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**Human Rights and EU Conditionality
in the Western Balkans**

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BEÁTA HUSZKA AND ZSOLT KÖRTVÉLYESI *
Human Rights in the EU's Conditionality Policy Towards
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* [\[huszkabea@tatk.elte.hu\]](mailto:huszkabea@tatk.elte.hu) (ELTE TáTK, Hungary);
[\[kortvelyesi.zsolt@tk.mta.hu\]](mailto:kortvelyesi.zsolt@tk.mta.hu) (Hungarian Academy of Sciences Centre for
Social Sciences Institute for Legal Studies, Hungary)

The special section in the present issue of *Intersections. East European Journal of Society and Politics* was inspired by FRAME (Fostering Human Rights Among European Policies), a large-scale EU FP7 research project¹ that investigated the role of human rights, including a part that focused specifically on the EU's enlargement conditionality towards the Western Balkans. The research gave a bird's eye view on the situation of human rights in the Western Balkans, which allowed us to identify a number of challenges, such as the shallowness of reforms in the area of human rights and democracy in the whole region, or the short supply of in-depth case studies focusing on specific human rights.

Enlargement is considered to be the EU's most efficient foreign policy instrument in terms of its ability to transform existing practices and institutional structures outside of its borders. Less is known about how it works on the ground in specific contexts. Despite high leverage at the general level and the efforts of monitoring, for example through the meticulous assessment in the Commission's annual progress reports, a large part of the enlargement literature shares the view that the EU's record in spreading human rights and democratic norms in a credible and effective fashion during the accession process is mixed at best. Compliance may stop at the level of formal changes, seemingly satisfying both sides, the candidate country's government as well as the EU, while falling short of bringing about sustainable reforms that are hard to be reversed. Experiences from the Central Eastern European enlargement have also revealed the limits of the EU's democratic conditionality, as measured by implementation, sustainability and post-accession performance. This means that new member states carry their deficiencies of democracy and human rights with them, which calls for new mechanisms to address problems with human rights and the rule of law within the EU.

Huszka and Körtvélyesi ('Conditional Changes: Europeanization in the Western Balkans and the Example of Media Freedom') examine more closely how such mechanisms could possibly work and more precisely what particular aspects such effective mechanisms should take into account in the case of media freedom in the Western Balkans. The study finds that enlargement countries continued to receive benefits in the form of progressing along the way to accession while their performance in a key area of human rights and democratization has shown considerable backlash. Formal compliance, an easy target both for the EU (to measure) and for the respective governments (to fulfil), can be coupled with continued violations and sometimes even

¹ See <http://fp7-frame.eu> Accessed: 28-06-2017.

with strengthening repression. The examples of Hungary and Poland shred the optimism that post-accession trends somehow lead to an automatic reinforcement and conclusion of the process of democratization, the respect for human rights and the rule of law. Shallow democratization might easily prove to be unsustainable and easy-to-implement reforms might be equally easy to revert. This is why the argument to prioritize stability over democratization is a false dilemma. While keeping states on the enlargement path and institution-building are crucial goals, the pattern we find in the case of media freedom raises the question whether measures that sever the link between performance and benefits can still be called 'conditionality', in the original sense of the word, or 'principled pragmatism', if the principles seem to have faded. This risks human rights conditionality to be completely hollowed out. In fact, the EU, by its very presence and tacit encouragement, can strengthen autocratic leadership in the region if it continues to support politicians who can deliver while it fails to maintain a check on this performance based on the EU's core values.

After the study that looked at the entire Western Balkan region, Kadribašić ('Effectiveness of Human Rights Conditionality in Bosnia and Herzegovina: What Lessons for Future Advocacy?') narrows the focus of analysis down to Bosnia and Herzegovina and anti-discrimination reform. His contribution investigates how the EU applied the condition related to the Sejdíć and Finci judgement that sought to end the ethnic discrimination inherent in the constitutional structure of Bosnia and Herzegovina. The article presents this case in the wider context of anti-discrimination reform triggered by the EU's visa-liberalisation conditionality in 2009. Kadribašić thus presents a focused case study on the essential elements of effective conditionality. We now know that the implementation of the Sejdíć and Finci judgement as a condition has been postponed. Kadribašić provides an explanation for why this particular condition failed to trigger domestic changes. While the condition was clear in what it sought to achieve and there were direct and credible rewards promised in the case of compliance, with six years of stalled progress due to non-compliance, the domestic adoption costs proved to be too high. While dropping the condition later might have hurt consistency and credibility, the case shows the importance of assessing the domestic context of the reform in addition to setting and communicating European standards.

In another close-up case study ('Human Rights in the EU's Conditionality Policy towards Albania: the Practice of Sub-Committee Meetings') Jusufi brings a more positive view and discusses the case of Albania, and focuses on an institutional aspect that is hardly ever examined in detail by studies of enlargement conditionality. Jusufi argues that human rights conditionality brought about important changes in the domestic institutional structure and the work of sub-committees was central to these. The study, in line with numerous calls for transparency of the accession process (see e.g. BiEPAG, 2017: 11-12), provides insight into the work of sub-committees. Jusufi's assessment of the work of the Sub-Committee on Justice, Freedom and Security demonstrates how direct engagement with Albanian decision-makers led to a number of important changes that can be instrumental in sustainable democratization. It served as a learning experience and created new capacities in government offices that deal with human rights in addition to what Jusufi calls a 'constituency', within the bureaucracy, committed to the cause of human rights. Domestic entities like law

enforcement institutions received direct feedback on their human rights performance with established guidelines. All this has taken place against a background of weak state institutions, and a number of shortcomings of the established procedures, including the challenge to go beyond a mere recitation of well-known human rights standards and the problem that most human rights issues are, due to the time limitation inherent in the working of sub-committees, not discussed in detail. Finally, the lack of clear acquis in a number of fields can hamper the effectiveness of conditionality.

Two recent books confirm the dilemmas of external conditionality and domestic change. Marek reviews the volume edited by Bojan Bilić (*LGBT Activism and Europeanisation in the Post-Yugoslav Space: On the Rainbow Way to Europe*, Palgrave Macmillan, 2016). The book documents how the struggle for LGBT rights has been ‘Europeanized’ in the post-Yugoslav region, creating a ‘hegemonic framework’ and moving away the focus from what ultimately counts, domestic support for equality. The chapters in the book demonstrate and substantiate the oft-made remark about unintended consequences, with the illustrative example of Pride Parades: the way the easy-to-monitor condition of holding peaceful Pride marches are problematic in their potential to advance the cause of LGBT rights.

Kadribašić reviews Marko Kmezić’s book (*EU Rule of Law Promotion: Judiciary Reform in the Western Balkans*, Routledge, 2017) that also raises the question of effective conditionality, this time in the context of rule of law promotion, more specifically concerning the reform of the judiciary, building on case studies of the ex-Yugoslav states that are not yet EU members: Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, and Serbia. This area is key in that it has a direct impact on sustaining and securing a regime with human rights and the rule of law, and also on the implementation of EU law, considering that domestic courts are key actors in this respect. Kmezić finds that the technocratic approach that focuses on short-term but shallow, formal changes, often monitored following vague guidelines, is an important impediment to achieve meaningful progress. The book also criticizes the almost exclusive focus on the role of the state, which limits effective rule of law conditionality. While states and governments are important actors, they are by no means the only players in achieving sustainable changes. More regard for the local context, socialization, engaging with civil society should also form part of conditionality because only these long-term changes can protect reforms from easy reversal.

This links back to a thread common to the contributions, a dilemma that is summarized in a text written over 150 years ago, from John Stuart Mill:

If a people – especially one whose freedom has not yet become prescriptive – does not value it sufficiently to fight for it, and maintain it against any force which can be mustered within the country, even by those who have the command of the public revenue, it is only a question in how few years or months that people will be enslaved. [...] for, unless the spirit of liberty is strong in a people, those who have the executive in their hands easily work any institutions to the purposes of despotism. (Mill, 1859)²

² As quoted by Müller, 2013: 3.

Promotion of liberal democratic reforms from the outside is a delicate endeavour and past experiences show that pushing for legal and institutional reform is only one part of the equation, a part that is easily lost without domestic popular support. This latter is harder to achieve but without this, all achievements of conditionality and integration are built on shaky grounds.

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* [\[huszkabea@tat.k.elte.hu\]](mailto:huszkabea@tat.k.elte.hu) (ELTE TáTK, Hungary);
[\[kortvelyesi.zsolt@tk.mta.hu\]](mailto:kortvelyesi.zsolt@tk.mta.hu) (Hungarian Academy of Sciences Centre
for Social Sciences Institute for Legal Studies, Hungary)

Abstract

This paper takes a broad view on the context of EU conditionality and, after presenting various challenges, narrows down its focus to provide evidence for the shortcomings concerning media freedom in the Western Balkans. That enlargement is not the linear, one-way process it was once believed to be - where countries gravitating towards an evident liberal democratic consensus through the pull of integration - is evident from cases reaching beyond the Western Balkans. While we will not try to establish any direct causal relationship between the shortcomings of EU conditionality and the democratic backlash in the Western Balkans in the past ten years, we do seek to demonstrate how conditionality is failing in a particular context, by providing an overview of what the essential conditions of successful norm promotion, credibility and, most importantly, consistency are, and illustrate how these are lacking in the case of media freedom conditionality.

Keywords: European Union; Enlargement; Conditionality; Western Balkans; Human Rights; Media Freedom.

This paper takes a broad view on the context of EU conditionality and, after presenting various challenges, narrows down its focus to provide evidence for the shortcomings concerning media freedom in the Western Balkans. The way in which the government in Serbia has been undermining media freedom and pluralism in recent years while formally complying with EU conditionality has been documented elsewhere (Huszka, 2017). The Serbian example also shows that despite all the criticism the EU raised in its progress reports and other accession documents, the country could record great progress on its accession path while backsliding on a key human rights condition, which reveals a glaring inconsistency in the EU's conditionality policy. Here the scope of our analysis is broadened to include other Western Balkan countries.

That enlargement is not the linear, one-way process it was once believed to be – with countries gravitating towards an apparent liberal democratic consensus through the pull of integration – is evident from cases reaching beyond the Western Balkans. The backlash in Hungary and Poland serve as reminders that many achievements can easily be reversed. Turkey provides another example that the enlargement path is no guarantee against the most severe diversion from democracy. These examples make it topical to assess what the realistic goals of EU conditionality are in the fields of democracy, human rights and the rule of law. The insights below apply regardless of whether we see the growing contestation of European integration after 2004 as a welcome politicization and democratization or a breakdown completed by the EU's inability to defend its core values or to prevent the first exit. Alarmist accounts should in fact embolden calls for effective conditionality.

While we will not try to establish any direct causal relationship between the shortcomings of EU conditionality and the democratic backlash in the Western Balkans in the past ten years, we do seek to demonstrate how conditionality is failing in a particular context, by providing an overview of what the essential conditions of successful norm promotion, credibility and, most importantly, consistency are, and illustrate how these are lacking in the case of media freedom conditionality. The present paper builds on a wide-scale research study with the participation of the authors (Fraczek, Huszka and Körtvélyesi, 2016) drawing on policy documents and interviews with stakeholders.

Conditionality and Consistency in the Enlargement Context

The core values of the EU as defined in Article 2 of the Treaty on European Union – like democracy, human rights and the rule of law¹ – are not simply value choices, they constitute the foundations of integration. As de Búrca has shown, the legal commitments to these in the EU's framework are but the return of the founding ideals and rationales. (de Búrca, 2011) Furthermore, these principles have become positive law in Member States, with consequences for political and constitutional expectations towards EU laws and institutions as well, making the observation of these

¹ The full article reads: 'The 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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

standards legally compelling. Meaningful European cooperation that seeks to create a common space and deep and stable integration with peaceful and institutionalized handling of conflicts cannot be maintained without basic guarantees for these values applying to all levels of decision-making. This includes internal and external policies, the European and the Member States levels, and the meeting point of all these: enlargement conditionality that seeks to make candidate states ready to take part in the integration. In this sense, pursuing these goals represents both a value-based commitment and an inherent interest, as noted more widely by Baehr and Castermans-Holleman: it is in the ‘national interest of liberal democracies to export their norms and values, including human rights norms’. (Baehr and Castermans-Holleman, 2004: 2) Balfour also challenges the view that principles and interests can be presented in a clear-cut dichotomy. (Balfour, 2006: 115)

While enlargement has often been labelled as the most successful area of EU policies, critical voices are dominant in the literature. Considering the complexity and the difficulty of triggering domestic changes in the state of democracy, human rights, and the rule of law, it is easy to criticize the EU’s actions and lack of actions. Most, if not all, studies in the field conclude that consistent application of conditionality is a key to successful promotion of the said values. We will first look at the complexity behind ‘consistency’ and the legitimate role for prioritization, providing a brief overview in a way that will allow us to revisit some of these specific sources of inconsistency in our case study. (For a more detailed overview of the types of inconsistencies, see Körtvélyesi, 2016.)

The variety of the institutions, bodies and actors including the level of the Member States can explain the type of inconsistency that is often described as the EU having ‘too many voices’. Speaking with many voices is in fact a feature of a liberal democratic regime with various bodies controlling each other and ensuring representation at various levels. This is not to say that these voices cannot undermine each other where divergence is too high.² The Council and individual Member States, especially those that can weigh in heavily in relation to specific third countries, the Commission and the European Parliament are the most obvious players, while other institutions like the Court of Justice of the European Union also shape European foreign policy. EP resolutions are a common target of criticisms, sometimes including remarks about how they undermine consistency, but they can equally boost consistency by providing reminders about earlier commitments.³ In the enlargement

² The establishment of the European External Action Services under the Treaty of Lisbon in 2011, charged with assisting the High Representative of the Union for Foreign Affairs and Security Policy, was aimed at forging a foreign policy that is truly common, with the coordination of action at the international scene. In the human rights context, this will brought about the adoption of the EU Strategic Framework and Action Plan on Human Rights and Democracy in 2012 (Council of the European Union, 2012), the Action Plan itself seeing an update in 2015 (Council of the European Union, 2015). Indeed, the Action Plan serves as an important guideline for the everyday work within the EU’s ‘ministry of foreign affairs’, the European External Action Service. (Interview with Riccardo Serri, Deputy Head of Division on Human Rights Strategy and Policy Implementation, European External Action Service. Brussels, 12 June 2014).

³ The Parliament can also be seen as contributing to the welcome politicization of foreign policy, including non-traditional measures like political groups exerting influence on their members directly, in line with the commitments these parties and their members make in their work in EU institutions. It

context, some Member States or the Commission can send mixed messages about the feasibility of future accessions, thus putting accession perspective in question even for those EU candidates that are already negotiating their membership. It might be enough for one player to deviate from consistent conditionality to undermine credibility and effectiveness, even in the case of core human rights commitments. For instance, after sustained criticism in the Commission's progress reports about the media situation in Serbia, Johannes Hahn, EU Commissioner for European Neighbourhood Policy and Enlargement, undermined EU and domestic NGO efforts by questioning claims about violations of press freedom and self-censorship in a public statement (BIRN, 2015).

The EU is often criticized, and in most cases rightly, for the inconsistency between internal and external policies which is an aspect specifically addressed by the EU (Council of the European Union, 2016). This is not so much of a problem where higher standards apply to Member States. Joining the EU means that the full scope of the *acquis* applies, which is not the case with non-members. However, where conditions are set for third countries, usually in the context of enlargement, that Member States governments themselves do not observe or are not even bound by, this can undermine the legitimacy and effectiveness of EU pressure. The fact that the EU's leverage is lower once states have joined the EU is partly linked to the lack of institutional guarantees for post-accession compliance. Thus, references to the decreased leverage are not so much an excuse than an argument for institutional reform.

While the EU Strategic Framework mentions, in its opening paragraph, 'respect for human rights, democracy and the rule of law' as principles that 'underpin all aspects of the internal and external policies of the European Union', candidate states were faced with demands – taking up international minority rights obligations (see Sasse, 2008: 847) or cutting back government influence on the media – that some states that were already members clearly did not fulfil. (Take the example of the EU's loss of credibility due to its handling of those seeking asylum in its Member States.) While this has become a crucial element in the 'normative power' (Manners, 2002) the EU has, if any, towards candidate countries, our interest here lies in the internal consistency of conditionality. In the context of enlargement, governments will be hesitant to take up duties that were not demanded from other candidate countries. Accordingly, a more general version of this criticism is the double standard argument pointing out different treatment of different third countries, or 'double standards' in favour of countries that are important strategic or trade partners, for example (Khaliq, 2008: 452).

Probably the greatest challenge for consistency is to set and maintain priorities and to keep their consistency over time. While consistency can be mistaken for the failure to define priorities, the 'indivisibility' of human rights does not mean that the EU cannot and should not pick specific goals that it seeks to achieve with conditionality. Lucarelli and Manners contrast consistency and pragmatism (Lucarelli and Manners, 2006: 207–208). What some see as 'mismatch' or 'bifurcation'

might be important to note in the enlargement context that European political parties include parties from non-EU member states, including EU candidates.

(Williams, 2004) can also be interpreted as a ‘flexible adherence to principles’.⁴ Equally pursuing all human rights goals all the time can result in poor impact, or none at all, while a selective application, reflecting a strategy with realistic targets and considering the possible range of domestic change, can still be consistent. Setting clear and transparent goals with consistent follow-up measures can be key to effective human rights promotion. Consistency might fail in the discrepancy between stated goals and the weights reflected in financial support. Earlier assessment of priorities as reflected in financial support for Serbia and Bosnia and Herzegovina showed only partial overlap with stated priorities, based on the Instrument for Pre-Accession Assistance (IPA). (E.g. asylum and human trafficking featured in IPA priorities, but not in enlargement strategies, while certain enlargement priority areas only showed up sporadically as financial support. See Fraczek, Huszka and Körtvélyesi, 2016: 54–58, 78–84, 134–138.)

Critiques of inconsistency often point out the gap between rhetoric and action. The EU can be voicing concerns and repeat commitments in public statements and still act in a manner that undermines its stated values. Without a strong commitment to observe and represent human rights standards, these can give way to other foreign or domestic policy interests, which makes value-based references mere ‘window dressing’ or ‘luxury goods’ (Jørgensen, 2006: 42). Consistency in practice requires the consistent use of instruments, linked to progress (or lack of progress or even backsliding). This in turn requires measurable targets and the prior communication of sanctions. The EU has an immense array of instruments at its disposal, quiet and public measures, formal and informal, diplomatic and economic actions, used unilaterally or through multilateral institutions etc. (For a detailed overview, see Fraczek et al., 2015: 71–109.) A common dilemma of conditionality concerning human rights and democracy is that measures like sanctions or financial benefits might end up benefitting a regime as opposed to domestic democratic forces. The right approach in such cases is the heavy reliance on what is usually termed targeted measures, most importantly direct support to civil society like the European Initiative for Democracy and Human Rights.

Conditionality might require harsh sanctions to indicate where standards cannot be relaxed for a would-be Member State. One of the greatest challenges to consistency is indeed the fear that this rigorousness backfires and places the perspective of membership too far away to work as an incentive. The lines of studies by Schimmelfennig, Sedelmeier and others (see e.g. Schimmelfennig and Scholtz, 2008) maintain that conditionality works where credible and realistic benefits (like membership, see Schimmelfennig et al., 2006: 260) are linked to low domestic adoption costs. It is a thin line that the EU can walk, and responding too readily to domestic political shifts by relaxing conditions might take away consistency and credibility. The constant challenge for conditionality is to stand its ground and become proactive instead of a series of mere reactions to domestic developments and scandals.

Consistency is key to effectiveness, but is not the sole contributing factor. Realistic prioritisation is equally important. Just like it is hard to measure domestic performance that should be the basis of applying differentiated measures vis-à-vis the

⁴ Balfour, 2006: 128, referring to Knud Erik Jørgensen; see also Jack Donnelly and Chris Brown, cited in Lucarelli and Manners, 2006: 213.

country in question, it is not easy to assess whether conditionality has been successful. Setting formal goals like the adoption of laws or creating various bodies and procedures might prove easy targets both from the side of compliance and that of measuring progress. Yet, these usually only lead to ‘shallow’ compliance, to domestic changes that are easy to revert. (See terms like ‘shallow Europeanization’, Goetz, 2005: 262; and ‘Potemkin harmonization’, Jacoby, 1999: 62-67, cited by Börzel, 2011: 9.) On the other hand, substantial changes, e.g. of social attitudes, might not be realistic policy goals. These are dilemmas that are at the heart of the type of conditionality issues we are assessing here.⁵

After the overview of conditionality challenges, we will now turn to the question of how domestic actors react to conditionality pressure, especially political decision-makers who lack commitment to democracy, human rights and the rule of law, or even consider these in many cases as detrimental to their goals of staying in power.

Challenges to Conditionality in the Western Balkans

The insights from the burgeoning literature on conditionality can be summarized in five points. Conditionality is more likely to succeed ‘if membership criteria are clear, if the same criteria are applied equally to all applicants, if they are strictly but fairly monitored, if the findings are transparently communicated, and if there is no doubt that the reward will come once conditions are met’ (...and sanctions where they are not), none of which currently holds (BiEPAG, 2017: 14). In addition to the external factors of credible, transparent, and consistent conditionality, domestic adoption costs play an important role (Schimmelfennig and Sedelmeier, 2004). In the Western Balkan context, the domestic political landscape is an important determinant. Measures required by conditionality in the field of human rights and democracy can be costly for rulers seeking to maintain power at all costs. Börzel confirms that, just like in the case of the Central and Eastern European enlargement round, successful conditionality ‘depends on a credible accession prospective, non-prohibitive compliance costs and the existence of liberal reform coalitions’ (Börzel, 2011: 14). Schimmelfennig, Engert and Knobel distinguish the liberal from the anti-liberal party constellation, and argue that in the latter case, marked by ‘nationalism, communism, populism, and/or authoritarianism’, ‘the political costs of adaptation to the liberal community rules will be steadily high’ (Schimmelfennig et al., 2006: 245-46). They conclude that it is only in the ‘mixed constellation’ where ‘the membership promise [has] a strong impact on democratic consolidation’ (Schimmelfennig et al., 2006: 246). While the description of the anti-liberal constellation unsurprisingly applies to the Balkan cases, this has received less attention so far. The literature has

⁵ For the sake of providing a complete picture of the types of inconsistency arguments, we should also mention a source of criticism that we will not deal with in this article, for it holds little water in the enlargement context: the equal concern for civil and political as well as social and economic rights. The universality and indivisibility of human rights is a principle that the EU stresses strongly, see, e.g. Art. 21-1 of the Treaty on European Union (TEU) citing the principle of ‘the universality and indivisibility of human rights and fundamental freedoms’ as guiding external action; and EU Strategic Framework, section ‘Promoting the Universality of Human Rights’, reaffirming the EU’s ‘commitment to the promotion and protection of all human rights, whether civil and political, or economic, social and cultural’, specifically mentioning labour conventions (Council of the European Union, 2015: 9).

focussed more on the difficulty of complying with EU conditions⁶ that touch upon statehood and national identity issues. These include the EU's expectations towards Serbia regarding Kosovo, or concerning ICTY cooperation, when persons regarded as war heroes must be extradited for criminal investigation and, ultimately, to the International Criminal Tribunal for the former Yugoslavia. While it seems logical to concentrate, in a post-conflict setting, on the impact this legacy has on compliance, we argue that sustainable transformation should also seek an understanding of how more 'mundane' features of post-communist societies, especially those related to the rule of law area, affect rule transfer.

