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Legacy Issues and the Rule of Law in the Western Balkans: Slow Progress and Countless Obstacles

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Ana Marjanović Rudan – for the European Fund for the Balkans

Author:

Jovana Marović – Politikon Network

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Quick Summary:

- Although the ending of the long-lasting name dispute between Greece and North Macedonia has given a strong impetus to resolving the remaining bilateral disputes, there is still a large number of complex open issues in the Western Balkans and these issues have to remain high on the Berlin Process annual summits' agendas due to their specific format which is suitable for securing the commitment of the regional leaders.
- Tracking progress in solving the remaining bilateral disputes should gain new quality with reporting through an obligatory template developed during the last few months. Yet, new solutions have to be tested in practice and their suitability cannot be assessed at the moment. What is unquestionable is that the reports prepared based on this template have to be public.
- Mixed messages from the level of the European Union on the region's perspective and the EU's priority to be stronger in order to be bigger are not encouraging for the rule of law and thus the stability of the region.
- Reconciliation has been hampered by the unwillingness of Balkan leaders to take further steps in this process, but also lack of a stronger and more decisive approach from the EU level.
- Activities implemented by the Western Balkan countries under the EU conditionality have extremely limited influence on democracy and the rule of law. Last year saw no progress in tackling major problems while few of the instruments foreseen in the Western Balkans Strategy to help developments within these areas have advanced from the early stage.
- Since the European Union has also recognized the weaknesses of its mechanisms for influencing the rule of law in the Western Balkans, activities on their improvement have to be intensified.
- Thus, the think tank community in the Western Balkans believes that the EU should change its approach and use the enhanced instruments, primarily the Priebe style reports patterned as the results of the *ad hoc* mission in, at that time, Macedonia. The on-going initiative for a comprehensive monitoring of the rule of law in Bosnia and Herzegovina is promising, but such activities should be extended to all countries of the Western Balkans. Built on the binding and specific recommendations of such missions, a clear link between the other EU instruments should be shaped. Moreover, the EU should develop a mechanism at the supranational level to support the resolution of the bilateral disputes and foster progress in reconciliation. Decision-makers in the Western Balkans should present the outcomes and challenges in a simple and short way and fully open the reforms to citizens. They should also prioritize reforms and put the reconciliation process high on the agenda.

Relevance to Regional Reconciliation:

The rule of law is a prerequisite for the reconciliation. Strengthening the rule of law means that society has attained a certain degree of democratization and is ready to face legacy issues. In this sense, the judiciary is free from political influence to prosecute war crimes, institutions to officially recognize the victims and examine all the facts. Therefore, the recommendations presented in this paper for the rule of law (but also for other areas) are directly linked with the reconciliation.

List of think-tanks and organisations whose research and/or field reports were used for the preparation of this document:

1. Analitika, Sarajevo, Bosnia and Herzegovina
2. Balkans in Europe Policy Advisory Group (BiEPAG)
3. Belgrade Centre for Security Policy, Belgrade, Serbia
4. Centre for Investigative Journalism, Belgrade, Serbia
5. European Movement in Serbia, Belgrade, Serbia
6. European Policy Institute, Skopje, North Macedonia
7. Group for Legal and Political Studies, Pristina, Kosovo
8. Institute Alternative, Podgorica, Montenegro
9. Institute for Democracy and Mediation, Tirana, Albania
10. Institute for Democracy "Societas Civilis", Skopje, North Macedonia
11. Politikon Network, Podgorica, Montenegro
12. The Coalition for REKOM
13. Transparency, Belgrade, Serbia

Note: In the preparation of the part related to bilateral disputes, the findings and studies of the Balkans in Europe Policy Advisory Group (BiEPAG) were used as a primary source.

