HOW TO BUILD COMMON FEATURES OF THE JUSTICE SYSTEMS IN CANDIDATE COUNTRIES AND EU MEMBER STATES / Marina Matić Bošković, Jelena Kostić

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Abstract: *The rule of law (Chapters 23 and 24 of the Acquis) is at the heart of the EU accession process. Given recent experience with backsliding on rule of law, the European Commission has firm expectations of countries that aspire to EU membership when it comes to compliance with EU principles relating to the judiciary, fundamental rights, and the rule of law. Areas of focus include improving judicial independence, both conceptually and functionally, and strengthening accountability and efficiency of judiciary. Judicial independence and integrity are under threat in several EU member states, including Hungary and Poland. Judicial crises in the EU jeopardize essential principle of mutual recognition in judicial matters and free movement of goods, services, people and capital. The recent decision of the Irish high judge to refuse to extradite a suspected drugs trafficker to Poland due to concerns about the integrity of the Polish justice system, re-confirms the relevance of the rule of law for the EU. These recent experiences will shape the future Commission approach to accession countries and how strict they should be in the implementation of EU acquis and standards.*

Key words: *the rule of law, common features, judiciary systems, Candidate Countries and EU Member States*

1 INTRODUCTION

The Rule of Law is at the core of the EU system. It means and requires the respect of legality, the equality of citizens, the legal certainty, the independence of the judiciary, the accountability of the decision-makers and the protection of human rights.

The rule of law is incorporated in the EU founding treaties and case law of EU Court of Justice. According to Article 2 of the Treaty of European Union, 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. Mentioned 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.

The European Commission, together with all other EU institutions is responsible under the Treaties for guaranteeing the respect of the rule of law as a fundamental value of our Union and making sure that EU law, values and principles are respected. The rule of law means that all members of a society – governments and parliaments included - are equally subject to the law, under the control of independent courts irrespective of political majorities.

According to article 47 paragraph 2 the Chapter of fundamental rights of the EU everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

The rule of law, chapters 23 and 24 of the acquis is at the heart of the European accession process. European Commission expectations of candidate countries are compliance with EU principles relating to the Rule of Law, Judiciary, Fundamental Rights and the Anti-Corruption. Areas of focus of Chapter 23 of accession negotiations are improving judicial independence, both conceptually and functionally, and strengthening impartiality, accountability, professionalism and efficiency of judiciary.

Since 2015, the Polish authorities have enacted a series of judicial reforms including the creation of new disciplinary procedures and oversight body for judges that have dramatically increased political oversight of the judiciary. Already in 2016 the European Commission triggered mechanism under the EU Framework to strengthen the Rule of Law to prevent further negative influence on rule of law in Poland and adopted 1st Rule of law recommendation 2016/1374.[1] In addition, judgement of the EU Court of Justice in Case C/216 PPU regarding the decision of the Irish high judge to refuse to extradite a suspected drugs trafficker to Poland due to concerns about the integrity of the Polish justice system, re-confirms the relevance of the rule of law for the EU. Same mechanism was triggered against Hungary in 2017 for concerns about the functioning of the country's institutions, including problems with the electoral systems, independence of the judiciary and the respect for citizens' rights and freedoms.[2] One of the problems in Hungary was the fact that the competences of the Hungarian Constitutional Court were limited as a result of the constitutional reform, including with regard to a budgetary matters, the abolition of the

[1] Commission Recommendation (EU) 2018/103 of 20 December 2017 Regarding the Rule of Law in Poland Complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, 2017 O.J . (L 17/50), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0103&from=EN.

[2] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2017/2131(INL). According to article 7(1) of the Treaty on European Union in a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply. According to Article 7(2) of TEU the European Union Council acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member States of the values referred to in Article 2., after inviting the Member State in question to submit its observations. In situations when a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.