Hungary that in 2006 looked like a solid case with virtual consensus on Western orientation, EU membership, and liberal democracy, might be a sign of caution for the less clear cases of Western Balkan candidate states, showing the limits of triggering change and lock-in from the outside. What Schimmelfennig et al., call 'international socialization efforts' led, in most cases, to reluctant compliance and not 'internalization or habitualization', and even where there was genuine change, it was more of a result of 'instrumentally rational behaviour under changed circumstances', i.e. conditionality pressure (Schimmelfennig et al., 2006: 257). As the conditionality pressure eases enormously after accession, under the present framework at least, the backlash that some countries witness, after and before accession, can easily fit this theory.⁷ We should note, however, that the CEE and WB contexts differ in that rule transfer generally fails in the Western Balkans at an earlier stage than it did, e.g. in the case of Hungary. Namely, formal regulations like media laws in Serbia or anti-discrimination legislation in Bosnia are often not implemented in the first place and, as a result, there is not much to lock in for the future. In this sense, what could be labelled as 'backlash' in CEE countries is not so much a 'reversal' in the Western Balkan context as a road that has never been taken.

The particular challenge for conditionality in the Western Balkans is that the existence of an able central government that can meet conditionality goals cannot be assumed, and state-building in many cases runs parallel to democracy promotion. (Börzel, 2011) The EU, recognizing this, promotes both goals, which has the paradoxical consequence of further strengthening strong leaders that some describe as 'stabilitocracy' (Pavlović, 2016; BiEPAG, 2017). Even if there is a strict commitment to conditionality following standards of human rights, democracy and the rule of law, EU actions can strengthen autocratic leaders. Part of the reasons might lie in the heavily state-centred approach to conditionality, seeing reforms as mere 'box ticking'. (See, in the context of transitional justice and security, Bojicic-Dzelilovic et al., 2016). Serbia managed to meet the condition of ICTY cooperation without generally condemning war crimes, often celebrating convicted war criminals as heroes (Ristic, 2015). As conditionality rewards delivering on targets set by the EU, regardless of

⁶ Though by far not exclusively, see e.g. Noutcheva, 2012 and Noutcheva and Aydin-Düzgit, 2012 on rule of law reforms.

⁷ Even if they, in the original formulation of the theory, did not see this as a likely development: countries like Hungary and Poland 'have become EU and NATO members already so that accession conditionality is not available anymore. However, the internal mechanisms of human rights monitoring and judicial enforcement of the Western international community (such as the CE's system of human rights protection) are likely to be sufficient to ensure continued respect for human rights and democratic norms (Schimmelfennig et al., 2006: 259.)

domestic support for reforms, leaders with autocratic tendencies can enjoy an advantage. As a recent report of the Balkans in Europe Policy Advisory Group argues, '[e]xternal efforts at resolving the open questions of statehood have also favoured heavy-handed fixers' (BiEPAG, 2017: 4). In addition to the Kosovo question, dealing with asylum seekers is also an issue that seems to be caught up in the game of exchanging security measures for democratic conditions.⁸

The fundamental flaw of this approach, regardless of whether it is a desired or only an eventual outcome of conditionality, is twofold. First, such a process will never lead to reliable members who share the common foundations of integration, and will become part of the problems, posing internal challenges to the working of the EU. Second, related to this, while the term 'stabilitocracy' suggests stability, it is akin to building on sand. As Erwan Fouéré notes in reaction to the European Commission's self-laudatory comments, 'if fundamental and systemic violations of the rule of law and the erosion of democratic standards are not effectively addressed, any stability achieved is not sustainable' (Fouéré, 2016: 2). (We will come back to the argument of sustainability later.)

Despite all the challenges, we do see change, and we witness cases where the standards set by the EU condition domestic political behaviour. Even leaders with autocratic inclinations are aware of red lines, and actively test the boundaries. Serbian President Vučić knows well that concessions on Kosovo are fundamental to progress on the path to membership, while he can also be sure that crackdown on opposition in various areas, from the media to civil society, will not provoke a strong response from EU officials. If the semblance of progress is maintained through acts like the protection of the pride parade, showing friendliness to asylum seekers, other, often fundamental challenges to democracy can be swept under the carpet.

To reiterate, conditionality needs clear and realistic targets that nevertheless have the ambition of a genuine transition to democracy with human rights and the rule of law. Key to this is a consistent application of conditionality, in all of the respects listed earlier, especially where additional challenges are present in the form of ongoing state-building and a challenging international context, the siren song of illiberal regimes. What adds to the complexity is that consistency is not a yes-or-no question, and it is often hard to tell whether we truly have it. What is easier to tell, however, is when we see a clear trend that violates even basic concepts of consistency. In the final section of this paper we will illustrate this with the EU's conditionality in the field which is key to building and maintaining democracy: media freedom.

Conditionality and Media Freedom in the Western Balkans

The role of independent media cannot be overestimated and no democracy, no genuine guarantees to human rights can exist without the check on power provided by free journalism. This is confirmed by various theoretical accounts of what democracy is (see Dahl, 2000; Habermas, 1984; or accounts of 'media democracy', often with

⁸ The problem is further exacerbated when EU measures not only reinforce leaders with dubious credentials as a side-effect but implicitly encourage human rights violations, based on a false dichotomy between security and liberty, like in the case of the treatment of asylum seekers.

critical overtones, see, e.g. Voltmer, 2013: 218), and also in practice, by the inclusion of the media landscape in assessing the fairness of elections and referenda. (See, most recently, on the Turkish referendum, OSCE, 2017.) There is a general sense that better overall media performance in a country relates to a better functioning democracy, a connection confirmed by comparative studies (Müller, 2014). Free media works as a crucial check on power, and a functioning democracy guaranteeing human rights and the rule of law are important to secure independent media. It is thus a crucial area for testing the impact of EU conditionality. How do we run this ‘test’, how should we measure ‘success’? There are at least three variables in the equation: the *content* of conditionality on media freedom, the *instruments* that the EU used or can use, and the media landscape in Western Balkan countries (the *target*).

Despite the centrality of media freedom to many of the values (including freedom, democracy, human rights, and pluralism) central to the European Union (see Art. 2 TEU), the field remains largely national competence (but see the Audiovisual Media Services Directive). As is common with such areas, this creates problems for enlargement conditionality, which are further exacerbated by the variation in media regulation in EU Member States. Accordingly, no core *acquis* is available that could be transferred. A quick look at Enlargement Strategies and Country Reports, key instruments in the enlargement context, however, reveals a core agenda with elements like fighting intimidation and political pressure, easing (or eliminating) direct political influence on public broadcasting, the transparency of ownership and of state support to certain outlets, integrity and self-regulation, decriminalization of defamation, pluralism of the media, and diffusing an ethos of tolerance, with special regard to the representation of minorities.

The instruments available for the EU to exert pressure as part of its conditionality includes statements and criticism both informally (including by Member State politicians) and in formal documents adopted by various bodies, most importantly the enlargement strategies and country reports; targeted and non-targeted financial measures as part of CARDS (Community Assistance for Reconstruction, Development and Stabilization) and, from 2006, IPA (Pre-Accession Assistance Instrument) and, more directly in the context of human rights and democracy, EIDHR (European Instrument for Democracy and Human Rights); twinning, TAIEX workshops and trainings (Technical Assistance and Information Exchange Instrument) and other types of direct assistance; the adoption of formal steps towards accession like the Stability and Association Agreement (SAA), including tangible economic benefits like autonomous trade preferences (ATP); and visa liberalization. (For a broader overview see Fraczek et al., 2015: 71–161). All of these can be used to advance media freedom, not only as positive measures, but also as benefits conditioned on performance. Being conditioned should mean that they are in fact linked to fulfilling requirements set by the EU, postponed and, in some cases, revoked in case of non-compliance.

It follows that, for a consistent use of conditionality, monitoring state performance as well as a corresponding application of conditionality instruments are essential. Furthermore, as we have seen in the first part of the paper, consistency is not limited to the consistent use of instruments, but should also include consistency over time and across countries. Benchmarking state performance can be a tool that makes

consistency in these respects more likely. In the case of media freedom, this would require a systematic assessment of the state of the media, in a way that it is widely applied by experts. (See, e.g. Brogi and Dobrev, 2015: Annex 5 with the ‘risk domains and indicators’ developed for ‘Monitoring Media Pluralism in Europe’, a project financed by the European Commission.) Such a systematic monitoring would make it more likely that conditionality assessment registers problems like continued criminalization despite the formal move to decriminalize defamation (i.e. it is no longer punishable with imprisonment), as happened in the case of Serbian journalist Stefan Cvetković who was sentenced to 27 months of prison in a first instance ruling, at the initiative of government politicians, for unauthorized publication of documents (Reporters Without Borders, 2017). While broad monitoring of the field of media freedom might stop at acknowledging (formal) decriminalization, a more detailed benchmarking exercise would include data on criminal procedures against journalists, especially those ending in conviction and certainly those that involve imprisonment.

The Commission is apparently aware that benchmarking is an essential element of conditionality and, ultimately, of securing media freedom in candidate countries, as it published specific guidelines for media freedom conditionality (DG ELARG, 2014). These only work, however, if benchmarking is linked to actual measures, serving ultimately as true conditions of accession, i.e. ‘that failure to meet them will be an obstacle to EU entry’ (Dunham, 2014). This fails on various levels. While the 2015 Enlargement Strategy refers to the Guidelines in a footnote (European Commission, 2015: 26 fn. 7), the 2016 Strategy (European Commission, 2016) or the country reports⁹ lack any reference to it. More crucially, enlargement conditionality is dominated by ‘positive’ conditionality that seems to exclude the possibility of adequate responses in the case of a serious backlash against media freedom. In the Western Balkans in the past 6-8 years, media freedom has been deteriorating across the region according to international media think tanks (see Charts 1-2-3). This includes EU candidates like Serbia and Montenegro that, despite their human rights performance, made great progress along their accession path in the same period. Thus, the rest of this article seeks to substantiate the claim that relying exclusively on positive measures fails as a consistent conditionality policy in the case of Western Balkan countries.

A well-informed observer of the region, Florian Bieber summarized the general media landscape three years ago:

Only a few critical media of the nineties have survived the past decade. The economic crisis and the state as the most important advertiser [...] have resulted in a media landscape in the region in which critical voices hardly find a place. This is particularly pronounced in Montenegro, Macedonia and Bosnia. In Macedonia all important critical media, such as the private channel A1 have been forced to close [down] and only few journalists dare to openly criticize the government. In Montenegro, there [are often] attacks by ‘unknown’ perpetrators against independent media. [...] In the Republika Srpska [...], criticism is only aimed against the opposition, ‘Sarajevo’ and foreign powers. In

⁹ See the 2016 country reports on the ‘Strategy and Reports’ page of the Commission: https://ec.europa.eu/neighbourhood-enlargement/countries/package_en. Accessed: 21-06-2016.

Serbia, only a few media nowadays dare to openly criticize Vucic. (Bieber, 2014)

In a more detailed assessment, Tadić Mijović and Šajkaš (2016) show how the withdrawal of Western donors of independent media in the region after 2008 led to a tangible deterioration in media freedom in countries like Bosnia and Herzegovina, Serbia, and Montenegro. They report about parallel physical and legal attacks on journalists in Montenegro and government-orchestrated smear campaigns against investigative journalists in Serbia. In Bosnia and Herzegovina, government influence on the media in Republika Srpska remains decisive, and the financial basis of media in the Federation remains dependent on state or foreign support (Tadić Mijović and Šajkaš, 2016).

It is not the case that the EU is not aware of this backsliding. In its most recent enlargement strategy, the Commission describes its response to tangible problems in the region as follows:

In the Western Balkans, undue political interference in the work of public broadcasters, untransparent public funding of media, and intimidation of journalists has continued. To address these issues, building on the Speak Up! conferences, the Commission will launch a new concept of ‘media days’ in the region, broadening the spectrum of media-related issues addressed beyond the freedom of expression as such, also to cover the functioning of media markets, competition distortions and related issues such as financing and advertising markets (European Commission, 2016: 4).

The strategy paper, immediately after noting the political interference and intimidation (not mentioning physical attacks in particular¹⁰), lists extremely soft measures: conferences and ‘media days’. Human Rights Watch has criticized the EU’s response to physical attacks on journalists, the failure to investigate these crimes and, in particular, the strategy for failing to include detailed recommendations (HRW, 2016). While expressing concern in a strategy paper is not the only tool, it is hard to see how the EU’s motivation reflected therein will get anywhere close to persuading governing forces that they should make concessions even if that weakens their power and chances of re-election.

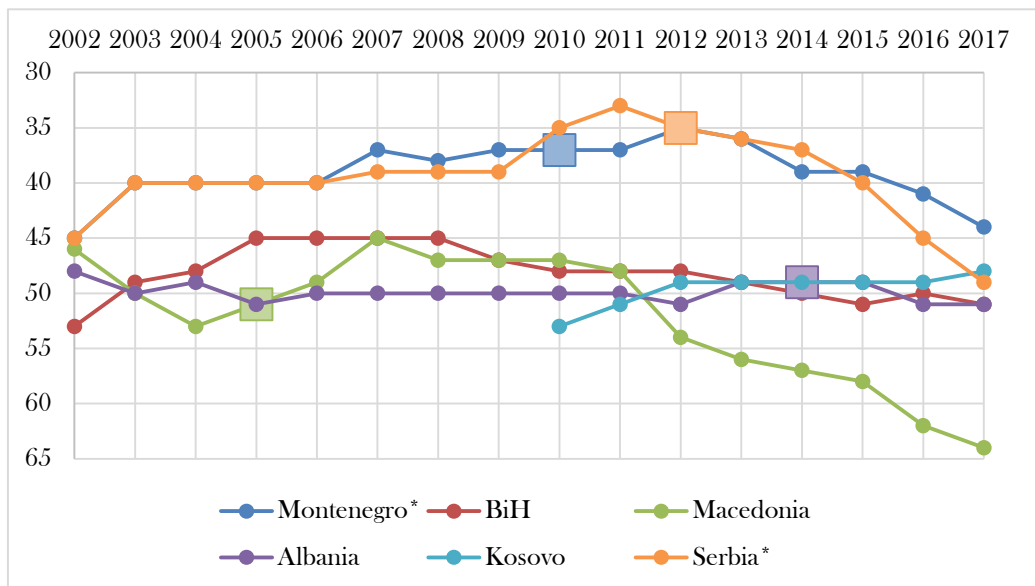
But is the situation in fact that bad that it warrants a more severe response from the EU? We can raise this question as government influence on media – if not directly, then through economic means – is present in many countries, and the phenomenon of fake news and direct and selective political attacks on media outlets seem to carry the day in more established democracies, most prominently in the US. We argue that the Western Balkan situation requires firm responses, even when assessed against the current international context. It would be impossible to provide an adequately detailed overview of the various media landscapes in Western Balkan countries. Yet, the evidence is so overwhelming that a limited overview, based on international rankings of overall performance concerning media freedom, will be

¹⁰ This comes up later, and only concerning Kosovo. (European Commission, 2016: 19)

enough to make our point. The point-based system has been widely criticized for oversimplification and inadequate cross-country comparison. What these scores and rankings do well, however, is registering longer trends. It is this latter that we seek to demonstrate: consistent backsliding should somehow result in policy responses, if enlargement is in fact conditional.

We provide a narrow overview in Chart 1, with Freedom House ‘Freedom of the Press’ values for non-EU Western Balkan countries. (For a more detailed comparison, see Charts 2 and 3 in the Annex, using two independent datasets, one based on values describing media freedom, by Freedom House, and one based on a – directly – relative value, country ranking, by Reporters Without Borders. There we included all Western Balkan countries on the integration path in the 2010s and a number of states that became members in the 2000s to show post-accession patterns as well.)

Chart 1. Freedom of the Press Values in Western Balkan non-EU Countries



Source: <https://freedomhouse.org/report-types/freedom-press> Accessed: 21-06-2017. *Notes:* Lower values are better. Marking the date of granting candidate status with squares. Serbia / Montenegro: Yugoslavia in 2002 and 2003, Serbia and Montenegro in 2004-2006.

What is immediately apparent from the charts is the general trend of decline in the second half of the examined period, a general deterioration even after Bieber’s 2014 observation quoted earlier. This is in line with regional tendencies. (See Charts 2–3 in the Annex.) Four of the six countries have been granted candidate status, and all of them show a decline after that date. While Montenegro showed some progress before 2010, the year it became an official candidate country, it has turned to the worse considerably since, and the same applies to Serbia after 2012, with its media freedom performance peaking in 2011. Albania stagnates at low levels, with a slight decline after 2015 (having become a candidate in 2014). While it was possible to note

in 2011 that Macedonia was making progress, witnessing the freest elections in 2009 (Börzel, 2011: 12), in 2017 we can only note the incredible decline. Macedonian values are nothing short of worrying: with some progress after the country was granted candidate status, its performance has been in free fall since 2011, with a decline from 2007. The turn came after conditionality pressure faded, not, as in other cases, with accession, but with the Greek veto threat over the name dispute. The shift also shows the strength of the ‘clientelistic structures’ (for a demonstration in Macedonian politics and how these structures impede conditionality, see Giandomenico, 2012) that continue to dominate political life. On the other hand, the two non-candidate countries, Kosovo and Bosnia and Herzegovina, show no similar decline, with Kosovo actually making slow progress.

The cases of Bulgaria, Hungary and Poland (Charts 2-3) indicate that the post-accession period can also bring about considerable deterioration. This serves as a warning for one-off instruments of conditionality. Once visa liberalization, an important ‘carrot’ measure that the EU used for all countries in the region, happened, it is politically unfeasible to revert the change, and it is impossible to revoke membership after accession takes place.

The decline manifest from the charts could only happen if conditionality has not worked, and it is crucial to understand why. Part of the explanation lies in the reluctance to apply negative measures, i.e. sanctions, a term largely avoided by the EU. Seen against the background of alarming trends, the statement from Fouéré does not sound too harsh:

The EU should use all the tools at its disposal, such as cutting off EU development and pre-accession assistance, or suspending scheduled meetings, to make it clear to recalcitrant governments that being a candidate to join the EU entails responsibilities and obligations that must be respected. (Fouéré, 2016: 4)

Allowing governments to avoid domestic costs of democracy conditionality like guarantees of media freedom means a direct violation of the said measures. When the EU does not send clear signals, including negative conditionality, in clear cases of consistent violation as evidenced by the indicators, that can translate to an invitation to violation, only by more refined measures short of direct formal assault. The EU communicates, through its actions, that it is unwilling to counter such moves and finds it uncomfortable to pressure these governments into compliance, which also leads to weakening domestic forces that could fight oppressive government measures. First, because EU support continues to work out in favour of domestic governments, and second, because softer measures like individual threats or financial-economic tricks to discipline or close down critical outlets makes it harder for domestic forces to build up and resist direct government influence.

In addition to the general unwillingness to sanction non-compliance, the ‘content’ of conditionality is also misplaced in many cases. The requirement to adopt formal measures like passing laws and setting up institutions create a seemingly win-win situation: it is easy for the EU to track such steps and relatively easy for governments to comply. What is losing out is the goal of norm promotion:

democratization. Easy-to-adopt measures are equally easy to revert. Formal reforms remain shallow and do not result in genuine transformation and sustainable reform.

Sustainability includes regard to the various contextual elements that strengthen and erode the independence, the plurality and the integrity of media outlets. Bajomi-Lázár argues that party politics have an important impact on media freedom and describes a regional tendency of undue government influence, or 'party colonization of the media' (Bajomi-Lázár, 2014). He argues that securing party influence makes sense not only as a tool to ensure control over media content, i.e. as a form of censorship, but it can also be important as a means of clientelism, maintaining oligarchic structures and corruption. We have seen earlier that clientelistic structures can play a crucial role in the functioning of democracy, which has an effect on the domestic media landscape as well. Podumljak provides a complex measurement tool that assesses how areas like employment rights, the work of self-regulatory bodies, the transparency of ownership, existing monopolistic structures, and the transparency of public media financing from the point of view of their (positive, neutral or negative) impact on clientelism in Western Balkan countries (Podumljak, 2016). Note that many of these goals were priorities set by the EU that have never been effectively implemented.

The focus on contextual determinants also hints at ways to achieve sustainable reform. Staying with the example of media freedom, the social and economic, legal and political, institutional and normative, domestic and international conditions can all play a role in securing media freedom in a country. Bajomi-Lázár identifies seven conditions of media freedom, and concludes that five of these are harder to change [attitudinal condition (citizens), professional condition (journalists), entrepreneurial condition (owners), economic condition (advertising revenue), external condition (including the EU)], while two can be especially important for short-term changes, the institutional framework of the media and politicians' behaviour towards media, adding that single-party governments are more likely to colonize.

While the goal of political domination might look simple, political influence of journalists can take many forms, including economic pressures, ownership and advertisement, silencing through revoking frequency usage, denying access for certain media outlets, administrative and criminal sanctions and threats, often through informal channels, secret service meddling etc. Pluralism is a delicate good that can be threatened and demolished by various types of evil, and those promoting media freedom should engage with threats on all of these fronts. These can include the condemnation, investigation, and sanctioning, by states, of physical attacks against journalists (HRW, 2015), ensuring the transparency of media ownership and state support (Valcke, 2014), and many more. To look more closely at one aspect, the structural reasons of party colonization are, according to Bajomi-Lázár, the following:

one-party colonisation of the media is more likely to occur 1) under single-party governments; 2) under parties with highly centralised decision-making structures; 3) under unified parties with a high degree of party discipline; 4) under parties or governments with a strong ideological agenda; 5) under parties that try to gain popular support by means of denying opposition networks

access to resources; and 6) under charismatic leaders who are 7) personally intolerant of critical media. (Bajomi-Lázár, 2014: 233)

This confirms that conditionality that tries to separate media freedom from wider problems of democratic party competition fails to consider important elements of the equation. Important guarantees for media freedom fall outside the traditional scope of media conditionality and legal reform, and will include electoral laws, party funding rules, or even internal rules in parties (Bajomi-Lázár, 2014: 236). These findings suggest that factors in the penumbra of media regulation should be equally important in seeking, as part of enlargement conditionality, a sustainable framework guaranteeing media freedom, an idea currently not fully embraced by EU conditionality. What makes this endeavour (taking context into account) particularly challenging is that many elements, the electoral system in particular, fall outside the scope of conditionality. This is also the case with other elements of conditionality, e.g. with minority rights, that have particular importance in the Western Balkan region.

Here we conclude our overview of media freedom. The discussion on media freedom leads back to broader questions of promoting human rights and democracy through conditionality. We picked media freedom because this is a more focussed area of conditionality that is central to several elements of the Copenhagen criteria as well as of core EU values. Many other areas and even the overall performance as a democracy would reveal a similar trend. Our limited overview demonstrated how in the area of media freedom conditionality remains inconsistent, allowing domestic governments to crack down on critical voices in a systematic manner while securing the overall support of the Union with concessions elsewhere. The final section of the paper elaborates on why this is a fatal failure of EU conditionality.

Lessons and conclusions

Membership conditionality based on the Copenhagen criteria set high standards for a region where the more immediate goal has been to prevent the re-emergence of violent conflicts. If we measure European and other international engagement by this latter metric, it has been a relative success. This also makes it understandable how the dispute over Kosovo can trump all other conditionality topics in Serbia. From a narrower security perspective, this makes good sense. Yet, the commitment of the EU to the principles of democracy, human rights and the rule of law are not pure self-defeating idealism: they are the only sources of long-term stability in the region. Along the road, we find state-building and a political system that is able to adopt reforms and sustain them.

While it is possible to argue for the approach that, as Börzel et al., critically note, the EU puts stability over democratization (Börzel et al., 2011), without the deeper changes necessary for sustained democratization, enlargement will only contribute to the existing internal challenges of the European Union. Economides and Ker-Lindsay argue that even in the case of Serbia's compromising stance towards Kosovo, what we really witness is a series of pragmatic - even opportunist - concessions that remain far from normative adaptation, and it is hard to describe changes as 'Europeanization' (Economides and Ker-Lindsay, 2015: 1038). The Kosovo

question, where the Serbian leadership was clearly motivated by short-term goals, is an apt example for making concessions on a rational and instrumental grounds short of 'adaptive normative Europeanization'. Using EU funds while blaming unpopular measures, or even problems, on the EU has become a common practice among such 'instrumentalists'.

