



# Rule of law challenges in the Western Balkans

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## Question

*What are the main rule of law challenges in the six countries of the Western Balkans, and to what extent have external donor efforts to support reform been effective?*

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# 1. Executive Summary

The rule of law, in its most basic form, is based on the principles that society is governed openly and fairly according to widely known and accepted rules; that no one is above the law, including those in authority; and that justice is accessible to all (Bara and Bara, 2017, 24-25; Mavrikos-Adamou, 2014; Memeti, 2014). A country operates under “rule of law” when it has, among other institutions and services, a legislature that enacts laws in accordance with the constitution and human rights; an independent judiciary; effective and accessible legal services; and a legal system guaranteeing equality before the law (Gome, 2017). Both the quality of laws (clear, general, stable, coherent and enforced laws) and quality of the judicial system (capable, independent, accountable and impartial) are important to the rule of law (Mendelski, 2018).

Rule of law reform is a complex, expensive, and challenging issue, due to the heterogeneity of means, goals, opinions, agendas, and priorities of diverse stakeholders (Mendelski, 2018). Practitioners and legal experts have differed in their views and understanding of how rule of law can be established. International donors have also emphasised a wide range of issues to establish the rule of law, such as judicial capacity building (EU, USAID, and World Bank); respect for human rights and a fair trial (ECHR); countering corruption, judicial independence, impartiality and training (Council of Europe and EU); and law and order and minority rights (OSCE) (Mendelski, 2018). The vagueness of the concept of the rule of law can undermine the effectiveness of rule of law reforms (Ilievski, 2014).

Establishing the rule of law remains a key challenge in the Western Balkans. Progress in the region, while different across countries, is slow (Mendelski, 2018; Milošević and Muk, 2016). The rule of law criterion has emerged as one of the top priorities and key concerns in EU enlargement policies for the region (Elbasani and Šabić, 2017). The EU Commission’s new enlargement strategy emphasises that “the rule of law must be strengthened significantly” (EC, 2018). Strengthening the rule of law is not only an institutional issue, but also requires societal transformation in the countries and incorporation of particular fundamental values into daily culture (Hoxhaj, 2018).

This report discusses the key challenges faced by countries in the Western Balkans in the area of rule of law and the experience of relevant reform efforts. Given the breadth of this topic, the report is based on a review of literature published during the past five years. They comprise primarily of academic literature, NGO reports, and EC and US government status reports. There are very limited donor evaluations or discussions of particular projects and programming readily available. In addition, academic and NGO literature rarely refer to specific donor projects and programmes, but rather discuss reforms more generally. A key commonality in academic and NGO literature is the critique that donors have not paid sufficient attention in their reform efforts to issues of pervasive politicisation and historical legacies in the region that impinge on the current culture and environment. There has also been inadequate attention to the need for accountability. As such, reform progress can be constrained. In some instances, reforms may even produce negative unintended consequences, such as by pushing for strong, independent judicial councils, when members are still politicised and subject to political influences.

The topics and challenges that receive the greatest focus in the literature are judicial independence and corruption. Other challenges that receive substantial attention are judicial efficiency; war crimes prosecution; media freedom and protection; minority protection; and asylum frameworks. These will be discussed first on a regional basis, based on literature that covers the region as a whole, followed by findings from country-specific literature.

**Judicial independence:** The judicial systems of the Western Balkans are adversely affected by politicisation of the judiciary, undue influences and judicial corruption (Anastasi, 2018; Taleski et al., 2016). The establishment of an independent judiciary has been one of the key reform priorities in EU accession processes (Bobek and Kosar, 2014). An extensive study on monitoring and evaluating the rule of law in the region finds, however, that there is no significant progress regarding independence (Milošević and Muk, 2016). Institutional reform has often been limited to promoting judicial councils, which are typically independent intermediary bodies, designed to insulate the functions of appointment, promotion and discipline of judges and other judicial staff from partisan political processes (Takacs, 2018; Bobek and Kosar, 2014). Judicial academies, heavily promoted by the EU, have also been established to improve the quality of judicial education and judicial effectiveness and efficiency (Ilievski, 2014). The introduction of “strong” judicial councils and academies, however, without adequate internal reform (e.g. transformation of culture, political maturity, clarity on separation of powers) has led to the emergence of new channels of political interference, resulting in the persistence of dependent judges. There has thus been continued political influence in the operation of the judiciary, particularly in the case of appointments, promotions and case allocation (Takacs, 2018; Imeri et al., 2018; Fagan, 2016; Bobek and Kosar, 2014). Attention to judicial accountability, which acts as an effective “check and balance” to judicial independence, is essential, but has received much less attention until very recently (Anastasi, 2018; Taleski et al., 2016; Bobek and Kosar, 2014). In its absence, granting judges from the socialist period too much independence, can enable threats from internal and external actors (Preshova et al., 2017; Fagan, 2016).

**Judicial efficiency:** Many years of neglect and underinvestment have undermined judicial efficiency and access to justice in the Western Balkans (Hoxhaj, 2018). In most countries, there are long court delays and a high backlog of cases (Hoxhaj, 2018; Imeri and Ivanovska, 2016). Digital case management systems, including audio-visual recording and transcription of court proceedings, could make courts more transparent and easier to access. They can also reduce corruption and increasing public confidence in the judicial process (Hoxhaj, 2018).

**Corruption and organised crime:** Systemic corruption and organised crime are persistent problems in all Western Balkan countries, despite successes in strengthening relevant legal frameworks and setting up anti-corruption institutions (Čeperković and Gaub, 2018; EPSC, 2018; Sanfey and Milatovic, 2018; Ciero, 2016). Curbing overarching politicization in the region is essential to countering corruption effectively, alongside technical reforms (Milošević and Muk, 2016). While corruption undermines the functioning of the judiciary, the lack of independence of the judiciary also undermine adequate processing of corruption cases (Imeri et al., 2018; Ungar, 2017; Imeri and Ivanovska, 2016). There is a consistently poor track record of prosecuting and punishing corruption and organised crime, particularly among high-level officials (Imeri et al., 2018; McDevitt, 2016). This is due in large part to political interference, inadequate institutional capacities, and lack of institutional cooperation (McDevitt, 2016; Imeri and Ivanovska, 2016).

**War crimes prosecution:** Past and ongoing approaches to the prosecution of war criminals in the region have been piecemeal, failing to dismantle powerful structures of impunity (Ungar, 2017). With the termination of the International Criminal Tribunal for the Former Yugoslavia (ICTY), it is now solely up to the states themselves to continue with prosecutions. Apart from Bosnia and Herzegovina (BiH), where there is some limited progress with local prosecutions, other countries are falling short (Ungar, 2017). Factors behind failures in effective prosecution include: lack of political will; ethno-religious tensions; politicised media; and inadequate resources and capacity. Further, Ungar (2017) emphasises that such prosecutions have clear

limitations in terms of dealing specifically with individual criminal responsibility, rather than with changes in ideologies. The EU accession process provides an opportunity to reframe discussions around justice, to re-evaluate the meaning of reform and how it can be more effective in fighting impunity.

**Media freedom and protection:** Given the absence of strong horizontal accountability in the region, it is even more critical that media has the capacity and freedom to hold political actors to account (McDevitt, 2016). Media freedom has deteriorated in recent years, however, characterised by political interference; corrupt ties between officials and media owners; tight government control; non-transparent public funding of media and financing of pro-government media; and intimidation of or violence against journalists. This results in (self-) censorship (Imera et al., 2018; Imeri and Ivanovska, 2016; McDevitt, 2016; Milošević and Muk, 2016).

**Minority protection:** While legislative frameworks, strategies and action plans for protection against discrimination have been adopted across the region, implementation has been poor. This is due to lack of institutional capacities; poor understanding of the issues and how the law is supposed to be implemented; and absence of political will (Imeri et al., 2018; Imeri and Ivanovska, 2016). There have been persistent shortcomings, particularly with regard to discrimination against the Roma community and hostility towards the LGBTI community. Data on discrimination cases registered with official institutions is scarce and non-systematized, which hinders a quantitative overview of the situation throughout the region (Imeri et al., 2018).

**Asylum framework:** Thousands of people have been trapped in Western Balkan countries that lack the capacity to provide functioning asylum systems (Imeri and Ivanovska, 2016). The human resources and capacities of reception centres have yet to be increased (Imeri et al., 2018). Given the complex nature of the necessary reforms, however, establishing an effective asylum and migration framework is recognised as a long term process (Imeri and Ivanovska, 2016).

### Factors affecting rule of law reforms

**Historical legacies**, such as the legacies of communist judicial culture and civil war, play a role in a country's degree of compliance with judicial reform and entrenchment of the rule of law (Mendelski, 2018; Čavalić and Gajić, 2017; Preshova et al., 2017). Western Balkan countries historically did not have much experience with political entities that provided sufficient rule of law (Čavalić and Gajić, 2017). Thus, the "European model" is based on assumptions and preconditions relating to a certain legal and judicial culture and mentality that is not necessarily present, likely limiting the success of reforms (Preshova et al. 2017). A further key challenge in the Western Balkans is the **failure of political elites to commit** to the implementation of rule of law standards (Imeri et al., 2018; Milošević and Muk, 2016). The **politicisation** and instrumentalisation of new laws, reforms and public institutions are critical challenges in the region (Mendelski, 2018; Mendelski, 2016). In addition, Mendelski (2016) finds evidence that many of the EU's reformist change agents from the Western Balkans can also be obstructionist. Curbing overarching politicisation in the region is thus a key precondition to the establishment of the rule of law (Milošević and Muk, 2016) and for greater success in internationally-led campaigns (Elbasani, 2018a). However, progress has generally been more technical rather than directly focusing on politically sensitive issues (Elbasani, 2018a). Scholars advocate for a **"fundamentals first" approach**, with better attention to impartiality, such as independence and separation of power (Elbasani, 2018a; Šabić, 2018; Milošević and Muk, 2016). Similarly, a key identified problem with the EU's rule of law reforms is its quantitative approach, which follows a "the more the better" mindset in the assessment of the rule of law, rather than focusing on the

qualitative reform processes (Mendelski, 2016). **Quantitative and technical approaches** can not only limit impact on the ground, but also create perverse incentives and superficial outcomes. Mendelski (2018; 2016; 2014) finds that EU-driven rule of law reforms often contribute substantially to improvements in judicial capacity and substantive legality, but with adverse consequences on judicial impartiality.

### **Insufficient knowledge & evidence**

Despite years of research, it remains unclear whether and under which conditions rule of law promotion and judicial reform (as advanced by the EU and international donors) establishes or undermines the rule of law (Mendelski, 2018). Most literature on the rule of law in Central and Eastern Europe proposes arguments and findings which remain restrictive and incomplete. In order to broaden the theoretical and methodological lens through which external rule of law promotion and reform can be analysed, more comprehensive and integrated explanations combining different methodologies, approaches, and literatures is required (Mendelski, 2018).

Further, Mendelski (2018) argues that the EU lacks a well-elaborated methodology, sufficient to allow a consistent and objective evaluation of the rule of law. Most relevant studies are qualitative in nature and restricted to findings from single cases or geographically restricted regions, thus offering restrictive, non-generalisable insights about rule of law development in the region. There is a need for more systematic comparative studies with a larger number of cases that would help to determine why some countries are able to establish rule of law and others not (Mendelski, 2018). At the same time, Anastasi (2018) states that while a comparative analysis of rule of law reforms is an effective way to make conclusions and suggestions, transferring measures from one country to another, without sufficient analysis, can be detrimental.

In addition, since the rule of law can mean different things to different scholars and practitioners, it can also be measured through different methods. This can contribute to different evaluations of the rule of law in a particular country (Mendelski, 2018). Assessments of the rule of law are often conducted narrowly and unsystematically, focusing on the quality of the judiciary, such as empowerment of the judiciary. This has resulted in some cases in the existence of independent but unaccountable judiciaries, judicial councils and constitutional courts (Mendelski, 2018).

## **Country summaries**

### **Albania**

The judicial system in Albania continues to be affected by a high degree of political influence. Political interference in appointments within the judiciary and lack of oversight mechanisms persist (Anastasi, 2018; Elbasani, 2018; Elbasani and Šabić, 2017; McDevitt, 2016; Mavrikos-Adamou, 2014). The Albanian School of Magistrates suffers from inadequate budgetary allocations and training resources; and political influence in its management (Mitrushi, 2018; Fagan and Sircar, 2015). Implementation of the vetting law, involving re-evaluating all judges and prosecutors, has begun (EC, 2018a; US DOS 2018a). While the EC (2018a) has commended the resignation of members of the judiciary, Xhepa (2018) finds that vetting processes can also have adverse consequences. In the case of the Constitutional Court, for example, the re-evaluation of judges found that seven out of nine proved to be inadequate, rendering the Court unable to function (Xhepa, 2018). Court management in Albania remains poor, with insufficient human and material resources, long delays in conducting judicial proceedings, and a high backlog of cases (Mavrikos-Adamou, 2014). Random allocation of

cases and the adoption of digital recording technology could improve the efficiency and transparency of court proceedings (EC, 2018a; USAID, 2015). High levels of corruption are pervasive in all branches of government (Mitrushi, 2018; US DOS, 2017a). The country has made some progress, notably with the legal framework, and is in the process of establishing a chain of specialised anti-corruption bodies (EC, 2018a). However, the number of convictions of officials engaged in corruption or organised crime remains low (EC, 2018a; US DOS, 2018a). Independent media in Albania is active and able to express a wide variety of viewpoints (US DOS, 2018a). Media still faces challenges, however, including political pressure, resource constraints, and threats and violence against journalists – contributing to self-censorship (Mitrushi, 2018; US DOS, 2018a). There are no indications of any prosecutions or convictions for such violence (McDevitt, 2016). The government has recently adopted new legislation on minorities, which provides official minority status for nine national minorities. There are continued allegations of discrimination against members of the Romani and Balkan-Egyptian communities, including in housing, employment, health care, and education (US DOS, 2018a). While Albania has in place a law on asylum, there are reports that authorities did not follow due process obligations for some asylum seekers and that the system lacked effective monitoring (US DOS, 2018a).