Background to the Topic:

Strengthening the rule of law and overcoming the legacy issues are at the very top of prerequisites that the Western Balkan countries have to fulfil in order to enhance their chances of becoming European Union member states, improve regional cooperation and preserve regional stability. However, the WB6 are only partially successful in these efforts. In explaining the problems facing the Western Balkans in these areas and defining guidelines, studies by NGOs from the region have been used, specifically those prepared during 2018 and 2019. The **findings and recommendations presented in this paper are the civil sector contribution in tackling the burning issues in the Western Balkans.**

Key Issues

The aim of this paper is to point out key issues that still stand in the way of resolution of bilateral disputes and progress in the process of reconciliation, and to explain how the weak rule of law affects these processes and why they are interconnected.

Issue 1:

Bilateral Disputes and the Poznan Summit Agenda: Looking for a new Format to Deal with them?

By pushing bilateral disputes into the centre of the Berlin Process at the first summit in 2014, the participating states¹ paid particular attention to the creation of a framework for reaching compromise between the Western Balkan states. By all means, the most significant achievement is the resolution of the nearly thirty-year long name dispute between Greece and North Macedonia. The resolution was influenced by the change of the Macedonian government and the readiness of the Greek leadership to finally remove this issue from the agenda. A strong EU message on not importing any open issues also helped.² Because of a large number of remaining open issues,³ the **bilateral disputes need to stay high on the Berlin Process agenda, with the constant improvement of monitoring and reporting tools** (both at the technical and ministerial level). Bilateral disputes have been the focus of this initiative from the very beginning⁴ and should remain one of the main topics in the future. Its format (summit at the highest level) should be further and more efficiently used for securing the commitment of the Balkans leaders taking into account that important steps concerning these issues, such as the Vienna Declaration⁵, or setting up meetings in Vienna and Skopje, were taken at the summits. It is still unclear whether bilateral disputes will be one of the main topics of the Summit in Poznan given that the meeting of foreign ministers in the framework of the Berlin Process⁶ has just been devoted to these issues. Moreover, bilateral disputes have not been announced as one of the main topics of the Poznan event.

Issue 2:

Unavailability of Information makes it hard for Interested Parties to Track Bilateral Disputes Resolution

In line with the envisaged dynamics from the London summit⁷ two meetings dedicated to bilateral disputes were held in Vienna and Skopje.⁸ The focus was on the reporting template and the timing of informing on progress in addressing these issues. Although the template should help in overcoming some of the technical issues, this mandatory form for reporting still needs to be tested in practice. Also, the interested parties have to be informed about the prepared reports. Monitoring of the bilateral disputes resolution has so far been extremely difficult due to a large scope of information that is not publicly available.⁹

¹ Germany, Austria, France, Italy, Slovenia, Croatia + UK, Poland, Greece are participating EU member states in the Berlin Process. In addition, six Western Balkan states (Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, Serbia) and representatives of the European Commission participate in the process.

² European Commission, (2018), *A credible enlargement perspective for and enhanced EU engagement with the Western Balkans*, Strasbourg, p. 7, https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf

³ Greece and Albania, number of challenging issues; Serbia and Croatia, territorial dispute; Croatia and Bosnia and Herzegovina, dispute over construction of Pelješac Bridge and dispute over the land border; Serbia and Bosnia and Herzegovina, border dispute; Serbia and Kosovo. Source: Djolai, M., Nečev, Z., (2018), *Bilateral Disputes Conundrum: Accepting the Past and Finding Solutions for the Western Balkans*, BiEPAG, <https://biepag.eu/bilateral-disputes-conundrum-accepting-the-past-and-finding-solutions-for-the-western-balkans/>

⁴ Nečev, Z., et al. (2018), *The Credible Enlargement Perspective for the Western Balkans through the lenses of the Berlin Process*, Institute for Democracy "Societas Civilis", <https://idscs.org.mk/wp-content/uploads/2018/07/Enlargement-Perspective2.pdf>

⁵ Which urged for more efforts into resolving outstanding bilateral disputes, *Final Declaration by the Chair of the Vienna Western Balkans Summit*, August 27, 2015, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/policy-highlights/regional-cooperation/20150828_chairmans_conclusions_western_balkans_summit.pdf