The wider problem is that short-term instrumental concessions seem to be the norm, not the exception, in domestic reactions to EU conditionality. Against this background, it is not so much the reversal but the lack of reversal that requires explanation. Turning conditionality into a real transforming force requires strong political will. Consistency also means commitment, and enlargement is getting less and less political attention. Where governments feel that there is hesitance from EU actors to follow-up, shame, and sanction, they can easily interpret this as encouragement, posing a danger to the entire project.

Schimmelfennig et al. ask the opposite question: would loosening conditionality have benefits, and respond in the negative:

Abandoning the strictly rewards-based policy of political membership conditionality is unlikely to produce better results. Coercive policies such as in Bosnia and Kosovo have been useful in stopping violent ethnic cleansing but have not accelerated either democratic consolidation or Western integration. On the other hand, there is no evidence that looser political accession criteria and a policy of 'integration before consolidation' would help. (Schimmelfennig et al., 2006: 260)

One might ask if 'principled pragmatism' that appears in the updated Action Plan could lead to allegedly pragmatic concessions to the detriment of coherent goals. The term presents a tension that ideally triggers a delicate balancing exercise. Such balancing is often hard to be assessed from the outside. What looks like a betrayal of values might in fact be a result of legitimate prioritization and pragmatism, and sustained but rigid consistency might lead to no results with a focus lost in too much talk and too many 'key conditions'. What scholarship can do, however, is to assess the outcomes - conditionality is validated by results; and scholars can point to clear cases where concessions make conditionality practically disappear from certain areas. It is this latter that we documented in the case of media freedom. Asking for consistent conditionality, tracking domestic changes and designing policy responses accordingly is in fact not to ask for the impossible: detailed expert assessments of the various fields, especially of media landscapes, are widely available. EU bodies should make better use of field expertise in the ongoing assessment of fulfilling basic conditions and in responding to shortcomings.

Once the appeal and political force of integration provided support for reforms and shaped domestic political landscapes. Yet, this phenomenon was followed by a turn against the vision and values that the EU has been promoting, a 'de-Europeanization'. This is most palpable in Turkey (see a recent analysis in the context of media freedom, Yılmaz, 2016), but is also manifest within the EU, most prominently in Hungary. The Hungary and Poland problem exposes the EU to the charge of inconsistency (double standards) vis-à-vis Member States as opposed to

candidate countries. While the legal framework is indeed very different, it is harder to defend a position that allows the systemic curtailment of freedoms within the EU while setting them as conditions in neighbouring countries. Undermining conditionality is one weighty reason why EU institutions and other Member States should not become complicit by remaining passive when they face violations by fellow governments.

The political developments on both sides of the Atlantic do not weaken the argument for stronger and stricter democracy promotion in the Western Balkans, these events make the case stronger in fact. The backsliding that we saw in the case of media but that is part of a larger trend, combined with the shift in the international context, makes it increasingly dangerous to disregard challenges to democracy in the Western Balkans (Bieber and Kmezić, 2016: 11).

There is a very tangible risk, exemplified by recent Hungarian and Polish challenges, that conditionality does not lead to transformation, but allows the same actors to pursue the same policies they would anyway, except that they learn to play by the rules, on a formal level, thus gaining additional legitimacy from the EU. The backsliding to earlier levels questions if any achievement has been made with external support, and highlights the lesson that conditionality should only be seen as successful where subsequent changes – disappearance of conditionality pressures with, most importantly, accession, but also the fading of the membership perspective – do not lead to full reversal.

The experiences described above caution us that specific structural problems continue to exist and can easily undermine any progress in the field of democracy and core human rights. The scope of the problem suggests that conditionality might need to be sustained after accession, as happened in the case of Bulgaria and Romania, with the Cooperation and Verification Mechanism (Balfour and Stratulat, 2012: 2). This step would require rethinking the post-accession phase and make it a sustained transition instead of a one-off event. And yet, it would not go a long way in making sure that change is lasting.

Evidence shows how informal norms and networks can not only alter but completely overwrite formal structures. Kostovicova and Bojicic-Dzelilovic (2014) argue in the Bosnian context that 'informal power structures', contested statehood helps maintaining ethnic nationalism and 'allows ethnic elites to sustain the system of informal rule involving disregard for state-sanctioned rules and regulations' (Kostovicova and Bojicic-Dzelilovic, 2014: 206). The elite that realized how ethnic nationalism can help maintain its rule, even at the cost of wars (Gagnon, 2006) is now more than reluctant to switch paths, which is effectively blocking efforts to build a democratic system that, getting rid of 'wartime structures', works towards genuine public good instead of maintaining and reinforcing divisions. This constructivist explanation suggests that it is the material basis of these regimes that needs to be tackled in the first place and façade-like institutional measures do little or nothing to build long-term stability (Kostovicova and Bojicic-Dzelilovic, 2014: 207). The current situation in Macedonia serves as an ample reminder that the risks of fundamental destabilization are still very much present in the region.

Stability and human rights performance should not be seen as notions in tension. Strengthening democracy and respect for human rights, as exemplified in the

media context, can serve as long-term guarantors of stability. Shortcomings in these areas indicate that change is not sustainable. We have also seen that without democracy and human rights conditionality the political recognition and financial support from the EU can end up helping strong leaders with dubious credentials who are testing the boundaries and undermine core EU values in their countries. In the post-accession stage, this can be a result of the lack of conditionality instruments, while during enlargement, it might flow from an unwillingness to apply consistent conditionality. Yet, conditionality should mean that the relevant polices are in fact conditioned:

Conditionality is only credible because the EU is willing to stop the process when a government is not making progress on crucial domestic reforms. For this reason, the enlargement process must sometimes come to a standstill for some candidates. (Vachudova, 2014: 134)

Regardless of whether the EU is willing to wholly embrace its position as a centre of gravity that transforms political processes in Central Eastern and South Eastern Europe, the effect is there. In fact, conditionality plays out in a context where the opposite of democracy promotion is happening with the influence of illiberal regional powers (Börzel, 2015). The Trump presidency or Russian involvement in general, or even actors like Saudi Arabia and China, have an influence on democratic as well as non-democratic countries.

Operationalization could happen through a more systematic review of progress after opening Chapters 23 and 24 in all Western Balkans countries (BiEPAG, 2017: 15). Consistency and persistence should mark this process, bearing in mind the risks involved. Persistence is necessary because deeper changes require time. ‘Rhetorical entrapment, persuasion, and cognitive change require more time than behavioural adaptations stimulated by strong and credible incentives’ (Schimmelfennig et al., 2006: 258). While the Council of Europe, and even more NATO and the EU have been in a position that they could build on the strong incentive of membership, this has allowed the negligence of genuine persuasion and social or ‘cognitive’ change, without which there can be no sustainable shift to the liberal democratic order, democracy with human rights and the rule of law, upon which further cooperation can reliably be built.

Building on domestic support is essential to achieve this. Recent demonstrations and popular sentiments from Turkey through Serbia and Romania to Hungary show that the abstract values enshrined in TEU Article 2, including democracy, human rights and the rule of law, have local supporters. To advance these goals – among others, through demanding concessions from those in power to the benefit of media freedom – is not only a legal duty for the EU: not pursuing them is to betray these people(s). Furthermore, giving up on core values risks that the integration project itself is hollowed out, a threat that points beyond the Western Balkans, but that has very tangible consequences in this region.

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Appendix

Chart 2. Freedom of the Press (Freedom House) values (lower is better) and Word Press Freedom Index (Reporters Without Borders) country ranking (lower is better) for selected countries, marking accession dates (●) and visa liberalization dates (●). Serbia / Montenegro: Yugoslavia in 2002 and, for FH, in 2003, Serbia and Montenegro in 2002/2003-2006. Kosovo: numbers for Yugoslavia / Serbia before 2010.

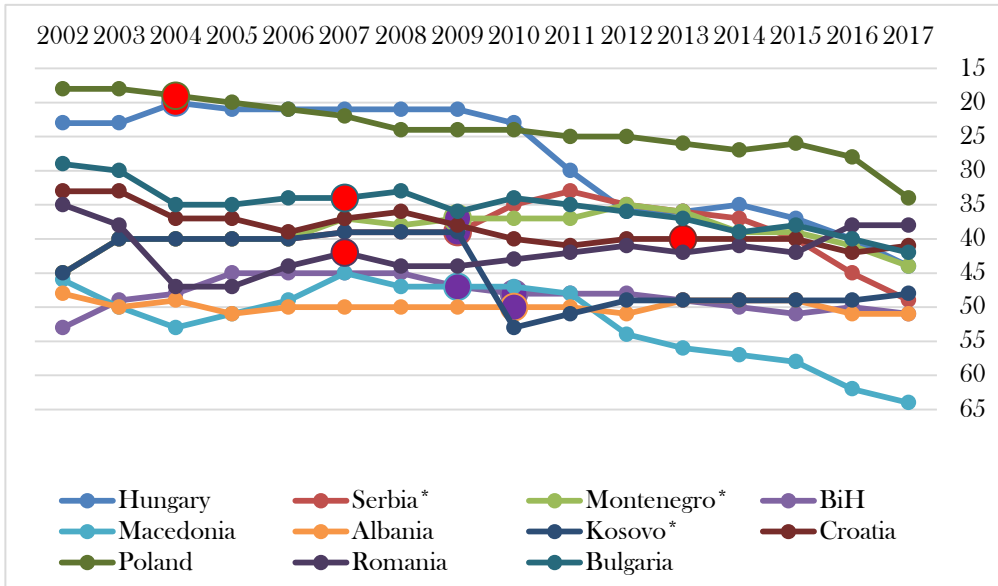
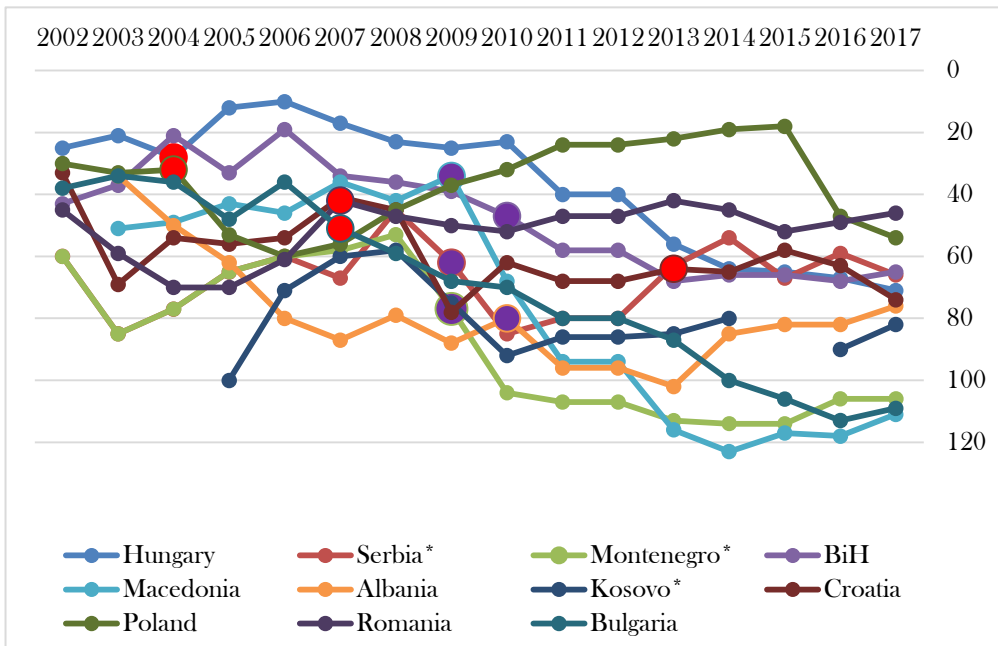


Chart 3. World Press Freedom Index 2011-2012 for both 2011 and 2012. Note especially the Western Balkan numbers for 2009 and 2010 as these years mark visa liberalization: 2009 for Macedonia, Montenegro and Serbian and 2010 for Bosnia and Albania. (Freedom House, 2017; Reporters Without Borders, 2017b)



ADNAN KADRIBAŠIĆ *

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<http://intersections.tk.mta.hu>

* [adnan.kadribasic@gmail.com]

Abstract

This paper analyses the effectiveness of EU conditionality in the area of human rights with a focus on non-discrimination in terms of its characteristics, particularities, and difficulties in Bosnia and Herzegovina. From the analysis of two case studies, this paper finds evidence that the effectiveness of human rights conditionality largely depends on the determinacy of conditions, the size and speed of rewards, the credibility of threats and promises, and the size of adoption costs. It also finds evidence of the impact socialization plays as an alternative and supportive model of rule transfer. These findings could support future EU conditionality policy towards Bosnia and Herzegovina which entered its most intensive phase following the entry into force of the Stabilisation and Association Agreement on June 1, 2015, and the presentation of the EU Questionnaire in December 2016.

Keywords: Europeanization, conditionality, Bosnia and Herzegovina, equality and non-discrimination, Sejdić and Finci v. Bosnia and Herzegovina.

1. Introduction

One could define EU enlargement conditionality as an exchange between the EU and a candidate country in which the EU offers the candidate a (realistic) prospect of EU membership if the candidate implements a wide range of (EU-driven) domestic reforms. The so-called carrot and stick approach of conditionality involves the withdrawal of the benefits of accession and the halting or slowing down of the process if the candidate state government fails to progress with reforms (Steunenbergh and Dimitrova, 2007). As Schimmelfennig and Sedelmeier (2004: 670) argue, ‘the dominant logic underpinning EU conditionality is a bargaining strategy of reinforcement by reward, under which the EU provides external incentives for a target government to comply with its conditions.’

EU conditionality in Bosnia and Herzegovina (BiH) is part of a comprehensive process of institution building and the creation of a democratic and stable ‘political community’ as part of post-war reconstruction. The EU is capitalising on its authoritative/asymmetrical position vis-à-vis Bosnia and Herzegovina, which is eager to become part of, or closely affiliated with, the EU. The prospect of European integration has the potential to create a long-term and coherent perspective, to encourage domestic ownership and institutional development, to support stability and regional cooperation, and to soften nationalist identities.

The EU perspective is perceived by many as a viable approach to supporting the transition of Bosnia and Herzegovina from an unstable to a functioning democracy. The current constitutional set-up is based on the 1995 ‘Dayton Peace Agreement’ – the General Framework Agreement for Peace in Bosnia and Herzegovina – which defined the country as a parliamentary democracy with a bicameral parliamentary assembly and a three-person rotating presidency at the central level of government. The constitution states that Bosnia and Herzegovina is a state of three constituent peoples – Bosniaks, Croats, and Serbs – as well as ‘Others’, making clear reference to the group rights of the main ethnic groups, not to individual rights. As a result, members of the presidency need to be from the three different ethnic groups and a similar rule applies to the upper house of parliament, the House of Delegates, where there need to be five delegates from each group. This system has been criticized by many,¹ and since 2009, following several rulings of the European Court for Human Rights (ECtHR),² it has become clear that the constitution of Bosnia and Herzegovina is discriminatory since it excludes all other groups (except for the *constituent peoples*) from key government positions.

This paper will analyse the effectiveness of EU conditionality in the area of human rights in Bosnia and Herzegovina. It uses the general proposition that the effectiveness of EU conditionality depends on a cost-benefit analysis of the costs of adaptation and the rewards that are promised. Schimmelfennig and Sedelmeier (2004: 664) argue that this cost-benefit analysis depends on the following factors:

¹ See e.g. Chandler, 2000.

² *Sejdić and Finci v. Bosnia and Herzegovina* [GC], (nos. 27996/06 and 34836/06), ECHR 2009; *Zornić v. Bosnia and Herzegovina* (no. 3681/06), ECHR 2014; *Slaku v. Bosnia and Herzegovina* (Application no. 56666/12), ECHR 2016.

- (i) the determinacy of conditions,
- (ii) the size and speed of rewards,
- (iii) the credibility of threats and promises, and
- (iv) the size of adoption costs.

Two case studies which involve the topic of non-discrimination – the adoption of the law prohibiting discrimination, and the implementation of the *Sejdić and Finci vs Bosnia and Herzegovina* decision – will be assessed against these factors. These cases studies were selected for three reasons: a) because of the position of the prohibition of discrimination in the EU's and Bosnia and Herzegovina's legal order; b) because they were both clear conditions for Bosnia and Herzegovina during crucial parts of the integration process; and c) because one was seen as a success and the other as a failure of EU conditionality policy.

2. Prohibition of discrimination in the EU and the legal order of Bosnia and Herzegovina

Prohibition of discrimination is based on the key principles of international human rights law. Articles on the prohibition of discrimination can be found in all major international and human rights treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, etc.

Non-discrimination is one of the fundamental values of the European Union as we know it today (see the references in both Art. 2 and 3-3 of the Treaty on European Union). The basic legal text of the Treaty Establishing the European Economic Community (1957) included a provision on the prohibition of discrimination. With the entry into force of the Treaty of Amsterdam which was signed in 1997, the European Community was allowed to legislate not only on gender but also on other grounds – namely, race and ethnicity, religion and belief, age, disability and sexual orientation. In 2000, two directives were adopted: the Employment Equality Directive (Council Directive 2000/78/EC) that prohibited discrimination on the basis of sexual orientation, religious belief, age and disability in the area of employment; and the Racial Equality Directive (Council Directive 2000/43/EC) which prohibited discrimination on the basis of race or ethnicity in the context of employment, but also in accessing the welfare system and social security, and goods and services. This was a significant expansion of the scope of non-discrimination law within the EU, which recognised that in order to allow individuals to reach their full potential in the employment market, it was also essential to guarantee them equal access to areas such as health, education and housing. Finally, after the Treaty of Lisbon entered into force, the Charter of Fundamental Rights of the European Union (2000/C 364/01) became legally binding and defined broader aspects of discrimination in Article 21.

In Bosnia and Herzegovina, international and regional human rights conventions relevant to human rights and equality are central pillars of the constitution. Additionally, the protection of human rights is incorporated in Article II of the constitution of BiH. Pursuant to Paragraph 1 of the said provision, Bosnia and

Herzegovina and both entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms. Pursuant to Article II.2 of the BiH constitution, the ‘rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina’ and ‘shall have priority over all other law’.

Grammatical interpretation leads us to the conclusion that the phrase ‘*over all other law*’ means that in the legal order of Bosnia and Herzegovina the European Convention has priority over the entire legal order of the country and, consequently, over the BiH Constitution as well; i.e. ‘over all other law’.

Such a formulation puts the European Convention at the centre of the constitutional order of Bosnia and Herzegovina and represents the supreme law of the land, since ‘all other law’ represents the entirety of the legal system including constitutional law. However, this is not translated into an effective mechanism which would ensure full compatibility with the ECHR, or, most importantly, in terms of the discriminatory provisions of the constitution.

3. EU human rights conditionality policy for Bosnia and Herzegovina

The conditionality policy of the EU began to take shape at the summit in Copenhagen in June 1993 when the European Union established the criteria for entry of future Member States into the EU. These conditions are value based and they rely on values which the EU is founded on: democracy, the rule of law, respect for fundamental rights, as well as the importance of a functioning market economy.

Looking at the recent history of Bosnia and Herzegovina and the turbulent changes that took place, it is obvious why the EU had to recognise that all relations with Bosnia and Herzegovina and other Western Balkan countries would take place within a special framework known as the Stabilisation and Association Process (SAP). The entire legal and institutional system had to go through a structural reset due to the situation immediately after the conflict. It is important to note that in this process of change the EU was not the only driving force, and other organizations (the Office of the High Commissioner, OSCE, and the Council of Europe, just to name a few) also participated in the internalization of the reform processes in the country. These organisations, many of which were used to impose reforms, had their roles defined through the Dayton Peace Agreement. This fact needs to be taken into account since the success of conditionality was on most occasions the result of synergies between these organisations.

Overall, EU conditionality in Bosnia is established with the following tools:

1. general Copenhagen criteria - political, economic and *acquis*-related - that are applied to all candidate and potential candidate countries;
2. the 1997 Regional Approach and the 1999 SAP;
3. country-specific conditions that must be met before entering the Stabilisation and Association Agreement (SAA) negotiation phase, and conditions arising out of the SAAs and the CARDS framework;
4. conditions related to individual projects and the granting of aid, grants or loans;
5. conditions that arise out of the Dayton Peace Agreement.

Table 1 Main phases of EU conditionality in the area of non-discrimination law and policies.

No.	Name of stage	Main events and conditionality	STAGE
1.	Post-war Stabilisation	<p>ROADMAP FOR BOSNIA AND HERZEGOVINA</p> <ul style="list-style-type: none"> • Focus on ethnic discrimination and ethnic-related incidents • Creation of a non-discriminatory common market • Allocation of sufficient funding for the Constitutional Court of BiH • Approve and implement laws on judicial and prosecutorial service in the Federation and law on court and judicial service in Republika Srpska 	<p>1997-2000</p> <p>2001-2004</p> <p>2005-2008</p> <p>2009 -June 2015</p> <p>2016 -...</p> <p>PRE-EUROPEANIZATION</p> <p>LIMITED EUROPEANIZATION</p> <p>AND</p> <p>STABILIZATION AND ASSOCIATION</p>
2.	Enlargement perspective	<p>FEASIBILITY STUDY ASSESSING BIH'S CAPACITY TO IMPLEMENT A FUTURE SAA</p> <ul style="list-style-type: none"> • Meeting Council of Europe post-accession criteria, especially in the area of democracy and human rights • implementation of the decisions of the human rights institutions (including better reporting to international human rights bodies) 	
3.	Pre-SAA period	<p>SAA NEGOTIATIONS BETWEEN THE EU AND BIH ARE OFFICIALLY LAUNCHED</p> <p>VISA LIBERALISATION WITH BOSNIA AND HERZEGOVINA ROADMAP ADOPTED</p> <ul style="list-style-type: none"> • Anti-discrimination legislation exists in several areas, but implementation has been deficient. • A Law on Gender Equality was adopted in 2003 • Discrimination on the basis of sexual orientation and discrimination against minorities, most notably the Roma population, is common • Discrimination in employment and education remained a key obstacle to sustainable return 	
4.	POST-SAA	<p>STABILISATION AND ASSOCIATION AGREEMENT WITH BOSNIA AND HERZEGOVINA IS SIGNED; SEJDIĆ and FINCI v. BIH RULING; HIGH-LEVEL DIALOGUE ON THE ACCESSION PROCESS</p> <ul style="list-style-type: none"> • A comprehensive state-level anti-discrimination law was adopted which failed to include age and disability • Little progress was made in harmonising other laws with the anti-discrimination law. • Implementation of the anti-discrimination law remained weak. • Country's failure to implement the Sejdić-Finci ruling of the European Court of Human Rights (ECtHR) 	
5.	The SAA enters into force	<p>REFORM AGENDA APPROACH (pays particular attention to the implementation of the Sejdić-Finci ruling)</p> <ul style="list-style-type: none"> • Some progress with the adoption of relevant amendments to the anti-discrimination law. • Uneven implementation of the anti-discrimination legislation and the absence of a country-wide anti-discrimination strategy. 	
	BiH submits its application to join the EU		

Before the entry into force of the SAA, the EU had not presented a coherent and comprehensive human rights conditionality strategy for Bosnia and Herzegovina. Conditions were defined in various documents produced by the EU to monitor the progress of BiH, but seemed to be neither coherent, nor comprehensive. I illustrate this fact with a research matrix which was developed for a paper entitled *Europeanization by Rule of Law Implementation in the Western Balkans* (Kmezić et al., 2014).

After the entry into force of the Stabilisation and Association Agreement on June 1, 2015, Bosnia and Herzegovina was presented with an EU Questionnaire³ in December 2016. The Questionnaire has several chapters containing questions related to human rights and non-discrimination, and one specifically entitled 'Anti-Discrimination and Equal Opportunities'. In this process Bosnia and Herzegovina entered its fifth and most intensive pre-accession phase. However, it is too early to assess the effectiveness of the future EU conditionality policy in terms of human rights, although a much more credible policy in relation to human rights could be anticipated.