### **Bosnia and Herzegovina**

BiH has a stringent legal framework to ensure independence of the judiciary and prosecutors. The establishment of the High Judicial and Prosecutorial Council (HJPC) has been the key focus of EU assistance. There are continuing concerns, however, about political interference in the judiciary, particularly in the case of judicial appointments, transfers and removals (Hrasnica and Ramić-Mesihović, 2018; McDevitt, 2016; Fagan, 2016; Fagan and Sircar, 2015). Vetting measures have had a mild effect, partly restoring public confidence in the judiciary (Maxhuni and Cucchi, 2017). A reduction in the backlog for pending court cases has improved efficiency of the judiciary (Milošević and Muk, 2016); however, the backlog remains a persistent obstacle (EC, 2018b). Reforms have yet to adequately improve budgeting, training and capacity building in the judiciary (Hrasnica and Ramić-Mesihović, 2018; Fagan and Sircar, 2015). Corruption and organised crime remains widespread, despite progress with establishing a legal framework, strategy and action plan (EC, 2018b). Jurisprudence on corruption-related offenses is not harmonized; and the number of officials convicted of abuse of office and corruption is minimal (BTI, 2018b; OSCE, 2018). BiH has continued to implement the national war crimes strategy objectives, which include tackling the backlog of cases (EC, 2018b). There have been weaknesses in implementation, however, including greater attention to indictments of low-level perpetrators rather than those who were leaders or held command responsibility (Korner, 2016). Most media outlets in BiH are dependent on and controlled by the ruling elite and powerful oligarchies. Threats and attacks against journalists and media workers do not receive adequate follow up by relevant police and judicial authorities (EC, 2018b; (Hrasnica and Ramić-Mesihović, 2018). BiH's legal framework for protection of minorities has not been adequately enforced (US DOS, 2018b). Members of minorities continue to experience harassment and discrimination in various sectors (Hrasnica and Ramić-Mesihović, 2018; US DOS, 2018b). The asylum and international protection system in BiH is largely in line with EU and international standards (Hrasnica and Ramić-Mesihović, 2018).

### **Kosovo**

The independence of the judiciary continues to be undermined by undue political influence and high levels of corruption, despite legal safeguards on independence and impartiality and the

establishment of judicial and prosecutorial councils (BTI, 2018c; EC, 2018b). Vetting has resulted in re-evaluation of judges and prosecutors, but has not had lasting effects in the judiciary, evident in the persistence of judicial dependence, high level of corruption and lack of efficiency (Maxhuni and Cucchi, 2017). Administration of justice in Kosovo is slow and inefficient, with a large backlog of cases and inadequate physical, technical and financial resources (BTI, 2018c). The task of prosecuting war criminals has recently been left entirely to local prosecutors. There are concerns, however, that they lack sufficient capacity to deal with the cases (EC, 2018c; Ungar, 2018). Despite the existence of an anti-corruption legal framework and various efforts to tackle the problem, there are minimal concrete results (BTI, 2018c; EC, 2018c; Roxcan, 2018). Institutional overlap in anti-corruption efforts has resulted in confusion and susceptibility to manipulation (McDevitt, 2016). Local judges and prosecutors are often reluctant to take on cases of high-level corruption and organised crime, due to physical threats and fear of job loss (Dursun-Özkanca, 2018). There are thus very few convictions (EC, 2018b; Roxcan, 2018; US DOS, 2018c). Growing financial difficulties of media outlets, and an increase in the number of threats and attacks against journalists, have the potential to undermine the editorial independence of media outlets (EC, 2018c; US DOS, 2018c). There is minimal follow-up in the case of such attacks, with lack of thorough investigation and few final verdicts (Roxcan, 2018). Ethnic minorities and LGBTI groups have experienced varying levels of institutional and societal discrimination in various sectors (BTI, 2018c; US DOS, 2018c). Access to justice for non-Albanian communities, particularly for Kosovo Serbs and displaced persons, remain a concern (US DOS, 2018c). In the case of migration, staff involved in asylum applications require training in order to more effectively implement the law on asylum (Roxcan, 2018).

## **Macedonia**

Despite the adoption of the structural preconditions for judicial independence (legal framework, judicial councils and academies), political intervention and influence in judicial decisions are common (BTI, 2018d; Priebe report, 2017; Preshova et al., 2017; Jordanova and Dimovska, 2016; McDevitt, 2016; Taleski et al., 2016; Fagan and Sircar, 2015). Wiretapped conversations, which emerged in late 2015, revealed that the executive has complete control over the judiciary, particularly with regard to appointments and promotions (Priebe report, 2017; Priebe report, 2015). This indicates that the judiciary was not ready for such a high level of self-government in the form of the judicial council (Preshova, 2018; Preshova et al., 2017). After the change of Government in June 2017 (and change in political climate), there has been a slight improvement in respecting merit-based principles in judicial appointments (Imeri and Ivanovska, 2018). The efficiency of the judiciary in Macedonia has improved, in terms of reduction in case backlogs. Corruption remains prevalent, with little concrete results in practice (BTI, 2018d; US DOS, 2018d). While there is a track record of investigations, prosecutions and convictions on offences committed by low-level officials, this is limited progress with high-level corruption (EU, 2017; Jordanova and Dimovska, 2016). The media continues to be undermined by perceptions of political affiliation and influence. While intimidations, threats and violence against journalists are reported, there is a climate of impunity (Priebe report, 2017). There has, however, been a recent decline in pressure on journalists with the change in political climate. Vulnerable groups (i.e. the Romani, some ethnic minorities and LGTBI persons) are frequently subject to discrimination, denial of basic liberties, and violence (BTI, 2018d; US DOS, 2018d). There are few arrests, however, and failure of the government to condemn discrimination against the LGBTI community (US, DOS, 2018). The Law on Asylum is largely harmonized with the EU, however the UNHCR finds weaknesses in the mechanism for adjudicating refugee status (Imeri et al., 2018; US DOS, 2018d).

## Montenegro

Despite the adoption of a legal framework and the establishment of new institutions, significant changes in judicial practice have yet to occur (BTI, 2018e). Attempted political interference, including by authorities internal to the judiciary, is a key concern (EC, 2018e). The capacities of the judicial and prosecutorial Councils have improved, indicated by the recruitment of judges and prosecutors under the new system and implementation of the new IT strategy (EC, 2018e). The promotion system has yet to be implemented however, and a track record of disciplinary responsibility is still lacking (EC, 2018e). While there has been some progress with tackling corruption, it remains prevalent (EC, 2018e). While the government has yet to fully implement the law prescribing criminal penalties for corruption (US DOS, 2018e; McDevitt, 2016), there has recently been limited progress in establishing an initial track record of investigation, prosecution and final convictions in high-level corruption cases; and in organised crime prosecutions involving smuggling of migrants and drug trafficking (EC, 2018e). Such progress is due in large part to the greater pro-activeness of the Special Prosecutor's Office (SPO) (BTI, 2018e; Milošević et al., 2018). The SPO and the Anti-Corruption Agency still face various challenges in their work, however (EC, 2018e; Vavić et al., 2016). Institutional capacity to ensure freedom of expression and media protection remains weak (Vavić et al., 2016). There are limited investigations into cases of violence against journalists, and new cases continue to emerge (EC, 2018e). This is despite the establishment of the Commission for Monitoring Competent Authorities in Investigating Cases of Intimidation and Violence Against Journalists in 2014 (Milošević et al., 2018). Implementation of the anti-discrimination legislation also remains weak (EC, 2018e). The Roma minority are still particularly vulnerable and subject to discrimination, in addition to Albanians and Bosniaks in certain parts of the country (BTI, 2018e; EC, 2018e; US DOS, 2018e). In the case of asylum, decisions on whether to accept refugees in Montenegro are often purely political, with the government deciding whether to accept refugees (Vavić et al., 2016).

## Serbia

While Serbia has made progress in the Europeanisation of judicial independence, various problems persist. The current reforms encourage separation of powers, but this has not been implemented (BTI, 2018f; EC, 2018f; Gome, 2017). While judicial and prosecutorial councils have continued to build their capacity, they have yet to fully assume their role due to legislative and administrative delays (EC, 2018f). Political interference with the councils' appointments and promotions continues, with limited progress toward a transparent, merit-based system (BTI, 2018f; EC, 2018f; Elek et al., 2016; Milošević and Muk, 2016). The Ministry of Justice also holds much control over the composition of the academy (Fagan, 2016). The judiciary's vulnerability to influence makes it risky to remove external oversight and to grant the judiciary full independence (Fagan and Sircar, 2015). In the absence of an enabling culture and environment, the situation in Serbia is considered by some to have worsened with the establishment of a judicial council (Bošković, 2015). The current government has failed to design a comprehensive vetting process, due in large part to a lack of political will (Maxhuni and Cucchi, 2017). Judicial efficiency is undermined by a large backlog of cases; inadequate levels of competence; a high level of bureaucracy and red tape; and unchecked procedural abuses (Gome, 2017; Elek et al., 2016; World Bank, 2014). Access to justice is also hindered by high legal fees; lack of an efficient free legal aid system; and delays in case processing (EC, 2018f; World Bank, 2014). Corruption and organised crime remain serious and widespread problems (EC, 2018f; Ciero, 2016). Serbia has established the legal and institutional framework to fight organised crime, corruption, abuse of

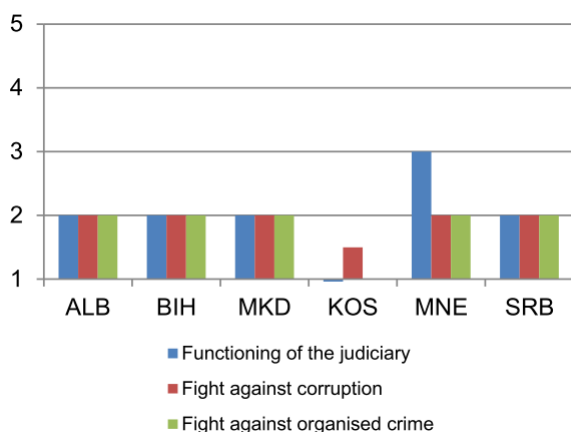


power and other corrupt practices, including action plans and more recently the introduction of whistle-blower protection (BTI, 2018f). Various challenges remain, including: lack of sufficient capacities; lack of transparency in decision-making processes; and lack of institutional cooperation (Ciero, 2016; McDevitt, 2016). There is a limited track record of investigations, indictments and final convictions in corruption cases involving high-level public officials and in cases of organised crime (BTI, 2018f; EC, 2018f; McDevitt, 2016). There have been various challenges in carrying out war crimes prosecutions in Serbia, including delays in publishing the strategy and in appointing staff; and public statements about trials by the executive (EC, 2018f; McDevitt, 2016). There has been backsliding in media freedom and protection, with reports of various forms of government pressure and attacks against journalists, with few convictions (EC, 2018f; Huska, 2018; Marić and Bajić, 2018; US DOS, 2018f; Elek et al., 2016). The Romani experience the greatest level of discrimination of any ethnic minority in Serbia (BTI, 2018f; US DOS, 2018f; Elek et al., 2016). Other marginalised groups include LGBTI persons, persons with disabilities, and victims of gender-based violence. Despite a strong legislative framework and corresponding institutions in place to prevent such discrimination, there are inadequate levels of staff and substantial knowledge gaps (Marić and Bajić, 2018). While the EU and the EC praised Serbia's performance during the 2015-16 refugee crisis, there are key problems with the asylum system. These include: deficient implementation of legal provisions; slow and ineffective asylum procedure; lack of human resources; and inadequate knowledge and skills of the existing staff (Imeri et al., 2018; Marić and Bajić, 2018).

## 2. Regional challenges

Establishing the rule of law remains a key challenge in the Western Balkans. Progress in the region, while different across countries, is slow (Mendelski, 2018; Milošević and Muk, 2016). The rule of law criterion has emerged as one of the top priorities and key concerns in EU enlargement policies for the Western Balkans (Elbasani and Šabić, 2017). The countries in the region are in different stages of the EU integration process. Weakness in rule of law is a common obstacle towards faster integration (Marović, 2018). The World Bank’s Worldwide Governance Indicators show that the largest gap between the Western Balkans and EU member countries lies in the rule of law (see Sanfey and Milatovic, 2018). The World Justice Project Rule of Law index (2018) also indicates that the Western Balkans experiences weaker rule of law than members of the European Union. European Commission progress reports in the areas of rule of law (functioning of the judiciary, fight against corruption and fight against economic crime) demonstrates that the countries in the Western Balkans operate largely based on (2) some level of preparation. There are also some scores of (1) at an early stage and (3) moderately prepared.<sup>1</sup> See Table 1.

**Table 1: State of progress in rule of law**



Albania, Bosnia and Herzegovina, FYR Macedonia, Kosovo, Montenegro and Serbia  
Source: EC progress reports; see Sanfey and Milatovic, 2018, 8

The 2016 Balkan Barometer, a public opinion survey commissioned by the Regional Cooperation Council, also reveals poor public perception on rule of law in Macedonia, Montenegro and Serbia. On average, more than 71 percent of citizens in the three countries disagree with the statement that the law is applied to everyone equally, while 67 percent of them disagree with the statement that judicial system is independent from political influence (see Milošević and Muk, 2016, p. 7).

### Judicial independence

The rule of law requires an independent judiciary to protect citizens against the arbitrary use of power by the state, individuals or any other organisation (Bara and Bara, 2017). Judicial independence means that judges act freely and impartially, without political pressures, influences and biases, when they are called upon to determine what the law requires. This also requires

<sup>1</sup> The other two levels are: (4) good level of preparation, and (5) well advanced.

that judges are appointed without the influence of certain political personalities (Bara and Bara, 2017; Hajdari et al., 2014). Despite efforts to establish relevant legal frameworks and infrastructure, most countries in the Western Balkans still face problems in terms of a lack of independence and accountability (Imeri and Ivanovska, 2016). Their judicial systems are adversely affected by politicisation of the judiciary, undue influences and judicial corruption. This undermines the institutions themselves, their ability to hold other institutions accountable, and public trust in the judiciary (Anastasi, 2018; Taleski et al., 2016).

The prevailing view is that curtailing political interference with the judiciary and strengthening the competency and independence of judges (most of who will have been appointed and trained under the socialist regime) will promote sources of progressive change and prevent corruption (Fagan, 2016). Judicial independence and accountability are considered critical to advancing impartial justice and increasing public confidence in the judiciary (Anastasi, 2018).

