profile cases, in the areas of fight against corruption and fight against organised crime. In addition, a positive track record is needed in the areas of human rights and minority issues, particularly regarding the full exercise of freedom of expression, and in fight against discrimination of the most vulnerable groups;

Depoliticisation should be placed on the Government's agenda as a priority. This is particularly true for the areas of judiciary, public administration, public enterprises, law enforcement agencies and the media.

To the parliament:

Adopting the changes to the Rules of Procedure of the National Assembly could provide a leeway, at least for the opposition parties if the ruling majority have no intention, to exert more control over the executive branch of the Government;

Making the legislative agenda/calendar publically available would contribute to better participation of relevant stakeholders in the process of adopting laws;

Parliamentary committees need to be allowed to fully exercise their control powers, especially over the security sector, in line with their remits.

To political parties:

Political parties need to take on a public commitment to supporting the rule of law and ensure the separation of state and party;

As key stakeholders in the political arena, through their internal procedures and public commitment, political parties need to sanction clientelism, nepotism and assure depoliticisation of key state institutions and sectors.

⁴ CRTA, "Executive Summary Report: Early Parliamentary Elections 2016," 5.

To the EU institutions:

The EC should move their focus away from insisting on stability and security, and shift it back to fundamentals, i.e. supporting the rule of law, basic democratic values and strong institutions.

The EC should avoid overt technicisation in their reporting and recommendations, and focus on assessing actual, substantive progress achieved in different areas.

To civil society:

CSOs need to continue with their watchdog role when it comes to the reform process under the auspices of the EU accession talks, to assure that substantive changes are taking place on the ground.

CSOs should improve their cooperation and exchange best practices, with the view to achieving a synergetic impact on the policy process. This is true at the national, but also at the Western Balkans level, since democratic backsliding is taking place across the region and these trends share common features and dynamics.

CSOs should further develop and initiate actions of monitoring, targeted advocacy and awareness raising, even when not invited to do so by all the stakeholders involved in the EU accession process.

MONTENEGRO

Executive Summary

Despite the establishment of new anti-corruption institutions and intensive legislative activity, Montenegro has not significantly advanced towards meeting the EU's political criteria and rule of law standards.

Reform of the judiciary is ongoing, but problems identified at the outset, including accountability, independence and impartiality, remain a challenge. The key issues, such as the recruitment and promotion of prosecutors and judges, the transparency of how their performance is evaluated, ethical and disciplinary accountability, criminal liability and the rationalization of the judiciary network, have still not been adequately addressed.

The establishment of the Agency for the Prevention of Corruption was marked by many controversies and a lack of transparency. All penalties imposed for violation of the Law on Prevention of Corruption are below the legal minimum. Donations by individuals to political entities are not sufficiently transparent. The Agency failed to grant whistleblower status to an individual who had exposed misuse of public funds for party purposes. The work of the Special Prosecutor's Office (SPO) represents a rare example of progress in the area of the fight against corruption, although there are many obstructions impeding its work.

The fight against organized crime is still marked by difficulties arising from the shift from judicial-led to prosecutorial-led investigation and the process of adjusting police officers and prosecutors to their new roles. A Special Police Department was formed with a half-year delay, and although the Police Development Strategy 2016-2020 was enacted, the implementation of its measures has been delayed.

Several events in Montenegrin political dynamics marked 2016. The Social Democrat Party (SDP) left the ruling coalition, subsequently joining the so-called government of electoral trust with the other two opposition parties. The government of electoral trust had some positive effect on the transparency of the government's work, but it did not manage to prevent electoral misuses, while the competent institutions lacked proactivity in ensuring free and fair elections.

Misuse of public funds, cases of vote-buying and many violations of the law were reported during the electoral campaign and on election day itself. The SPO raised 157

cases for criminal acts against electoral law, based on charges filed by NGOs, political parties and citizens and on media reports. The opposition refused to recognize the election results due to allegations and official statements made on election day by the police and prosecutors, claiming that terrorists from Serbia, acting on behalf of certain parties, were planning to capture the prime minister.

The not particularly ambitious Public Administration Reform Strategy and its accompanying Action Plan were adopted after more than half a year of delay. Merit-based recruitment is yet to be achieved, and the implementation of several laws has been repeatedly postponed. The start of EU membership talks has not sufficiently curbed politicization in Montenegro.