4.1. Pre-Europeanization

EU conditionality policy toward Bosnia and Herzegovina over the years progressed from quite general conditions to more concrete ones. Much of the conditionality in the first years before 2009 focused on institution building and consolidation. In these two phases, the EU relied significantly on other actors such as the Office of the High Representative, the Council of Europe and the OSCE Mission to Bosnia and Herzegovina. The institution in the driving seat in this period was the Office of the High Representative in BiH (OHR). The role of the OHR was to supervise the transition to self-governing democracy. Its role was particularly strengthened after the Bonn Peace Implementation Council (PIC) summit in December 1997, which gave the High Representative the power to directly impose legislation.⁴ The 'Bonn Powers' provided the High Representative with almost unrestricted power (Chandler, 2006: 27). Most of the decisions by the High Representatives were made in order to implement the Dayton Peace Agreement, and included innovative reference to the 'spirit of Dayton' (Chandler, 2006: 25). The lack of clear criteria concerning how these new powers of the OHR should be used was severely criticized by some authors such as Knaus and Martin, who named the High Representative at the time, Paddy Ashdown, the 'European Raj' (Knaus and Martin, 2003).

The OHR has used its Bonn Powers to enact laws which directly influenced the efforts to establish a human rights system and to respond to human rights issues. When in March 2000 the European Union announced a Road Map as a first step for Bosnia in the SAP, the role of the international community shifted from post-conflict rebuilding toward an enlargement perspective for the country. During this phase the

³ Information requested by the European Commission to the Council of Ministers of Bosnia and Herzegovina for the preparation of the Opinion on the Application of Bosnia and Herzegovina for Membership of the European Union, December 2016.

⁴ Peace Implementation Conference meeting, December 10, 1997, Bonn.

approach of the OHR was increasingly shaped by the EU Road Map, and subsequently EU engagement strategies, rather than by the Dayton Agreement itself. This was also confirmed by the Peace Implementation Council at the May 2000 meeting in Brussels. These developments have intensified the role of the enlargement process, as well as the overall approach of the international community in BiH. The European Commission agenda became an instrument of the Office of the High Representative.

Whereas prior to 2000 the EU played a subordinate and supporting role within the PIC Dayton framework rather than dictating its own terms, a shift in ownership started in 2002 when Lord Paddy Ashdown, the High Representative at that time, was named the first European Union Special Representative in Bosnia. The creation of Ashdown's 'double-hatted' position as both EU and PIC representative marked the clear intention to focus on transition (Council Joint Action 2004/569/CFSP: 7). Although many would later criticize the OHR for rarely wearing the EUSR hat, the shift gradually started to take place. With the launch of the SAA negotiations between the EU and BiH in November 2005 and the adoption of a visa liberalisation process within the Bosnia and Herzegovina Roadmap in December 2007, EU conditionality and the EU's role compared to other international organisations intensified.

In this phase, EU progress reports started taking note of the existence of anti-discrimination legislation, and reporting on occurrences of discrimination. These assessments found that anti-discrimination legislation existed in several areas, but implementation remained deficient. However, the progress reports recognized that a Law on Gender Equality was adopted in 2003, which was the first anti-discrimination legislation in Bosnia and Herzegovina. In relation to occurrences of discrimination, progress reports found that discrimination on the basis of sexual orientation and against minorities, most notably the Roma population, was common. At the same time, they continued to focus on refugees and displaced persons in employment and education – issues which were also highlighted in previous years.

This phase can be considered the pre-Europeanization phase, since clear conditions were not yet put forward. This changed with the signing of the Visa Facilitation and Readmission Agreement in September 2007 and the introduction of the Roadmap Towards a Visa Free Regime with Bosnia and Herzegovina (ESI, 2008). These agreements represented the first step towards the establishment of a visa-free regime and triggered the structured dialogue on visa liberalisation based on detailed roadmaps. The Roadmap introduced a number of requirements, and offered visa-free travel as the reward for meeting these benchmarks. Visa-free travel was high on the agenda of most citizens since applying for a Schengen visa was time-consuming, costly and stressful. This push from the citizenry was even more important for the political elites than the pull from the EU.

In terms of non-discrimination, the primary condition was easy to identify: Bosnia and Herzegovina should 'adopt and enforce legislation to ensure effective protection against discrimination'. It should be noted that before the EU defined the requirement to regulate legal mechanisms for protection against discrimination as a condition, a civil society network was actively advocating for the adoption of a uniform anti-discrimination law. This group of over 100 NGOs led by the Helsinki Committee for Human Rights was greatly inspired by the work of the Europe-wide

association the Starting Line Group, and worked to improve anti-discrimination protection⁵ and conduct country-wide consultations on the content and the scope of the future draft law. This process can be considered a form of socialization, one of the alternatives to conditionality as proposed by Schimmelfennig and Sedelmeier.

This group, supported by the Parliamentary Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics, produced a draft law which the members of the Joint Committee publicly declared that they would sponsor. Although this represented an unprecedented case of cooperation between the elected members of the Parliamentary Assembly of BiH and NGOs, the draft was not forwarded to the parliament for adoption but was delivered to the Council of Ministers (the government composed of ministers of state-level ministries) for further consultation with the relevant ministries.

The Ministry for Human Rights and Refugees of BiH took the lead in this process and included it in its Program of Work for 2008. The work on the draft started formally in May 2008 when the MHRR established an expert working group for the purpose of preparing the draft law.⁶ The working group held its first meeting in June 2008. Its baseline study was a comparative analysis of ten anti-discrimination acts in Europe at that time, while it also conducted research into how BiH could comply with international standards.

The working group agreed that its main approach would be to draft this law along the lines of the Race Equality Directive 2000/78/EC, the Employment Equal Treatment Directive 2002/73/EC, and the Recast Directive, but that it would also aim to incorporate other international legal provisions into the legal system of BiH. The focus on the directives was a result of the strong conditionality created by the Community Visa Facilitation and Readmission Agreement, a situation which also proved crucial for the adoption of the law in the Parliamentary Assembly.

As the concepts of discrimination on other grounds besides gender (and the forms prohibited in the Law on Gender Equality in BiH) were new to the legal system of BiH, members of the working group also had problems defining different concepts. The main challenges included deciding on the list of grounds on which discrimination was to be prohibited, the scope of the protection provided by the law, and the provisions for the formation and the role of a central institution to combat discrimination. In almost all other areas, the draft substantially follows the approach of the equality directives and uses almost the same wording when defining different forms of discrimination.

The parliamentary debate on the draft law in 2009 was heavily influenced by EU conditionality, especially since by that time the adoption of an anti-discrimination law was one of two last remaining conditions for the visa liberalisation agreement. At the same time, some groups, especially religious communities, were advocating against what they perceived was an attack on the traditional values of the country. The Inter-Religious Council of BiH in an open letter to all parliamentarians warned that the *'Law if adopted without amendments [...] would enable [gay] couples to legally marry*

⁵ The Starting Line Group was a coalition of more than 400 non-governmental actors from across the European Union, active in the field of anti-discrimination, which advocated for the adoption of directives in the field of anti-discrimination

⁶ The author of this paper was a member and the secretary of the working group

and adopt children' (Latal, 2009). This position disregarded the fact that sexual orientation was at that time already a prohibited basis for discrimination in the legal system of BiH, including in the Law on Gender Equality from 2003, the Criminal Code from 2003, and the open-ended list from the Constitution of BiH when read in line with ECtHR case law.

In response, a group of MPs proposed a set of amendments designed to exclude sexual orientation from the law and a number of other grounds, such as '*marital and family status, pregnancy or maternity, age, health status, disability, genetic heritage, sexual orientation or expression*'.⁷ Although there was no debate during any of the sessions about the reason why these other grounds were not to be included, many have argued that this was only to mask the true intent behind the amendment relating to the deletion of sexual orientation. This was particularly obvious during the parliamentary debate when arguments were raised only in relation to sexual orientation. Many professionals and international organisations, including the EU delegation, criticized this approach, but the amendments were adopted.

After many discussions and exhausting parliamentary debates the Law on the Prohibition of Discrimination was adopted in July 2009 and entered into force in August 2009. However, once the law was published in the Official Gazette, 'sexual orientation' and 'sexual expression' appeared on the list of prohibited grounds - but all the other grounds mentioned above did not (*marital and family status, pregnancy or maternity, age, health status, disability and genetic heritage*), leaving experts who were monitoring the process puzzled. Regardless of the fact that the law did not fully transpose the equality directives of the EU (failing, in particular, to spell out 'age' and 'disability' as grounds for discrimination), the Roadmap condition of adopting a law on anti-discrimination was considered as fulfilled. This might be because, even though the law did not explicitly mention 'age' and 'disability' as grounds for discrimination, the list of grounds for prohibition is open-ended, which is not the case with the equality directives. This has allowed the first litigants to use the law to successfully litigate a disability discrimination case.⁸

Applying the research methodology, we find evidence of effective conditionality in the case of the adoption of the law prohibiting discrimination. It is clear that the condition was:

- (i) determinable - the Roadmap Towards a Visa Free Regime with Bosnia and Herzegovina spelled out a quite determinable condition: 'adopt and enforce legislation to ensure effective protection against discrimination'. In terms of the determinacy of EU standards in the area of non-discrimination, the EU equality directives created clear standards for compliance.

⁷ Amendments proposed by the members of the Croat Democratic Party of BiH (HDZ BiH) to the House of Representatives, The Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics and the Constitutional Committee of the House of Representatives of the Parliamentary Assembly of BiH on June 10, 2009.

⁸ E.B. vs. Ministry of Education, Science, Culture and Sports of Herzegovina-Neretva Canton, Case No. P 58 0 P 056658 09 P, July 7, 2010.

(ii) the size and speed of rewards – being one of the last conditions for a visa-free regime, compliance promised immediate rewards. The push from the citizenry to obtain the opportunity for visa-free travel in this case could be considered even more important to the political elites than the pull from the EU.

(iii) the credibility of threats and promises – in this case, the EU, possessing an important bargaining tool, was able to employ a credible promise and threat in case of non-compliance. Given the size and speed of rewards, the credibility of this promise was further amplified.

(iv) the size of adoption costs – analysis of the parliamentary discussion suggests that adaptation costs in this case were quite high. On the one hand, the law introduced standards many of the members of parliament were not comfortable with, while on the other hand civil society groups which had a perceived influence over an important part of their constituencies asked them to reject parts of the law.

In this case of conditionality, all factors proved to be important. It is clear that rewards and the credibility of threats and promises existed, which created a clear push towards the adoption of the law. The adaptation cost of a part of the law (including ‘sexual orientation’ among the prohibited grounds) was obviously high, and members of parliament used every opportunity to argue that it should not be part of the anti-discrimination legislation of BiH. However, the determinacy not only of the law, but also of the disputed prohibited ground in EU equality directives, proved to be crucial as this specific substantive condition was followed through by the EU. At the same time, less push was made in relation to the grounds of age and disability which remained deleted by the abovementioned amendment.

4.2 Limited Europeanization

The SAA with Bosnia and Herzegovina was signed in June 2008.⁹ While many expected the process of Europeanization to intensify, new challenges emerged in relation to the dysfunctional constitutional system created by the Dayton Peace Agreement. In December 2009, the ECtHR ruled – in its judgement on the case *Sejdić and Finci v. Bosnia and Herzegovina*¹⁰ – that the constitution and the electoral law of Bosnia and Herzegovina violated the ECHR and its protocols. The court found that the precondition of declaring one’s affiliation as Serb, Croat or Bosniak ‘constitutes a violation of Article 1 of Protocol No. 12’ of the European Convention on Human Rights. The ruling in *Sejdić and Finci v. Bosnia and Herzegovina* has since become the dominant issue in Bosnian politics. It also became one of the conditions

⁹ Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other, OJ L 164, June 30, 2015. 2-547.

¹⁰ *Sejdić and Finci v. Bosnia and Herzegovina* [GC], (nos. 27996/06 and 34836/06), ECHR 2009; *Zornić v. Bosnia and Herzegovina* (no. 3681/06), ECHR 2014; *Slaku v. Bosnia and Herzegovina* (Application no. 56666/12), ECHR 2016.

of a credible membership application and one of the most foreseeable human rights conditions tied to EU candidacy. However, changing a constitution in a country with outdated post-conflict power-sharing mechanisms proved to be challenging. The EU invested a significant amount of its capacity in organising high-level political meetings facilitated by EU institutions, but to no avail.

In 2014 plenty of criticism arose over this approach and several initiatives were established to overcome the stalemate. One of them was the British-German initiative which proposed a new approach to Bosnia and Herzegovina based on the argumentation that this condition should be dealt with at a later stage. This new approach was translated into the conclusions of the EU Foreign Affairs Council on Bosnia and Herzegovina that were agreed at a meeting in Luxembourg in October 2014 (Council of the European Union, 2014). As a follow-up to these conclusions, the main political stakeholders of BiH made a written commitment to the EU.¹¹ This written commitment proposed to address ‘*the implementation of [the ruling of the ECtHR in the case of Sejdić and Finci v. Bosnia and Herzegovina] at later stage (consequent to the initial reform measures)*’ and invited the country instead to ‘*make progress regarding implementation of additional reforms in order to improve the functionality and efficiency of all levels of government in Bosnia and Herzegovina*’.¹²

Some saw this shift as the end of conditionality in Bosnia and Herzegovina and a ‘bankruptcy of the previous policy, and the fact that a proper strategic approach to Bosnia appears unattainable’ (Vogel, 2015). Others like Mr Sejdić welcomed the new approach and the readiness of the EU to continue supporting reforms in Bosnia, warning however that the decision would have to be implemented (Lingo-Demirovic and Sajinovic, 2016). In any case, this made possible the unfreezing of the SAA, which has been in force since 1 June 2015.

Applying the same research methodology to the time before the Sejdić-Finci condition was dropped, we can find evidence of what has hindered the effectiveness of this condition.

(i) Determinacy – this condition was quite determinable since it was related to the decision of the ECtHR. At the same time there is no doubt that the constitution of Bosnia and Herzegovina is discriminatory concerning citizenry.

(ii) The size and speed of rewards – the reward in this case was clear, and could be obtained quickly: the entry into force of the SAA brings political gains and permits access to new pre-accession funds. On the other hand, it also initiates further conditionality, which may be anticipated to be even more demanding. Although there was a push from many human rights advocates, the citizenry remained largely divided, and one cannot argue that there was a significant push

¹¹ Written Commitment of Bosnia and Herzegovina Agreed by the BiH Presidency on January 29, 2015, Signed by the leaders of the 14 parties represented in parliament, and endorsed by the Parliamentary Assembly of Bosnia and Herzegovina on February 23, 2015. http://www.europarl.europa.eu/meetdocs/2014_2019/documents/dsee/dv/0507_11/0507_11en.pdf
Accessed: 01-03-2017.

¹² Ibid.

from the citizenry/citizenries to put these amendments high on the political agenda.

(iii) the credibility of threats and promises – the credibility of the withdrawal of the reward was clear. The entry into force of the SAA was postponed for almost six years.

(iv) the size of adoption costs – this factor was one of the main obstacles for most stakeholders in the country. Considering that the Sejdić-Finci judgement touched upon a key element of the Dayton constitutional setup – the ethnic quota –, compliance could not have happened without fundamental changes. Any change in the current power-sharing mechanism could have had a significant impact on the constitutional set-up of the country, and it seems that not many of the political parties which had been in position since 2009 were ready to give up on this system, or at least a critical number of political parties never shared the same vision.

The absence of the clear determinacy of this condition combined with the size of adaptation costs gave political elites enough room to argue and advocate against these reforms. Others have confirmed this conclusion and found that in the case of BiH the value of ‘eventual membership is considered lower than the value of maintaining the current status quo of ethnic relations,’ which limits the effectiveness of EU conditionality to ensure reforms (Vasilev, 2011). It was not only government sources who argued that this conditionality is too strict for a pre-accession country and ‘unfair and counterproductive’, questioning the fairness of the costs of adaptation (ESI, 2013). Speaking of determinacy, some have raised the question that as similar legislative provisions existed in EU countries such as Belgium, South Tyrol (Italy) and Cyprus, then why was there so much focus on the constitution of Bosnia and Herzegovina? With the known outcome of this condition we can argue that these factors have contributed to an adjustment in EU conditionality policy. However, if this change in EU conditionality policy will affect its future effectiveness remains to be seen.

4.3 Stabilization and Association

The entry into force of the SAA in June 2015 gave new momentum to the process of Europeanization. In terms of non-discrimination, this momentum will support efforts to further strengthen legal safeguards against discrimination and to address the prohibited grounds for discrimination that are lacking. The progress report from 2010 immediately noted that ‘no steps were taken to remedy the shortcomings of the Anti-Discrimination Law, notably the failure to include age and disability and the broad scope of the exceptions.’ Additionally, the recommendations from the 7th Plenary meeting on Structured Dialogue between the EU and Bosnia and Herzegovina concerning the revision of the Law on the Prohibition of Discrimination recommended that the Ministry of Human Rights and Refugees consider *‘the inclusion of more substantial amendments to further harmonise the law with the EU*

acquis, particularly looking at disabilities and age as grounds of discrimination, as well as including a definition of sexual orientation and gender identity in line with internationally agreed terminology (European Commission, 2014b).¹³ This conclusion was repeated in the European Commission Progress Report of Bosnia and Herzegovina in 2015 (European Commission, 2015).

In addition to these conditions, understanding grew among legal professionals, civil society organisations and academia that the law has other shortcomings. Several research papers which analysed these shortcomings were produced, many of which highlighted other areas where the law was failing to transpose the directives fully (Šimonović Einwalter and Selanec, 2015). The OSCE Mission to Bosnia and Herzegovina produced a set of ready-made proposals for amending the law, pointing to the shortcomings of the law which affected its effectiveness. Again, there was enough evidence of socialization beyond conditionality, as was the case in 2008 and 2009.

These conditions, but also a growing awareness of implementation problems, finally motivated the Ministry for Human Rights and Refugees of BiH to work towards amending the law in late 2015. The explanatory report following the amendment of the law specifies that the main goal of these amendments is to fully align the law with EU equality directives.¹³ Once again, the inclusion of sexual orientation as a prohibited ground was questioned during the hearings but less vigorously than in 2009. The law was finally modified in August 2016 following numerous hurdles in the parliamentary assembly.¹⁴ The amended law is now significantly improved and introduces many procedural safeguards which can support the litigation of discrimination cases.

The amendments were later hailed as progress by the 2016 Progress Report, especially ‘the inclusion of age, sexual orientation, gender identity and disability as grounds for discrimination’ (European Commission, 2016). Although the amendments were adopted and progress was noted, the effectiveness of EU conditionality policy in this case is questionable. As already noted, the inclusion of the two missing grounds in the law were not that controversial, since both were de facto already part of the law, and, most importantly, the law was already used to litigate cases of disability and there was nothing to prevent litigation of age discrimination cases. Instead of focusing on these two grounds, the EU should have defined the full transposition of equality directives as a condition. Other organisations took the lead in this regard and proposed amendments which rectified important shortcomings of the law; e.g. a very restrictive statute of limitation which affected the effectiveness of the law. Additionally, the article on the burden of proof was not aligned with the relevant standard from the directives, which prevented an important procedural safeguard being used in many cases. These and a number of other shortcomings were amended, although not specifically mentioned as a condition.

¹³ Draft Amendments of the Law prohibiting discrimination, March 2016. [http://static.parlament.ba/doc/89179_0102-02-1-341_16%20-%20\(B\)%20Precisceni%20tekst.pdf](http://static.parlament.ba/doc/89179_0102-02-1-341_16%20-%20(B)%20Precisceni%20tekst.pdf). Accessed: 29-06-2017.

¹⁴ Law on changes and amendments to the Law on Prohibition of Discrimination, BaH Official Gazette No. 66/16.

Additionally, EU conditionality relating to the ‘broad scope of exceptions’ of the principle of equal treatment contained in Article 5 of the law was not amended. Experts agree that some of these exceptions are grounded in EU equality law (such as positive measures for marginalized groups, genuine occupational requirements, exceptions in the best interest of the child, reasonable accommodation, and citizenship), while others are not (Kovač, 2016). These include an exception from application of the law in terms of access to any right regulated by the family codes, while another relates to certain exceptions in terms of access to employment in religious communities. Conditions in relation to these particular shortcomings are quite determinable in EU equality directives, and it is not quite clear why they were not communicated to the government.

Application of the same methodology as in the previous cases is not fully possible. The condition was determinable and the adaptation costs were low. Although a tangible reward was missing, it appears that socialization contributed to the success of this condition. However, EU conditionality cannot be seen as responsible for the success and the improvements in the law prohibiting discrimination, at least not for those which go beyond the inclusion of the missing grounds for discrimination. However, the EU can be criticized for failing to use this opportunity to condition the full transposition of EU equality directives. This is a missed opportunity which will have to be addressed through future conditionality. However, Bosnia and Herzegovina can be praised for making very significant and substantive changes to the procedural aspects of the law which pave the way for its more efficient implementation and better protection of victims of discrimination.

5. What lessons for future EU human rights conditionality?

This paper analysed two case studies to identify the lessons that could be learned in relation to the effectiveness of EU human rights conditionality. As elaborated in the discussion of both case studies, the interplay between different factors proved to be crucial in terms of effectiveness. Adoption costs in both case studies were high (it could be argued that, in terms of conditionality, adoption costs generally tend to be high, otherwise internal actors will be able to broker the changes concerning any conditionality). This is why the determinacy of conditions, the size and the speed of rewards, and the credibility of threats need to be as clear as possible: to ensure that local stakeholders do not veto reforms.

In both cases (the adoption of the law prohibiting discrimination and the implementation of the *Sejdić and Finci v. Bosnia and Herzegovina* judgement), adoption costs were high. The former introduced advanced legal solutions which proved to be controversial to members of parliament who used every means available to amend these solutions and water down the legal safeguards proposed by the Council of Ministers. However, the determinacy of conditions manifested in clear legal provisions in EU equality directives and the prospect of a clear and immediate reward lead to the circumvention of these objections and resulted in the adoption of the law.

In the case of the implementation of the *Sejdić and Finci* decision adoption costs were high as implementation would have required a political consensus among a

number of political actors who had divergent views about how the constitution should be amended. In this particular case, the rejection of constitutional reform meant maintaining the status quo of current ethnic relations, which increased the adaption cost. And although the reward was clear, its size and immediacy, as well as the determinacy of the condition, was not. This created enough room to attract criticism from political elites who were more inclined to maintain the status quo than to undertake demanding reforms. The fact that the EU postponed this condition to a later stage might negatively affect the credibility of future conditionality.

Socialization proved to be an important factor, especially during the process of adopting the law prohibiting discrimination. Where conditionality was not clear, as in the amending phase, socialization proved to be a more effective alternative model for exporting values and norms. Domestic actors had the knowledge and the capacity to identify gaps between the law and the equality directives, and used the directives to advocate for the adoption and later amendment of the law. They seemed to have recognised that EU equality directives include rules which if adopted could address domestic policy problems effectively. A network of domestic civil society organisations pushed for the adoption of the law as a response to discriminatory practices in the country, and civil society organisations proposed and successfully advocated for substantial changes in the law which went beyond those identified by the EU.

With the entry into force of the Stabilisation and Association Agreement on June 1, 2015, Bosnia and Herzegovina has entered its fifth and most intensive pre-accession phase. It can be expected that human rights conditionality will also intensify once Bosnia and Herzegovina presents its response to the Questionnaire. This paper has highlighted some of the key factors which influence the effectiveness of this approach. It also proposes that investing in socialization should be considered an effective alternative or supporting model.