The establishment of an independent judiciary has been one of the key reform priorities in the EU accession processes of the Western Balkan countries (Bobek and Kosar, 2014). While there has been progress in improving the efficiency of the judiciary in the Western Balkans, an extensive study on monitoring and evaluating the rule of law in the Western Balkans finds that there is no significant progress regarding independence (Milošević and Muk, 2016). Legal systems continue to be influenced by corruption and politicisation. Much of the reforms here have focused on the establishment of judicial and prosecutorial councils, academies for judges and prosecutors and vetting processes (Memeti, 2014).

### **Judicial councils**

Institutional reform has often been limited to promoting one particular model of court administration: the judicial council model. The vast majority of documents of the Council of Europe and the European Union claim that the model improves judicial independence; however, they do not set out standards of how this should be achieved (Bobek and Kosar, 2014). Judicial councils are typically independent bodies, established under law or constitution, which serve as intermediary organisations positioned between the judiciary and the politically responsible administrators in the executive or the parliament. They are designed to insulate the functions of appointment, promotion and discipline of judges from partisan political processes (Takacs, 2018; Bobek and Kosar, 2014). The aim is to prevent undue influence of the executive over the judiciary from being misused to influence decision-making of the courts and individual judges. Judicial councils are also expected to improve the overall performance of judges and promote efficient functioning of the judicial system, in terms of court management, budgeting of the courts, and equipment and infrastructure modernisation (Takacs, 2018; Bobek and Kosar, 2014).

### **Judicial academies**

A key issue in reforming judicial independence in the Western Balkans has been the understanding and application of the concept of “independence” amongst judicial practitioners (Fagan, 2016). Judicial academies, established in countries in the Western Balkans, are designed to improve the quality of judicial education and ultimately to enhance effectiveness, efficiency and professionalism of the judiciary (Imeri et al., 2018; Ilievski, 2014). The EU has heavily promoted academies as a tool for improving the quality of the judiciary (Fagan, 2016). Academies serve as the main entry point for judicial and prosecutorial candidates into the judicial system, carrying out initial and ongoing training of such candidates to further pursue their careers

in the justice systems. They are expected to contribute to the merit-based recruitment and professionalism of judges (Imeri et al., 2018).

## Challenges

*Multiple models:* The judicial council Euro-model, which centralises competencies affecting almost all matters of the career of judges at one place and grants control over this body to the judges, is but one model that exists in Europe (Preshova et al., 2017; Bobek and Kosar, 2014). It is thus difficult to claim that it is truly a “best practice” or a genuine “European model” (Preshova et al., 2017). There is also a general discrepancy in the practices within the EU which are used to foster judicial independence (Preshova, 2018).

*Unintended consequences:* Case studies of judicial reform in BiH and Serbia suggest that EU rule of law interventions and support in the Western Balkans can inadvertently result in deficient independence and the emergence of new channels of political interference (Fagan, 2016). The introduction of “strong” judicial councils, such as the High Judicial and Prosecutorial Council (HJPC) in BiH, and efforts to reform the judiciary more generally, has led to adverse effects when carried out prematurely - in the absence of the appropriate legal and judicial culture and mentality or a parallel process of transformation of culture (Takacs, 2018; Fagan, 2016; Bobek and Kosar, 2014). It is unlikely that judges who operated in communist and totalitarian regimes can transform rapidly into independent and responsible judicial managers and self-administrative bodies (Bobek and Kosar, 2014). New, relatively autonomous bodies tasked with training and regulating the activities of judges may unintentionally enable new forms of political manipulation and reinforce conservative practices that undermine the reputation of the judiciary (Fagan, 2016). Thus, the introduction of judicial councils, judicial academies, and other judicial institutions without adequate internal reform (e.g. transformation of culture, political maturity, and clarity on appropriate levelling between judiciary and other political branches) has led to corruption and clientelism. This has led in turn to the formal constitutional prescription of an independent judiciary, but the persistence of dependent judges (Takacs, 2018; Bobek and Kosar, 2014).

*Political influence:* Political affiliation is still a key factor in the selection and dismissal of judges, prosecutors and members of the relevant judicial and prosecutorial councils, despite the adoption of legislative frameworks for merit-based career systems (Imeri et al., 2018). Individual independence of judges has still in certain cases been compromised due to political control of the disciplinary procedure of judicial councils, evaluation of their work and dismissal. Growing political pressure and existing judicial clientelism has also undermined the transparency of judicial councils (Preshova et al., 2017). There are also concerns of political influence over judicial academies through the composition of directors, steering councils and/or management boards of the academies, as in the case of Albania, Serbia and Macedonia (Imeri et al., 2018).

*Inadequate attention to accountability:* An effective system of checks and balances between judicial independence and judicial accountability is necessary in order to advance the impartiality of the adjudication process and increase public confidence in judges and prosecutors (Taleski et al., 2016). However, much less attention has been paid, until very recently, to balancing the emphasis on independence with equally strong requirements for public accountability and transparency (Anastasi, 2018; Bobek and Kosar, 2014). While judiciaries and judicial councils have become more independent from political interference in some countries in the Western Balkans, they have also in some cases become less transparent and less accountable (Anastasi, 2018; Fagan, 2016; Bobek and Kosar, 2014). Without ensuring a balance of power with the executive and legislature, and without establishing clear terms on the accountability and liability

of councils' members, judges can become too independent, using their new-found power to block genuine reform. As such, while efforts to curb political interference are important in the post-authoritarian period, too much movement toward self-governance of the judiciary and granting judges from the socialist period independence, in the absence of judicial accountability, can be detrimental. It can enable threats from internal and external actors and perpetuate clientele type relations between judges and special interests (Anastasi, 2018; Takacs, 2018; Preshova et al., 2017; Fagan, 2016). Creating mechanisms for and ensuring judicial accountability has emerged as a most pressing issue and has become an aspect in the most recent reforms of the justice system in the Western Balkan countries (Anastasi, 2018). It can be difficult, however, to find the appropriate balance between independence and accountability (Fagan, 2016). It involves continual negotiation between judicial institutions and political elites and, importantly, close scrutiny of these institutions over time (Fagan, 2016).

*Professional disincentives:* Trainings are not sufficiently linked to advancement in the career or promotion of judges. As such, those who have gone through training and those who have not often remain on equal footing (Ilievski, 2014).

*Finances:* Academies often experience financial difficulties due to inadequate budgetary allocations. In Albania and Macedonia, for example, the School of Magistrates and the Judicial Academy (respectively) lack adequate resources to cover the expenses of the overall operation of the institution (Imeri et al., 2018).

## **Judicial efficiency**

The constitutions of the countries of the Western Balkans stipulate that the judiciary must offer access to justice (Hoxhaj, 2018). Many years of neglect and underinvestment, however, have undermined judicial efficiency and access to justice of ordinary citizens in the region (Hoxhaj, 2018). In most countries in the region, long court delays are common and efforts to reduce the time frame have yet to be a policy objective (Hoxhaj, 2018). A common recommendation and reform initiative throughout the Western Balkan countries is a reduction in the backlog of cases (Imeri and Ivanovska, 2016). The overly complex and extended system in courts, resulting in higher than necessary operating costs, and poorly equipped and maintained facilities, also undermine access to justice and produce long wait times for cases to be completed (Hoxhaj, 2018). Courts are often far away, forcing citizens to travel long distances as soon as cases move to upper courts and tribunals. There is also substantial regional variation between metropolitan and rural areas (Hoxhaj, 2018).

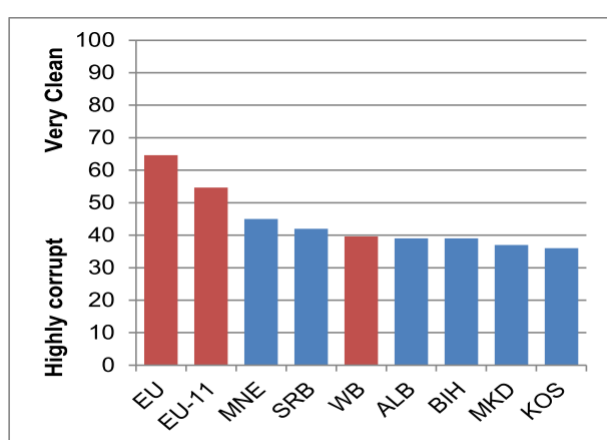
Hoxhaj (2018) recommends that the EU's rule of law initiative in the Western Balkans incorporate an infrastructure development strategy to accelerate the reconstruction of courts and increase the capacity and resources of the judiciary. The aim should be to render the judiciary more accessible to the public. The initiative should include simplifying court documents and procedures, including encouraging the use of appropriate technology to enhance court efficiency (Hoxhaj, 2018). Technology can also address the need for better transparency, for example through the timely publishing of court decisions (Imeri and Ivanovska, 2016). Digital case management systems, including audio-visual recording and transcription of court proceedings can not only make courts more transparent and easier to access, but also reduce the level of corruption and increase public confidence in the judicial process (Hoxhaj, 2018). The establishment of a virtual court that relies on a video link between defendants detained in police custody or prison and a court room can also result in time and cost-savings. This is particularly relevant in the Western Balkans countries, where budgets are often limited (Hoxhaj, 2018).

## Corruption and organised crime

### Corruption

Systemic corruption is a persistent problem in all Western Balkan countries (Čeperković and Gaub, 2018; Sanfey and Milatovic, 2018). All six countries are ranked relatively low on Transparency International's Corruption Perceptions Index (CPI), ranging from Montenegro in 64th place to Kosovo in 95th out of 176 countries. The latest EC progress reports assessed each of the six Western Balkan countries' fight against corruption as being at "some level of preparation" (second lowest point). The Western Balkan average CPI score is 40 (on a scale of 0 (worst) to 100 (best)), compared with an average of 65 in the EU (See Table 2). The private sector also perceives corruption as a major obstacle (Sanfey and Milatovic, 2018, 26).

**Table 2: Corruption Perception Index Score 2016**



Source: Transparency International.

Albania, Bosnia and Herzegovina, FYR Macedonia, Kosovo, Montenegro and Serbia (see Sanfey and Milatovic, 2018, 26)

The recent Balkan Barometer (2016) finds that citizens in the Western Balkans perceive corruption as widespread and endemic. It also finds that citizens do not see nor recognize efforts of respective governments in fighting corruption, and expect much more to be done (RCC, 2016). The majority of the population in Southeastern Europe do not consider that their government effectively fights corruption (73 percent), although there is variation across countries (RCC, 2016, p. 115).

Corruption and organised crime are considered a threat to stability and good governance. They are significant obstacles to the firm establishment of the rule of law, accountable institutions, democratic stability, and economic development in the area (Ciero, 2016). The EU Commission's new enlargement strategy notes that "countries show clear elements of state capture, including links with organised crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests" (EC, 2018). In order to establish a functioning rule of law, it is essential to fight corruption and dismantle criminal networks more efficiently.

Politicians are seen as corrupt primarily at the national level in the Western Balkans, but also at the local level (RCC, 2016). Curbing overarching politicisation in the region is essential to countering corruption effectively. The EU, other international donors, the governments and civil

society organisations should thus avoid technicisation of the EU accession efforts (Milošević and Muk, 2016).

### **Anti-corruption efforts**

While corruption undermines the independence and functioning of the judiciary, and genuine reform efforts toward the promotion of rule of law, the lack of independence of the judiciary and political influences also undermines adequate processing of corruption cases (Imeri et al., 2018; Ungar, 2017; Imeri and Ivanovska, 2016). As such, interventions seeking to address judicial independence can also contribute to the effectiveness of anti-corruption efforts. Judicial reforms and the fight against corruption are also closely related to fostering changes in legal and judicial culture and mentality (Takacs, 2018).

While the EC has given largely positive assessments concerning the strengthening of legal frameworks for tackling corruption in Western Balkan countries, political commitment in the region is still lacking (Imeri and Ivanovska, 2016). There is a consistently poor track record of prosecuting and punishing corruption, particularly among high-level officials. Even when cases are investigated, they generally suffer from inadequate investigation, long delays and often end in acquittals or with light and inconsistent sentences (Albania, BiH, Montenegro, Serbia) (McDevitt, 2016). This contributes greatly to lack of public trust in the public institutions that are meant to fight corruption (McDevitt, 2016). In 2016, only Kosovo was seen to have made progress in countering corruption (Imeri and Ivanovska, 2016).

An emerging practice aimed at addressing the politicisation of institutions is the establishment of a Special Prosecutor's Office. However, they also suffer from political obstacles and lack of administrative capacity (Imeri and Ivanovska, 2016). Efforts to tackle corruption within the judiciary of Western Balkan countries include raising judicial salaries; and introducing random allocation of cases, ethical codes for magistrates, and transparency rules (Mendelski, 2014). These reforms have had little impact, however, on the perception of corruption and likely on the de facto level of judicial corruption. Codes and rules have not always been enforced in practice and new procedures can be circumvented. It is argued that such reforms have not tackled the sources of corruption (Mendelski, 2014).

In addition, in order for anti-corruption efforts to succeed, there needs to be effective cooperation between all relevant anti-corruption, judicial and law enforcement bodies. Lack of institutional cooperation, however, is a common feature of most of the countries in the Western Balkans. Failure to cooperate can result in political isolation which renders such bodies vulnerable to undue influence and manipulation, which can undermine their ability to perform their functions (McDevitt, 2016). Key problems include institutional overlap in fighting and preventing corruption (Kosovo, Serbia), limited cooperation between the prosecution and police (Kosovo, Macedonia, Montenegro, Serbia) and regular infighting between key judicial and law enforcement actors (Albania, BiH) (McDevitt, 2016). There is also widespread political interference in the appointments, transfers and removal of judges, prosecutors and police and in the decision-making processes of anti-corruption and judicial bodies (McDevitt, 2016).