The accountability of local government is particularly worrisome, with information about finance at the local level considered confidential by the Ministry of Finance. The lack of budget transparency is also a problem at the national level.

Cooperation between civil society and the government has slid backwards. The Law on NGOs has not been amended, while the work of the Council for the Development of NGOs has been hampered by a boycott by NGO representatives. EU membership talks continue to involve the government and the European Commission almost exclusively. Other relevant actors, including CSOs, are sidelined and their role is further downgraded by a lack of public access to expert opinions issued in the process of approximation of Montenegrin legislation with EU standards.

Government efforts to achieve social inclusion do not provide sufficient control of funds for the employment of marginalized groups. There is no systematic approach covering all types of discrimination. Although new legal provisions could improve the organization of public assemblies in Montenegro, they fail to address two enduring issues: administrative procedures and good policing. Personal data remains insufficiently protected and freedom of information is still difficult to achieve. There has not been sufficient progress either in dealing with incidents of attacks on journalists, as threats to journalists are not considered criminal acts.

Policy Recommendations

Legislative recommendations

Amend the Law on Financing of Political Entities and Election Campaigns in order to enable the Agency for Prevention of Corruption to control data submitted by institutions and political entities, and not only collect it.

The Law on Local Administration needs to be further amended in order to specify the rules for human resource management at the local level, which have proved particularly worrisome;

The upcoming work on amendments to the Law on Civil Servants and State Employees and relevant by-laws should address the persistent levels of politicization and non-merit based recruitment in public administration.

Law on Free Access to Information should be amended in order to resolve existing problems in the area of freedom of information, particularly the legal loophole which allows authorities not to act upon decisions made in favour of claimants by the Council of the Agency for Protection of Personal Data and Free Access to Information.

Adopt a Law on the Parliament that ensures more precise definition and differentiation of competences of the branches of government, that defines the obligation to report automatically on parliament's conclusions within a framework set as optimal by the lead committee, and that sets out penalties and sanctions for state

To the competent authorities

Mol in cooperation with the SEC should establish a clear methodology on the register of voters. Firstly, a list of holders of citizenship who have not resided in Montenegro for two years prior to elections must be made, followed by the deletion of those names from the register of voters. Secondly, a reliable system of monitoring the migrations of residents must be established;

SEC should introduce better recruitment procedures for electoral committees in terms of providing them with adequate training and instructions for elections;

The Ministry of Finance and local administrations should open up the currently closed budget data and information of public finances in order to permit greater public scrutiny;

The Police Administration, the High Courts and the State Prosecution, as institutions involved in the chain of applying secret surveillance measures, should keep records of statistical information on the application of such measures and make it transparent;

The Ombudsman's office should ensure monitoring system in order to track implementation of its recommendations;

Ministry of Interior and Police Directorate should ensure effective mechanisms for determining accountability and liability of abuse of powers by police officers;

The Police Administration must cooperate with The Government's Commission for monitoring the competent authorities in investigating cases of intimidation and violence against journalists, murders of journalists and attacks on media property, by providing relevant information and documents that could help the investigation of the attacks on media and journalists.

To Parliament:

Improve reporting on control and consultative hearings held; make state institutions more accountable by adopting definite conclusions after hearings and by drafting detailed committee reports on the implementation of conclusions;

Introduce an obligation to conduct regulatory impact assessments (RIA) for bills proposed by MPs.

To the Government:

Maintain good practices of proactive publishing of information important for the prevention of abuse of public resources, undertaken by the Government of Electoral Trust;

Ensure transparent and comprehensive result-oriented monitoring of implementation of EU-related obligations, especially within the Chapters 23 and 24;

Adopt a new Action Plan for the implementation of the Strategy for the Reform of the Judiciary (2017-2019) with emphasis on measuring the influence of implementation;

Publish track record annexes to the bi-annual reports on the implementation of action plans for Chapters 23 and 24;

Streamline procedures and criteria for the public funding of NGOs.

To the European Commission:

Increase the transparency of accession negotiations via publishing the reports of expert missions on the approximation of Montenegrin legislation with EU standards.