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ISLAM JUSUFI *
Human Rights in the EU's Conditionality Policy
Towards Albania: The Practice of Sub-committee
Meetings

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* ijusufi@epoka.edu.al (Epoka University, Albania)

Abstract

EU enlargement policy is organized through a series of practices that regulate its relations with enlargement countries, including Albania, a candidate for EU membership. The aim of this contribution is modest in that it does not seek to engage in a discussion about the actual impact of EU conditionality. Instead, it takes the well-known limitations of external interference as given, and seeks to demonstrate the importance of an often-neglected institution in the process: sub-committees. These bodies bring together EU and Albanian officials and comprise a major part of the EU's engagement with enlargement countries. Imposing conditionality through sub-committee meetings, including in the field of human rights, is a practice that occupies most of the time of the European Union services working at the offices that maintain relations with Albania. However, this instrument has received scant attention in the literature.

Keywords: Human rights, EU, Conditionality, Albania, Sub-Committees.

Introduction

The EU has engaged in various strategies to promote human rights in Western Balkan countries such as Albania, a country that from the beginning of the post-communist transformation process in the 1990s aspired to EU membership. The EU is a normative power and the promotion of human rights norms and values has been a central element of the EU's engagement internationally (Manners, 2006), but particularly in its peripheral regions where the countries concerned have aspired to full EU membership through membership conditionality.

EU conditionality is organized through a series of institutions that regulate the EU's relations with the enlargement countries, including Albania, a candidate for EU membership. The major institution in this regard is the sub-committee, which brings together EU and Albanian officials. Sub-committees are a major part of the EU's engagement process as concerns promoting and imposing rules and values. The sub-committees review the situation in specific fields, including in the field of human rights, request further information on specific cases, press for reforms and report on progress. The sub-committee in charge of dealing with human rights is the Sub-Committee on Justice, Freedom and Security, or as better known in European Commission jargon, the JLS Sub-Committee, with 'JLS' standing for Justice, Liberty and Security. Imposing conditionality through the sub-committees, including in the field of human rights, is an undertaking that occupies most of the time of the EU services working at the offices that maintain relations with Albania and other enlargement countries.

This paper examines EU conditionality, with a specific focus on human rights in Albania. The discussion below focuses on the institution of sub-committees in general, and specifically the JLS Sub-Committee with Albania, launched in 2009, and its role in EU relations with Albania from 2009 until 2016. The aim is to assess the significance of the JLS Sub-Committee and describe the lessons that can be learned in terms of strategies directed at the transformation processes of EU foreign policy as regards human rights in enlargement countries.

The main methodological approach consists of qualitative research on the case study of Albania, with a particular focus on demonstrating the importance of the work of sub-committees. The paper assesses developments in Albania and how they relate to EU conditionality, and specifically to sub-committees. Although a lot has been written about EU conditionality, very little analysis has been generated about how sub-committees relate to EU conditionality, or to the EU's relations with enlargement countries. Examination of the EU sub-committees which, with the enlargement of the EU, have emerged as important institutions for monitoring and pushing for reforms is particularly lacking in scholarly research into EU conditionality. To the extent that EU conditionality has contributed to the processes of transformation, democratization and European accession in contemporary Albania – and the EU has clearly been engaged in these areas, with some impact – the contribution of sub-committees cannot be overlooked.

Albania has been strategically selected as a case study. The country quickly established institutional ties with the EU and has traditionally had relatively strong transnational ties. Among the sectors where there has been EU engagement with

Albania, the issue of human rights has been considered the most likely to undergo noticeable change. The country is a crucial case in terms of the analysis of EU conditionality choices, considering that it has seen relatively drastic changes in its attitude towards transition—from a position of distance, to considering accession, to a state with real prospects of EU membership. This experience of Albania facilitates an investigation of the country's engagement with the sub-committees. The analysis of the role of the sub-committees starts with the launch of sub-committees in 2009, and ends in 2016. The analysis provided here sheds light on the unexplored relationship between sub-committees and Albania, specifically, and the politics of EU conditionality in general.

Sets of hypothetical expectations may emerge following discussions about domestic changes as a result of the work of sub-committees, among other actors: membership conditionality can lead to domestic change, but might not be sufficient by itself; the success of conditionality can also depend on the articulation of EU policies in specific settings, such as the sub-committees that facilitate change on the ground. In other words, sub-committees play an instrumental role in triggering domestic change in response to EU conditionality. Thus, the assumption that supports the analysis in this paper is that conditionality in itself does not bring about change, but the work of sub-committees is instrumental.

The paper is organized into five broad sections. In the first section, the paper examines conditionality in general. It discusses in more detail the conception of conditionality and how this applies to the EU's relations with Albania in the field of human rights. It reviews relevant literature about the concept of conditionality and its role in explaining EU–Albania relations. The second section presents an analysis of the sub-committees. The third section reviews the EU's human rights policy and EU–Albania relations. The fourth section looks to contextual developments in Albania, while the fifth section describes how these developments relate to the role of the sub-committees.

1. Conditionality

As Western Balkan countries progressed to the stage of post-communist transformation, EU membership prospects moved to the top of the agendas of countries in the region, including Albania, a country that for more than four decades had lived in communist and dictatorial isolation, and which rapidly adopted a reform agenda to start climbing the ladder to EU integration. Although Albania in its post-communist years battled with long-lasting transition issues, it has been able to engage with the European integration process. The EU itself responded to the circumstances and the developments in the country, partly by establishing the Stabilisation and Association Process in 1999 that provided a European integration framework for Albania and other countries of the Western Balkans. Conditionality was put in place to encourage reforms in the field of human rights, among other areas.

Conditionality is a form of power that the EU wields, not only to induce national governments to behave in certain ways and embark on the implementation of particular measures and policies, but also to shape the institutional environment within the target states (Anastasakis and Bechev, 2003). Conditionality by itself is a

necessary but not sufficient condition for making changes in states that aspire to obtain EU membership. Conditionality does not necessarily trigger immediate change, and may affect no change at all. Whether or not the country honours conditionality depends on a lot of factors, including the work of *sub-committees*.

Conditionality generally follows a 'top-down approach' by which the EU applies its conditions, imposing upon countries a model of governance that reflects values, norms and principles which are fundamental to the EU and its member states. The top-down approach does not cause problems in enlargement countries such as Albania because the EU is seen as a provider of benefits such as economic assistance, security, and access to trade. As a 'privileged club' it is perceived as being entitled to define the rules. Although distant, the prospect of membership tends to be attractive to both the elites and the public (Bechev and Andreev, 2005). The top-down approach emphasizes the existence of a degree of mismatch with EU requirements at the domestic level (Cowles et al., 2001). The existence of these differences or mismatches between EU policies and policies on the ground is assumed in cases of declaration or the imposition of conditionality. Where there is a mismatch between EU requirements and domestic circumstances, 'adjustment pressure', which varies from one country to another, builds up at the domestic level. Variations in adjustment pressure can be measured, among other ways, by the positions expressed in the sub-committees. Through the sub-committees, the EU affects governance, including reforms in human rights policy (Grabbe, 2001).

Conditionality effects outside of EU borders started to occur when Central and Eastern European countries, emerging from communism in the early 1990s, declared their intention to join the EU. The EU offered the prospect of membership at the Copenhagen Council in 1993, when the 'Copenhagen criteria' (or terms of conditionality) were defined (European Council, 1993).

The term 'conditionality' is used in a number of ways to describe a variety of phenomena and processes of change. Conditionality as a process describes how the EU affects political systems, society, and economies in general. Thus, the Copenhagen criteria for accession can be seen as conditions imposed upon other countries which are established to ensure that changes take place in governance that reflect the values, norms and principles upon which the EU system and its member states are constructed (Friis and Murphy, 1999). The Copenhagen criteria are the rules that define whether a country is eligible to join the EU. The criteria require that a state has the institutions to preserve democratic governance and human rights, a functioning market economy, and the ability to take on the obligations of membership. Interest in the term 'conditionality' grew as the EU called for the enlargement of its borders to East European states (Cowles et al., 2001; Olsen, 2005; Jordan, 2005). The EU started monitoring the adjustment of these countries to the EU's rules and regulations (better known as *acquis communautaire*), as well as the fulfilment of specific membership conditionality criteria concerning issues such as human rights (Sedelmeier, 2011). The Copenhagen criteria, the *acquis communautaire*, and other democracy-, human rights- and rule-of-law-related conditionality has been essential components of EU policy towards enlargement countries (Schimmelfennig, 2005); a process which continues with their application to Western Balkan countries like Albania.

Conditionality has functioned through a carrot-and-stick approach, compelling actors through the appeal of EU membership to change their policies (Barnett and Duvall, 2005; Diez et al., 2006). The impacts of this approach have occurred in Albania very much in proportion to the desire of Albania to become an EU member. Association agreements such as the Stabilisation and Association Agreement and financial assistance can be considered important carrots. The EU can also employ sticks, a process that mainly consists of withholding benefits.

Conditionality in the case of the Western Balkans, including the Albanian case, has become much more rigorous and extensive as time has passed, and has increased in importance (Pridham, 2007). The Stabilisation and Association Process and the Western Balkan countries' perspective on EU membership, including the various political criteria reflected in the annual progress reports of the European Commission, started to broaden the focus of conditionality and establish the conditionality of candidate and potential candidate states of the Western Balkans as a separate sub-field. As non-member states, the Western Balkan states do not usually have a voice in making the rules that they are required to adopt, hence the description 'top-down' process. In the case of Albania, specific conditionality has included reform of the police and the judiciary, fighting organised crime and corruption, combating trafficking in drugs, arms and human beings, and some other areas.

The EU, throughout the period of Albania's transition lasting from 1991 to the present, has been instrumental in shaping Albanian policies as regards the promotion and protection of human rights. The involvement of the EU in Albania does not represent a novel approach as the EU applied a pre-existing toolkit which included the establishment of the institution of sub-committees. The format for the sub-committees in Albania was inspired by the sub-committees created in Central and Eastern European countries that joined in 2004 and in 2007.

2. Sub-committees, and the Sub-Committee on Justice, Freedom and Security

Since 1994, in each country with accession prospects there have been sub-committee meetings at a technical level, organized around specific parts of the *acquis communautaire*. These specialized sub-committees facilitate the prioritisation of reforms, shape them according to EU models, solve problems, and monitor their implementation. Sub-committees have assumed a role in monitoring the progress made by candidate countries for EU membership in terms of the adoption and implementation of the *acquis* and the implementation of agreements such as Europe Agreements or Stabilisation and Association Agreements. The Stabilisation and Association Agreement has been the framework through which the EU and Albania discuss technical and policy issues in relation to the European agenda. The Agreement's bodies included the Stabilisation and Association Council, assisted by the Stabilisation and Association Committee, as well as SAA Sub-Committees. Analytical examination of the *acquis* also takes place in the context of the sub-committees. The 2006 Stabilization and Association Agreement between the EU and Albania stipulated the establishment of sub-committees. These were launched in 2009 after the date of entry into force of the Agreement. Each Sub-Committee meeting monitors reforms

and identifies how the EU can assist in this process. Different areas are covered by sectoral meetings of sub-committees, including the committees for Justice, Freedom and Security, Innovation, Information Society, Social Policy, Education and Culture, Trade, Industry, Customs and Taxation, Internal Market, Competition, Consumer and Health Protection, Agriculture, Fisheries, Forestry, Food Safety, Transport, Environment, Energy, Regional Development, Economic and Financial Issues, and Statistics.

The sub-committees are part of *comitology* processes in the EU. The significance of these committees, however, remains a matter of dispute. One of the approaches, drawn from sociological institutionalism and constructivism, suggests that EU committees provide a forum in which national and supranational experts meet and deliberate as part of the search for the most efficient solutions to common policy problems (Pollack, 2003a). Another view derives from rational choice theory and depicts comitology committees as institutions of control designed by the EU to supervise and condition governments in the execution of their duties (Pollack, 2003b). The sub-committees are institutions, as they are socially structured within the EU construct and held regularly. The focus on sub-committees provides a basis for reviewing the specific context in which factors may causally affect actors and their doings (Sending and Neumann, 2011). Institutions become powerful as they define infrastructure and the set of tools that actors use and deploy in their interactions with each other (Sending and Neumann, 2011).

The EU's conditionality is embedded in a set of key institutions such as sub-committees that structure its relations with third states. Key among these is the JLS Sub-Committee, which is the EU's annual meeting with counterpart governments of enlargement countries in the field of human rights and related issues, officially known as the Sub-Committee on Justice, Freedom and Security. Starting in 2009, the EU and Albania have held JLS Sub-Committee meetings on an annual basis, alternately in Tirana and in Brussels. Eight rounds of the EU-Albania JLS Sub-Committee meetings have taken place as of 2016. Sub-Committee meetings have been co-chaired by the European Commission and Albanian government, and each meeting has resulted in jointly agreed minutes and a list of follow-up activities to be taken by the Albanian authorities.

All of the JLS Sub-Committee meetings that were held so far have followed a similar pattern. Some of the issues raised are of common concern. In the deliberations of the JLS Sub-Committee, the EU also takes the opportunity to submit enquiries with respect to specific and individual cases, and Albania provides oral or written clarifications about a number of those cases. Although the EU in its annual progress reports mainly focuses on general tendencies, in sub-committees it has an opportunity to refer to and submit enquiries with respect to specific individual cases of human rights violations. The EU occasionally incorporates the voice of civil society into the JLS Sub-Committee meetings with Albania, and meets with representatives of domestic NGOs.

The JLS Sub-Committee has served as the EU's special review institution for monitoring the general political and human rights situation as much as an instrument for achieving objectives in a systematic and coherent fashion. The JLS Sub-Committee's work has been based on information drawn from its own delegations, the

embassies of EU member states, and the reports of other international organisation and independent agencies. The JLS Sub-Committee exchanges information about the human rights situation in Albania, expresses EU concerns about aspects of the country's human rights record, identifies practical steps to improve the human rights situation on the ground, and discusses questions of mutual interest. It provides the space for a substantial dialogue to take place on human rights issues in Albania or in other enlargement countries where it takes place. The JLS Sub-Committee has served to guide Albania through the extensive requirements of EU conditionality and to define clearer benchmarks by identifying short- and medium-term priorities. The applicant country, after sub-committee meetings, is expected to respond by drawing up a plan for the implementation of solutions to the problems and priorities highlighted in the meetings, while also identifying the human and financial resources needed and concrete timetables for addressing each of these problems and priorities.

Each JLS Sub-Committee has so far included specific discussions about human rights developments in Albania, and noted the EU's stance on the issues raised. In the meetings, the EU has called upon the Albanian government to fully abide by its international human rights obligations. The annual JLS Sub-Committee meetings can be understood as the central method of producing positions that feed directly into processes of shaping and guiding the EU's relations with Albania in the framework of conditionality. The JLS Sub-Committee thus plays an instrumental role in change. Institutions such as the JLS Sub-Committee give observers an opportunity to identify what kind of roles are awarded to actors (e.g. the EU) within the space in which they act (Albania). The JLS Sub-Committee is the main forum at which the EU can deliver its positions and criticism about human rights issues to the Albanian government, and its key function is to facilitate follow up of the issues that have dominated the human rights agenda of Albania. It is thus a central vehicle through which the EU lays out and articulates its conditions.

Among the specific human rights issues that the JLS Sub-Committee has tackled, the implementation of recommendations by the Ombudsman, freedom of expression, the rights of children and of persons with disabilities, torture and ill-treatment in the prison system, as well as respect for and the protection of minority communities are noted. In addition, freedom of assembly and association, gender equality, anti-discrimination, and property rights have been core elements of the EU's concerns which have been voiced during the annual JLS Sub-Committee meetings with Albania.

3. EU human rights policy and EU-Albania relations

The EU regards human rights as fundamental. Concern to protect human rights guides the EU's action both inside and outside its borders (EUR-Lex, 2016). The Treaty of Lisbon stipulates that the Union's action on the international scene shall be guided by the principles which have inspired its establishment, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, human rights and fundamental freedoms, respect for human dignity, and respect for international law (Treaty of Lisbon, 2007). The EU is perceived as an authority that protects and promotes the human rights values within its borders and

outside. Its central role as an authority on human rights matters stems in large part from the fact that it is perceived as a normative power with regard to this topic.

The EU promotes human rights abroad in a variety of ways, including through annual human rights reports, annual progress reports, human rights dialogue and consultations, financial assistance for the improvement of human rights through the European Instrument for Democracy and Human Rights, declarations and statements on human rights, initiatives of the EU High Representative and of the EU Special Representative for Human Rights, and other formats such as JLS Sub-Committee meetings (Council of the EU, 2009). Respect for human rights is incorporated into all forms of cooperation with third countries, including in agreements that regulate relations with third countries. Since 1992, a clause on 'essential elements' has been included in all agreements signed with third countries. On the basis of this clause, respect for human rights constitutes an 'essential element' of agreements (European Commission, 2001).

To see how the framework of EU human rights conditionality developed in the case of Albania, the process of the deepening of connections and of Albania's transformation is discussed in brief. The relations between Albania and the EU have progressed through a series of stages:

- Establishment of initial relations in the 1990s,
- Policy orientation of Albania towards EU membership in the early 2000s,
- Formalisation of connections through the signature of the Stabilisation and Association Agreement in 2006,
- Launch of sub-committees in 2009, and
- Award of candidate status to Albania in 2014.

The Stabilisation and Association Process, endorsed in 1999 and further enhanced in 2003, led to the adoption of a Stabilisation and Association Agreement; a contractual agreement that would lead all Western Balkan countries, including Albania, all the way to EU membership. The Agreement builds on respect for key democratic and human rights principles and is based on the implementation of reforms designed to promote the adoption of EU standards with the aim of greater integration with the EU. Albania concluded the Stabilisation and Association Agreement with the EU in 2006 which entered into force in 2009. In the same year, Albania applied for EU membership. Albania was awarded visa-free travel for its citizens to the EU in 2010.

4. Changes in Albania since 2009

Since the early years of the post-communist transformation, Albania, as one of the democratising post-communist countries of the Western Balkans, has been engaged in improving its human rights record. The aim of this engagement has been to establish functioning, democratic and professional governing institutions, to develop structures and capabilities that ensure respect for human rights, and to meet EU standards as regards human rights.

Albania's path towards democracy can be partly attributed to external factors, especially the prospect of European integration which has become the engine of Albanian transformation and has turned into a grand national strategy, a consensual goal for the entire political spectrum, and a high-ranking social priority (Elbasani,

2010). The all-dominant project is quite similar to the pre-communist desire of Albania to associate the country with the European family of nations, and to the communist appeal to unite against external enemies.

Albania was formerly a communist country, yet there existed significant popular movements which contributed to the collapse of this regime. Albanians who supported the changes pressed for democracy and respect for human rights. In this context, while Albania had support from the EU for making changes, the initiative also came from within. It was clear for Albanians from the outset that EU membership should be a key goal of their transition process. This explains the high and sustained level of popular support for EU membership in the country (87 percent of the population support EU membership) (Holman, 2013). Regarding the calculation of costs and benefits which will determine the success of conditionality, Albanian leadership remains convinced that the benefits outweigh the costs. This has translated into a strong commitment to implement the recommendations which come from the sub-committees.

Albania has been continuously insisting that it belongs to the same community of norms that exists within the EU. This has pushed the country's elite to avoid implementing policies that would endanger the country's EU membership. The work of the sub-committees matches the interventionist style of the international community in Albania, and it has been noted that Albania's problems have been solved through the mediation, supervision or intervention of various organs of the international community (Elbasani, 2009).

EU conditionality in the field of human rights has consisted of the requirement that candidate countries such as Albania have in place appropriate legislative, institutional and administrative arrangements that ensure protection of and respect for human rights. Candidate countries must have institutions, management systems and administrative arrangements which meet EU standards that effectively implement EU legislation, and, in particular, implement measures with respect to the protection of the rule of law.

Parliamentary elections were held in 2009 in Albania. The OSCE expressed the opinion that these elections did not fully realize Albania's potential for adhering to the highest standards for democratic elections. In early 2011, allegations of corruption emerged in the public arena and led the opposition Socialists to send their supporters to the streets, leading to a violent backlash on 21 January 2011 between the police and protesters in which four people were killed. The parliamentary elections in 2013, won by the Socialists, were deemed to be 'free and quite fair' by the OSCE (Abrahams, 2015).

Albania has persistently ranked lower on most conventional indices on democracy than other Central and Eastern European countries, and even lower than some of its Western Balkan neighbours. Until very recently Albania featured among the laggards of the EU accession process, and as a 'difficult democratizer' frequently located at the tail end of international rankings of successful post-communist transition (Elbasani, 2015). This has something to do with the legacy of communist destruction that has been more difficult to correct than in other countries. However, the bigger problem in Albania has been weak institutions. Influential stakeholders have expressed no interest in creating change (Abrahams, 2015), although the incentive of

EU membership could provide external impetus and pull the country forward. The EU has inspired an outburst of activity in the field of the protection of human rights in Albania and the country has now ratified most international human rights conventions. Freedom of assembly and association has generally been respected. Freedom of thought, conscience and religion is also generally respected. An important challenge for Albania lies in the implementation of legislative and policy tools, which remains insufficient overall (European Commission, 2016; 2015; 2011; 2010; 2009). A backlog of disputes in courts (involving, among other things, property disputes, the infringement of minority rights, and freedom of expression) has constituted the main deficiencies in the Albanian human rights protection system. Nevertheless, Albania's EU integration prospects created a rare opportunity for the conversion of status from 'transition' to 'integration'. In June 2014, the country was awarded candidate status for EU membership.

The European Council of June 2014 which awarded candidate status to Albania highlighted the fact that the decision was due to Albania's fulfilment of the Copenhagen criteria, and referred to progress in the protection and promotion of human rights (Council of the EU, 2014). The EU called this the logical consequence of reform efforts (Abrahams, 2015). Candidate status was political recognition of the development of a closer relationship between the EU and an Albania on its way towards EU membership. The progress it has made with respect to human rights and fundamental freedoms has played a role in this and reinforced the EU position that the treatment of human rights is a key condition for the country's entry into the EU.

The granting of candidate status to Albania came with another to-do-list of reforms, about which the country needs to show further progress which will entitle it to open accession negotiations with the EU in the future. The prospect of negotiations has thus placed the country on a firm footing towards EU accession, and has further consolidated the framing of EU integration as the country's primary strategy for domestic change and transformation (Elbasani, 2015). The sub-committees have played a largely constructive role through the different phases of late democratization in Albania. The country has reformed its human rights protection system, enabling it to meet some of the country's contemporary obligations and challenges as regards protection and respect for human rights.

The EU has maintained a consistent or well-defined institutional preference for policies towards Albania, and a general pattern of causal links between EU conditionality and compliance in Albania is identifiable. The outcome of interactions appears to have been influenced by the conditionality emanating from the EU, and by the operationalization of the conditionality in the sub-committees. The existence and impact of EU conditionality on Albania was strong, leading to a positive response to demands for democratisation. Whereas the EU has used a wide array of instruments and channels to promote its norms and rules in Albania, the JLS Sub-Committee has created norm-conforming domestic change. Norms and values (such as human rights and fundamental freedoms) are best able to generate positive outcomes when they are structured within a cooperation and discussion framework. The work of sub-committees has gone beyond the narrow notion of 'impact' and has led to the reordering of state institutions and the emergence of new rules, procedures, norms and practices, and to new modes of bilateral interaction between the EU and Albanian

officials, instead of the unidirectional rhetoric of the EU. However, asymmetrical power relations and the promised rewards modify domestic actors' opportunity structures by providing them with the additional incentive to choose reform instead of the status quo. The sub-committees approach to facilitating joint discussions between EU and Albania, rather than accepting a clearly top-down approach, has allowed the EU to become more deeply involved in rebuilding the state.

Since the first sub-committee meeting in 2009, the EU has consistently monitored progress in the field of human rights. The discussions and the results of the sub-committee meetings feed into the preparation of the annual reports of the EU on the progress of Albania in European integration. The assessment in annual reports on the human rights situation since 2009 indicates progress, albeit with many caveats (Elbasani, 2009). The next section of this paper provides an overview of the application of conditionality with a focus on the workings of the JLS Sub-Committee.