### **Organised crime**

Organised crime, ranging from trafficking in human beings, drugs and weapons to risk of criminal infiltration of the political and economic systems, remains a key problem in the Western Balkans (EPSC, 2018). There have been limited changes in reform strategies to counter organised crime over the past decade and a half (Imeri et al., 2018). Despite the presence of strategies and

action plans to fight organised crime, various challenges persist. The number of convictions is still limited. Moreover, there seem to be strong links between organised crime and politics, which has resulted in selective investigation of allegations. Overlapping jurisdictions of local and international administration and unclear demarcation of responsibilities has undermined reform progress in BiH and Kosovo (Imeri et al., 2018). In general, the fight against organised crime and high level corruption is still a work in progress, requiring political will in order to make it a reform priority. The absence of a concrete EU model has also allowed for governments to pick and choose their own model, which may not necessarily comply with guidelines or lead to changes in substance (Imeri et al., 2018).

The European Political Strategy Centre recommends that organised crime needs to be mapped more thoroughly. It also recommends that credible action plans are produced and implemented that further develop the law enforcement framework, strengthen the prosecution chain and improve data collection (EPSC, 2018).

## War crimes prosecution

Impunity refers to “a structure or culture in which people who hold positions of power abuse human rights and commit crimes or other offences without fear of consequences” (Ungar, 2017, p. 7). It is not solely a judicial issue, but a highly political problem that can be embedded in cultural practices. Ungar (2017) argues that impunity for the crimes committed during the conflicts in the Western Balkans is widespread and ingrained throughout the region. Approaches to the prosecution of war criminals, crimes against humanity and genocide in the region is considered to be piecemeal, failing to dismantle powerful structures of impunity. This undermines efforts to achieve justice, restore rule of law and contribute to reconciliation.

Failure to address the structures of impunity, through such prosecution, is evident in part in the declining number of prosecutions (Ungar, 2017). With the termination of ICTY, the main driver for criminal justice in the Western Balkans is gone. It is now solely up to the states themselves to continue the prosecutions. Apart from BiH, where some limited progress exists with local prosecutions, other countries in the region are falling short in adequately addressing impunity through their national court systems (Ungar, 2017).

There are various factors behind failures to prosecute effectively and to address impunity:

*Lack of political will:* All the countries of the Former Yugoslavia have amended their criminal legislation to allow for effective investigation and prosecution of war crimes. They have also built modern courtrooms with the latest audio/visual technology such that the trials can be recorded; improved on security; and raised employees’ salaries. However, even in cases where the justice system works relatively well, lack of political support can negatively influence the judicial process in these cases (Fouéré, 2018). Many suspected war crime perpetrators remain embedded in legal structures that are in charge of detecting and prosecuting war crimes, allowing them to exert significant influence on decisions related to the investigation and prosecution; and to take part in the deliberate destruction and removal of evidence (Fouéré, 2018).

*Ethno-religious tensions:* A large proportion of citizens in countries of the former Yugoslavia perceive high-ranking war crimes suspects as heroes (Fouéré, 2018). If communities are sharply divided along ethno-political lines, discourse often centres on commemorating “own” victims and perceived heroes of war and silencing “own” crimes and the suffering of the “others” (Fischer, 2016).



*Politicised media:* These views are often reinforced in the media – in print, on television, on the Internet, the radio or in other forms. For example, the media often publicises biographies of war crimes suspects, including the difficulties he or she has had to face in life, or interviews with close relatives in which they praise the suspect as a good and honest person (Ivanović and Soltvedt, 2016). Attempts by authorities to prosecute such individuals can then result in resentment among the public and loss of legitimacy on the part of the authorities (Fouéré, 2018). There has thus often been neither the will nor courage of leading political structures to process war crimes suspects nor to investigate their possible crimes. (Fouéré, 2018).

*Inadequate resources and capacity:* All countries of the Former Yugoslavia have faced problems, particularly in the early post-conflict years, with shortage of prosecutors. In conflict-affected contexts, there are an even smaller number of prosecutors (and support staff) specialising in war crimes, crimes against humanity and genocide (Fouéré, 2018). Further, general weaknesses with the judiciary and other oversight bodies make it difficult for them to fulfil their function in guaranteeing the non-recurrence of violations (Ungar, 2017). Nonetheless, it is important to note that many members of the War Crimes Investigation Service have demonstrated a high degree of efficiency and professionalism when acting according to the requirements of the War Crimes Prosecutor (Fouéré, 2018).

*Complexity:* More than two decades after the 1990s wars, only a small number of cases have been concluded and most relate to mass crimes. It is unlikely that the thousands of other pending cases will be dealt with and concluded during the lifetime of the accused, the victims and the witnesses (Fischer, 2016). In addition to weaknesses in capacity and political will, the reason for these delays stem in large part from the significantly greater complexity of these types of crimes, compared to traditional criminal investigations and prosecutions (Fouéré, 2018). In addition, it is particularly difficult to collect evidence as crimes were often committed in territories outside the jurisdiction of state authorities (Fouéré, 2018). This is due in part to weak regional cooperation (Fouéré, 2018; Ungar, 2017). A further key obstacle is the ban on the extradition of states' citizens between countries in the region, thus making it impossible to ensure the presence of foreign or dual nationality suspects at trial (Fouéré, 2018).

*Victim compensation:* The work of the courts has yet to be complemented by programmes that provide compensation for the victims, despite the fact that their right to such compensation is entrenched in international law (Fischer, 2016).

Since the end of the conflicts in the Western Balkans, donors have relied on the ICTY as a key mechanism to promote change. Ungar (2017) emphasises, however, that the court has clear limitations in terms of dealing specifically with individual criminal responsibility, rather than with changes in ideologies. The EU accession process provides an opportunity to reframe discussions around justice, to re-evaluate the meaning of reform and how it can be more effective in fighting impunity.

## **Media freedom and protection**

Given the absence of strong horizontal accountability in countries in the Western Balkans, it is even more critical that non-state actors, such as the media, have the capacity and the freedom to act as an impartial watchdog and to hold political actors to account (McDevitt, 2016). There is a continuous trend of stagnation or backsliding in fundamental rights in the Western Balkans, however, which has been reflected especially in deteriorating media freedom in recent years. This is characterised by political interference; corrupt ties between officials and media owners;

tight government control; non-transparent public funding of media and financing of pro-government media; and a prevailing atmosphere of fear, intimidation of journalists, censorship or self-censorship (Imera et al., 2018; Imeri and Ivanovska, 2016; McDevitt, 2016; Milošević and Muk, 2016). A range of international actors, such as the EC, OSCE/ODIHR, Reporters without borders and the Freedom House, have confirmed this downward trend in media freedom (Imera et al., 2018). According to Freedom House's 2016 "Freedom of the Press" ranking, the countries of the Western Balkans represent six of the nine worst performers for press freedom in Europe (see McDevitt, 2016).

One of the key problems with media independence in the region is the long-term financial sustainability of the public broadcaster and political appointments on the editorial board. This undermines attempts to promote a diverse and plural media platform (Imera et al., 2018). The lack of transparency of media ownership is also problematic, contributing to an environment in which journalists do not feel safe to report on particular perspectives (Imera et al., 2018).

Attacks on journalists, in the form of killings, kidnappings and missing persons, persist throughout the region and have increased in recent years (Imeri et al., 2018). In Albania and Kosovo, journalists have been continually targeted because of their efforts to expose widespread official corruption and organised crime affiliation in their countries. In addition, such attacks do not receive adequate judicial follow up due in large part to lack of political will and accountability for ineffective investigations. In the case of BiH, there is also an inadequate legal framework; the criminal law does not treat attacks against journalists as a criminal offence (Imera et al., 2018).

## Minority protection

Due to the presence of large diaspora groups in the Western Balkans, there are small pockets of minorities among neighbouring countries' majorities. Serbia, for example, has a large minority concentration in the autonomous region of Vojvodina and small groups of ethnic Albanians in the south (Tubbs-Herring, 2014). The EU has advocated for stronger rights of minorities, such as in the case of political representation, access to education, and voting rights. Legislative frameworks, strategies and action plans for protection against discrimination have been adopted across the region, stemming from EU conditionality (Imeri et al., 2018).

There has been weak implementation of legal frameworks, however, due to lack of institutional capacities; poor understanding of the issues at hand and how the law is supposed to be implemented; and absence of political will on the part of the various bodies and institutions responsible for the protection of human rights and minorities (Imeri et al., 2018; Imeri and Ivanovska, 2016). Most politicians in the Western Balkans ideologically oppose the idea of integrating minorities into mainstream civil society, resulting in limited progress with minority protection, rights and integration (Tubbs-Herring, 2014). In Macedonia, non-professional staff with no experience were elected through a non-transparent procedure to the Commission for Prevention and Protection Against Discrimination in 2016, thus calling into question the independence of the Commission. Some members have been public supporters of Government policies that preclude the equal treatment of ethnic minorities in the country (Imeri et al., 2018). In Albania and BiH, the governments lack political will to independently establish minority rights or infrastructures. In Serbia, there is political will, however, civil society has opposed such reforms to integrate minority groups, making it difficult for the policies and the agencies to be effective (Tubbs-Herring, 2014).

Imeri and Ivanovska (2016) find that the wording adopted by the EC on several occasions does not adequately reflect the severity of the shortcomings regarding minority protection, particularly in terms of the persistent discrimination against the Romani community and the hostility shown towards the LGBTI community.

In Albania, discriminatory practices apply to ethnic and religious minorities such as the Romani people, who face severe discrimination in education, health care, employment, and housing in Albania (Imeri et al., 2018). BiH adopted amendments to the Law on Protection Against Discrimination in 2016, which included age, sexual orientation, gender identity and disability as grounds for discrimination. In Kosovo, the Law on Protection Against Discrimination lacks legal harmonization with other laws and, in general, there is insufficient protection from discrimination in practice. This is due in part to many inconsistencies, contradictions, and misinterpretations of the law. (Imeri et al., 2018; Imeri and Ivanovska, 2016). In Macedonia, legislation has omitted “sexual orientation” as grounds for discrimination. In addition, there are very few resolved cases confirming discrimination and still no effective protection against discrimination when it comes to marginalized groups. In Serbia, although anti-discrimination legislation is in place, there are inconsistencies between anti-discrimination laws or ambiguities that require further judicial interpretation or legal amendments. In addition, anti-discrimination knowledge of prosecutors and judges has still not reached the desirable level (Imeri et al., 2018; Imeri and Ivanovska, 2016).

There is a need for better implementation of the protection of vulnerable groups and a comprehensive approach towards the inclusion of national minorities. Strategies and legislation relating to the rights of women and minorities must be carried out and enforced. There also a need for higher sanctions for discriminatory acts (Imeri et al., 2018; Imeri and Ivanovska, 2016).

Data on discrimination cases registered with official institutions, across the region, is scarce and non-systematized, which hinders a quantitative overview of the situation in the field. There are growing numbers of discrimination cases on the basis of sexual orientation, but these figures are not indicative of the reality due to the high number of unreported cases. There is a general lack of trust in the institutions and a fear of negative consequences for the victims (Imeri et al., 2018).

In terms of gender discrimination, Ungar (2017) argues that a meaningful gender approach after conflict is necessary in the Western Balkan that goes beyond viewing women solely as victims of rape. Such an approach should look at the role of criminal justice in contributing to changing engrained structures of marginalisation and discrimination.

## **Asylum framework**

Given the unprecedented emergency situation along the Eastern Mediterranean-Western Balkans route in 2015-16, special attention has been paid to asylum and immigration policies throughout the region. The EU has confirmed the significance of the issue in the new Enlargement Strategy (Imeri et al., 2018). Thousands of people have been trapped in Western Balkan countries that lack the capacity to provide functioning asylum systems (Imeri and Ivanovska, 2016). The human resources and capacities of reception centres have yet to be increased, in order to adequately respond to the demands of asylum seekers (Imeri et al., 2018). Given the complex nature of the necessary reforms, however, establishing an effective migration framework is recognised as a long term process (Imeri and Ivanovska, 2016).

Cooperation and efforts to address the refugee crisis did not bring about advances regarding rule of law. Instead, numerous studies have highlighted the detrimental impact the crisis has had on

rule of law in the region. Most Western Balkan countries still face important structural shortcomings in all branches, characterised by failure to practically implement fundamental rights in key areas, and continued weaknesses in the rule of law (Imeri et al, 2018). Given the unpredictability of the issue and the fact that the EU itself does not have a clear plan and solution for proper regulation and implementation of asylum policies, Western Balkan countries tend to replicate the confusing attitude of EU member states. This leaves them poorly prepared to address the needs of asylum seekers (Imeri et al, 2018). Problems with the implementation of asylum law, as in the case of Macedonia and Serbia, include the right to submit an asylum request; processing and delivering decisions on asylum claims, which are often undermined by discretion in providing explanations for the reasons for rejecting a claim (Imeri et al., 2018).

The MIPEX assessment (Migrant Integration Policy Index) is an effective instrument to assess already implemented and ongoing migration and refugee policies in the Western Balkans. The region has recorded the poorest levels of integration in the fields of political participation and education (see Stančetić, 2018).

## **Factors affecting rule of law reforms**

The absence of the rule of law in the Western Balkans is reflected in weak and heavily politicised judicial systems; lack of accountability and transparency at all levels; weak separation of powers; insufficient judicial capacity; presence of corruption; and low quality of legislation (Marović, 2018; Mendelski, 2018). Scholars claim that the differential impact of the EU in Central and Eastern Europe – and the varied development in the rule of law – can be explained in part by structural conditions, such as historical legacies, judicial culture, lack of domestic capacity, the power balance between change agents and ‘veto players’; and the reform strategy of donors (Mendelski, 2018).

### **Structural preconditions**

Historical legacies, such as the legacies of communist judicial culture and civil war, play a role in the degree of compliance with judicial reform and entrenchment of the rule of law (Mendelski, 2018; Čavalić and Gajić, 2017; Preshova et al., 2017). Western Balkan countries historically did not have much experience with political entities that provided sufficient rule of law. While these countries adopted legislation in line with other European countries, subsequent to the Ottoman empire, its implementation was weak (Čavalić and Gajić, 2017). In addition, lustration laws in the Western Balkans were adopted only by Albania (2008) and Macedonia (2012). This has resulted in the persistence of former communist officials from regimes accused of massive human rights violations in high offices, undermining rule of law initiatives (Čavalić and Gajić, 2017).

### **Politicisation**

Evidence from the most recent round of the EBRD/World Bank Life in Transition Survey highlights the pervasive belief in the region that political connections are important to success in life (Sanfey and Milatovic, 2018).