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action popularis and other important issues. The Venice Commission expressed concerns about mentioned limitations and the procedure for the appointment of judges. Mentioned Commission made recommendations to the Hungarian authorities to ensure the necessary checks and balances in its Opinion on Act CLI of 2011 on the Constitutional Court of Hungary adopted on 19 June 2012 and in its Opinion on the Fourth Amendment to the Fundamental Law on Hungary adopted on 17 June 2013. During the 2018. The UN Human Rights Committee expressed concerns that the current constitutional complaint procedure affords more limited access to the Constitutional Court, does not provide for a time limit for the exercise of constitutional review and does not have a suspensive effect on challenged legislation.[3]

The Venice Commission in its Opinion of Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, adopted on 19 June 2012. Reports on 2015 made by GRECO urged the Hungarian authorities to take additional steps to prevent abuse and increase the independence of the prosecution service by removing the possibility for the Prosecutor General to be re-elected. In addition GRECO called for disciplinary proceedings against ordinary prosecutors to be made more transparent and for decision to move cases from one prosecutor to another to be guided by strict legal criteria and justifications.[4]

Noticed problems in Hungary was also regarded the conflict of interests and corruption. During the 2016 the Open Government Partnership Steering Committee received a letter from the Government of Hungary announcing its withdrawal from the partnerships. The Government of Hungary had been under review by Open Government Partnership since July 2015 for concerns raised by civil society organisations, in particular regarding their space to operate in Hungary. According to the Global Competitiveness Report 2017-2018, published by the World Economic Forum, the high level of the corruption was one of the most problematic factors for doing business in Hungary.[5] The problems was also identified in the following areas: privacy and data protection, freedom of expression, academic freedom, freedom of religion, freedom of association, right to equal treatment, rights of persons belonging to minorities, including Roma and Jews, and protection against hateful statements against such minorities, fundamental rights of migrants, asylum seekers and refugees and economic and social rights. Regarding the above mentioned issues the Council adopted the decision where proclaims that in Hungary exists a clear risk of a serious breach of the values on which the Union is founded and recommended that Hungary must take a necessary actions within the three months of the notification of Council Decision.

In its Resolution from January 16, 2020, the European Parliament note that EU's discussion with Poland and Hungary have not yet led these countries to realign with the EU's funding values, indicating that "the situation in both Poland and Hungary has deteriorated since the triggering of Article 7(1)".[6] These recent experience with EU member states and challenges in the negotiation process with candidate countries shaped a New methodology for the accession negotiations that was adopted on February 5, 2020. However, the application of the methodology will depend on rule of law progress in the member states

[3] Recital (8) and (9) of the European Parliament resolution of 12 September 2018.
[4] *Ibid.* Recital (19).
[5] *Ibid.* Recitals (22) and (24).
[6] European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary (2020/2513(RSP).

and genuine delivery of reforms in candidate countries to ensure irreversibility of the process.

2 THE PRINCIPLE OF MUTURAL RECOGNITION IN JUDICIAL MATTERS AND ITS ROLE IN JUDICIAL REFORMS

The strongest EU mechanism for the rule of law protection is described in the document *A new EU Framework to strengthen the Rule of Law*[7] from 2014. The Framework is used for future treats to the rule of law in the members states, before creation of conditions for activation of mechanisms envisaged in the Article 7 of the EU Treaty. It will be applied in the situation of systematic and negative influence on the integrity, stability and proper function of institution and protection mechanisms that guarantees rule of law. Based on this document, in the crisis European Commission has right to evaluate, provide recommendations and monitor member states. From the EU Framework to strengthen the Rule of Law it is clear that the European Commission refers to standards of the Council of Europe and Venice Commission, and content of the principles and standards of the EU Court of Justice, European Court of Human Rights and Council of Europe documents.[8] In parallel, during the procedure of assessment of existence of negative influence on the rule of law to the issuing of the Commission Opinion, this body continues dialogue with member state, Venice Commission, judicial councils, European Network of Judicial Councils, etc.[9] The method of functioning of this mechanism could be seen in reasoned opinion of the Commission in relation to the treats of violation of judiciary independence in Poland.[10]

European union is specially interested in the reform of judiciary, including reform of prosecution system, to ensure trust among the member states so that EU instrument of mutual recognition could be applied in each state, including new members. Mutual recognition is not fully new concept in the international cooperation, but in the EU it was developed to the different concept in which differences between legal systems do not present barrier for recognition. Mutual recognition is understood as concept of cooperation established on mutual trust and mutual understanding that rules and legal protection in all members states are at the same level.[11]

European Commission in its Communication COM (2000) 495 from 2000 on mutual recognition of final decisions in criminal matters stated that mutual recognition is "principle that is widely understood as being based on the thought that will another state may not deal with a certain matter in the same or even a similar way as one's state, the results will be such that they are accepted as equivalent to decisions by one's own state".