5. The impact of the Sub-Committee on Justice, Freedom and Security in Albania

Conditionality, including that applied through the sub-committees, works best when countries have a credible promise of eventual membership (Bauer et al., 2007); when the EU possesses information with credible evidence about the issues in question; and when the partner government has the corresponding capacity to engage in measures that will honour their commitments as regards respect for human rights and fundamental freedoms.

Three forms of impact can be distinguished, corresponding to different degrees of compliance with EU conditionality: adoption, enforcement, and internalization. Adoption means issuing national legislation that transposes relevant EU rules and norms into the national legal system. Enforcement consists of the implementation of adopted legislation and the establishment of formal institutions and procedures for the implementation of the new legislation. The last stage of internalization goes beyond adoption and enforcement to include socialization with EU rules and norms. The JLS Sub-Committee has helped with compliance in Albania in all three forms. With the JLS Sub-Committee, Albania has internalised some of the human rights values into its domestic policy, which in turn has enhanced its capability to implement better policies as regards respect for human rights and fundamental freedoms.

During the deepening of relations between Albania and the EU- from the establishment of initial contacts to the policy orientation of Albania towards EU human rights values, to EU involvement in the JLS Sub-Committee with Albania - there has been an increase in the intensity of conditionality, and greater infiltration of the EU into Albania's system for protecting human rights and fundamental freedoms. The operationalization of conditionality from the perspective of the sub-committees can be seen as one particular type of conditionality; one in which transition takes the form of learning, shaming and penalizing. The JLS Sub-Committee plays a special role in operationalizing conditionality in that it can identify, at an early stage, problems that are likely to lead to major problems later. It has been useful in exposing Albania to international human rights standards and best practices, and has supported change by involving officials in Albania to help foster a constituency for reform.

The JLS Sub-Committee has acted through questioning, pressure, and discussions, compelling national actors through the appeal of EU membership to advance the country's democracy and human rights. Discussions in sub-committees go through various stages and form the basis for an analysis of the impact of EU conditionality in Albania. In order to better understand how the institution of sub-committees functions as a tool of conditionality, it is important to observe the progress along the various stages. These stages can be characterized by an increase in the intensity of conditionality. Conditionality is weakest when the articulation of an issue during a sub-committee meeting occurs as a singular event at the opening of a sub-committee. Sub-committee meetings start with opening remarks by the highest officials representing both sides. On the EU side, this is typically a director from the Enlargement Directorate of the European Commission, and on the Albanian side, the Minister or Deputy Minister for European Integration. What follows is the articulation of the positions of the EU and of the Albanian government as regards a particular human rights issue. The discussion in general concludes with Albania either accepting the approach offered by the EU, or agreeing to come back later with written information about the issue and a description of what measures will be taken.

The JLS Sub-Committee thus appears to function both as a diplomatic exercise and as leverage for human rights change in the field. There has been some follow up to JLS Sub-Committee meetings. It appears that the JLS Sub-Committees have become a means of achieving measurable and tangible results, and an effective tool for leading changes in the legislative and institutional framework. The JLS Sub-Committee has contributed to building new capacities in the government and giving rise to new institutional structures, bodies, and channels of respect and promotion for human rights in Albania. Among the notable developments in the field of human rights in Albania during the period of existence of the JLS Sub-Committee (which have been part of discussions during meetings of the JLS Sub-Committee) are the passing or amendment of human-rights-related acts such as the Law on Protection from Discrimination, the Criminal Code, the Labour Code, and the Law on Audiovisual Media. Other developments have included the establishment of the following human-rights-related institutions, as well as their strengthening in terms of material resources such as budgets and human resources: the Commissioner for the Protection from Discrimination, the national referral mechanism against trafficking in human beings, the national preventive mechanism against torture and ill-treatment, the Office of the National Anti-Trafficking Coordinator, the Commissioner for the Right to Information and Data Protection, the Agency for Support to Civil Society, the Children's Commissioner, the State Committee on Minorities, and the State Commission for Legal Aid (European Commission, 2016; 2015; 2014; 2013; 2012). The JLS Sub-Committee has also repeatedly pressed for the implementation of the recommendations of the Ombudsperson which institution has been a key to protecting human rights. Also, the JLS Sub-Committee has followed up cases of intimidation or assault against journalists and against persons and institutions belonging to minority groups, such as the Roma and the Greek. In addition, the JLS Sub-Committee has pushed the Albanian government to ratify a number of international human rights instruments, such as Protocol 16 of the European Convention on Human Rights, the Council of Europe Convention on Preventing and

Combating Violence against Women and Domestic Violence, and the European Charter for Regional and Minority Languages (European Commission, 2016; 2015; 2014; 2013; 2012).

The JLS Sub-Committee has also functioned as a confidence-building exercise, as well as a results-oriented meeting. The most vital human rights questions, even those that Albania would not want to discuss during the JLS Sub-Committees, find their way on to the agenda of the JLS Sub-Committee. The annual JLS Sub-Committee meetings symbolize the recognition of Albania as part of a wider EU system, that the problems of Albania are European challenges, and that the solutions to identified problems should be European solutions.

The JLS Sub-Committee has been an institution that put in place a practical approach to tackling the problem of transforming domestic institutions in a way that makes them capable of respecting human rights. The work undertaken in sub-committees was an important learning experience in terms of the transformation of a transitional society such as Albania. It represented an important test for a potential candidate state for EU membership in terms of its ability to plan and conduct reforms in the field of human rights. As such, it helped to rectify considerable deficiencies in Albania's governance as regards human rights. In this context, the JLS Sub-Committee appeared as a powerful force for influencing the process of democratisation in Albania. The JLS Sub-Committee caught and sustained the attention and momentum of the elite and the wider public for reform. The institution of sub-committees has also supported socialisation and the domestic empowerment of the Albanian bureaucratic elite. The JLS Sub-Committee established new constituencies which have become able to absorb EU norms and standards in the field of human rights. It has empowered the elite to undertake changes, which in turn has facilitated the impact of conditionality.

The JLS Sub-Committee offered a clear framework and a level of quality that the country could use as a standard when evaluating its development towards a modern democracy able to protect and promote human rights. In this light, the JLS Sub-Committee functioned as a check on the behaviour of institutions, particularly law enforcement structures such as the Albanian State Police as regards human rights. The working of the JLS Sub-Committee has played an important role in pushing law enforcement institutions, prosecutors' offices and judiciary to honour their commitments in this respect.

Since the launch of sub-committees in 2009, through to 2016, Albania went through different waves of reforms, featuring institutional progress and democratic consolidation, but also significant stagnation coupled with crises of order and legitimacy. The post-2009 era signalled the start of a new period when the sub-committees turned into an all-important actor, leading efforts to rebuild human rights protection structures under the conditions of a highly politicised political atmosphere and weak domestic leadership as concerned reform (Elbasani, 2009). Sub-committees are credited with having impacted institutional change in the EU candidate country of Albania, having been crucial instruments of domestic change and having vested EU conditionality with influence over domestic change.

Despite initial perceptions that the sub-committees would be purely of an operational character, through their work they turned into a critical engine for

institutional change in Albania, with a number of limitations. Key challenges for the JLS Sub-Committee include the need to go beyond the mere recitation of well-known positions to being able to lead concrete improvements in the human rights situation on the ground. Sub-committees have served as institutions and been additional safeguards, keeping on track the major reform orientation of Albania and serving as a means to define limits to the freedom of manoeuvre of Albania. However, conditionality in the field of human rights has not had commensurate leverage, unlike in other fields where there is clear *acquis communautaire*. Finally, sub-committees are organized to last for a day or two, and, as a result, human rights issues are not discussed in detail. This is due to the stance of EU officials who prefer to highlight major features of the issues concerned, and also to the fact that the EU officials who reflect on the positions of the EU as concerns specific human rights issues in Albania may not be experts in the field of human rights.

Conclusions

This paper has examined closely one aspect of conditionality of one of the enlargement countries: the role of sub-committees in shaping EU conditionality vis-à-vis Albania as it moves towards democratization and European integration. The case of Albania shows that sub-committees have had a significant role in operationalizing conditionality. By launching sub-committees with Albania in 2009, the EU engaged directly and advocated for the protection and promotion of human rights and the extension of democratic rights and fundamental freedoms.

Changes in human rights legislation and implementation were directed towards establishing the necessary basis for the functioning of law and order in Albania that would respect, protect and promote human rights. In Albania, there was a clear need for EU-initiated reforms that aimed at strengthening the rule of law, thereby securing human rights and fundamental freedoms. Conditionality has been at the core of EU policy in Albania, and the paper demonstrates that one specific instrument, sub-committees, have been an essential tool in operationalizing and facilitating the impact of this. Besides promoting the dimension of conditionality, the sub-committees have also played a role in socialization, applying pressure, networking, benchmarking and learning, although this paper has also identified a number of their shortcomings. The JLS Sub-Committee has represented a specific framework for furthering the progress of the country in terms of increasing respect for human rights. While the impact of the legislative and institutional reforms and the sustainability of changes in many cases is yet to be seen, the JLS Sub-Committee has triggered genuine compromises in Albanian politics that have led to the positive assessment by the EU that Albania meets Copenhagen criteria.

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ZSOLT ZÓDI*

Law and Legal Science in the Age of Big Data

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* zodi.zsolt@tk.mta.hu (Hungarian Academy of Sciences Centre for Social Sciences Institute for Legal Studies)

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Abstract

The connection between Big Data (BD) and law can be thematised in several ways. This article aims to contribute to the understanding of the different levels of interplay between Big Data, law and legal science. The paper firstly considers Big Data as the subject of legal regulation. Accordingly, it overviews the moral questions surrounding Big Data, BD's predictive potential as well as the impacts of it on legal framework rules regarding privacy, data protection, competition and business regulation. The next section understands Big Data as a tool in the regulator's and the lawyer's hand. It discusses the new ways of 'Big Data-based social engineering' as well as the creation of predictive tools and inferencing techniques based on Big Data in policing, law enforcement and litigation. Then the paper investigates the use of BD in legal science, thus the fourth section considers Big Data as a research tool. It seeks to explore the use of legal data-sets and textual corpuses as BD. In addition, it sheds some light on the wider impacts of statistical analysis, natural language processing, content analysis, machine learning and behavioural prediction on legal science. Finally, the paper gives some insight into the relationship between traditional doctrinal scholarship and the new types of BD-based research.

Keywords: Big Data, Legal Regulation, Legal Science, Law-making, Prediction in Law, Data-driven Lawyering.

1. Introduction

The phrase ‘Big Data’ (hereinafter: BD or BD phenomenon) was born in the IT sector, and it was first described by IT (e.g. Ahlberg, 2011) and business journals (see e.g. Economist, 2010), and later in the seminal book by Mayer-Schönberger and Cukier (Mayer-Schönberger and Cukier, 2013). It later became a buzzword in the business sciences, sociology and public policy. Though it has influenced law and legal science, and the Mayer-Schönberger – Cukier book itself also devotes a whole chapter to the risks (practically regulatory aspects) of BD, still, the number of reflections in law is significantly lower than in the domains mentioned above.¹ This paper aims to contribute to the understanding of the connection of law and legal science, on the one hand, and the BD phenomenon, on the other.

The term Big Data is used in a rather loose way in the literature. Most of the sources are using, or at least are mentioning the ‘magic’ 3-4-5, ‘V’-s (Volume, Velocity, Variety, Veracity and Value)² as a definition. However this can hardly be considered a classical definition: it only gives the *differentia specifica* describing how Big Data differs from other ‘things’, (in the 3-4-5 ‘V’-s) but does not provide the *genus proximum*, (the family of phenomena to which the Big Data belongs). Does BD herald a new period in history?³ Or only a new era in the development of the information society?³ Or is it a new *driving force* that is changing our society?³ A new *mindset*? A set of *attitudes*? And if it is, what is the scope of this mindset? My definition in this article is a narrow and simple one: I use the term Big Data for the new (technical) ways, solutions and methods of producing, collecting, processing and using data, which together, as a driving force, might ultimately change the mindset, the attitudes, and all of society, – including the law. Big Data therefore initiates social changes, but it is not the social change, nor the new historical period *in itself*.

A vast amount of data is generated on the internet every second by people and by machines (sensors). These data mainly provide information about people. (Data on natural phenomena, such as the data from the Large Hadron Collider or weather data, are sometimes also considered to be ‘Big’, but this aspect has no relevance here). It includes a whole range of data from the cell information, location and call (meta)data of mobile phones, the search strings typed into search engines, and click information on websites, as well as the data generated by sensors, smart meters, and online cash machines, or the millions of pages written and published by government officials, also known as ‘open data’ (Mayer-Schönberger and Cukier, 2013: 116–118). It no longer represents an IT or a data storage problem, but a social phenomenon, since this amount of data not only requires different storage methods, handling and interpretation techniques, but can be and already is being used in totally different ways than ‘normal’ data. These new data-usage practices will have a severe social impact. Some aspects of this impact are already detectable, but some are still to come.

¹ At Wiley alone, 30 books were recently available analysing BD in business, while there is no monograph in the legal field, although recently, HeinOnline contained some 180 legal articles. The White House is also very active in producing policy papers, reports, and other documents (see White House, 2012; White House, 2012c; White House, 2014; White House, 2015a; White House, 2016; NFS, 2015).

² For the three V-s: (Eaton et al., 2012: 5), for the four and five: (IBM Data Hub, 2016), but there are already sources who mention seven: (DeVan, 2016)

The aim of this article is to collect and systematise the arguments concerning the impact of BD on law (on legal regulation and lawyering) and its potential effects on legal science. My ambition here thus is not more than to collect and systematise the arguments, and insights from the available legal literature, and other influential resources – mainly from policy papers – that has a legal (regulatory) relevance, and partly to frame these issues and arguments. Hence, this writing is a collection of ideas and arguments, sometimes predictions and framings of leading authorities in the field, completed with my own observations. As with all predictions of this kind, those provided here are subject to mistakes. Finally, some of my observations and thoughts are purely descriptive, while others may have prescriptive elements, (like the ‘ethics of BD’ section).

BD as a term appeared before 2010, but it became a popular subject of analysis only at the beginning of the present decade. This was the time during which most scholars realised that the mass production of data was a sign of deeper changes beneath the surface of society. Since then, hundreds of articles have been published in leading legal journals on different aspects of law and BD. Some of the papers have analysed BD in general, addressing questions such as the ethical problems raised by BD or its impact on data protection. Some other works have analysed specific problems arising from concrete well-known cases.

The connection of BD and law can be thematised in several ways. I distinguish between the effect *to law, and legal science*. First I discuss the interplay between law (legal regulation) and BD. Here, a further distinction is made, whereby BD can be the *subject* of legal regulation, but it can also be a *tool* for better, ‘predictive’ law making and application of law and policing. After this, in the third section I will discuss the potential impact of BD on *legal science*. The following table illustrates the three domains of interaction between law, legal science and BD.

Table 1. The role of BD in law and legal science.

	BD as a subject	BD as a tool
Law	<p>① How should law frame, define and regulate the BD phenomenon? How will BD change existing privacy, data protection, competition, business regulatory, etc. rules? What will the new rules regulating BD look like? Methodological and theoretical (including ethical) questions about BD regulation, methodological and theoretical questions about using BD methods in law making and law enforcement. Moral dilemmas of prediction.</p>	<p>② How can we exploit the new possibilities provided by BD in law making, policy creation and the application of law? How can we design new ways of ‘BD-based social engineering’? How can we create predictive tools and inferencing techniques based on BD in policing, law enforcement and litigation</p>
Legal science	<p>③ BD as a new research tool in legal science. The use of big data-sets and textual corpuses as BD. How will these ‘super-empirical’ research methods change legal scholarship? What is the relationship between traditional doctrinal scholarship and the new types of BD-based research? How can we use statistical analysis, natural language processing, content analysis, machine learning, behavioural prediction, etc. in legal science?</p>	

2. BD as the subject of legal regulation

2.1 Risks

The first point of connection is that the BD phenomena visibly raises a whole range of risks that eventually must be handled in some way – also by the law. And BD – as Mayer-Schönberger and Cukier put it, are not only increased risks of the past, but the BD ‘changes the character’ of the risks, (Mayer-Schönberger and Cukier, 2013: 153). Regulators are facing a serious dilemma: BD offers new possibilities in business and government, but implies dangers that are not clearly foreseeable. The dilemma is present in policy papers and discussions, (White House, 2012; White House, 2016; FTC Conference, 2014) and within the literature (e.g. Tane and Polonetzky, 2012: 63–69.) As usual, even the need for any, and especially any new regulation is questioned sometimes (Big Data and the Law Blog, 2014).

As for the risks, the literature mentions the following interrelated dangers:

1. Even in the case of data collected with the consent of the data-subject, because of the quantity of the data and its connection with other data elements, power is created on the part of the data-owner which is far beyond the normal data-protection scenario. The classic example here is the Target case, in which a BD-based algorithm that processes the buying habits of customers figured out the pregnancy of a 16-year-old girl (Duhigg, 2012; Mayer-Schönberger and Cukier, 2012: 152–153). An aspect of this danger is, that within big databases, de-anonymisation can be relatively easily based on metadata and the use of certain algorithms (Ohm, 2010: 1718; Mayer-Schönberger and Cukier, 2012: 154). On a wider horizon, as Tane and Polonetzky (2012) and Crawford and Schultz (2014: 94) have pointed out, nearly all categories of ‘traditional’ data protection are being questioned, and especially ‘notice and consent’, data minimisation’ and ‘principles of purpose’ elements. For example, traditional data protection regulation is based on the consent of the person. But in the age of the BD, so much data is generated by a person that simply no one can control it. ‘Can you imagine Google trying to contact hundreds of millions of users for approval to use their old search queries?’ – ask Mayer Schönberger and Cukier. Or what ‘legitimate purpose’ of the data processing means, when ‘the most innovative secondary uses haven’t been imagined when the data is first collected’ (Mayer-Schönberger and Cukier, 2012: 153).

2. There is a new phenomenon: the ‘predictive power’ of BD (McGregor et al., 2013; Siegel, 2013; Simon, 2014; White House, 2014; Ferguson, 2015; Jeon and Jeong, 2016). A company can look much more deeply than before into its customers’ habits with the help of BD, and based on that, it can exercise, for example, discriminatory practices. The problem has been discussed extensively in policy papers (White House, 2015b), as well as in a conference organised by the Federal Trade Commission in 2014 (FTC Conference, 2014). The FTC also detected another new BD-based risk, namely discriminatory pricing. Further, everyone is familiar with (and sometimes, does not like) the surge pricing of UBER, for example, which is also based on BD algorithms, and many people do not like it (Dholakia, 2015).

It is quite normal, that when a new social phenomenon is forming, there is neither consensus about a definition among scientists and experts, nor any agreement

among regulators and stakeholders whether to regulate it or not, and if so, how. But it is also a common experience that eventually, the definition *of the law* will finally be much simpler – sometimes surprisingly so – than the definitions given by the experts or social scientists. It is likely that this will be the case with the BD phenomenon. I think, that from the legal, regulatory, ‘risk-centred’ point of view, the important aspect of BD is not the ‘four Vs’ or that it has been collected without explicit consent, but that there are huge data sets that have been collected with *one* particular purpose (or even generated spontaneously, without any aim), which are used *for another purpose*. The other peculiarity of BD is that, under certain conditions, one can make relatively accurate *predictions* based on it.

BD therefore creates an information ‘super-power’ on the part of the data owner. A further problem is that these predictions are made by algorithms that are not transparent to the average citizen, and their inferences cannot be understood by ‘common sense knowledge’. Most of the recommendations appear to be aimed at mitigating or compensating for this superpower, and they urge transparency concerning the algorithms and the decisions generated by these algorithms (Mattioli, 2014: 537; EU Regulation, 2016: 13.2.f, 14.2.g).

Therefore, this article opines that BD is primarily *not a data protection problem*. Traditional data protection regulations can be applied to the BD world, but they would deprive BD of its value-creating characteristics. The paradox is that the risks of BD are identical to its most significant value-creating power.

2.2 *Ethics of BD*

Traditional doctrinal scholarship can do little or nothing regarding the BD phenomenon, because there is not yet any regulation or jurisprudence in the field. So, in the case of BD and legal science, one must pursue other avenues, such as Richards and King (2014) who aim to establish the foundations for future regulations addressing ‘Big Data ethics’. As they stated: ‘We have some privacy rules to govern existing flows of personal information, but we lack rules to govern new flows, new uses, and new decisions derived from that data’ (Richards and King, 2014: 408). They lay down four high level principles. First, privacy will not be dead in the era of Big Data, but it should rather be perceived as ‘information rules’ than as ‘information we can keep secret or unknown’. They stated:

Privacy should not be thought of merely as how much is secret, but rather about what rules are in place (legal, social, or otherwise) to govern the use of information as well as its disclosure (Richards and King, 2014: 411).

Second, in the BD era, we must rethink our attitudes towards sharing personal information. Shared private information can still remain confidential, and that is what counts. Information always exists in intermediate states between completely public and completely private. We often share information with trust, expecting that it will remain confidential. The third ethical standard in BD ethics is transparency. Transparency, as the authors stated, ‘fosters trust by being able to hold others accountable’. According to the authors, BD practices should be as transparent as

possible, though they also admit that this will create a problem they call ‘a transparency paradox’:

Transparency of sensitive corporate or government secrets could harm important interests, such as trade secrets or national security. Too little transparency can lead to unexpected outcomes and a lack of trust. Transparency also carries the risk that inadvertent disclosures will cause unexpected outcomes that harm privacy and breach confidentiality (Richards and King, 2014: 420).

Finally, the fourth standard is the standard of identity. In the BD era, based on inference and predictive algorithms, governments, companies, and organisations can create a profile on us, and practically decide who we are, under which categories we belong, before we make up our own minds. There should be rules that empower us to define ourselves against the machine-made identity.

There are some insights beyond these ethical standards. The first is that BD’s predictive and inferential power will enable the machines to make decisions that cannot be explained by our traditional narratives or justified by our ‘traditional’ justification techniques. And this problem is not solved by the rule that ‘meaningful information about the logic involved’ should be provided by the controller (EU Regulation, 2016: 14.2.g). Imagine that a machine makes a prediction that a certain group of men with a definite skin and hair colour, height, social status, and shoe size (just to be even more absurd) will commit violent crimes with a 90 per cent probability. Will the authorities stay idle? Or will they at least place these people under surveillance? And if they do, how this will be justified? How can any measurement be justified that is based on attributions that are not under the control of the person? How can the inference of a machine be justified that is not based on our ‘normal’ moral narratives and ‘causal explanations’, but on some hidden interrelationships based on a huge amount of data? Let us just consider the terrorist dilemma (Brugger, 2000), assuming that the machine pinpoints a person who will, with 99 per cent probability, commit a terrorist attack. Will we do anything, and if we do, what will be the underlying reasoning?

2.3 The dilemma

If we have so many risks and fears, why should we not just put a ban on BD practices? First, because it is impossible, second because it is very inexpedient. Nearly all scholars agree that BD has an enormous value-creating potential. Byers (2015) pointed out five areas in business for which BD can create value.

1. ‘Creating transparency to big data often exposes variability in performance and results, leading to changed behavior for more economic impact’ (Byers, 2015: 758). This means that BD encourages economic performance.
2. BD enables experimentation and gives direct feedback for different solutions, business models, and product-types. For example, Tane and Polonetzky (2012) discussed BD-based web-analytics as follows:

(W)eb analytics - the measurement, collection, analysis, and reporting of internet data for purposes of understanding and optimizing web usage - creates rich value by ensuring that products and services can be improved to better serve consumers (67).

3. **BD** enables companies or organisations to segment populations in a very sophisticated way. **BD** can not only be a tool for marketers but also an excellent new basis for improved risk-management.