The politicisation and instrumentalisation of laws, reforms and public institutions, such as newly created anti-corruption agencies, judicial councils, specialised courts, and other horizontal accountability institutions, are critical challenges in the Western Balkans. These institutions lack transparency and professionalization and are often captured by reformist change agents or reform-resisting veto players (Mendelski, 2018; Mendelski, 2016). Change agents in countries with weak rule of law often lack the appropriate incentives, norms and skills to carry out reforms

in a non-politicised manner. Mendelski (2016) finds evidence that while attention is paid to veto players as obstacles, many of the EU's reformist change agents from the Western Balkans can also be obstructionist. They have (mis)used the law and the judicial/prosecutorial structures as a weapon against their political and economic competitors, rather than respecting the rule of law. Civil society organisations should identify genuine change agents of reforms in the region in order to hold them up as role models and to promote peer pressure among the countries (Milošević and Muk, 2016).

### **Political will**

A key challenge to the establishment of the rule of law is the failure of current political elites in the Western Balkans to commit to the implementation of democratic principles and rule of law standards (Milošević and Muk, 2016). An assessment of EU benchmarking mechanisms in the region demonstrates that political will is crucial for the success of planned reforms and for the prosecution of high-level corruption, war crimes and institutionalised crime (EPSC, 2018; Imeri et al., 2018). However, political will is often lacking in the region, resulting in limited progress. In Macedonia and Montenegro, for example, special prosecutions, while demonstrating a degree of independence, face intense political pressures and obstructions from other institutions (Milošević and Muk, 2016). Also in Montenegro, a completely new legal framework (prepared with extensive assistance from EU experts) and institutional capacity building (e.g. the Judicial Training Centre and the Judicial and Prosecutorial Council) have not yet guaranteed merit-based recruitment and promotion – indicating the presence of undermining political influences (Imeri et al., 2018). In Serbia, political elites have vested interests in maintaining the status quo and keeping a hold on the judiciary (Imeri et al., 2018).

### **Localisation**

Reforms can both consolidate and undermine the rule of law (Mendelski, 2016). Memeti (2014) finds that rule of law promoters tend to see rule of law as an institutional checklist focusing primarily in the judiciary, often equating rule of law with judicial reform (e.g. establishment of judicial councils, capacity building for judges, case management).

Much of the literature emphasises the need to develop specific approaches for each country. However, international donors, including the EU, often insist on transplanting their particular “best standards” laws and model, which may not work sufficiently well under domestic conditions (Mendelski, 2018; Mendelski, 2016). Preshova et al. (2017) emphasise that the “European model” is based on assumptions and preconditions related to a legal and judicial culture and mentality that were/are not yet present in the Western Balkan countries. Thus, the limited success of the model can be attributed to the premature establishment of initiatives, such as the establishment of judicial councils, in the absence of the necessary accompanying judicial culture.

A further challenge of transplanting a “European” model is that there is an absence of a unified approach among EU member countries, themselves, for example in preserving judicial independence (Preshova et al., 2017).

### **Fundamental vs Technical**

Progress on rule of law in the Western Balkans has generally been more technical rather than directly focusing on politically sensitive issues. Financial assistance has been directed toward technical capacities, including attention to better infrastructure, improved payment schemes, clear institutional procedures, and training (Elbasani, 2018). While judicial capacity in the region

has increased to some extent, judicial impartiality has not. On the one hand, international donors were able to modernize the judicial system by redesigning the legal framework, increasing judicial salaries, providing computerization and training, and creating and strengthening judicial bodies and agencies. On the other hand, in Serbia, for example, too many hasty legal changes and the politicised manner of conducting reforms have contributed to declines in overall efficiency and impartiality (Mendelski, 2014). As discussed, curbing overarching politicisation in the region, in particular progress regarding independence, is a key precondition for the establishment of rule of law (Milošević and Muk, 2016) and for greater success in internationally-led campaigns (Elbasani, 2018). Scholars advocate for a “fundamentals first” approach, with better attention to impartiality, independence, separation of institutions, and more efficient inclusion of civil society (Elbasani, 2018; Šabić, 2018; Milošević and Muk, 2016).

### **Quality vs Quantity**

A key identified problem with the EU’s rule of law reforms is its quantitative approach, which follows a “the more the better” mindset in assessing rule of law (Mendelski, 2016). Quantitative outcomes (e.g. more laws, resources, convictions, arrests etc.) have taken precedence over qualitative reform processes and procedures (i.e. how laws, arrests or convictions are made) and efficiency-related outputs (e.g. absence of backlogs) (Mendelski, 2016; Mendelski, 2014). Mendelski (2016) advocates that EU conditionality should shift its focus from quantitative outcomes and indicators towards qualitative processes and indicators. This could contribute to a greater impact on the ground (Mendelski, 2014). The World Justice Project has attempted to fill this void by providing indicators to assess the quality of laws (Mendelski, 2018).

### **Adverse consequences**

Quantitative and technical approaches can not only limit impact on the ground, but also create perverse incentives and superficial outcomes. For example, the demand for shorter case proceedings could result in superficially adjudicated cases. Further, calling for judicial independence, without attention to judicial accountability, can create a powerful and unaccountable judiciary that blocks reforms (Mendelski, 2014). Mendelski (2018) finds that EU-driven rule of law reforms often contribute to a considerable increase of judicial capacity and substantive legality, but have adverse consequences on judicial impartiality and formal legality. Similarly, Fagan (2016) concludes that EU interventions can result in deficient independence along with the emergence of new channels of political interference.

Reforms can thus both consolidate and undermine the rule of law. Determining factors are the quality of the reform process, which depends on the underlying conditions in the target country. Reformers often reproduce the respective social order in which they are embedded (Mendelski, 2018). For example, while judicial councils and anti-corruption agencies have worked relatively well in established democracies in the Baltic states, increasing judicial independence and oversight, they became unaccountable and non-transparent bodies in Southeastern Europe, subject to political influence. This in turn undermined the rule of law (Mendelski, 2018).

## 3. Albania

### Judicial independence

There is little respect for the rule of law and its implementation on the part of the political elite in Albania (Mavrikos-Adamou, 2014). Key obstacles include difficulties in establishing an independent judiciary and the pervasiveness of corruption (Mavrikos-Adamou, 2014).

The Albanian Constitution sets out the principles of judicial independence and impartiality. Ongoing justice reform in Albania aims for a total reformation of the judicial system and the functioning of the courts in Albania, including the Constitutional Court, placing important criteria on the selection of judges and law clerks, in order to ensure judicial independence (Bara and Bara, 2017).

Progress reports of the EU Commission for Albania find, however, that the functioning of the judicial system continues to be affected by a high degree of political influence. Albanian political leaders have often assumed open political affiliations in their nomination of key posts within the judiciary, resulting in the presence of party cronies in the judicial hierarchy (Elbasani, 2018; Elbasani and Šabić, 2017). The lack of a functional, independent role for the judiciary, along with leader-dominated political parties, undermines the process of institutional checks and balances. There are inadequate degrees of transparency in the appointment and promotion of judges, insufficient oversight mechanisms to ensure the integrity of the judiciary, and questionable independence and impartiality of the High Court (see Anastasi, 2018; McDevitt, 2016; Mavrikos-Adamou, 2014). The position of the Prosecutor General is of particular concern, being appointed by proposal of the president and only simple majority consent in parliament (McDevitt, 2016). Reforms in Albania have given prosecutors greater autonomy and reduced the centrality of the Prosecutor General. None of the criminal cases against serving government officials in Albania have resulted in convictions, with the High Court and the prosecution blaming each other for the failures (McDevitt, 2016).

According to the 2017 Balkan Barometer, 49 percent of the respondents disagree that judiciary institutions are independent of political influence, while only 3 percent agree that they are independent (see Mitrush, 2018, p. 8).

### Judicial and prosecutorial councils

The latest EC report recommends that Albania should advance the implementation of justice reform by completing the set-up of the new judicial structures – the High Council of Justice (HCJ), the High Prosecutorial Council (HPC), the High Justice Inspector and the Justice Appointment Council (EC, 2018a). The High Council of Justice has been unable to operate effectively and has failed to promote professionalism. The institution will be replaced with the High Council of the Judiciary, which will be comprised of six judges and five non-judges. It will be in charge of the election of Supreme Court members, the annual evaluation of judges, career promotion, disciplinary measures, finance management etc. (Xhepa, 2018).

The Prosecutorial Council, which oversees the work of prosecutors, is a formal and weak structure, unable to keep a check on the Prosecutor General's power over prosecutors' careers and discipline. As a result, almost 80 percent of prosecutors believe that the current appointment formula for the Prosecutor General lacks guarantees of independence and should be changed (McDevitt, 2016).

## **Judicial academy**

Since its creation in 1997, the Albanian School of Magistrates has been responsible for the education and ongoing professional training of judges and prosecutors in the judicial system; and changes in the recruitment of judges and prosecutors. However, inadequate budgetary allocations and training resources continue to be a challenge (Mitrushi, 2018; Fagan and Sircar, 2015). Justice reform has also yet to effectively establish the merit-based career system for judge's benchmark, with appointment and promotion of judges often based on political influence (Mitrushi, 2018). Moreover, the law that established the School of Magistrates raises concerns about political influence through the composition of the Steering Council of the School and the appointment procedure of the School's Director (Mitrushi, 2018; Fagan and Sircar, 2015).

Professional Judges' Associations have also been established and supported, by USAID, in order to strengthen the judiciary and foster its independence. An early challenge involved the association of existing judicial associations with a single individual, suggesting that the organisations were nothing more than a reflection of the two main political parties (USAID, 2015). An assessment of USAID's first year of support for judges' associations finds that only one of these organisations, the Union of Albanian Judges (UAJ), had the basic organisational foundation to become a viable voice of the judiciary (USAID, 2015). The UAJ is considered to be a success story though, with marked growth in members (through cluster groups and awareness campaigns), amounting to more than half of the judiciary in Albania. Greater membership has meant more revenues from dues, allowing the organisation to sustain itself from its own budget (USAID, 2015).

## **Vetting**

As part of Albania's EU- and US-led "reform package", the Albanian Assembly adopted the law "On the Re-Evaluation of Judges and Prosecutors in Albania", commonly known as the "vetting law". It is considered an important part of reforms, designed to root out the high level of corruption in the judiciary; to ensure judicial independence; and to restore public trust in the judiciary (Xhepa, 2018). The process of re-evaluating all judges and prosecutors has since begun (EC, 2018a; US DOS 2018a). There are controversies and concerns in the political arena, however, that public officials in the executive branch could use the new rules to influence judicial reappointments (Anastasi, 2018; Maxhuni and Cucchi, 2017).

In addition, the vetting process should not be viewed as an institutional asset that will be sufficient to eliminate corruption from the judicial system. Vetting cannot be a stand-alone measure. More comprehensive measures are needed to eliminate political interference and establish operational independence and public accountability in the judiciary (EC, 2018a; Maxhuni and Cucchi, 2017). Further, in order to renew public trust in the Albanian judiciary, there should be transparency and consultation, such that the public can understand and shape the process and have confidence in the reform (Maxhuni and Cucchi, 2017).

While the EC (2018a) has lauded the first tangible results of implementation of the vetting law with the resignation of members of the judiciary, Xhepa (2018) finds that these vetting processes can also have adverse consequences. The vetting process was delayed in Albania due to constitutional challenges, whereby the law was ultimately upheld (BTI, 2018a). These delays and the vetting process, itself, have impeded the establishment of numerous institutions and other processes of judicial reform. In the case of the Constitutional Court, for example, the re-evaluation of judges found that seven out of nine proved to be inadequate to be part of the



judiciary, essentially rendering the Court unable to function. This in turn allows for possible violations of the Constitution and a threat to rule of law (Xhepa, 2018). The vetting process also caused problems in the constitution of the Justice Appointments Council, HCJ, HPC, the court and special prosecution unit for combating corruption and organised crime. Xhepa (2018) recommends that all possible candidates who want to be elected in these institutions should previously be vetted.

## **Judicial efficiency**

Court management in Albania remains poor. There are inadequate human and material resources in first-instance district courts, long delays in conducting judicial proceedings, a high backlog of cases, all of which further weaken the judicial system (Mavrikos-Adamou, 2014).

The EC recommends in its latest report that the allocation of cases should be conducted randomly by lot and through electronic means (EC, 2018a). The electronic case management system has weaknesses, however, affecting its proper functioning. Prosecution offices often fail to make full use of the system and to produce reliable data. The system needs to be integrated with other relevant databases. Concerns over overall length of court proceedings and the execution of court decisions also remain (EC, 2018a). Court delay is a primary cause of public dissatisfaction, undermining confidence in the judiciary (USAID, 2015). The USAID Rule of Law programme was intended to assist courts in meeting standards for performance, accountability and transparency. It targeted Albania's two largest and most crowded urban courts, encouraging them to improve court management, courtroom usage and the efficiency of court operations. Software programmes helped to optimise available courtrooms (USAID, 2015; Mavrikos-Adamou, 2014).

Lack of transparency in the judicial system in Albania also weakens public confidence in the courts (USAID, 2015). The failure of judges to publish their decisions or to articulate the basis for decisions undermines the fairness of court proceedings. USAID assistance to Albania consisted of strategies to improve due process, in terms of establishing a reviewable record, transparency and openness. This can be promoted through digital audio recording technology, conducting of trials in public courtrooms, and the application of modern management principles to the processing of cases – all of which can promote more accurate trial records, greater transparency and public trust in the judiciary. Courtrooms in Albania now contain sustainable state-of-the-art digital recording technology to provide a verbatim record (USAID, 2015). In addition, attention to cutting down on the number of non-productive hearings and reducing court delay have improved the efficiency of court proceedings (USAID, 2015).

## **Access to justice**

A UNDP survey on access to justice in Albania finds that the need for justice in the country is largely unmet. Almost half of the population has had legal problems, which have largely gone unresolved due to a lack of legal awareness and the underperformance of justice sector institutions (Milatovic, 2017). This is particularly true for members of disadvantaged groups, including the poor, lesser educated, the Romani, members of the LGBTI community, and victims of widespread discrimination (Milatovic, 2017).