Mutual recognition in the context of criminal cooperation is mentioned for the first time at the European Council in Cardiff in 1998.[12] Council presidency adopted Conclusions and in point 39 emphasised relevance of the efficient judicial cooperation as part of fight against cross border

[7] A new EU Framework to strengthen the Rule of Law, Communication from the European Commission to the European Parliament and the Council, COM(2014) 158 final.

[8] *Ibid*., 4. At the same page the rule of law goals are listed: legal certainty, prohibition of arbitrariness of executive, independent and impartial courts, effective legal control, including respect of fundamental human rights, equality before courts.

[9] See: Annex 1 to 2 to the Communication from the European Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law.

[10] Reasoned Opinion to Poland regarding the Polish law on the Ordinary Courts Organisation.

[11] KLIP, A.: European Criminal Law – An integrative Approach, Intersentia, 2012, 362.

[12] SATZGER, H., ZIMMERMANN, F.: From traditional models of judicial assistance to the principle of mutual recognition: new developmnets of the actual paradigm of European cooperation in penal matters", In: BASSIOUNNI, C., MILITELLO V., SATZGER, H. (eds.), European Cooperation in Penal Matters: issues and perspectives, CEDAM, 2008, pp. 337–361.

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crime. While at the European Council in Tampere in 1999 it was agreed that mutual recognition will be corner stone of the judicial cooperation in civil and criminal matters. Mutual recognition presents basic concept of area of freedom, security and justice, since that is the only method to overcome challenges that are raised between national judicial systems. For development of mutual recognition necessary precondition is existence of high level of mutual trust among member states that are based on strict respect of high standards of individual rights protection in each of the member states.[13]

Purpose of these measures is improvement of efficiency and length of judicial cooperation, improvement of principle of mutual recognition among judicial systems of member states, as well as enabling cross border investigations and indictments through direct contacts among member states judges and prosecutors.

To understand concept of mutual recognition it is necessary to have in mind that principle of mutual recognition in criminal matters is accepted in order to avoid issue of criminal law harmonization within the EU.[14] Mutual recognition enables efficient cooperation among judicial systems despite differences in substantive and procedural legislation and ensures that members states keep sovereignty in this area. Based on this principle, EU was adopted program of measures that enable adoption of documents such as: Framework decision from 13 June 2002 on European arrest warrant.

The significance of the justice reform and organization of judiciary is also confirmed in the EU Court of Justice decision from June 2019 in the case Commission against Poland.[15] Although the Government of Poland insisted that organization of judiciary is exclusive jurisdiction of the member state and that EU institutions, including the Court of Justice, cannot questioned judiciary reform against EU standards, Court of Justice conclude that Poland took obligation to follow "common values from article 2 of the EU Treaty", including the rule of law. Court of Justice also stated that "although the organization of judiciary is within the member states jurisdiction", that does not mean that member states can violate EU acquis. When it comes to the Government of Poland argument that EU principle of the independence of judiciary can be applied only on situation that are regulated by the EU acquis, the Court of Justice referred to the previous decision of the Court[16] that national authorities must respect principle of the independence of judiciary also in the situation when national reforms of judiciary is not related to the application of the EU acquis. Article 19.1. of the EU Treaty relates to the national courts that may adopt decisions "on issues that relates to the application and interpretation of the EU acquis", which in line with the Court of Justice interpretation means that each national measures that influence on independence of judiciary is within the scope of application of the EU acquis.

In addition, on April 3, 2019, the European Commission announced an infringement procedure related to the judicial disciplinary reforms and concluded that the current disciplinary regime undermines judicial independence and did not meet EU standards.[17] On November 19, the EU Court of Justice released preliminary procedure decision regarding the independence of the

[13] OUWERKERK. J.: Mutual trust in the area of criminal law, in: BATTIES, H. BROUWER E., DE MOREE, P., OUWERKERK, J. (eds.), The principle of mutual trust in European Asylum, Migration and Criminal Law – Reconciling Trust and Fundamental Rights, Utrecht,: Forum, 2011, pp. 38-48.

[14] SUOMINEN, A.: The Principle of Mutual Recognition in Cooperation in Criminal Matters, Intersentia, 2011. p. 51.

[15] Case C-619/18.

[16] Case C-64/16 *Associação Sindical dos Juízes Portugueses*

[17] European Commission Press Release IP/19/1957, Rule of Law: European Commission Launches Infringement Procedure to Protect Judges in Poland from Political Control (April 2, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1957.

