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Promoting the rule of law in Serbia. What is hindering the reforms in the justice sector?

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ABSTRACT

EU rule of law assistance relies on supplying institutional ties as well as economic and technical support to candidate states, complemented by a demand to comply with certain political conditions. But, the establishment of the rule of law is a complex and often long-term process that includes both different facilitating and inhibiting conditions. Since 2006 Serbian government has adopted the National Judicial Reform Strategy aiming to establish a legal system based on legal security and respect for the rule of law. Nevertheless, its judiciary sector still reveals serious difficulties, especially in what concerns the independence and efficiency of judiciary.

Looking at Serbian efforts to reform the rule of law and promote an independent judiciary, we analyse how the EU has been influencing these reforms and try to identify the weaknesses and strengths of EU rule of law assistance. Finally, we aim to contribute to know why judicial reforms, introduced by legislation, are not resulting in a truly judicial independence in Serbia, and what are the main obstacles to its effective implementation.

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1. Introduction

Although there is no internationally accepted definition of the rule of law, key elements generally include: non-discrimination and equality before the law, the hierarchy of norms, and the substantive coherence of the legal framework, the government is bound by law, the separation of powers, the independence and impartiality of the judiciary, and respect for human rights. The rule of law implies legality, regularity and consistency in the enforcement of the democratic order. It requires that the process of law-making be transparent and itself guided by law. All exercise of public authority must be regulated by and consistent with the constitution and the law. In this context, an independent judiciary to which all persons have free recourse must control the interpretation and application of laws.

The rule of law is a necessary ingredient for the sustainability of development of the strategies and policies. The engagement of economic and social agents in developmental processes is facilitated when actions by institutions are predictable and reliable. A country operates under the “rule of law” when it has: a legislature that enacts laws which respect the constitution and human rights; an independent judiciary; effective and accessible legal services; a legal system guaranteeing equality before the law; a prison system respecting the human dignity; a police force at the service of the law; an effective executive who is capable of enforcing the law and establishing the social and economic conditions necessary for life in society, and which is itself subject to the law.

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The EU gives assistance to candidate countries, such as Serbia, due to the belief that a strong judicial system has implications for sustainable growth and social stability. Nevertheless, the establishment of the rule of law is a complex and often long-term process that includes different facilitating and inhibiting conditions.

The research methodology employed in this article used a combination of existing data from primary and secondary sources, and face-to-face interviews with judicial system representatives (judges and judicial servants) in Belgrade. All interviews were conducted in the first half of 2015. The analysis of the data collected during the interviews enabled proper identification of shortcomings in judicial reforms in Serbia.

The article is divided in three parts. In the first part, we present a brief conceptualization of rule of law and its importance for the EU. This justifies the strong assistance that EU gives to candidate countries at this stage. In the second part, we analyse Serbia efforts to reform the rule of law and promote an independent judiciary in the last years, and question how the EU has been influencing these reforms, identifying in this process the weaknesses and strengths of EU rule of law assistance. Finally, in the third part, we aim to contribute to better understanding of why judicial reforms, introduced by legislation, are not resulting in a truly judicial independence in Serbia, what are the main obstacles to their effective implementation and what is hindering this process.

2. The European Union and the rule of law

The rule of law is a term that is often used but difficult to define. A frequently heard saying is that the rule of law means the government of law, not men. The rule of law has been used to mean a system in which governance is based upon neutral and universal rules. This basic statement emphasized three intertwined concepts: legal detriments should only be imposed by law, not on the basis of the personal will or arbitrary decisions of government or private actors (neutrality); government action should be subject to regulation by rules, and that government officials should not be above the law (universality); and people should be protected from private violence and coercion (governance) (Angelis and Harrison, 2003: 1–2). One precondition for the rule of law is a strong, independent, and accessible judiciary capable of holding the government accountable and providing redress for violations of the law.

Accordingly to Raz (1977: 196), there are certain principles by which the rule of law can be achieved. He characterized such principles as follows

all laws should be prospective, open and clear; laws should be relatively stable; the independence of the judiciary must be guaranteed; the making of particular laws ... must be guided by open, stable, clear, and general rules; the principles of natural justice must be observed (i.e., open and fair hearing and absence of bias); the courts should have reviewed powers ... to ensure conformity to the rule of law; the courts should be easily accessible, and the discretion of crime preventing agencies should not be allowed to pervert the law.

As Kleinfeld (2005) argued, it is possible to divide the definitions of the rule of law into two groups: those that emphasize the ends that the rule of law is intended to serve within society, for example, upholding law and order and, providing efficient judgments; and, those that highlight the institutional attributes believed necessary to actuate the rule of law, for example, well-functioning courts, comprehensive courts and well-trained enforcement agencies. For Kleinfeld, there are five basic principles which the rule of law is based upon: a government bound by and ruled by law; equality before the law; the establishment of law and order; the efficient and predictable application of justice; and the protection of human rights.

According to the Treaty on European Union (TEU), Article 2, the European Union is founded, above all, on rule of law, freedom, democracy and respect for human rights. These values are common to the Member States, but EU aspirant countries are also expected to advocate and respect them. The judiciary is an important factor for the fulfilment and respect for these values. The quality, transparency and efficiency of justice systems of EU candidate countries are important structural components for a sustainable track record in the area of rule of law and thus, are fundamental to the effective implementation of EU law. So, in the EU context, the national judiciary has a dual role. On the one hand, independent and impartial judiciary is one of the fundamental pillars of the rule of law, and thus of any functioning democracy, which is a prerequisite for accession to the EU. On the other hand, the national courts are one of the key allies of the European Union in the development and application of EU law. Moreover, rule of law principles are seen as positive factors for economic and market oriented development. Formal legal rules for the market, systematically enforced by judicial institutions regardless of the parties involved, contribute to making framework conditions for economic activities more transparent and reliable (Schlaeppli, 2008: 8). And this is particularly important in political and economic transition processes in post-communist countries.

The European Union puts a strong emphasis on the judiciary in the pre-accession and the accession process. According to the 2014 EU Enlargement strategy, strengthening the rule of law is central to the accession process. This new and more structured approach to accession negotiation was introduced in 2012 as part of the negotiation framework for Montenegro, and it rests on the principle that issues related to judiciary and fundamental rights (Chapter 23 of the *acquis*) and justice, freedom, and security (Chapter 24)

should be tackled early in the accession process and the corresponding chapters opened accordingly on the basis of action plans, as they require the establishment of convincing track records. The Commission would report regularly, at all stages of the process, on progress achieved in these areas along milestones defined in the action plans with, where

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