## **Corruption and organised crime**

### **Corruption**

High levels of corruption is pervasive in all branches of government, representing a critical challenge in Albania that requires constant measures (Mitrushi, 2018; US DOS, 2017a).

Corruption undermines the independence and functioning of the judiciary in Albania, which has also affected public trust toward it (BTI, 2018a; Xhepa, 2018; Mavrikos-Adamou, 2014). Judges are often susceptible to bribery and, at the same time, have immunity against investigations of their alleged abuses of power (Mavrikos-Adamou, 2014). The media has reported on various cases of corruption including judges demanding payment or sexual favours for their decisions, the release of criminals with excessive criminal records, and the doctoring of incriminating evidence against political leaders (BTI, 2018a). Albanians have also suffered from long delays and unfair decisions, stemming from a corrupt judiciary (BTI, 2018a).

### **Anti-corruption efforts**

International and EU authorities have continuously urged Albania to intensify the fight against corruption (Mitrushi, 2018). The country has made some progress, notably with the amendments to the criminal code and adoption of a legal framework to counter corruption (EC, 2018a). It is also in the process of establishing a chain of specialised anti-corruption bodies in charge of investigating, prosecuting and sanctioning corruption, including a special prosecutor's office (EC, 2018a). Another important novelty of judicial reform in Albania is the constitution of the Special Anti-corruption Unit and the Anti-corruption Investigation Bureau. They will be composed of national and international prosecutors, and will undertake the fight against corruption by high level state officials (Xhepa, 2018).

While the law provides criminal penalties for corruption by public officials, the government has not implemented the law effectively, and officials have frequently engaged in corrupt practices with impunity (US DOS, 2018a). Corruption and abuses of public office are rarely investigated, particularly when it comes to high-level politicians and public officials (BTI, 2018a; Elbasani and Šabić, 2017; McDevitt, 2016). This is due to investigators' fear of retribution; a general lack of resources; investigative leaks; real and perceived political pressure; and corruption within the judiciary itself (US DOS, 2018a). Police involvement in corruption is also an obstacle to in-depth investigations of corruption cases (Mitrushi, 2018). Prosecutors recently announced, however, an investigation of a former interior minister for ties to abuse of office and organised crime (US DOS, 2018a).

Politicians who are accused of corruption and abuse of office are usually not prosecuted. Instead, they are released at various stages of judiciary proceedings, despite substantial evidence of guilt (BTI, 2018a; McDevitt, 2016). Where high-level officials have been convicted, they have mostly been part of the judiciary (judges and prosecutors) (EC, 2018a).

### **Organised crime**

Albania has made some progress with organised crime, notably in the fight against cannabis cultivation (EC, 2018a). In addition, amendments to the anti-mafia law and the Criminal Procedure Code have created the conditions for increased efficiency of criminal investigations. Albania participated successfully in international police cooperation, increasing collaboration with EU Member States. There has, however, been little progress in dismantling organised criminal groups. The number of final convictions in organised crime cases remained very low, with only a marginal increase. Greater efforts are needed to tackle money laundering, criminal assets and unjustified wealth (EC, 2018a).

## Media freedom and protection

Independent media in Albania is active and able to express a wide variety of viewpoints (US DOS, 2018a). There are various constraints that media faces, however, including political pressure, corruption, resource constraints and financial shortfalls, and threats and violence against journalists. This has contributed to the practice of self-censorship and bias in reporting (Mitrushi, 2018; US DOS, 2018a). While police protection is sometimes provided to journalists and investigations are initiated, there are no indications of any prosecutions or convictions. There are also records of hostile statements against journalists by politicians. Politicisation of the regulatory institution (the Audio-Visual Media Authority) and the public broadcaster is also an indication of government control of the media in Albania (McDevitt, 2016).

## Minority protection

There have been allegations of discrimination in Albania against members of the Romani and Balkan-Egyptian communities, including in housing, employment, health care, and education. Some schools resisted accepting Romani and Balkan-Egyptian students, particularly if they appeared to be poor. Many mixed schools that accepted Romani students marginalized them in the classroom, in some cases keeping them apart from other students (US DOS, 2018a). In addition, Romani rights NGOs criticized the Tirana municipal government for delaying the building of new homes for Romani families removed from their homes in 2016 (US DOS, 2018a).

The government has recently adopted new legislation on minorities, which provides official minority status for nine national minorities (Greeks, Macedonians, Aromanians (Vlachs), Roma, Balkan-Egyptians, Montenegrins, Bosnians, Serbs, and Bulgarians) without distinguishing between national and ethnolinguistic groups. The new legislation provides minority language education and dual official language use for local administrative units in which minorities traditionally reside, or in which a minority makes up 20 percent of the total population (US DOS, 2018a).

## Asylum framework

Algerians, Syrians, and Libyans have entered Albania in recent years, many of whom have requested asylum. The law on asylum requires authorities to grant or deny asylum within 51 days of an applicant's initial request. There have been credible reports from NGOs, migrants and asylum seekers, however, that authorities did not follow due process obligations for some asylum seekers and that in other cases those seeking asylum did not have access to the system. The UNHCR has also been critical of the government's migrant screening and detention procedures; and reported that the asylum system lacked effective monitoring (US DOS, 2018a).

# 4. Bosnia and Herzegovina

## Judicial independence

Bosnia and Herzegovina has made some progress regarding the judiciary. The country has a stringent legal framework to ensure independence of the judiciary and prosecutors, appointed and regulated by the High Judicial and Prosecutorial Council (HJPC) formed in 2006 (Hrasnica and Ramić-Mesihović, 2018). Reforms have generally been implemented at a slow pace, however, and there are continuing concerns about political interference in the judiciary,

particularly in the case of judicial appointments, transfers and removals (Hrasnica and Ramić-Mesihović, 2018; McDevitt, 2016; Fagan and Sircar, 2015). In addition, there are numerous instances of unwarranted political interference in the day-to-day operation and decision-making processes of judicial and anti-corruption bodies, including the executive making public threats to officials in prosecutors' offices to alter their decisions (McDevitt, 2016). Political interference and lack of independence of the judiciary have been particularly problematic in cases of war crimes processing (Hrasnica and Ramić-Mesihović, 2018).

Trust of citizens in BiH in the work of judges and prosecutors is very low. Citizens believe that corruption and political influence on judges and prosecutors are the biggest problems, for which they blame the government and poor internal organization of the justice system (Hrasnica and Ramić-Mesihović, 2018).

### **Judicial and prosecutorial councils**

The establishment of the High Judicial and Prosecutorial Council has been the key focus of EU assistance in the area of judicial reform. The HJPC is an independent state-level body, with wide-ranging competences across courts and prosecutors' offices across all levels of governance in BiH, including the appointment and promotion of all judges and prosecutors; disciplinary proceedings; determining training; and proposing judicial budgets (Fagan, 2016). The current composition of 15 members of the HJPC are selected from judges and prosecutors from the state, entity, and district levels (Fagan, 2016).

The politicisation of the appointment and recruitment procedures for the HJPC members and Chief Prosecutors at all levels are problematic. The election of the president of the Council in 2014, despite media reports of ties to organised crime, is one such example (McDevitt, 2016). Further, some political parties have suggested an increase in executive and legislative influence in appointing HJPC members (Fagan and Sircar, 2015).

In addition to undue influence from external actors, there are problems with the internal operation of the Council. There are concerns that the Council operates without transparency and that ethnic interests or factions impede their work (Fagan 2016). Fagan (2016) argues that the internal workings of the Council (i.e. how various factions are balanced and managed) is as important to ensuring its independence as preventing interference from the executive, legislature or other political interests (Fagan, 2016).

### **Vetting**

Vetting measures had a mild effect in BiH, increasing the transparency and accountability of the judicial system and partly restoring public confidence in the judiciary (Maxhuni and Cucchi, 2017). There were various challenges throughout the process, including lack of clarity over the evaluation criteria. Lack of transparency and accountability of institutions in BiH have made it difficult to assess the criteria of moral integrity, technical skills, qualifications, property and financial status, and war crimes record (Maxhuni and Cucchi, 2017).

### **Judicial efficiency**

There is consensus that inadequate attention has been given to strengthening of prosecutorial capacities and working conditions for prosecutors in BiH. The length of court proceedings has decreased in recent years, albeit minimally (EC, 2018b). An evaluation of the Improving Judicial Efficiency Project (JEP), commissioned by the Swedish Embassy in Sarajevo, finds that the

project contributed to improved efficiency of the judiciary, primarily through the reduction of case backlog. With JEP-funding, the HJPC instituted backlog reduction plans against which individual judges and court performance are monitored. This has also contributed to making the courts more accountable (Trivunovic and Devine, 2015). Despite these improvements, case backlog remains a persistent obstacle in prosecutor's offices (EC, 2018b; Milošević and Muk, 2016). At the end of 2016, there was still a backlog of over two million unresolved civil cases in BiH and no effective mechanism to enforce court orders (BTI, 2018b, p. 14).

Reforms have also yet to adequately improve the judicial budget, training for judges and prosecutors, and capacities of the judiciary (Hrasnica and Ramić-Mesihović, 2018; Fagan and Sircar, 2015). Training is provided by the Judicial and Prosecutorial Training Centres (JPTCs) of the two Entities, operational from 2003 (Hrasnica and Ramić-Mesihović, 2018). Inadequate infrastructure and equipment conditions of courts and prosecutors' offices, including lack of available space and inadequate facilities for juvenile and victims, undermine the efficiency and effectiveness of the judicial and prosecutorial institutions. This concerns security aspects, access for disabled persons, services to citizens, and support to victims/witnesses and media representatives. Equal access to justice is also severely undermined by the fragmentation, politicisation and inefficiency of the judicial system (BTI, 2018b).

## **Corruption and organised crime**

### **Corruption**

Despite some progress in fighting corruption in BiH, it remains widespread (EC, 2017b). Corruption represents a very significant threat to the country's long-term stability and rule of law (OSCE, 2018).

A public opinion survey carried out by USAID revealed that citizen satisfaction with the independence of the judiciary, its efficiency, and its ability to fight corruption, process war crimes cases, and protect labour rights remained low. Another survey focusing on actual experiences of corruption affecting the daily lives of ordinary people documents that 8 out of 10 Bosnian citizens have to deal with corruption in the course of the year. This occurs mainly at the local (municipal and cantonal) level, where most contacts between public administrators and citizens occur. It also occurs in both urban and rural areas (Belloni and Strazzari, 2014).

### **Anti-corruption efforts**

Although preventative measures remain important in BiH, the criminal justice system serves as the main instrument for countering corruption. However, national and international observers generally perceive that the judicial response to corruption is far from satisfactory (OSCE, 2018). Although the legal framework is in place, the number of officials convicted of abuse of office and corruption in BiH is minimal. According to the EU, the investigation of public officeholders remained rare and there were no final convictions in any high-level corruption case in 2016, despite frequent media reports on alleged systematic abuses of office (BTI, 2018b). Where investigations were launched against middle-ranking or high-ranking officials, they dragged on for years, ending in acquittals (McDevitt, 2016). There is no adequate sentencing practice for corruption cases. In many of the monitored cases that ended in conviction, there was a marked leniency in sentencing, with prescribed punishments often falling below the mandatory statutory minimum (OSCE, 2018; McDevitt, 2016). Corruption proceedings often result in pardons for defendants, while the remaining cases result in parole or fines (Belloni and Strazzari, 2014). The

poor track record in punishing corruption, particularly among high-level officials, is the key reason for the lack of public trust in institutions, their integrity and any commitment to fighting corruption (McDevitt, 2016).

Jurisprudence on corruption-related offenses is not harmonized, and judicial bodies adjudicating these cases fail to refer to precedents in their reasoning. Judicial decisions are often based upon unclear reasoning (OSCE, 2018). Trial monitoring reveals examples of unclear or inconsistent interpretation of substantive and procedural law in BiH. There is thus a high risk of individuals receiving different judgements in similar cases (OSCE, 2018).

## **Organised crime**

BiH has made some progress in tackling organised crime, notably by adopting a new strategy on fighting organised crime and suppression and fulfilling the action plan on anti-money laundering and financing of terrorism (EC, 2018b). The largest number of organised crime groups in BiH is engaged in illegal drug trade and human trafficking (Hrasnica and Ramić-Mesihović, 2018). Cooperation with EU member states resulted in the success of some large scale convictions for organised crime (Hrasnica and Ramić-Mesihović, 2018).

Obstacles to the efficient countering of organised crime are lack of technical and administrative capacities, in particular with regard to financial investigations and countering terrorism; communication with international partners; slow processing of cases within the judiciary; lack of coordination of law enforcement agencies; and inadequate cooperation with neighbouring countries (EC, 2018b; Hrasnica and Ramić-Mesihović, 2018).

## **War crimes prosecution**

BiH adopted the National Strategy for War Crimes Prosecution and has continued to implement the national war crimes strategy objectives (EC, 2018b). This includes the transfer of less complex cases by the state-level judiciary to other judicial levels and the state-level judiciary taking over the most complex cases from other jurisdictions. It also includes the ongoing tackling of the backlog of war crimes cases, including the successful prosecution of war crimes cases involving sexual violence (EC, 2018b). There have been weaknesses in implementation, however (Ungar, 2017). While the number of indictments filed and confirmed have increased, they relate primarily to low-level direct perpetrators of the crimes, rather than high-level perpetrators, who were leaders or held command responsibility (Korner, 2016). The backlog of cases is likely to remain high, given the working practices of the Court of Prosecutor's Office and the focus on trials of low-level perpetrators, which involve time and resources that could instead be allocated toward more complex cases (Korner, 2016).

Further, attempts have been made by politicians in the RS to undermine the work of the state-level court. In addition, issues connected with the application of the new criminal code have led to retrials that have had a negative impact on the perception of the judiciary in BiH (Ungar, 2017). While in-court victim and witness support was further improved with authorisation of the courts' police to ensure protection, its long-term sustainability is linked to the continued guarantee of domestic financing (EC, 2018b). Problems with witness protection remain wide-ranging and complex (Korner, 2016). Also, given the long time period that has elapsed since the start of the conflict, witnesses and potential accused have died, emigrated or suffered from memory loss. Available witnesses may have had to make numerous statements to different authorities and

testify before different courts, which increases the possibility of inconsistencies that the defence may exploit to discredit them (Korner, 2016).