⁶ Held in April in Warsaw

⁷ *Joint Declaration on Regional Cooperation and Good Neighbourly Relations in the Framework of the Berlin Process*, London 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/724294/180710_WBS_Joint_Declarations.pdf

⁸ As well as a meeting of foreign ministers in Warsaw

⁹ Marović, J., comp. (2018), *Legacy issues in the Western Balkans*, Civil Society Forum of the Western Balkan Summit Series, https://wb-csf.eu/docs/Legacy_Issues.pdf.pdf

Issue 3:

Keeping Status Quo Jeopardizes Stability in the Region

Slow reconciliation, bilateral disputes and an unsatisfactory status of the rule of law are a constant threat to the stability of the region. Thus, **the European Union and the Member States have to perceive the stability in the region as a responsibility to steadily invest efforts in political and economic consolidation and reconciliation instead of keeping the *status quo*.** The resolution of bilateral disputes, as the EU itself has recognized, should be an important part of these efforts to preserve stability. Also the resolved bilateral disputes would have a positive impact on regional cooperation and integration in general. Moreover, different messages about Western Balkans' EU perspective, i.e. frequent indications of the need for the Union to strengthen before integrating new members are not encouraging for the resolution of bilateral disputes. Along these lines, the EU has a negative impact both on the status of the rule of law and the resolution of bilateral disputes in the region. **Instead of sending mixed messages, the EU should develop mechanisms at the supranational level to support the resolution of bilateral disputes and foster reconciliation (which would again be in line with the need to change the overall approach towards the Western Balkans).**

Issue 4:

Political will of the Regional Leaders for Reconciliation is Questionable

Unlike the bilateral disputes, where we have witnessed significant progress during the last year, the reconciliation process has for many years been stagnant. While the Western Balkans governments have to play a decisive role in establishing effective rule of law and of the regional commission for the establishment of facts and other serious violations of human rights committed in the former Yugoslavia between 1991 and 2001¹⁰ as a basis for the reconciliation, the EU should enhance mechanisms to support these processes (as envisaged under the Flagship Initiatives 1 and 6¹¹ aiming to strengthen the rule of law and to support reconciliation and good neighbourly relations in the Western Balkans within the last year's strategy for credible enlargement perspective for the Western Balkans).¹²

¹⁰ Kandić, N., et al. (2017), *Reconciliation through the Berlin Process: the role of REKOM*, the Coalition for REKOM, http://recom.link/wp-content/uploads/2017/11/Sazetak-politike-Pomirenje-kroz-Berlinski-proces-ulo-ga-REKOM-a-ff_24.11.2017..pdf

¹¹ See: European Commission, (2018), *A credible enlargement perspective for and enhanced EU engagement with the Western Balkans*, Strasbourg, https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf

¹² Marjanović Rudan, A., (2018), *Roadmap for REKOM*, the Coalition for REKOM, <http://recom.link/sr/sazetak-politike-mapa-puta-za-rekom/>

Issue 5:

Reforms Implemented by the WB6 under the EU Conditionality Policy have Limited Impact on the Rule of Law

Limited accountability, deeply politicized institutions, media manipulation, misuse of statistics and public resources,¹³ deficient human resources, lack of cooperation among law enforcement agencies¹⁴ are just some of the problems of the Western Balkans states, regardless of their level of advancement in the EU accession process.¹⁵ Corruption remains endemic in the Western Balkans governance and social-political culture. The number of amended laws and other regulations symbolizes the only progress achieved under the EU conditionality policy. On-going work on regulations in general has little influence on transparency. Opening up institutions and publishing information is not necessarily linked to obligatory steps prescribed by law, but rather to the willingness to make something available to the public. The more sensitive the issues, the more closed the institutions are. In other words the institutions, regardless of legal solutions, always find a way to keep the information from the public. Besides, a significant amount of information from the integration (negotiation) process is still not shared with the public.¹⁶ While both the EU¹⁷ and state institutions in the Western Balkans¹⁸ believe that the reporting process should be improved and simplified neither party modifies the form or reporting style.