National Council of Judiciary and Disciplinary Chamber of the Supreme Court.[18] Although it made no authoritative conclusion on the independence of either of these bodies, instead choosing to send it to Polish Supreme Court to decide, it stressed that cases that fall within the exclusive jurisdiction of a "court which is not an independent and impartial tribunal" are precluded under the Charter of Fundamental Right of the European Union.

According to recital 10 of the Framework Decision 2002/584 the mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) Treaty of the European Union. In compliance with above mentioned article the European Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 december 2000, as adapted at Strasbourg, on 12 december 2007.

The high level of trust between Member States on which the European arrest warrant mechanism is based is thus founded on the premiss that the criminal courts of the other Member States – which, following execution of a European arrest warrant, will have to conduct the criminal procedure for the purpose of prosecution, or of enforcement of a custodial sentence or detention order, and the substantive criminal proceedings – meet the purpose of prosecution, or of enforcement of a custodial sentence or detention order, and the substantive criminal proceedings – meet the requirements of effective judicial protection, which include, in particulat, the independence and impartiality of those courts.

The existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph od Article 47 of the Charter of Fundamental rights is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effecto to that European arrest warrant, on the basis of Article 1 (3) of Framework Decision 2002/584.[19]

Bearing in mind the above mentioned the Irish court requested a Court of Justice of the European Union for a preliminary ruling in connection with the execution in Ireland, of European arrest warrants issued by Polish courts against the suspected drugs traficker.

On 2012 and 2013 Polish courts issued three European arrest warrants against the person concerned in order for him to be arrested and surrendered to those courts for the purpose of conducting criminal prosecutions, for trafficking in narcotic drugs and psyhotropic substances. During 2017 suspected person was arrested in Ireland on the basis ot European arrest warrant and brought before the referring court the High Court in Ireland. Than, he informed that court that he did not consent to his surrender to the Polish judicial authorities and was placed in custody pending a decision on his surrender to them.[20] The judge concerned that extradition of person concerned would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 of the European Chapter of Human Rights. He contends, that the recent legislative reforms of the system of justice in the

[18] Court of Justice of the European Union Press Release No. 145/19 (November 19, 2019), https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-11/cp190145en.pdf.

[19] According to article 1 (3) of the Framework Decision 2002/584 mentioned decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

[20] Paragraphs 14 and 15 of the Judgement of the Court of Justice of the European Union in Case C-216/18 PPU.

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Republic of Poland deny him his right to a fair trial.[21] Those situation changes fundamentally undermine the basis of the mutual trust between the authority issuing the European arrest warrant and the executing authority. That calling the operation of the European arrest warrant mechanism into question.[22] That Case ilustrates the impact of the judicial crisis in one Member States on muttual recognition in criminal law matters.[23]

3 EU ACCEESSION PROCESS AND REFORM OF JUDICIARY

EU member states, as well as EU accession countries, are facing with challenges to introduce European standards in organization of judiciary. As a result of these efforts the judicial reforms are implemented in line with EU acquis. Mechanisms of influence on organization of judiciary were more efficient in candidate countries through the negotiation procedure and monitoring of reform implementation. However, spreading of populist and authoritarian tendencies and jeopardizing of independence of judiciary had as a result that the EU institutions can apply specific mechanisms of influence on the EU member states when reforms they are implementing are violating European standards of independence and accountability of judiciary.

[21] According to Article 6 of the European Chapter of Human Rights, everyone has a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. That article also prescribed that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law and has the following minimum rights: to be informed promptly in a language he understands and in detail, of the nature and cause of the accusation against him, to have adequate time and facilities for the preparation of his defence, to defend himself in person or through legal assistance of his own choosing or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require, to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[22] Paragraph 16 of the Judgement of the Court of Justice of the European Union in Case C-21618 PPU.

[23] The Judgment of the Court of the European Union was only the step in the action peding before the national court. In this case Court ruled that *„where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) Treaty on European Union, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph od Article 47 of the Chapter of Fundamental Rights of the European Union, on acount of systemic or generalised deficiencies so far as concerns the independence of the issuing Memer State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for whish he is being prosecuted and the factual contect that form the basis on the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds believing that that person will run such a risk if he is surrendered to that State."* According to above mentioned article of the Framework Decision the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information.

EU enlargement is more than territorial increase. Enlargement incentivise creation of new politics, institutional organization of EU and influence on legal acts, both in EU member states and candidate countries.[24]

Organization of judiciary is part of EU negotiation process, specifically part of Chapters 23 and 24 of the negotiation.[25] Implementation of the EU acquis in these areas is requirement of accession negotiation and got central role during 2004, 2007 and 2013 enlargement, while judicial cooperation in civil and criminal matters is one of the requirements.