## **Media freedom and protection**

Most media outlets in BiH are dependent on and controlled by the ruling elite and powerful oligarchies. Government institutions remain the biggest advertisers and use this to pressurise media outlets to adopt editorial policies that promote their interests. This is particularly evident during election campaigns. The few media outlets that are critical of the government are instead frequently subjected to intimidation and threats, impromptu investigations and fiscal and tax controls, and physical violence from politicians or criminal groups (McDevitt, 2016). According to data collected by the Journalists Association of BiH, 217 media houses, institutions and association have been attacked since 2013 (Hrasnica and Ramić-Mesihović, 2018, 16).

Even when media outlets are successful in exposing a high-level corruption case, they generally receive a very limited response from law enforcement and judicial institutions (McDevitt, 2016). Authorities do not collect data on threats and attacks against journalists and media workers (EC, 2018b). Such threats and attacks do not receive adequate follow up by relevant police and judicial authorities; swift investigations and prosecution of perpetrators is not ensured (EC, 2018b; Hrasnica and Ramić-Mesihović, 2018). The authorities either fail to investigate the cases or do so only once the person involved has fallen from power (McDevitt, 2016). Further, criminal law in BiH does not treat threats and attacks against journalists as a criminal offence (Hrasnica and Ramić-Mesihović, 2018).

## **Minority protection**

BiH has an established legal framework for protection of minorities. Amendments to the Law on Prohibition of Discrimination were adopted in 2016 which included age, sexual orientation, gender identity and disability as grounds for discrimination (Hrasnica and Ramić-Mesihović, 2018; US DOS, 2018b). In addition, the Federation of BiH added hate crimes provisions to its criminal code (similar provisions were already in place in the RS and Brčko District) (BTI, 2018b). BiH Council of Ministers have also since made the first report on Discrimination Instances followed by recommendations for the decision-making and other bodies for prevention. In addition, state and entity-level parliaments had national minority councils that met on a regular basis, but lacked the resources and political influence to affect decision-making processes (US DOS, 2018b).

Members of minorities continue to experience harassment and discrimination in employment and education, in the government and private sectors; property rights to returnees; access to housing; and the right to health and social protection (Hrasnica and Ramić-Mesihović, 2018; US DOS, 2018b). A significant percentage of Romani people, for example, were homeless or without water or electricity in their homes (US DOS, 2018b). While the number of attacks against religious objects has decreased, there is a general increase in the number of discrimination cases on the basis of ethnic belonging and sexual orientation. LGBTI persons faced frequent violence, harassment and discrimination, including termination of employment (US DOS, 2018b). Discrimination also takes place on the basis of disabled persons, gender, returnees to areas where their constituent peoples are in the minority. Multiple discrimination is evident on the basis of women with disabilities, women from rural areas, Roma women, etc. (Hrasnica and Ramić-Mesihović, 2018).

Human rights activists have frequently complained that authorities do not adequately enforce the legal framework to protect minorities from discrimination (US DOS, 2018b). In addition, they find widespread indifference by law enforcement and government authorities toward Romani victims of domestic violence and human trafficking (US DOS, 2018b). There are also concerns that there are still a large number of unreported cases of discrimination, due to a general lack of trust in institutions and fear on the part of victims of negative consequences. In addition, some vulnerable groups (e.g. Romani and LGBTI) are hesitant to rely on the Law due to the inaccessibility of the legal system (Hrasnica and Ramić-Mesihović, 2018).

Discrimination in politics is also an issue in BiH. Persons who do not belong to any of the three main ethnic groups continue to be excluded from the right to compete for key public offices, despite a 2009 European Court of Human Rights ruling that requires the country to remove this restriction from its constitution (BTI, 2018b). Women also continue to be underrepresented in politics and even more so in the economic sphere, despite legislation on equal rights for men and women being largely in place. Further, legislation on the prevention of and protection from gender-based violence is inadequate and implementation remains poor (BTI, 2018b).

## **Asylum framework**

The asylum and international protection system in BiH is largely in line with EU and international standards (Hrasnica and Ramić-Mesihović, 2018). Given the refugee crisis, BiH adopted the Strategy and Action Plan on Migrations and Asylum 2016-2020, which refers to the need to strengthen reception capacity in the country and increase regional and international cooperation. Various departments and legal and security bodies, across the entities and Brcko District, signed a memorandum in 2016 on cooperation and coordination of activities in the case of a migrant crisis in BiH (Hrasnica and Ramić-Mesihović, 2018).

## **5. Kosovo**

### **Judicial independence**

Legal safeguards on independence and impartiality are enshrined in Kosovo's Constitution and legal framework (EC, 2018c). While progress has been achieved in implementing the 2015 justice package laws in Kosovo, its judicial system remains at an early stage. The UN mission in Kosovo (UNMIK) has the aim of establishing a multi-ethnic, transparency in judiciary. Kosovo has yet, however, to have a fully functional judiciary (Hajdari et al., 2014). The recruitment and integration of Kosovo Serb judges and prosecutors and their support staff across Kosovo into the judicial system was a big achievement in 2017 (BTI, 2018c; EC, 2018c).

The independence of the judiciary continues to be undermined, nonetheless, by undue political influence and high levels of corruption (BTI, 2018c; EC, 2018b). In addition, witness protection is inadequate and the administration of justice remains slow and inefficient (EC, 2018b). The European Union Rule of Law Mission in Kosovo (EULEX) and its Kosovan counterparts have made some progress in terms of sustainability, accountability, and multi-ethnicity of institutions, including compliance with European best practices and international standards (BTI, 2018c). Rule of law institutions require sustained efforts to build up their capacities (BTI, 2018c; EC, 2018b).



Public perception towards judicial independence continues to be low among the population in Kosovo. Around 60 percent of those that were surveyed think that the justice system did not improve in the last years (Rexha, 2018, 10). This could be explained in part by the lack of final verdicts in cases where high profile politicians are being investigated (Rexha, 2018).

The EULEX mission, which has been the costliest and the most ambitious mission undertaken by the EU, has also been one of the most criticised missions. Critics argue that it delivered only mediocre outcomes, operating with a top-down approach, which left the “everyday” space unaffected by reforms; and advancing short-term goals by empowering illiberal actors (Dursun-Özkanca, 2018). EULEX’s approach of offering assistance has been unable to counter the tendency of Kosovo elites to obstruct reform to protect their own particularistic or criminal interests (Radin, 2014).

### **Judicial and prosecutorial councils**

The laws on the Kosovo Judicial Council (KJC) and Kosovo Prosecutorial Council (KPC) were amended in June 2015 in order to give both institutions greater discretion in drafting and proposing their budgets to the Kosovo Assembly. In addition, the budget allocated to both councils was recently increased (EC, 2018c). There have also been efforts to increase transparency by making meetings of both councils open to the media and the public; and publishing annual reports online. Improvements to the reporting mechanisms are still required (EC, 2018c). Moreover, a constitutional amendment to the KJC requires that seven of the 13 members be appointed by judges and six by the National assembly (instead of four by judiciary and nine by the assembly). This gives the judiciary a more prominent role in appointing members to the judicial council. In addition, four members should be from minorities (BTI, 2018c; McDevitt, 2016). This change in composition should strengthen judicial independence (BTI, 2018c). Nonetheless, the Bertelsmann Stiftung’s Transformation Index (BTI) 2018 finds that the KJC and KPC have thus far failed to protect judges and prosecutors from external influence (BTI, 2018c). The EC (2018c) recommends that the two councils establish a mechanism to react more efficiently and actively in cases of alleged political interference in the judiciary.

### **Vetting**

The legal basis for the vetting process in Kosovo was adopted in 2006, based on the process followed by Bosnia and Herzegovina (Anastasi, 2018). The aim is to establish an independent and professional judiciary and prosecution service to administer the judicial system in a professional and transparent manner, thus improving public confidence in the judiciary (Maxhuni and Cucchi, 2017). The vetting process has faced a number of concerns, caused in large part by political influence, specifically during the process of (re)appointment of judges and prosecutors (Anastasi, 2018; Fagan and Sircar, 2015). The President of Kosovo interfered, for example, with a number of candidates being removed from the judicial council list without explanation (Fagan and Sircar, 2015).

Maxhuni and Cucchi (2017) offers instead a positive assessment of the vetting process, with re-evaluation of judges and prosecutors carried out under the supervision of the EU Commission Liaison Office. Nonetheless, the continued lack of judicial independence, lack of efficiency and high level of corruption are clear indicators that the vetting process has not had lasting effects in the judiciary of Kosovo (Maxhuni and Cucchi, 2017).

## Judicial efficiency

Administration of justice in Kosovo is slow and inefficient. Courts are burdened with a large backlog of pending cases at court level (BTI, 2018c). Kosovo needs to become more efficient in dealing with the backlog of cases (EC, 2018c). There is an ongoing risk that courts are unable to dedicate the necessary attention to high-profile and serious cases, alongside the high number of incoming minor offence cases (EC, 2018c). Kosovo is working on the implementation of the 2014-2019 strategic plan for its judiciary and a strategy for reducing the backlog of cases (BTI, 2018c).

Judicial efficiency is constrained by lack of physical, technical and financial resources. EULEX judges caution that the local judiciary was insufficiently prepared to manage complex and sensitive lawsuits (BTI, 2018c). There are also severe shortcomings in criminal legislation (BTI, 2018c; EC, 2018c). A centralized criminal records registry is still missing (BTI, 2018c); and many provisions in the Criminal Procedure Code are too cumbersome and formalistic to allow for robust and successful investigation and prosecution. In addition, the low capacity and commitment of some judges to manage court proceedings; to sanction the parties causing delays; and to ensure the presence of all parties at sessions results in numerous postponements of hearings and significantly protracted criminal proceedings (EC, 2018c). These delays in proceedings, in combination with the preference for detention over other restrictive measures, have resulted in cases of overly long detention (EC, 2018c).

## Corruption and organised crime

### Corruption

Corruption remains a serious and widespread problem in many areas of Kosovo's political and administrative life (BTI, 2018c; EC, 2018c). Kosovo is at an early stage in the fight against corruption; it continues to implement the 2013-2017 anti-corruption strategy and action plan, monitored by the Anti-Corruption Agency (ACA) (BTI, 2018c; EC, 2018c). Progress has been achieved in various areas, including: compliance of criminal law provisions on corruption with European standards; creation of a multi-disciplinary investigating team and introduction of a tracking mechanism for high-profile corruption, which could lead to asset seizure and confiscation (BTI, 2018c; EC, 2018c). There has been some preliminary confiscation of assets, although final confiscations remain low (BTI, 2018c; EC, 2018c).

### Anti-corruption efforts

Concerted and comprehensive efforts are needed to effectively tackle corruption (EC, 2018c). Anti-corruption, judicial and law enforcement bodies must work closely together to be effective (McDevitt, 2016).

Despite the existence of an anti-corruption legal framework and various efforts to tackle the problem, there are still minimal concrete results (Roxcan, 2018). Enforcement of anti-corruption measures and effective financial investigations still lag due to inadequate financing, limited capacity, and attempts to influence the proceedings (BTI, 2018c). The Kosovo Anti-corruption Agency and the Office of the Auditor General share responsibility for combating government corruption. Institutional overlap in anti-corruption efforts can cause confusion among citizens, involving multiple institutions (e.g. President's Anti-Corruption Council, ACA, the Anti-Corruption Task Force in the Special Prosecution's Office, networks of prosecutors coordinating corruption,

and EULEX). Further, failure of institutional cooperation, common in Kosovo and other countries in the Western Balkans, can lead to political isolation, which makes such bodies more susceptible to manipulation and less able to perform their functions (McDevitt, 2016). Some scholars argue that corruption and organised crime worsened under EULEX's tenure, contributing to perceptions of lack of legitimacy and accountability of the mission (Dursun-Özkanca, 2018).

While some progress has been made in the track record on the investigation and prosecution for high level corruption and organised crime cases, including final convictions, problems remain (EC, 2018c). Indictments are poorly written and not well investigated or presented, making it difficult for judges to make informed and well-reasoned decisions (McDevitt, 2016). Moreover, local judges and prosecutors are often reluctant to take on cases dealing with high-level corruption and organised crime, due to fear stemming from physical threats and losses of their jobs (Dursun-Özkanca, 2018). Even where corruption is investigated and charged, convictions are minimal (US DOS, 2018c). There is thus a poor track record in terms of punishing corruption, particularly among high-level officials, resulting in a lack of public trust in institutions, their integrity and commitment to fight corruption (McDevitt, 2016).

### **Organised crime**

Kosovo is also at an early stage in the fight against organised crime (EC, 2018b). While there is more preliminary confiscation of assets, there are still few final convictions, financial investigations and final confiscations of assets (EC, 2018b; Roxcan, 2018). In particular, the number of complex organised crime cases to result in final verdicts is low; and there are issues with inter-institutional cooperation among rule of law actors and information exchange (Roxcan, 2018). The EU has pushed for greater progress in tackling organised crime, more specifically: for the establishment of a tracking mechanism not only for high-profile cases, but for all criminal cases; and for more effective efforts to fight money laundering (EC, 2018b; Roxcan, 2018).

### **War crimes prosecution**

While the war crimes department within Kosovo's Special Prosecution Office continues its work, challenges persist. The Office's workload has increased significantly due to the downsizing and handover of EULEX cases to local prosecutors (EC, 2018c). As of summer 2018, the task of prosecuting war criminals was left entirely to local prosecutors, who do not have the capacity yet to deal with the issue (Unger, 2018). There is a pressing need for greater training, staff and translation capacity (EC, 2018c). There is a backlog of war crimes case files, due to the low number of prosecutors working on war crimes and inadequate cooperation between Kosovo's and Serbia's prosecution offices, particularly over the exchange of evidence and extradition (Unger, 2018; EC, 2018c).

There are also significant concerns about the willingness to investigate, prosecute and judge war crimes cases involving former Kosovo Liberation Army (KLA) members (EC, 2018c). UNMIK and EULEX often prioritised investigations into crimes committed by Serbian forces, but these cases rarely ended up in court due to the lack of cooperation between Kosovo and Serbia (Unger, 2018). There is currently significant opposition to prosecuting KLA members from former KLA members who have now become senior politicians. This plays out in the form of witness and victim intimidation (Unger, 2018).

