



Kingdom of the Netherlands

Bridging the gap between formal processes and informal practices that shape judicial culture in the Western Balkan

Over the past few decades, the EU's role in promoting the rule of law in its external relations has been rapidly developing especially since the early 1990s and the initiation of the accession process with the former socialist countries of Central and Eastern Europe. While the methods employed to promote the rule of law in the accession process negotiations have been further developed throughout the years, the adoption of the "newest" methodology being the latest stage,¹ the EU's approach has still not been prone to substantive change. As a matter of fact, the so-called 'anatomical approach'² solely focusing on formal rules and institutions has led to circumstances under which frequently the outputs matter more than the outcomes and the means are more important than the ends.³ This has led to a lack of sustainability of judicial reforms and a decrease in the quality of justice. In essence, it appears that the EU had ignored that "a credible assessment of the state of the "Rule of Law" in a country must ultimately be informed by an investigation of cultural patterns as reflected both in general beliefs and in a specific behaviour."⁴

However, as of recently the European Commission has come to recognize this reality and weakness of its approach and addressed it in important documents by stating that strengthening the rule of law is not only an institutional issue, but it also requires societal transformation.⁵ As a matter of fact, the EC in its Communication on the EU enlargement policy in 2020 for the first time emphasized the importance of judicial culture and its transformation.⁶ As much as formal rules and institutions are highly significant, the sought after societal transformation has equally important informal rules and practices at its core. The latter becomes clearer if one takes into consideration that "[e]ven in the most carefully designed judicial systems, the informal norms and attitudes of judges may counteract or undercut formal protections and guarantees written into the judiciary's formal institutional rules."⁷ Therefore, for such transformation to be successful it needs to be adequately contextualized, something that the Commission's approach seems to be still lacking.

¹ D. Tilev, *The EU Enlargement Methodology: Enhancing the Accession Process*, IDSCS, March 2020.

² K. Nicolaidis and R. Kleinfeld, 'Rethinking Europe's 'Rule of Law' and Enlargement Agenda: The Fundamental Dilemma', SIGMA Papers No 49 (Paris: OECD Publishing 2012) p. 12-15.

³ K. Nicolaidis and R. Kleinfeld, 'Rethinking Europe's 'Rule of Law' and Enlargement Agenda: The Fundamental Dilemma', SIGMA Papers No 49 (Paris: OECD Publishing 2012) p. 14-15.

⁴ *Ibid.* p. 23.

⁵ European Commission, *A credible enlargement perspective for and enhanced EU engagement with the Western Balkans*, COM(2018) 65 final, 6.2.2018, p. 4.

⁶ European Commission, *2020 Communication on the EU enlargement policy*, COM(2020) 660 final, 6.10.2020, p. 6.

⁷ D. Beers, 'A Tale of Two Transitions: Exploring the Origins of Post-Communist Judicial Culture in Romania and Czech Republic' (2010) *Demokratizatsiya* 18, no. 1, p. 32.

For this purpose, the underlying idea and objective of the papers published through this project is to complement the Commission's process of vertical judicial Europeanization with an internal and horizontal initiative that would combine academic and practical approach in detecting and noting the main features and shortcomings of the judicial culture in Albania, North Macedonia and Serbia and outline recommendations for future steps in the Europeanization of the judicial culture. The main motivation for this type of research is the fact that while in Central and Eastern European countries there is a large body of research dealing with the judicial culture, the Western Balkans region has virtually no such research output in these topics. More specifically, the research dealing with the Central and Eastern European countries defines the features and tenets of the dominant judicial culture and clearly detects that many of them are to a certain extent a legacy or a remnant of the socialist legal tradition. The main features of the judicial culture in these countries are related to formalism, textual positivism, bound decision making, reluctance to accept constitutional values and direct application of constitutional provisions, high level of legislative deferral and political obedience, and absence of rational discourse. Detecting these features serves as bases for designing reforms and drawing proposal for the transformation of the respective judicial culture, something that is missing in the Western Balkans. Therefore, many aspects of the research will represent a comparison with the findings in the Central and Eastern European countries taking duly into consideration both the socialist legacy and the existing differences in the evolution and development of the legal and political systems of these regions and countries.

Placing the research in the context of European accession intends to establish the link with the main pillars and areas of EU-led judicial reforms in which the cultural component appears to be crucial for success. Accordingly, the project covers four judicial culture dimensions: (1) The role of judges in developing the law; (2) Judicial self-governance and the post-socialist judicial culture; (3) The role of the higher courts in securing uniform application of the law; and (4) The importance of judicial independence of individual judges.

Societal transformations are achieved only incrementally, thus legal education represents the realm through which judicial culture could be Europeanized and then influence the actual practice. Therefore, since legal education is crucial and formative for judicial culture, and at the same time the main vector for necessary adaptations in the process of Europeanization of the legal order, as recognized by the EU, the recommendations of this project would be primarily addressed to the respective institutions for the training of judges and should be implemented through their curricula and training programs. Taking into consideration that the academies for judges are one of the main institutional pillars of the EU's approach to judicial reforms, the conclusions and recommendations stemming from this research will essentially establish the link between the vertical and horizontal initiatives on the Europeanization of law and judicial culture.