The rule of law is also neglected within the Berlin Process framework. By having the rule of law on the summits and regional meetings agenda only from time to time, the contribution of this framework to democracy remains poor. The rule of law is a precondition for all other reforms and as such should be one of the goals of the Berlin Process.¹⁹

13 Čečen, B., et al. (2018), *When Law Doesn't Rule – State Capture of the Judiciary, Prosecution, Police in Serbia*, Transparency Serbia and Center for Investigative Journalism, <https://www.opensocietyfoundations.org/sites/default/files/when-law-doesn%27t-rule-20181009.pdf>

14 Hroni, S., (2018), *Curbing Political Influence on Anti-Corruption Agencies: The Case of Albania*, Institute for Democracy and Mediation, p. 1, <http://idmalbania.org/analysis-curbing-political-influence-on-anti-corruption-agencies-the-case-of-albania-2018/>

15 For more see: Abazi-Imeri A., Ivanovska A., (2018), *Sitting on the bench and marking: How effective? - Benchmarking in Macedonia*, European Policy Institute, [http://www.epi.org.mk/docs/Benchmarking%20in%20Macedonia\(1\).pdf](http://www.epi.org.mk/docs/Benchmarking%20in%20Macedonia(1).pdf); Analitika, (2018), *Monitoring and Evaluation of the Judicial System: Some Methodological Issues and their Implications for Measuring the Response of the Judiciary to Corruption*, <http://analitika.ba/sites/default/files/publikacije/Monitoring%20i%20evaluacija%20pravosudnog%20sistema%20-%20policy%20memo.pdf>; Rexha, A., (2018), *EU's Benchmarking Mechanism on 'Fundamentals First': Results and Challenges – Benchmarking in Kosovo*, Group for Legal and Political Studies, <http://www.legalpoliticalstudies.org/wp-content/uploads/2018/03/Benchmarking-MECHANISM-in-Kosovo-GLPS.pdf>

16 Bajramspahić, D., (2018), *Gaps in Reporting on Reforms in the Area of Rule of Law*, Institute Alternative, p.10, <https://institut-alternativa.org/en/gaps-in-reporting-on-reforms-in-the-area-of-rule-of-law/>

17 Ibid, p. 5

18 As well as the civil sector

19 Marović, J., (2018), *Western Balkans and the Rule of Law: How to solve a catch-22?*, Institute for Democracy "Societas Civilis", <https://idscs.org.mk/en/portfolio/western-balkans-rule-law-solve-catch-22/>

Issue 6:

Instruments currently at the EU disposal are insufficient to strengthen the rule of law in the region – incentives and sanctions may be a driving force

Punishment is Justice for the Unjust²⁰

As specified, the EU instruments for the rule of law are neither effective nor sufficiently developed, since they are not the result of a systemic approach but just the lessons learned from previous waves of enlargement.²¹ The EU still has no adequate tools to tackle certain key issues that are at the root of the problems of democracy in the region. Recognising the limitations of its approach so far, the European Commission has introduced flagship initiatives, specifically the flagship initiatives 1 and 6, but these still need to be developed in practice.

Furthermore, almost seven years after the start of accession talks with Montenegro, the EU has started to consider more radical measures that should affect the promotion of the rule of law, such as the initiative of the European Parliament Foreign Affairs Committee which links the worrisome state of the rule of law in the Western Balkans with the suspension of the pre-accession assistance. Such a move can be a driver for the rule of law in the region. However, it should be accompanied by improved monitoring, better assessment of the rule of law reform and precise guidelines. All these improvements will create a better framework for conditioning and precise mapping of the problems with a clear explanation how the country can “unblock” the pre-accession assistance. In addition to the need for concrete benchmarking, more precise reporting and more coherent linking of the existing tools is needed. One of the powerful instruments that proved to be successful in North Macedonia is the Priebe report²² and should be used for each of the Western Balkan countries.²³