Characteristic of EU accession process is strong role of the EU that transposes EU acquis to third countries.[26] States that aspire to become EU members states are in obligation to adopt and implement EU acquis. Conditionality is methodology that is applied during accession process to ensure that new member states can absorb requirements incorporated in the EU acquis and implement obligations from the membership.[27]

During the EU enlargement to the East, the EU faced with the situation that countries in the transition, with different economic, political and social environment, are aspiring to become members. To address this challenge, the EU develop approach that was wider that simple requirement to harmonize national legislation with EU acquis.[28] European Council adopted in 1993 the Copenhagen criteria that included, among other requirement, stability of institutions guaranteeing democracy, rule of law, human rights and respect for and protection of minority rights, and functioning market economy and the ability to cope with competitive pressure and market forces within the EU. Copenhagen criteria were gradually developed and extended. As a result European Council organized 1995 in Madrid adopted conclusions where is stated that it is not sufficient condition to have political commitment of the candidate countries to adopted EU acquis, but they have to adjust administrative structures to guarantee efficient application of the EU acquis. When it comes to the rule of law, the EU policy developed over time. Countries that intends to join to the EU during negotiation process have to make sure that their judiciary is independent and impartial, which includes guaranteed access to justice, fair trial procedures, adequate funding for courts and training for magistrates and legal practitioners, while laws are clear, publicised, stabile, fair and protect human rights. In addition, candidate country government and its officials need to be accountable under the law and take a clear attitude against corruption.

Accession criteria existed in parallel with specific requirement that during accession process national legislation should be harmonized with EU acquis. These requirements were

[24] HILLION, C.: EU Enlargement, In: CRAIG, P., DE BURCA, G., (eds.), The Evolution of EU Law, Oxford, 2011. pp. 187–217.

[25] Chapter 23 relates to judiciary and fundamental rights. European standards in the Chapter 23 include strengthening independence, impartiality and professionalism in judiciary, enforcement of measures of prevention and fight against corruption and maintenance of high standards of protection of human and minority rights. Chapter 24 relates to justice, freedom and security. European standards include 11 areas thematic areas: external borders and Schengen system of migration, asylum, visa, police cooperation, fight against organize crime, fight against human trafficking, fight against terrorism, fight against drug, judicial cooperation in civil and criminal matters and custom cooperation.

[26] CREMONA, M.: The Union as a Global Actor: Roles, Models and Identity, In: Common Market Law Review, Vol. 41, 2004. pp. 555–573.

[27] SMITH, K. E.: Evolution and Application of the EU Membership Conditionality, In: CREMONA, M. (ed.), The Enlargement of the European Union, Oxford: University Press, Oxford 2003. pp.105–140.

[28] See: MATIĆ BOŠKOVIĆ, M.: Obaveza usklađivanja sa pravnim tekovinama Evropske unije, In:. ŠKULIĆ, M,, ILIĆ, G. MATIĆ BOŠKOVIĆ, M. (eds.), Unapređenje Zakonika o krivičnom postupku: de lege ferenda predlozi, Beograd: Udruženje javnih tužilaca i zamenika javnih tužilaca, 2015. pp. 149-158.

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used for evaluation of candidate countries to assess progress in implementation of EU standards.[29]

Countries that joined EU in 2004, faced with numerous challenges during '90s of XX century. The biggest challenge was the character of the EU acquis that was called "moving target". During '90s of the XX century the EU adopted significant number of EU acquis in the area of criminal law and judiciary. After terrorist attack from 11 September 2001 EU put criminal matters and judicial cooperation in this area as a priority, including application of mutual recognition and mutual trust among member states.[30]

However, shortcomings that existed in states that joined EU in 2004, influenced on the decision that new member states cannot automatically join to Schengen system. Intergovernmental mechanism was used for decision on full membership status to the Schengen system, which requires unanimously decision of all member states that new members fulfil membership conditions.[31] The article 39 of the Act on accession contained protection clause to include potential shortcomings in the application of the EU instruments in the area of mutual recognition in criminal matters in the new member states. The protection clause envisaged possibility for the Commission to temporary suspend provisions on judicial cooperation in criminal matters in case of shortcomings or risk. Period of validity of protection clause was three years and it has never been used.