4. In certain fields, human decisions (and human errors) can be replaced by **BD**-based decision-making.

5. Big data enables innovations in business models or pricing. **UBER**'s surge pricing is an excellent example.

BD as the most important driving force of the future economy is also present in policy papers both in the EU and in the USA. A recent EU document states: 'Big data technology and services are expected to grow worldwide to USD 16.9 billion in 2015 at a compound annual growth rate of 40 per cent - about seven times that of the information and communications technology (ICT) market overall.' (Communication WP, 2014:2) The document mentions the smart grid, health, transport, environment, retail, manufacturing and financial services as **BD** areas (Communication from the Commission, 2014: 2). The White House also shares this optimism concerning **BD**: 'big data technologies continue to hold enormous promise, as the report identified—to streamline public services, to advance health care and education, and to combat fraud and complex crimes like human trafficking' (White House, 2014).

However, the value creation potential of **BD** prevails only if **BD** sets are disclosed. Mattioli (2014) argued that disclosure of the **BD** sets should be encouraged:

Much of the rhetoric describing big data's potential for innovation assumes that data can be easily and meaningfully reused and recombined in order to examine new questions [...] Most significantly, big data's producers tend to infuse their products with subjective judgments that, when left undisclosed, limit the data's potential for future reuse. [...] These conclusions point toward the need for new policies designed to encourage the disclosure of big data practices (544, 549, 570).

An important contradiction is apparent here. On the one hand, **BD** and **BD**'s predictive power create a dangerous imbalance and increasing vulnerability among customers. On the other hand, the **BD** on which these predictive algorithms are based represent huge potential and value-creating power. Some assert that **BD** sets should be disclosed in order to increase their value-creating ability. But disclosure will increase the vulnerability of private persons, and since some of the **BD** sets collected by private companies are some of their most valuable assets, they are not eager to share them with anyone else. One of the most serious issues in the coming years will be to find an equilibrium in regulation between the values of transparency and limited usage, and value-creating freedom of use.

The EU's approach to the **BD** phenomenon is apparently also controversial. As we know, the EU initiated the revision of the data protection directive (EU

Directive 1995/46/EC) in 2012 (European Commission Press Release, 2012); at that time, Big Data was simply not an issue or at least not in the recent narrative framework. The narrative of the EU during the revision was that the level of data protection should be *increased* and should be brought to the same level across Europe. According to the reasoning underlying the Regulation, a higher data protection standard would leverage trust, because ‘(b)uilding trust in the online environment is key to economic development’ (Commission WP, 2012: 7). I have doubts whether this argument is so simple. Creating higher standards can result in a higher level of trust, but at the same time it increases administrative burden, or can even create obstacles for the enterprises that want to exploit the power of BD.

The Regulation contains only a few amendments with a connection to Big Data, and these amendments clearly show that this regulatory environment is not aimed primarily towards a ‘data-driven economy’. Let us take one of the most important fields of BD: regulation of automated decision making and profiling. There are two main rules in this field. First, ‘(t)he data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her’ (EU Regulation, 2016: 22.1), and second, the data subject has the right to obtain information about ‘the existence of automated decision-making [...] and meaningful information about the logic involved’ (EU Regulation 2016: 15.1.h) He/she is also entitled to ask for ‘human intervention’ (EU Regulation, 2016: 22.3) at any time. I have doubts if these rule can be aligned, and it is also unclear whether this will facilitate a ‘thriving data-driven economy’. Later, the case of two American legal information service companies are expounded, that are building their services on the liberal publication policy of American court documents. These services, in their existing form, simply *would be legally impossible to build in Europe*. But it is not only about data-protection rules. I already mentioned the connection between open data and the data economy. Despite all efforts, open data initiatives are developing slowly across Europe (Nicol et al., 2013; Open Data Maturity in Europe, 2016).

Because of all these controversies, the contents of the future regulation cannot yet be ascertained. Will it simply amount to some new rules within the existing data protection regulation and for e-commerce, or will it change the whole regulatory landscape? Traditional data protection rules in the 1980s and ‘90s protected ordinary citizens against governments, and later, up to the present, against large companies. In this respect, BD has created a new situation. It is collected and used in a non-transparent way, and it enables the data owners to make predictions and thereby to ‘control the future’. But there is still too little evidence about this predictive power. It is unclear whether famous oft-cited cases (like the Target-case) are really the forerunners of incidents that will occur very frequently or if such cases are only accidental and isolated stories. We do not yet know whether the BD collected about us and our fellow-citizens/customers/parties will enable these organisations to really know even more about us than we know about ourselves. The other side of the coin is that it has also not been established that BD will bring about a new era characterised by a ‘data-driven economy’ (whatever this means). As long as the answers to these questions are unknown, we must be very cautious about designing new rules.

3. BD as a tool in the regulator's and the lawyer's hands

Law is not just regulating, but can also *rely on* BD. As in many field of the business, healthcare, education and other sectors, it can also use it as a tool. In the field of law, however, we can differentiate between two levels of reliance: BD, on the one hand, can support *law making* and policy design, but on the other, it can be a tool in the hand of officials, lawyers, and judges in law application (lawyering), law enforcement and litigation.

3.1 BD in law making

In the field of law making and policy design, it is likely that better rules and regulations can be created with the help of BD: The EU also appears to adhere to this idea (H2020 Call, 2016). BD can open new perspectives in the preparation and design of rules, but also in the measurement of the effects of the amended rules. There is already a quite simple requirement that regulation should be based upon facts and data. (In Hungary for example this is also a legal requirement, since § 17 of the Act CXXX of 2010 on Law-making rules, that the law-maker should prepare an impact assessment on economic, social, budgetary, environment, safety fields – Act CXXX of 2010) For example, in planning VAT revenue it is important to know something about the gross retail turnover. If corporation tax is raised in the hope that it will bring in extra revenue, the number of companies and their profits should be studied. However, the possibilities offered by BD go far beyond this. In BD sets the data representing a certain social aspect is complete and available in real time. For example, the data generated by the online cash registers recently introduced in Hungary are the comprehensive and real-time set of data for the retail sector, and are not retrospectively collected or representative sample-based. The traffic information recorded by highway cameras registers every vehicle. The cell information from mobile phones shows the real movement of citizens, which is not distorted by the memory of the person who recalls it. Communications via social media show real-time human interactions.

Therefore, BD can support law-making in several ways. First, the effect of a policy decision can be measured by data outputs, which show changes at the micro-level. For example, a policy (law) change aimed at companies can be measured by the company register and the balance sheets or P&L statements published by companies. Second, in the era of BD, the initial data on which a policy decision is based are available in a complete and real-time format. The cases of the cash registers or the traffic information provided by highway cameras were mentioned above. At present, these data – if considered at all during law making – have been available only in an incomplete form, showing the past, not the present. Third, BD enables law-makers to experiment and to simulate certain policy decisions in smaller populations and to immediately measure the consequences of these decisions on certain outputs (for experiments with BD, see Byers, 2015). The acceptance of a decision or a policy change can be immediately monitored via social media, for example, or the increase or decrease of crimes via the information provided by CCTV cameras or information systems operated by the police.

3.2 *BD in lawyering*

The application of the law (law enforcement, litigation, decision making, drafting of documents, etc.) can be supported by **BD** as well. This is a field in which there are existing examples. *Lex Machina* and *Ravel* are two functioning applications, both of which are based on **BD**.

Lex Machina, which was recently acquired by Reed Elsevier, offers ‘legal analytics’ in three fields and argues that its software represents the ‘third leg to the law practice stool’ next to traditional legal research and legal reasoning.³ The product captures the litigation data and documents published in *PACER*,⁴ *UPSTO*,⁵ and *EDIS*,⁶ – all open data – then mines and analyses the data with the help of artificial intelligence software. This means that it extracts data from these documents (players, asserted properties, findings, and outcomes, including damages awarded, etc).

The logic behind *Lex Machina*’s competitor, *Ravel*,⁷ is nearly the same. It extracts information from litigation documents with the help of natural language processing algorithms, which, at the same time, have the ability to engage in machine learning and visualise the results in a very spectacular form.

Both companies can analyse individual judgements, areas of law, judges, and courts, and in certain areas, they can also do predictions on the outcome of a certain type of case, offer a certain type of language that has proven to be preferred by a particular judge, or plan a litigation strategy.

So, the use of **BD** in this area is already a reality. But beyond its predictive possibilities, which is also a key element here, these services throw light on all the methodological questions *on the interpretation* of data as well. It is common knowledge that the interpretation of statistical data has raised methodological issues and can be the source of huge errors, even if the data collection is carefully planned (see e.g. the ‘McNamara sin’ mentioned by Mayer-Schönberger and Cukier, 2013: 163–165). But **BD** has created many new problems, since the data *collection is done from data sets which were not originally designed for that particular purpose*. In the case of judgements and other free text documents, natural language further increases the possibility of misinterpretations and false conclusions. As Kris Hammond (2015) stated:

³ <https://lexmachina.com/law-firms/>

⁴ Public Access to Court Electronic Records (*PACER*) is an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts: <https://www.pacer.gov/>

⁵ The website and database of the U.S. Patent and Trademark Office: <https://www.uspto.gov/>

⁶ The website and database of the U.S. International Trade Commission (*USITC*): <https://www.usitc.gov/>

⁷ <http://ravellaw.com/>

Decision makers don't want data. They want to understand what's happening in the world. Data for the sake of data is a waste of time and money. Spreadsheets, visualizations, and dashboards fail because they may express the data, but they don't communicate facts and the events in the world that gave rise to them. [...] Likewise, the data associated with us as individuals, including the wealth of data from the emerging Internet of Things will be transformed into reports that real people will be able to read and understand. Rather than seeing data, they will see stories of their own lives mapped out for them based on artificial intelligence language systems looking at their data and explaining it to them (Hammond, 2015).

If we just consider the 'Judge analyzer' service of Ravel, whose system promises to uncover 'the rules and specific language your judge favors and commonly cites' and to 'pinpoint distinctions that set your judge apart', the hidden narrative behind it is that using the language, the distinctions, the arguments, the concepts and sources a particular judge prefers, can help to win the case. An even further and deeper narrative behind this is that there is a connection between the quality of the reasoning and winning the case. This narrative is certainly not self-evident for continental legal systems, where the quality of the reasoning is often not determinative in legal proceedings - and sometimes of course this is not the case in the Common Law systems either.

In the world of BD, it can sometimes turn out that our narratives - the big tales and the common interpretational frames - fail. What kind of narrative can be attached to the fact that a positive relationship exists between disgust sensitivity and political conservatism? (Inbar et al., 2011). How many such hidden interrelationships will be discovered that do not fit our existing narratives? Will BD be the next field for which we need to adjust our traditional narratives as we did after the development of quantum physics?

3.3 BD-based application of rules

If the predictive power of BD analytics is so powerful, is it not better to use these algorithms, which are based on real time, complete and detailed data, for example, to establish sentences in criminal cases to eliminate proven sentencing disparities? (Kunz and Majairan, 2016; Volkov, 2016; Windergren et al., 2016). Or is it not possible to use this power in civil law cases in which judges must interpret discretionary categories, such as a 'reasonable time' or 'fair compensation'. Would it not be better to use BD-based algorithms to actually consider every detail?

Outside the realm of the law, these BD-based decisions are already quite common. Just think about the scoring process used by banks when they decide whether to grant a loan, which is, in great part, based on data and algorithms. The process eventually ends with a number. The same applies to insurance companies' risk assessment process. They have one thing in common: Applicants do not receive a justification after the decision. This is partly because the decision is based on personal characteristics that the applicant cannot change, and partly because the decision is made based on data-based algorithms, which either cannot be explained using plain

words, or it is not in the interest of the decision-maker to disclose the underlying rules. The European General Data Protection Regulation contains rules on automated decision making, but as I hinted above, this rule can be counterproductive and can hinder the EU from achieving a ‘thriving data-driven economy’.

If this brave new world arrives, there will be several consequences. Just to mention two: first, imagine if sentencing was **BD** based. When creating the algorithms, the value judgements that until then, were hidden, would be explicit.⁸ In the case of sentencing, the goal of ‘special prevention’ (that the punishment should prevent the perpetrator from committing a crime again) and the goal of ‘general prevention’ (that the punishment should deter others from committing crimes) should be represented in the algorithm, and therefore, should be transformed into variables, which are made explicit.

Another consequence could be even more interesting. The unity (or uniformity) of the decisions within a legal system is an important constitutional principle. We tend to think that **BD**-based algorithms will produce more uniform decisions, because the same algorithm can be used across the whole legal system. But the opposite could occur. **BD**-based algorithms, simply because they are able to examine and process far more considerations parameters and circumstances than a human, can make more *diverse* decisions. This brings us back us to problem #1: in these cases the two sides (two sub-principles) of the same principle, – the justice – are conflicting. The first says, that since there are no two similar cases, every case must be treated differently. But the other principle of justice says that ‘like cases should be treated alike’. There is a certain point, where the decisions of complex algorithms simply cannot be explained by plain human words, because they do not fit into our everyday narratives. In these cases it will be for us to decide to use these algorithms, and create a justification, or to ignore them and take back control over the decision process.

4. *BD and legal science*

4.1 *BD as a ‘super-empirical’ method*

In many respects, **BD**-based research projects are not different from ‘simple’ statistical research projects, which are also based on great volumes of data, performed by computers, and use statistical and mathematical algorithms to process data. Nevertheless, **BD** has changed the landscape of the social sciences, and there have been extensive debates about how it will affect the methodology of social science research (Williford and Henry, 2012). It is far beyond the scope of this article to elaborate on the differences between the ‘old’ methods and the ‘**BD**’ methods. This article merely seeks to draw attention to some spectacular ones.

The first involves the population being studied. In a narrow social domain, **BD** shows *the whole picture*, (Mayer-Schönberger and Cukier, 2013: 22–31) and not a picture of a random or a representative sample. Normally, the domain under study is

⁸ An interesting example of making hidden value preferences explicit for the algorithm of an autonomous car is the ‘Moral Machine’ project by MIT: (<http://moralmachine.mit.edu/>).

smaller compared to traditional empirical research, and there are different distortions, compared to the previous research. If research is conducted on people's movements based on the location data of their cell phones, this will use real-time and undistorted data, but will not show, for example, the aim of the movement, which would be asked in a survey.

The second difference is that a statistical analysis is always preceded by a conscious and planned data collection process. The data collection is preceded by the data collection design (e.g. the drafting of questionnaires), and this is preceded by a hypothesis based on a narrative or a paradigm. Therefore 'normal' empirical research can never change the starting paradigm or narrative. It can falsify the hypotheses, and start the whole process from scratch, but it cannot change the paradigm itself. In case of BD research, *the birth of the data precedes the research*, and the researcher must somehow process and interpret the data after it has been created. Therefore, in BD research, if the hypothesis is falsified, one must rethink the paradigm as well. If the data does not fit into the existing narrative, one must change it or find another one (Deardorff, 2016).

Third, it seems that because of the volume and complexity of BD, the visualisation and interpretative tools are far more important in presenting the results of BD-based research than in any other field. It is quite natural for statistical results to be presented in diagrams and not only in tables. But in the case of BD, the visualisation is not simply a way to *better present* the data, but sometimes the only way to present it. Normally, BD simply cannot be presented in its raw form, like, for example, a report on statistical research normally presents the survey questions and the dispersion of answers for every question.

4.2 'Doctrinal' and 'empirical' legal science

How does all of this affect legal science?

In the past few years, - as happened more than once in the last century of legal science - it has become one of the leitmotifs of the methodological writings concerning legal science that traditional 'doctrinal' scholarship seems to be in a crisis (Bodig, 2015; Dyeve, 2016); one of the escape routes could be empirical, data-based research, through which legal science could become a 'real' social science.

To understand the problem, we should first clarify the relationship between 'traditional' legal science and 'empirical' science, which is considered to be 'real' social science, and the further difference between the 'old' empirical methods and the new method offered by BD in the legal domain.

Legal science's traditional role, which is sometimes called 'doctrinal', or in the German-speaking parts of Europe, 'dogmatical', 'ranges between straightforward descriptions of (new) laws, with some incidental interpretative comments, on the one hand, and innovative theory building (systematisation) of the other' (Hoecke, 2011: vi). Regardless of how innovative it is, doctrinal science always analyses *texts*, namely some *important* texts in the framework of normative concepts, which is partly established by the text of the laws, partly by judicial practice, and partly by legal scholars.

Empirical research, on the other hand, is centred on social, and sometimes, psychological ‘facts’. Further, research can be empirical without using data or bigger samples, so there are additional (narrower) categories of research methods, namely those which are ‘data-based’ and ‘statistical’. The former uses numbers and variables to describe certain social phenomena, and the latter relies on representative samples and statistical methods such as dispersion and correlation, and standard ways of segmenting a population.

Therefore, the different types of research in the legal domain are the following:

Table 2. Different types of legal research.

	Methodology and conceptual network	Observed object	Observed population	Reliability of prediction
Doctrinal	Desktop, using an existing normative, legal conceptual framework	Manifestations of the normative object – texts	Some ‘important’ texts	-
Empirical	Based on sociological methods, using social science methods, sometimes based on ‘numbers’ using concepts of social science and mathematical methods	Objectivations of the social phenomena and/or texts, or data taken on social phenomena and/or data taken on texts	Accidental selection of social facts.	Low
Statistical	Based on representative data, using concepts of social science, mathematics, and statistics	Data taken on social phenomena and/or data taken on texts	Representative sample	High
BD based	Mathematical methods, narratives and conceptual framework employed retrospectively	Data sets, in most of the cases, huge text corpuses processed as data	The total population/data-set	Very high

For the same research question (for example, ‘how has medical malpractice litigation changed in the last five years, and what are the future trends?’), there are five possibilities to elaborate the topic. The doctrinal research will comprise the reading of the most important higher court decisions and the analysis of the conceptual framework within these documents. An empirical study can include a questionnaire completed by counsels and judges active in the malpractice field. Data-based research can complete this with data connected to medical malpractice, for example, the length of the court procedures or the damages paid by hospitals. A statistical enquiry would conduct all of them using representative samples. Finally, the BD-based research could include complete data-sets, such as the whole aggregation of hospital and litigation documentation, which can ‘say’ anything about malpractice litigation.

Why is the situation of the legal domain special? Empirical *legal* research is always in a very strange, in-between situation for two reasons. First, the social facts it observes (such as the ‘behaviour of judges’ or the ‘medical malpractice’ itself) are based on normative constructions (the ‘judge’, the ‘malpractice’). Any empirical research in the field of law requires – beyond the general social distinctions such as gender and age – these sets of normative concepts. While it seems, that these concepts are much more stable than social ones, as they defined in legal sources, this is not entirely true. They are, very frequently also fiercely debated, – like many constitutional concepts recently in Hungary: including the concept of ‘rule of law’ itself

- and they are also subject to regulatory and interpretational changes too. This result, that any BD research in law will be the subject of not only general interpretational doubts, well-known from social science, but will be debated by the 'traditional' doctrinal scholars as well, using 'traditional' conceptual arguments. Second, empirical legal research should very often (though not always) rely on, process, control and interpret *texts*. This is true for 'normal' empirical research (such as research on the attitudes of judges), but it deeply pervades empirical research projects that are based on text analysis. These 'text-empirical research projects' can be subdivided into two types: projects that are based on human reading and coding (See for example, the famous Supreme Court (Spaeth) database,⁹ or the European Conreason project¹⁰ and projects based on machine processing (see e.g. Fowler et al., 2007; Zódi, 2015). In the case of the manually coded research, it is quite clear that coding sometimes requires interpretation and partially arbitrary decisions, but even in the case of a machine-made analysis during the construction of the text-analysing algorithms, one must make certain decisions which can distort the *data collection itself*.

These two peculiarities mean that BD-based research projects in law will not supersede doctrinal efforts; rather, they will rely on them. Doctrinal scholarship will provide the theoretical framework, the concepts and the distinctions that will serve as a basis for the higher narratives on which empirical and BD projects can build. But eventually, there will be a reverse process as well. BD research projects can offer new insights and ideas for which doctrinal scholarship can begin to build new theories and narratives.

5. Conclusions

Big Data already has a severe impact on law, and raises serious dilemmas. While Big Data is often mentioned as the basis for a new economic order, it is increasing risks, (mainly on privacy and anti-discrimination fields), which are different in character than 'normal' privacy issues (Mayer-Scönberger and Cukier, 2013). This new scenario means the 1. unmanageable volume, velocity, and movement of the (personal) data, that we and our devices generate, 2. the predictive power of the data which is resulting in an unbalanced relationship between private persons and those having access to the data and 3. the secondary use of the data, i.e. where the aggregated data is used for purposes that are far from their original ones. Keeping or tightening the existing (data protection and other) standards does not seem to be working, because this deprives society and the economy of Big Data's value-creation power. New rules are needed soon, based on new ethical principles.

BD offers possibilities in law making, lawyering and legal science. Experimental law-making, predictive lawyering and policing, legal enforcement based on data, and in-depth analysis of cases, fields of law, judges and courts will soon become parts of legal practice and will play an increasingly important role in the coming years. This does not mean that the political element in law-making or the moral judgement in legal decision making will disappear. It is rather that the foundation and the reasoning

⁹ <http://scdb.wustl.edu/>

¹⁰ <http://www.conreasonproject.com/>

structure of law making, lawyering and legal science will start slowly shifting to the direction where arguments based on Big Data will be accepted, and used more and more. Traditional legal science will also stay with us. But it will be controlled and complemented with the insights of (open) data-driven research.

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Book Review

Bojan Bilić (2016) (ed.) LGBT Activism and Europeanisation in the Post-Yugoslav Space: On the Rainbow Way to Europe. London: Palgrave Macmillan. 256 pages.

This edited collection published in the Palgrave Studies in European Political Sociology series is the first with a focus on, as the editor Bojan Bilić sums it up, ‘multiple forms and implications of the increasingly potent symbolic nexus that has developed between non-heterosexual sexualities, LGBT activism(s), and Europeanisation(s) in all of the post-Yugoslav states’ (pp. 4). The same set of issues has already been discussed in several articles and chapters (Brković, 2014; Kahlina, 2015; Mikuš, 2011; 2015; Pavašević Trost and Sloomackers, 2015). The publication under review therefore attests both to the growing academic interest in the topic and its practical significance in the region. Some of the contributors first met in a 2014 workshop at the University of Bologna, to be joined by others at a 2015 meeting at the Central European University in Budapest where the volume took its final shape. It contains nine chapters by nine different contributors – activists, anthropologists, gender scholars, sociologists, political scientists – all of whom come and/or are based in the countries of the former Yugoslavia, with each of the latter being covered by one of the chapters. Bilić, a Serbian sociologist known for his earlier work on post-Yugoslav anti-war activism, wrote the introduction and one of the chapters while co-authoring the conclusions with the British Zagreb-based sociologist Paul Stubbs.

Bilić opens with an evocative account of his visit to the second Montenegro Pride Parade in 2014. His conversation with a disgruntled middle-aged taxi driver on the way from the airport, who interpreted his intention to participate in the event through a ‘binary reference system’ (pp. 3) combining sexuality and geopolitics, brings home the master problem of the collection: the ways in which LGBT activism in former Yugoslavia has been enabled, constrained and shaped by the discourses and processes of European integration and the broader political, economic and social transformations of the past 25 years to which they were so central. At the same time, the experience provokes intriguing questions of a more political and activist nature: about what might be the ‘most adequate – the least intrusive – strategy’ for LGBT rights advocacy in this deeply patriarchal setting; one that would not be seen as threatening and that would also avoid reproducing the debilitating reduction of the issue to an EU integration condition.