Judiciary:

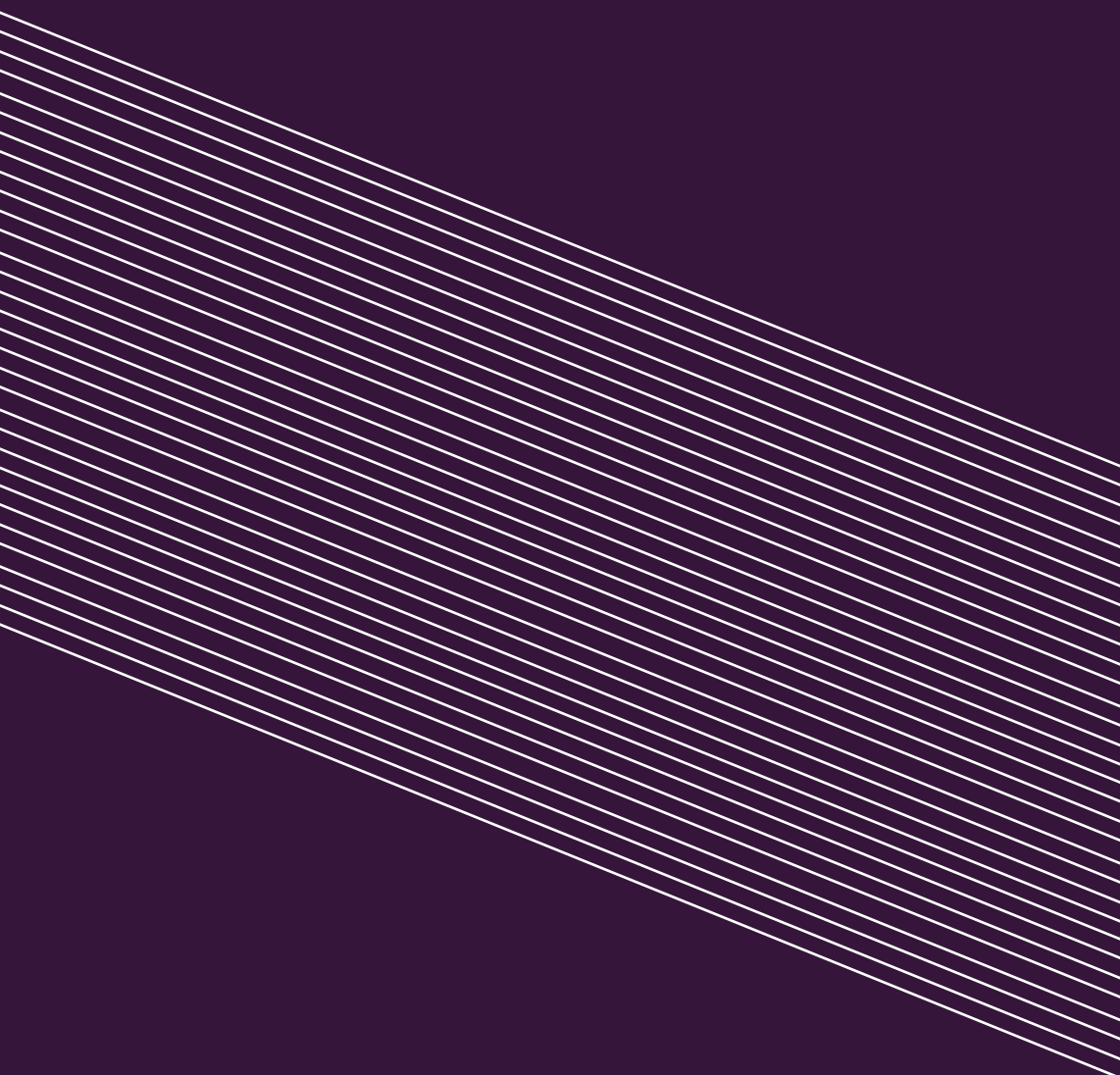
Prepare new Action Plan for the implementation of the Strategy for the Reform of the Judiciary (2017 - 2019) with emphasis on measuring the effects of implementation;

When it comes to recruitment in the judiciary, it is necessary to introduce reporting on the number of candidates who apply for each vacancy announcement (internal and public) and to publish score lists and justifications for appointments;

Proactively publish the grades of presidents, judges, prosecutors and employees in the judiciary, while maintaining personal data protection;

Encourage the presidents of courts and prosecutor s offices to start using official procedures for determining ethical and disciplinary responsibility in order to promote a culture of accountability in the judiciary;

Inform citizens and interested parties in court procedures about opportunities for making complaints about the actions of judges and prosecutors, i.e. about the types of procedures that can be commenced against them.



institut alternativa

Belgrade
Centre for
Security
Policy