Also during the next EU enlargement in 2007, when Bulgaria and Romania became member states, progress in the area of judiciary and internal affairs were closely followed and monitored.[32] European Commission Progress reports emphasized shortcomings of the progress in the area of judiciary and internal affairs, including lack of institutional capacities. The European Commission even questioned if countries would become members in 2007 as it was planned.[33]

European Commission emphasized in the reports on Bulgaria and Romania challenges in the area of judiciary and fight against corruption. To enable that these states become members in the planned timeframe, European Commission proposed additional security mechanism. In addition to protection clause in the Act on accession, the special mechanism to verify progress after accession was introduced. Two decision on establishment of mechanism of cooperation and verification of progress were adopted (OJ L 354, 14 December 2006) that introduce benchmarks in the area of judiciary reforms and fight against corruption.

Assessment of defined benchmarks for Bulgaria and Rumania reveals the method of EU influence on legislative amendments and institutional framework in these countries in the area of organization of judiciary. Rumania were obliged to ensure transparent and efficient court procedure, while Bulgaria needed to ensure guarantees of independence of judiciary through

[29] European Commission, White Paper – Preparation of the Associated Countries of Central and Eastern Europe for integration into the internal market of the Union, COM (95) 163 final.

[30] MITSILEGAS, V.: EU Criminal Law, Hart Publishing, 1st Edition, 2009. p. 284.

[31] MONAR, J.: Enlargement-Related Diversity in EU Justice and Home Affairs: Challenges, Dimension and Management Instruments, Dutch Scientific Council for Government Policy, Working Document W 112, The Hague 2000,
www.wrr.nl/fileadmin/nl/publicaties/DVD_WRR_publicaties_1972-2004/W112_Enlargement-related_diversity_in_EU_justice.pdf.

[32] BOZHILOVA, D.: Measuring Success and Failure of EU: Europeanization in the Eastern Enlargement: Judicial Reform in Bulgaria, In: European Journal of Law Reform, Vol. 9, 2007, pp. 285–319.

[33] European Commission, Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, COM (2006) 549 final, Brussels, 26 September 2006.

constitutional amendments and removal of ambiguity in relation to independence and accountability of judiciary system.[34]

Bulgaria and Rumania were obliged by Article 1 of the Act on establishment of mechanism of coordination and verification to report annually to the European Commission on progress in achieving benchmarks. The Commission had possibility to apply protective clause, including suspension of the member states obligation to recognize and enforce court decisions from Bulgaria and Romania if these two countries do not achieve defined benchmarks (article 7 of Preamble). However, the European Commission as a control and protection mechanism in case of Bulgaria and Romania used suspension of EU funds.[35]

Establishment of the verification mechanism, as *ex post* control after accession to the EU, represent the exception and requires extensive engagement of the European Commission. Experience with Bulgaria and Rumania in which significant shortcomings remain after accession to the EU, influence on the amendments of the Commission approach and introduction of practice that negotiation on Chapters 23 and 24 are open the first and close at the end of the negotiation process. This approach was used for the first time with Croatia that became EU member state in 2013. The same practice was applied in the case of Montenegro that opened accession negotiation in 2012 and Serbia that opened two years later.

The method of influence of the accession process on organization of judiciary in candidate countries, could be identified through the recommendations included in the Screening reports for Chapters 23 and 24, [36] as well as from the Action plans for these two chapters.[37] Screening report assessed the area of judiciary through four dimensions: independence of judiciary; impartiality and accountability; professionalism, competence and efficiency; and area of war crimes. For each of four dimensions the Screening report provides overview of legislative and institutional framework and compare it with the European standards. The Screening report contains recommendations to take additional activities to ensure complete independence of judiciary, impartiality and better efficiency.

The Screening report for Chapter 23 for Serbia listed following recommendations that influence on the organization of judiciary in Serbia: amendments of Constitution to improve independence and accountability of judiciary, including selection, promotion and dismissal of judges and public prosecutors, appointment of court presidents and introduction of mechanism for prevention of political influences; role of National assembly in the appointment of members of the High Judicial Council and State Prosecutorial Council could be only declaratory and composition of the Councils should be pluralistic. The Screening report recommendations influence on the constitutional position of judiciary, organization of public prosecution, hierarchical structure, procedure for selection of judges and prosecutors, relation between judiciary, executive and legislative branch, administration of judiciary and prosecution system and management over resources, etc. Republic of Serbia, specifically Ministry of Justice follows implementation of the Action plan for Chapter 23 and submits reports, while European

[34] TRAUNER, F.: *Post-accession compliance with EU law in Bulgaria and Romania – a comparative perspective*, European Integration online Papers (EIoP), Special Issue 2, Vol. 13, article 21, 2009. http://eiop.or.at/eiop/texte/2009-021a.htm.