Defining for the approach of the collection is the ambition to go beyond the conventional policy science assessments of the impact of EU conditionality on laws and institutions in prospective member states towards a critical questioning of the idea of ‘Europeanisation’ itself. The authors see this not as a one-way and inherently benevolent transfer of Western European modernity to the backward East but as a dynamic and power-laden process of translation and negotiation, which is in the case of Yugoslavia refracted by the variety of the successor states’ relationships with the EU. The contributors mobilise especially the critiques of Europeanisation and the EU’s ‘eastern expansion’ as informed by Orientalist/Balkanist hierarchies and

discourses about Western and Eastern Europe (Kuus, 2004; Petrović, 2014; Todorova, 2009). Bringing these arguments to bear on its particular focus, the key contribution of the volume is to document the mechanisms through which EU actors, national policy makers, and LGBT activists reproduced the hegemonic framing of former Yugoslavia as a 'homophobic Other'. Most importantly, this framing has led to the tendency to discuss and conceive LGBT rights advocacy and non-straight sexualities themselves as 'European', imported/imposed, and wholly dependent on the benevolent EU power. As a consequence, local traditions of tolerance and the transformative potential of local forms of sociality, as well as the ambiguous effects of EU integration on LGBT rights, were rendered insignificant or invisible altogether. To varying degrees, the chapters also provide information on the development of LGBT rights and activism in post-Yugoslav states, some of which have been covered by little scholarly literature so far (Bosnia and Herzegovina, Kosovo, Macedonia).

Nicole Butterfield shows how the efforts of Croatian LGBT activists to leverage EU conditionality in the pre-accession stage resulted in the emergence of a hierarchy of activisms with a division between 'serious', professionalised NGO work oriented to legal change and advocacy and presumably less serious grassroots activism and community involvement. Also, the focus was on achieving legal changes of the kind expected in the pre-accession changes, which reproduced the 'catching-up' framework and limited the activists' capacity to define and pursue indigenous agendas, such as those to do with social and economic issues. In response, however, debates have recently intensified about the need for a more diverse range of LGBT activist practices.

Sanja Kajinić dissects the ambiguous manner in which the organisers of the Festival of Gay and Lesbian Films in Ljubljana engaged with its roots in socialist Yugoslavia as the first such festival in Europe. This fact is often obscured by the organisers' effort to legitimate the festival and the LGBT movement within the Europeanisation framework, which assumes that Slovenia could have been tolerant to sexual diversity only since its entry into the EU. This is consistent with the broader Slovene strategy of claiming an advanced status through distancing from the rest of former Yugoslavia. Nevertheless, facing a conservative backlash *after* EU accession, the organisers sometimes did mobilise the Yugoslav beginnings of the festival, thus putting in question the idea of Europeanisation as a unilinear movement from non-European homophobia to European tolerance.

Ana Miškovska Kajevska demonstrates particularly well how little LGBT activists can achieve by leveraging EU accession if the conditions at the national level are not propitious. Her chapter, which reconstructs the development of LGBT activism in Macedonia, describes how NGOs advocating for LGBT rights struggled with the state-sponsored homophobia of the VMRO-DPMNE government, which has even managed to delete a mention of sexual orientation in the antidiscrimination law adopted as a condition for receiving the status of an EU membership candidate. What progress there was seems to have been achieved rather by media initiatives that increased the visibility of LGBT Macedonians, though this was not without negative side effects: the increase in homophobic violence.

Bojan Bilić's chapter focuses on the relationship of Europeanisation and the Pride Parade in Serbia. He shows how the government's narrow concern with delivering the Pride in order to please the EU has turned the event into a heavily

securitized and sterile performance. Largely limited to the legalistic paradigm of rights that often proves quite ineffective in practice, it does little to promote the equality and wellbeing of the Serbian LGBT community that has come to experience it as rather irrelevant. A lot of energy and resources has been spent on the organisation of the Pride at the expense of other possible forms of activism while also heightening antagonisms within the already fairly fragmented activist scene.

Danijel Kalezić and Čarna Brković, Montenegrin activist and anthropologist respectively, draw on ethnographic vignettes of the lives of several gay men in Podgorica to make similar observations about the dominant form of activism oriented to the leveraging of European integration and lobbying for legal rights. In a context characterised by pervasive homophobia that LGBT people have to navigate to go about their everyday lives, strategies oriented to their visibility (such as, indeed, the Pride) are easily seen as incomprehensible or even harmful. Kalezić and Brković point to the growing awareness of LGBT activists about the risks of reproducing the association between non-heteronormative sexualities and Europeaness and their attempts to undermine this by playful representations that instead link the former to Montenegrin tradition. Ultimately, however, this was insufficient to transform the hegemonic framework of LGBT politics.

The chapter by Piro Rexhepi leaves the impression that this framework might have been most rigid in Kosovo. The presence of Islam has added another crucial facet to the general tendency on the part of the EU and some activists to orientalise the country and to present it as inherently intolerant and hostile to sexual diversity. This has reduced LGBT people to perpetual victims in need of the protection of the EU, separating them from the wider Kosovar society (including other marginalised groups) and constraining their capacity to occupy more polyvalent, complex and situationally varied identifications.

Adelita Selmić points to the growing scepticism about EU integration generated by the seemingly eternal status of Bosnia and Herzegovina as a potential candidate. However, given the severity and complexity of the country's problems, the deadlock was not enough to stop citizens from looking up to EU accession as the prospect, however feeble, of a better future. LGBT activism has been no exception, resulting in the usual focus on legal rights and NGO work. Nevertheless, Selmić gestures to a potential for a more political LGBT activism. While the growing social unrest suggests that the dominant ethnocratic and clientelistic logics of BiH politics came to a breaking point, most LGBT people identify as 'other' in ethnic terms, presumably reflecting the complete disinterest of ethnocratic elites in their very existence. Selmić thus hazards the hopeful question of whether LGBT people could become a symbolically crucial building bloc of a new, civic political platform in BiH.

Alongside the consistent critique of Europeanisation, a range of conceptual frameworks crops up at various points of the volume. In Bilić's introduction alone, we encounter: aesthetics of postsocialism (pp. 3), citizenship (pp. 4), policy translation (pp. 6), social movements theory (pp. 7-8), and homonationalism/sexual nationalism (pp. 10). Unfortunately, some are mentioned far too briefly for their relevance to the main focus and their mutual fit to be sufficiently developed, leaving one with a sense of theoretical bricolage. In addition, the grounding of the volume's approach in the paradigm of Orientalism seems to lead to a preference for ideational and symbolic rather than materialist and pragmatic considerations. For instance, while the

antagonisms within the national LGBT activist scenes are relatively well accounted for in some chapters, it would be interesting to learn more about social relations between EU and national policy makers, officials, activists, and other relevant actors that presumably also conditioned the ways in which particular discourses, policies or bureaucratic practices selectively privileged some activist agendas and agencies.

Perhaps it was the relative lack of such analyses that has created a room for slightly conspiratorial suggestions of a monolithic and rather malicious intentionality on the part of the EU and its domestic allies as the driver of the orientalisising treatment of homophobia: ‘The protection and promotion of queer rights serves as an appropriate tool to then “contain and eliminate” the new enemy [radical Islam in Kosovo] as a necessary measure if Kosovo wants to fully integrate into the EU’ (pp. 190); ‘After aggressive post-Yugoslav ethno-nationalisms that shocked the continent, homophobia has provided fertile ground for survival, even reinvigoration, of a Western/European orientalist approach to the region, keeping the long-term and asymmetrical power relations intact’ (pp. 237). At some points, this occasions a subtly nationalist and not necessarily convincing implication that the states would deal with LGBT issues better if just left on their own, such as when Rexhepi observes: ‘Proving *Europeanness* then becomes the sine qua non of not only EU integration processes, but constitutes a disciplinary measure that allows the EU to intervene in the internal affairs of Kosovo’ (pp. 185). But are we sure that there is indeed an intention to use LGBT rights in this particular manner, instead of this being a consequence of policy makers and activists simply approaching the issue – one on the long laundry list of issues addressed, often quite formalistically, during the integration process – through their pre-existing folk models?

I would also welcome reading more suggestions about what should be done – perhaps by the EU itself? – to address the problems of LGBT people in these countries. Selmić’s forward-looking thoughts are particularly inspiring in this respect. In their conclusions, Bilić and Stubbs suggest another possible answer when they elaborate on the relationship between LGBT politics and the revitalisation of the radical left in former Yugoslavia. This is not without problems precisely due to the capture of LGBT issues by the hegemonic liberal politics of globalisation and postsocialist ‘transition’, but Bilić and Stubbs nevertheless point to signs of possible convergence. And yet, as much as I am sympathetic to the inclusion of LGBT politics in broader leftist projects, I find this a somewhat narrow manner in which to consider potential future strategies of LGBT activists. The new left might be gaining strength but it is currently still fairly marginal, which begs the sobering question of whether it is truly the best or only bet for a better future for LGBT people in the short and medium run. Perhaps it would be strategically more productive to define the challenge more broadly as transforming the relationships of LGBT people and these societies such as to release the issue from the instrumental straightjacket of EU integration and bring it to the agendas of various, not necessarily only radical leftist parties.

Mikuš Marek (mikus@eth.mpg.de)

Max Planck Institute for Social Anthropology, Halle, Germany

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Book Review

Marko Kmezić (2017) *EU Rule of Law Promotion: Judiciary Reform in the Western Balkans*. London: Routledge. 186 pages.

Marko Kmezić has been studying the role EU institutions have in Western Balkan countries and in particular the influence of EU conditionality on human rights and the rule of law. In recent years, his research focused on the effect Europeanization had in the area of rule of law. (Kmezić, 2014; Kmezić, Gordon and Opardija, 2013)

In his latest work, *EU Rule of Law Promotion - Judiciary Reform in the Western Balkans* (2017), Kmezić explores whether EU institutions have an influence on the implementation of the rule of law in potential candidate countries and, if so, of what kind. The question the book poses is quite valid considering that even though the EU launched the Stabilisation and Association Process over 15 years ago these countries seem to be far away from full EU membership. The book focuses on judicial reform in the five countries: Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, and Serbia, all Western Balkan countries still aspiring to EU membership.

In his book, Kmezić builds on the already existing scholarship on 'Europeanization', reflected in the works of Schimmelfennig (2010) and Sedelmeier (2006; 2011). During his research for this book, he collected empirical data on the EU's transformative power with regard to the effectiveness of rule of law and judicial sector reform. His work analyses the depth and limitations of EU rule of law promotion in the Western Balkans and ends with a presentation of policy recommendations intended to address the shortcomings of in judiciary reform. Kmezić uses a combination of the traditional top-down approach, already existing in Europeanization studies, and the constructivist institutionalist approach with a reconceptualization of the 'spiral theory' (Risse, Ropp and Sikkink, 1999). He uses a combination of three methodological strands: the *normative approach*, the problem-oriented *empirical approach* and the *institutional approach*. To this end he conducted a normative and empirical analysis of written (legal) documents, conducted explorative expert interviews and in-depth interviews with key actors including representatives of the political and economic elites, EU experts, and rule-of-law enforcement officers of the respective countries. In By doing so he provides a comprehensive analytical framework that tries to overcome theoretical dichotomies in an innovative way.

The book consists of three major parts. Beside the introduction, Part I provides an overview of the existing literature on Europeanization with a specific focus on its effect on the rule of law. Part II presents accurate and up-to-date normative and empirical analysis of the state of judiciary reforms in Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, and Serbia. Finally, Part III offers answers to the question of the success of the Europeanization by rule of law implementation in South East Europe (SEE), in the form of a comprehensive concluding chapter. In this part he also proposes policy recommendations, intended to address the shortcomings of

judiciary reforms in SEE observed during the research that led to this book, as well as ideas for how the EU could enhance its influence on rule of law promotion during the accession phase.

The countries studied were selected according to their status in the accession process, namely (1) Bosnia-Herzegovina, which have signed a Stabilization and Association Agreement, but also have serious problems with state institutions' stability due to the unresolved statehood and nationality issues; (2) Kosovo, a potential candidate country, still not recognized by five EU member states; (3) Macedonia, which is a candidate for EU accession, but with no date set for commencing accession negotiations; (4) Montenegro as a candidate country in the process of accession negotiations; and (5) Serbia, which formally started accession negotiations in January 2014.

As already indicated, democratic consolidation of the Western Balkans countries is intimately linked with the effectiveness of rule of law. However, the concepts of democracy and the rule of law are not identical. And although the rule of law principle has a long common tradition in most influential legal orders, it has not been precisely defined by any of them. Rule of law is one of the founding values of the European Union as confirmed in Article 2 of the Treaty of Lisbon.

With the prospect of enlargement to the SEE, Kmezić finds, the EU has become more aware of the need to provide content criteria, or benchmarks, with which to measure success or failure in fulfilling the principle of democracy and the rule of law. These criteria were set established with the conclusion of the Stabilization and Association Agreement(s) which marks only the beginning of the contractual relationship between the EU and the candidate countries/country. For this book, Kmezić uses benchmarks set for independence, accountability, efficiency and effectiveness of the judiciary in the Western Balkans and provides an in-depth normative and empirical analysis of the reforms undertaken to reach these standards in a five-country case-study.

The book concludes that there are two sets of obstructing factors that , which explain the gap between the adoption and internalization of norms related to the rule of law in the Western Balkans. On the supply side, i.e. on the side of the EU processes and strategies, these are the lack of *clarity* and *credibility* of EU conditionality while on the demand side, concerning the domestic drive for reforms, these relate to the obstructionist potential of *gatekeeper elites* and *legacies* of the past.

Kmezić finds that the EU has approached the rule of law reforms from the position that improving the performance of the judiciary is the most direct way to reinforce the legal stability in the target country. However, his research points out that the transformative effect of the 'current EU approach' for the Balkans appears to be insufficient. Conditionality in the Western Balkans is insufficient since it does not meet the main criteria for it to be effective: membership conditions should be clear, the same requirements should be applied to all applicants, which should be strictly but fairly monitored, findings should be transparently communicated, and there should be no doubt that the reward will come once conditions are met.

The EU's present approach also fails to deal with the problem of local cultural predispositions, to address the issue of informal institutions and centres of power, and to include the wider society in the reform process. Therefore, matters such as the

fairness and legitimacy of laws and court procedures, the effectiveness and accountability of the judiciary, and the role of civil society remain marginalized. He identifies five false assumptions that underlie the current approach: a) that an institutional approach is the answer, b) that governments are the key to achieving legal reform, c) that new laws are the answer, d) that governments know what they are expected to comply with and e) that the membership incentive is sufficient.

Finally, Kmezić fulfils his promise and suggests policy options which could improve the EU's rule of law conditionality toolbox in order to guide domestic reforms beyond the phase of formal rule adoption. His list of policy recommendations that need to be taken into account by relevant actors are: a) creating clear criteria and indicators for the rule of law conditionality, b) producing interim benchmarks, c) redefining progress reports, d) including civil society in the EU integration process, e) opening Chapters 23 and 24 and f) monitoring the state of democracy.

These recommendations are based on recognizing the false assumption that the top-down institutional approach employed by the EU, empowered by the golden carrot of full membership, has generated unique broad-based and long-term support for rule of law reform and progress towards EU membership in the Western Balkans. However, Kmezić finds that this approach is undermined by the technocratic, vague and short-term nature of the EU's rule of law conditionality coupled with the increasing lack of credibility of the overall enlargement process which at best leads to redistributive, capacity-related and short-term outcomes rather than sustainable and transformative change. At the same time, he suggests that it would be necessary to combine this approach with more bottom-up soft socialization mechanisms to ensure that capacities of civic society organizations are mobilized and to create a consensus among the ruling and oppositional elites on the necessity of socialization of the adopted norms.

In his book, Kmezić aims at and succeeds not only in advancing scholarship on this topic but also in providing policy recommendations which could have an impact on EU policy towards rule of law reform in the Western Balkans. However, turning policy recommendations into action requires a significant amount of advocacy, a task Kmezić, as a member of the Balkans in the Europe Policy Advisory Group, will have plenty of opportunities to pursue.

ADNAN KADRIBAŠIĆ (adnan.kadribasic@gmail.com)

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Book Review

Andrew Geddes & Peter Scholten (2016) *The Politics of Migration and Immigration in Europe*. 2nd edition. Los Angeles; London; New Delhi; Singapore; Washington DC; Melbourne: SAGE. 270 pages.

The question of migration and the debate around it have become focal points of the European agenda since the refugee crisis of 2015. The responses to the crisis formulated by the affected countries' governments have diverged around two main approaches. While some governments stressed the importance of responsibility sharing and a common European solution to the challenge, emphasising the importance of awareness raising about global conflicts and inequalities, others labelled the refugee crisis as a threat to the domestic labour markets, and an unmanageable national and European security issue.

The authors argue that if we wish to understand the underlying mechanisms behind these opposing approaches - looking beyond the current political responses towards the crisis - international migration should be analysed as part of a much broader and more complex question. The countries' individual reactions shaped by their historical immigration and emigration patterns, the various forms of international migration (family migration, labour migration, migration for studying purposes, or migration to seek refuge) characteristic of the different countries, and the question of convergence between the migration policy of the EU and its member states are simultaneously part of this question. The main objective of the book is to present how migration and integration policies were developed - and shaped in different European countries and at the EU level.

The novelty of the book lies in changing the approach in two ways. First, it does not only focus on the policy responses of the EU and its member states on international migration, but it also assesses how these policy decisions influence migration itself.

As the authors argue, reversing the analytical focus may contribute to a deeper understanding of how international migration is shaped (p. 4). Second, - besides Northern and Western Europe - the authors include Central Eastern and Southern European countries in their investigation, supply the readership with a highly comprehensive picture about the studied phenomenon. Countries covered by the different chapters are: the United Kingdom, France, Germany, the Netherlands, Sweden, Italy and Spain, Greece and Turkey, as well as the group of Central and Eastern European countries.

While thoroughly expounding the immigration and integration policies of the examined countries, the authors highlight four central questions.

The *first* topic reflects the idea whether or not European immigration policies have also become European Union policies. The authors argue that the EU shapes the environment within which European immigration and integration policies come to life, and simultaneously the independent strategies of the member states also construct EU-level policy. The role of the EU in this respect can be grasped along two main

dimensions: (1) the ‘institutionalisation of Europe’, and (2) the ‘Europeanisation of institutions’. (p. 238)

The ‘institutionalisation of Europe’ dimension describes how EU policies are developed, and how the attitudes of the member states towards migration play a crucial role in shaping the common framework. The question of free movement of labour or intra-EU mobility, for instance, also belongs to this scheme, which was and continues to be an essential aspect of EU migration debates throughout the past decade. Nonetheless, as the authors have repeatedly highlighted, the most explicit manifestation of this dimension is linked to the question of external border controls and border security. The development of the Schengen Area and the renegotiated temporary border controls and restrictions after the 2015 refugee crisis illustrate how member states have the potential either to broaden or tighten the commonly accepted framework depending on the given situation.

Discussing the dimension of ‘Europeanisation of institutions’ the authors elaborate how EU measures regarding immigration make their way into the domestic politics of the member states. The perception of these directives among member states is far from being alike. In the UK, the Netherlands and France the concept of free movement of labour and the EU’s immigration policies became a central target of Eurosceptic and populist parties and provided a fertile soil for them to exploit the current ‘anti-immigrant sentiment’. At the same time in Southern Europe (particularly in Spain) EU measures were generally welcomed and embraced in domestic politics, while Central-Eastern European countries have heavily criticised the EU position about the quota system and responsibility sharing in response to the refugee crisis. (p 238)

In the *second* core analytical part of the book, the different driving forces of domestic immigration and immigrant politics are discussed. In recent years the expansion of extreme-right wing and populist parties became widespread all over Europe, which indirectly impacts governments proposing more restrictive measures regarding immigration.

The authors illustrate the phenomenon by highlighting the increasing popularity of the French Front National, the British UKIP, and the Dutch Freedom Party. All these parties managed to merge the question of immigration with national security issues, and they blame European integration as being the major source of the ‘problem’.

The third analytical part argues that immigrant policies are, after all, local. Immigrant policies are mostly decentralised at the local level, and unlike immigration policy the ‘EU signal directing convergence in immigrant policies is not strong’. (p. 241) At the local level the integration of immigrants does not follow group specific measures predefined on ‘higher’ levels, it attempts to assist the process of integration through traditional channels, such as providing access to education, offering employment and housing opportunities. To underline the importance of municipalities in the implementation process of immigration policies, the authors give the example of the French Fond’s d’Action Sociale regional offices. These local offices are targeting diverse multi-ethnic neighbourhoods with assistance, by finding adequate responses to the challenges that are present at the local level.

Last, but not least the authors reflect on the question whether the establishment of common European and EU immigration policies is conceivable in the current state of affairs. They conclude that European immigration policies are ‘channelled’ in the analysed countries’ national contexts and can only be understood if ‘we pay attention to national particularities’. (p. 242) For instance, British, French, Dutch and German immigration politics can only be comprehensively analysed if we bear in mind the colonial and post-colonial linkages, the active post-war labour recruitment movements, while in the case of the Southern European countries we must account for the importance of the informal economy in shaping irregular migration. Referring to Peixoto’s (2012) paper *‘Immigrants, markets and policies in Southern Europe: the making of an immigration model?’* the authors argue that ultimately two migration regimes can be identified in Europe: the Northern and the Southern models.

Convergence between the two regimes at the current state of affairs is not likely for two reasons. Firstly, migration patterns developed differently within these two models. Secondly, – and perhaps more importantly – for the sake of converging migration politics it would be crucial that Southern (as well as the Central-Eastern) economies catch up with their Northern counterparts. Without rapid economic growth and development in the South and East, the idea of a common migration policy remains only an over-ambitious vision.

The book of Geddes and Scholten fills a gap within the literature on European migration and immigration policy. On the one hand, the covered geopolitical regions (North-West Europe, Central-Eastern Europe and Southern Europe) enable a comprehensive and rich overview of the development of the European migration processes. On the other hand, the analysis clearly describes the synergies between the member states and the EU in the scope of developing and implementing migration policies.

András Éger (andras.eger1@gmail.com)

PhD Student, Covinus University of Budapest, Hungary

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Authors' Biographies

András Éger is currently a PhD student at the Doctoral School of Sociology at Corvinus University of Budapest. His main research interest includes labour migration, labour market integration of migrants and migrant network analysis.

Beáta Huszka is assistant professor at the Department of European Studies of ELTE U., Budapest; she completed her Ph.D. in international relations at the Central European U. in 2010; from 2013 to 2017 was leading work package six of FRAME Fostering Human Rights Among European Policies, a large-scale, collaborative research project funded under the EU's Seventh Framework Programme. She is the author of the book 'Secessionist Movements and Ethnic Conflict - The Development and Impact of Nationalist Rhetoric' published by Routledge in 2014.

Islam Jusufi, PhD, is currently Lecturer and Head of the Department of Political Sciences and International Relations at Epoka University, Tirana, Albania. He served as adviser to the President of Macedonia and to the European Union. He held fellowships at the Wilson Centre, Washington DC; EU Institute for Security Studies, Paris; ERSTE Stiftung, Vienna; Centre for Policy Studies, Budapest; and NATO, Brussels. His main research interests includes international, European and Balkan politics and security studies.

Adnan Kadribašić is a legal adviser and a human rights specialist. His main research interest includes human rights, gender equality, discrimination and rule of law development in countries in transition.

Zsolt Körtvélyesi (S.J.D., CEU; LL.M., Harvard) is assistant lecturer at the Department for European Studies of the ELTE Social Science Faculty, and junior researcher at the Institute for Legal Studies, Centre for Social Sciences of the Hungarian Academy of Sciences. His main research interests include human rights, comparative constitutional law, citizenship and minority protection.

Marek Mikuš (PhD - LSE, 2014) is a social anthropologist working on social, economic and political transformation in former Yugoslavia, in particular Croatia and Serbia. His current research project as part of the Research Group Financialisation at the Max Planck Institute for Social Anthropology (Halle, Germany) examines the boom, crisis, and ongoing social and political repercussions of household debt in Croatia since the 1990s. His research interests include economic and political anthropology, civil society, development, neoliberalism, public policy and the state.

Zsolt Zódi PhD is an associate professor in Corvinus University of Budapest, and research fellow at the Hungarian Academy of Sciences Centre for Social Sciences Legal Studies Institute. His main research areas are legal theory with a focus on judiciary, and regulatory issues of the information society.