If a set of negative measures (sanctions) is confirmed and applied, it can also be counterproductive in terms of turning Balkan autocrats away from the Union itself, since most of them are exclusively interested in the financial aspect of integration. However, abandoning the European agenda is a dangerous step, almost certainly leading to a loss of support and as such is risky for any political elite.²⁴ Therefore, the EU should insist on accompanying annual priorities for the Western Balkan countries by a set of positive (incentives) and negative (sanctions) measures. In that sense, a positive measure could be a detailed roadmap to full membership that would include step-by-step scheme and dates (including deadlines for opening and closing chapters)²⁵ for moving within the integration process if the annual priorities are met.

²⁰ St. Augustin

²¹ Marović, J., Prelec T., Kmezić, M., (2019), *Strengthening the Rule of Law in the Western Balkans: Call for a Revolution against Particularism*, BiEPAG, <https://biepag.eu/strengthening-the-rule-of-law-in-the-western-balkans-call-for-a-revolution-against-particularism/>

²² The group of experts led by the retired Commission Director Reinhard Priebe who had specific mandate in Macedonia “to carry out a rapid analysis of the situation and provide concrete recommendations on how to address the issues arising from the interception scandal”, *The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts’ Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015*, June 2015, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2017.09.14_seg_report_on_systemic_rol_issues_for_publication.pdf

²³ Pejić, J., Stojanović-Gajić, S., (2018), *Why Do We Need the Priebe Report As Well? How to Reverse the Trend of State Capture in the Western Balkans*, Belgrade Centre for Security Policy, <http://preugovor.org/Policy-Papers/1482/Why-Do-We-Need-the-Priebe-Report-As-Well.shtml>

²⁴ PIN, (2019), *When the rule of law is not working*, Politikon Network, <https://politikon.me/2019/02/09/when-the-rule-of-law-is-not-working/>

²⁵ Međak, V., et al. (2018): *Twelve Proposals for EU enlargement from the Western Balkans*, European Movement in Serbia, <http://www.emins.org/wp-content/uploads/2018/06/Twelve-Proposals-web.pdf>

Recommendations:

Decision-makers in the Western Balkans should:

1. Make a step towards presenting the results to the EU and the public through simple, brief and understandable way;
2. Open the reform process (including reporting on the bilateral disputes resolution) fully to the public. There are interested parties that can contribute to the process with their expertise and they could do it only if the process is completely transparent;
3. Act towards ensuring the rule of law and better regional cooperation having these goals as a value itself. Creation of the regional truth-telling commission should be an important step in showing willingness to achieve these values and respond to citizens' expectations.

The EU should:

1. Use the Priebe style reports throughout the region in order to better understand and present the problems faced by the states. Such reports should include binding recommendations. Mandate of missions established to prepare these reports should be case-specific and target-oriented. A clear link between mission reports, annual priorities and benchmarks has to be established. In other words, the conditionality policy has to be improved, monitoring and reporting mechanisms developed, while undemocratic practices and violations of the law should be directly highlighted;
2. Pair progress or lack of it with incentives or sanctions (such as the possible measure on temporary suspension of the pre-accession assistance in case of serious violations of the rule of law);
3. Develop mechanism at the supranational level to support the resolution of the bilateral disputes and foster progress in reconciliation (e.g. by developing the flagship initiatives 1 and 6 and the conditionality within the chapter 35 for bilateral disputes, with concrete benchmarks);
4. Combine the mechanisms within the enlargement process with the instruments under the Berlin Process. Therefore, the rule of law should be included as one of the Berlin Process goals, while the bilateral disputes and reconciliation process should be kept at the summit agendas.

EU member-states should:

1. Avoid negative messages about the Western Balkans perspective in the European Union;
2. Invest further efforts in political and economic consolidation and reconciliation of the region instead of keeping the *status quo*.

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