[35] Commission report on the Management of EU Funds in Bulgaria, COM (2008) 496 final, Brussels, 23. July 2008.

[36] See: *Vodič kroz Izveštaj o skriningu za poglavlje 23 – pravosuđe i osnovna prava,* Beogradski centar za bezbednosnu politiku i Beogradski centar za ljudska prava, Beograd, 2015.

[37] Action plan for Chapter 23 is available at:
https://www.mpravde.gov.rs/tekst/9849/finalna-verzija-akcionog-plana-za-pregovaranje-poglavlja-23-koja-je-usaglasena-sa-poslednjim-preporukama-i-potvrdjena-od-strane-evropske-komisije-u-briselu-.php

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Commission prepares bi-annual reports: Annual progress reports on progress (each April) and Non-papers on Chapters 23 and 24 (each November).

The EU revised enlargement methodology from February 2020 is putting an even stronger focus on the core role of fundamental reforms essential for the EU path. Within this methodology the rule of law will become even more central in the accession negotiations, while progress on the fundamental reforms will determine the overall pace of negotiations.[38] It has to be seen how this revised enlargement methodology will be applied in the practice. Although the negotiation procedure has become stricter over the time, existing mechanisms were not sufficient to track real progress in the justice reforms. Most of the activities were focus on ticking the box and amendments of legislation, while independence and accountability of judiciary remain the problems in all candidate countries. In addition, countries that are members for more than decade are facing with reversible processes and violation of rule of law.

4 CONCLUSIONS

The rule of Law is very important for the functioning of the European Union and incorporated in the its founding treaties and Case Law of EU courts. That principle means the respect of legality, equality of citizens, legal certainty, the independence of judiciary, accountability of the decision-makers and the protection of human rights.

During the negotiations process candidate countries have to make sure that their judiciary is independent and impartial, which includes guaranteed access to justice, fair trial procedures, adequate funding for courts and training for magistrates and legal practitioners, while laws are clear and fair and protect human rights. Sometimes EU principles relating to the Rule of Law can be breach by member states. During the 2015 the Polish authorities have enacted a judicial reform including the creation of new disciplinary procedures and oversight body for judges that have increased political oversight of the judiciary. One year later the European Commission triggered mechanism to strengthen the Rule of Law in order to prevent further negative influence on the rule of law and adopted the Rule of law recommendation. The problems about the functioning of the country' s institutions, including problems with the electoral systems, independence of the judiciary and the respect for citizen' s rights have been noticed in Hungary in 2017. One year later European Parliament established a resolution on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded. However, two years later in Resolution from January 2020 the European Parliament note that the EU's discussion with Poland and Hungary have not yet led these to realign with the EU's funding values, indicating that the situation has deteriorated since the triggering of Article 7(1) of the Treaty on European Union. The crisis of judiciary systems in one country can jeopardize the principle of mutual recognition in judicial matters. That was a subject of the EU Court of Justice regarding the decision of the Irish high judge to refuse to extradite a suspected drugs trafficker to Poland due to concerns about the integrity of the Polish justice systems. The rule of law is also relevant for the free movement of goods, services and capital investments. Breach of the principles relating to the Rule of Law, Judiciary, Fundamental Rights and Anti-Corruption can have a negative impact on potential investments. Therefore,

[38] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Enhancing the accession process - A credible EU perspective for the Western Balkans, Brussels, 5.2.2020, COM(2020) 57 final, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enlargement-methodology_en.pdf

for each Member State of the European Union and Candidate Countries, strengthening and improving the mentioned principles is very important.

The judicial crises in few EU Countries had a great impact on revision of enlargement methodology in February 2020 which is putting a stronger focus on the core role of fundamental reforms essential for the EU path. It seems that the rule of law will become even more central in the accession negotiations and progress on the fundamental reforms will determine the overall pace of negotiations. We are sure that the future Commission approach to accession countries in the implementation of EU acquis will be stricter than before. In addition, for the Member States should be more than before important the compliance with the EU principles relating to the rule of law. That's not a supranational interest but interests of each Member State and its citizens.

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