While progress was made with regard to prosecutions for sexual violence in the ICTY, including landmark verdicts on sexual violence in armed conflict, and by local courts in BiH, only a handful of prosecutions for wartime rape have been completed in Kosovo (Unger, 2018).

## **Media freedom and protection**

One of the key problems with media independence in Kosovo is the long-term financial sustainability of media outlets (Roxcan, 2018; US DOS, 2018c). Growing financial difficulties of media outlets have the potential to undermine the editorial independence of media outlets. Those that are self-sufficient often adopt policies independent of political and business interests; however, those with few resources may accept financial support in exchange for particular coverage in line with the funders' interests (US DOS, 2018c).

The EC (2018c) reports that the number of threats and attacks against journalists has increased, resulting in journalists feeling unsafe with regard to reporting perspectives (see also US DOS, 2017c). Key challenges regarding the protection of journalists are the lack of thorough investigations by the justice system in relation to physical attacks; and the low efficiency of the courts giving final verdicts in relation to those cases (Roxcan, 2018). While investigations have been opened in many reported cases, investigations are slow and convictions minimal (EC, 2018c). There needs to be a more systematic response, including prompt investigation and timely judgements, in addition to a mentality of zero tolerance for threats or attacks against media (EC, 2018c).

## **Minority protection**

Ethnic minorities (e.g. the Serb, Romani, Ashkali, Egyptian, Turkish, Bosniak, Gorani, Croat, and Montenegrin communities) have experienced varying levels of institutional and societal discrimination in employment, education, social services, language use, freedom of movement, the right of displaced persons to return to their homes, and other basic rights (US DOS, 2018c). According to NGO reports, the LGBTI community has also faced overt discrimination in employment, housing, determination of statelessness, and access to education and health care (US DOS, 2018c).

Minorities also experience discrimination in the judicial system (BTI, 2018c). Access to justice for non-Albanian communities, particularly for Kosovo Serbs and displaced persons, remain a concern. Access and the proper delivery of justice is constrained by poor or no translation in court proceedings, inconsistency between Albanian and Serbian translations of legislation, and limited numbers of non-Albanian staff (US DOS, 2018c).

## **Asylum framework**

EC reports underlined that training of staff in regards to their capacity to assess asylum applications needs to be ongoing in order for the law to be fully implemented (Roxcan, 2018).

# **6. Macedonia**

## **Judicial independence**

Reports of political intervention and influence in judicial decisions are common in Macedonia, severely undermining the independence of the judiciary (McDevitt, 2016; Taleski et al., 2016).

The government adopted the 2017-2022 Judicial Reform Strategy and a corresponding action plan. The independence of the judiciary is formally guaranteed by the country's legal framework, which is aligned with EU standards on judicial independence. The system has gradually been strengthened in practice, with the establishment of self-elected judicial and public prosecutors' councils that appoint and dismiss judges and prosecutors and the Academy for Judges and Prosecutors (BTI, 2018d; Preshova, 2018; Jordanova and Dimovska, 2016).

Despite the fact that the structural preconditions for independence are in place, reforms have not been substantially implemented, and the functional independence of the judiciary has deteriorated. There continues to be political pressures and interference in the work of the judiciary (BTI, 2018d; Priebe report, 2017; Preshova et al., 2017; Jordanova, and Dimovska, 2016; Fagan and Sircar, 2015).

A series of wiretapped conversations, which emerged in late 2015, revealed that the executive has complete control over the judiciary, resulting in an atmosphere of pressure and insecurity within the judiciary (Priebe report, 2017; Priebe report, 2015). Specifically, the director of the security service and the first cousin of the prime minister kept a list of eligible candidates for judges and issued orders regarding the career advancement system and the election of members to the Judicial Council and the Council of Public Prosecutors (McDevitt, 2016; Mendelski, 2016; Taleski et al., 2016). This scandal adversely influenced public perceptions of the judiciary (Taleski et al., 2016).

Criminal responsibility for the illegal wiretaps is essential (Priebe report, 2017). Prosecutions arising from the scandal appear, however, to be selective – and have related exclusively to the acts of making, obtaining, releasing and publishing the interceptions, rather than to the many potentially criminal or otherwise illegal acts revealed in their content (Priebe report, 2015). A special public prosecutor office was set up due to the public prosecutor's failure to investigate the wiretapped materials (BTI, 2018d). This office has been impeded in its work, however. While it has submitted several charges, the court has been very slow to process them (BTI, 2018d).

Other indications of political interference in the judiciary include the allocation of sensitive files to particular judges whose decisions favour the political establishment, rather than following the system of random allocation using an automated system (Priebe report, 2017). A number of judges have also reported that some judges who had failed to act as demanded by political elements were transferred to a different type of work, given very little work to do or overloaded with an unmanageable level of cases. These practices correspond with the very high rate of dismissals from the judiciary in the country over the last decade (Priebe report, 2017).

The judiciary is constrained not only by the lack of independence or budget, but also by the lack of trust among citizens. Studies have demonstrated a deep mistrust in the judiciary and its various institutions (Taleski et al., 2016). Respondents considered the independence of the judiciary to be on the decline, due primarily to the presence of political interference (Taleski et al., 2016). There is also widespread perception among ethnic Albanians that the delivery of justice is selective and that accountability of the judiciary is weak (BTI, 2018d; Taleski et al., 2016). This harms the trust that is placed on judicial institutions (Taleski et al., 2016).

### **Judicial and prosecutorial councils**

The Judicial Council's primary role is that of ensuring and guaranteeing the independence and the autonomy of the judiciary. Its functions include the appointment, evaluation, promotion, discipline and dismissal of all judges (Priebe report, 2017). The Council has 15 members, eight

of whom are elected by the judges themselves. Appointments and promotions should be made by the Judicial Council and the Council of Public Prosecutors according to transparent, objective and strictly merit-based criteria and based on transparent procedures established by law (Priebe report, 2015).

In Macedonia, however, judicial and prosecutorial councils have functioned as a long arm of the political parties with little transparency (Milošević and Muk, 2016; Fagan and Sircar, 2015). The appointment of judges and court presidents by the Council has been made without any prior changes to the election system (Jordanova and Dimovska, 2016). Politically motivated appointments and promotions were regularly used by the ruling parties for extending their influence in the judiciary (Preshova et al., 2017; Fagan and Sircar, 2015). The control and misuse of the judicial system by a small number of judges in powerful positions, in order to promote their own political interests, has continued. These judges pressurise more junior colleagues through their control over the systems of appointment, evaluation, promotion, discipline, and dismissal, which have been used as rewards and punishments (Priebe report, 2017).

Further, the way in which the Council evaluates and disciplines judges serves to undermine rather than to guarantee their independence and autonomy (Priebe report, 2017). The European Court of Human Rights has found that the Council's practices in regard to disciplinary proceedings have infringed human rights, yet the Council has not taken steps to remedy the breach (Priebe report, 2017). The Council also fails to provide specific reasons for dismissals and is less inclined to adopt other measures short of removal (Fagan and Sircar, 2015). In addition, it failed to ensure proper supervision of the system of random assignment of cases (Priebe report, 2017).

The case of the Judicial Council in Macedonia demonstrates that the judiciary was not ready for such a high level of self-government. It was introduced amidst the existence of strong ties with the past judicial mentality and culture. In the absence of a genuine tradition of judicial independence in the country, the introduction of the Council could not lead to a positive outcome (Preshova, 2018; Preshova et al., 2017). The insulation of the judiciary from the other branches of state power through the Council, has not strengthened independence and accountability, but rather has had the adverse consequence of exposing the judiciary even further to undue political pressure from the executive and ruling party elites (Preshova, 2018; Preshova et al., 2017; Jordanova and Dimovska, 2016; Taleski et al., 2016). A recent analysis finds that there is a very low level of trust in the work of the Judicial Council and the Council of Public Prosecutors. Respondents have given a very low score for the functioning of the two councils, in large part due to political influences. Trust of the Judicial Council is particularly low among the Albanian population, which also undermines the legitimacy of the courts (Taleski et al., 2016).

The EU has set out a list of "urgent reform priorities" that Macedonia needs to implement to avoid further backsliding (see Preshova et al., 2017). After the change of Government in June 2017 (and change in political climate), there has been a slight change in the direction of respecting merit-based principles in the procedure for selection of presidents of the courts and higher courts judges (Imeri and Ivanovska, 2018). Later that year, the Judicial Council selected, for the first time, candidates based on the criteria for promotion of judges stipulated in the Law on Judicial Council (Imeri and Ivanovska, 2018).

## Judicial efficiency

The efficiency of the judiciary in Macedonia has improved. Case backlogs have not been an issue for several years (Centre for legal research and analysis, 2016). Transparency of the judiciary remains an issue, however, requiring further improvements. While transparency has improved with the publication of decisions on the courts' website, there needs to be greater outreach by the courts (Taleski et al., 2016).

The World Bank and USAID have funded projects in Macedonia in order to increase the efficiency of the judiciary. The objective of the World Bank's Legal and Judicial Implementation and Institutional Support Project (LJIS) was to contribute to improving judicial efficiency by enhancing judicial capacity and infrastructure; and supporting the Judicial Council in implementing efficient processes for monitoring and evaluating judicial performance (Centre for legal research and analysis., 2016). The main focus of USAID funded projects in the judiciary was also on increasing the efficiency of the judiciary, by improving the case management systems, infrastructure of the courts, and ICT and court staff capacities (Centre for legal research and analysis, 2016).

## Corruption and organised crime

### Corruption

The law in Macedonia provides criminal penalties for corruption by officials. However, there were reports that officials engaged in corruption with impunity (US DOS, 2018d). Corruption remains prevalent, with little concrete results in practice (BTI, 2018d). There is a strong perception among the population in Macedonia that the judiciary is corrupt (BTI, 2018d). NGOs find that the government's dominant role in the economy created opportunities for corruption (US DOS, 2017d). According to Transparency International's annual 2016 Global Corruption Barometer, 12 percent of survey respondents reported having to pay bribes to obtain public services to which they were legally entitled. In addition, all respondents believed powerful, influential, and rich individuals exerted too strong an influence over politics (US DOS, 2018d, p. 23). Corruption also varies along ethnic lines. A study finds that 83.3 percent of ethnic Albanians reportedly experienced pressure to pay a bribe and 80.5 percent paying a bribe, compared with 40.6 percent and 35.5 percent, respectively, of ethnic Macedonian respondents (US DOS, 2018d, 23).

### Anti-corruption

Measures to fight corruption have ultimately had no pronounced impact, as indicated by the country's persistently low standing in the Transparency International Corruption Perception and other relevant indices.

A key achievement in anti-corruption efforts in Macedonia is the establishment and the operation of the Special Public Prosecutor. Despite systematic and organised obstruction by Government institutions and courts, such as withholding approval of the team requested by the Special Prosecutor, the Office has continued investigations (EPI, 2017; Milošević and Muk, 2016). The track record of investigations, prosecutions and convictions is strong on offences committed by low-level officials but remains weak on high-level corruption (Priebe report, 2017). The legal framework for the prosecution of abuse of office is largely in place; however, the relevant institutions lack the necessary resources (BTI, 2018d). There is a need for greater capacities and improvement in horizontal cooperation amount anti-corruption, judicial and law enforcement

bodies (BTI, 2018d; McDevitt, 2016). In Macedonia, however, cooperation among the judiciary, the State Commission for the Prevention of Corruption (SCPC) and the Prosecution Office for Organised Crime and Corruption is consistently found to be weak or non-existent, rendering these bodies less effective and susceptible to manipulation (McDevitt, 2016). The passiveness and failure of the competent institutions, including the SCPC, to react to the wiretapping scandal is a significant step backwards in the area of anti-corruption (Jordanova and Dimovska, 2016). The new anti-corruption programme (2016-2019) of the SCPC does not include any planned actions that address the problems from the wiretapping scandal (Jordanova and Dimovska, 2016).

### **Organised corruption**

The main role in the fight against organised crime now belongs to the Special Public Prosecutor (Jordanova and Dimovska, 2016). The failure of the judiciary to respond to major abuses of high-ranking officials, indicating the existence of organised crime, supports the view of backsliding in efforts to tackle organised crime and corruption (Jordanova and Dimovska, 2016).

### **Media freedom and protection**

The media in Macedonia continues to face many of the same challenges that have influenced the media landscape for the past several years (Priebe report, 2017). The perception remains that media outlets are politically affiliated or instruments of influential persons (Priebe report, 2017). Freedom House reports that political influence from both the ruling parties and the opposition characterise the media landscape. The media regulator, AAVMS, is also seen to be neither politically or financially independent (McDevitt, 2016). Media outlets are also divided along political and ethnic lines (Priebe report, 2017).

Investigative journalism is obstructed by authorities, which hinders citizen's access to reliable pluralist and objective information. Journalism is curtailed due to fear, lack of resources and journalistic skills (Priebe report, 2017). While intimidations, threats and violence against journalists are reported, there is a climate of impunity, with failure of the authorities to investigate, charge or convict the perpetrators (Priebe report, 2017). More recently with the improved political climate, however, there has been a decrease in pressure on journalists. The government concluded an agreement with an association of journalists to conduct follow-up investigations on attacks against them in December 2017. Registration of attacks on journalists remains inadequate, however, with few investigations being launched (EC, 2018d).

### **Minority protection**

Some vulnerable groups in Macedonia are frequently subject to discrimination and the denial of basic liberties. Selective application of established laws by authorities are particularly harmful to the Romani and the poor (BTI, 2018d). They are reports of unequal access of the Romani to employment, public services and benefits (US DOS, 2018d).

Ethnic minorities, with the exception of Serbs and Vlachs, reported widespread societal discrimination. They are significantly underrepresented in the civil service and other state institutions, including the police and courts (US DOS, 2018d). Ethnic Albanians continued to critique unequal representation in government ministries and public enterprises (US DOS, 2018d).

The constitution and law prohibit discrimination based on sexual orientation and gender identity. However, the LGBTI community remains marginalised. Members of LGBTI groups and activists



advocating for their rights are often targets of physical violence, harassment, and derogatory language, including from journalists and official political representatives (BTI, 2018d; US DOS, 2018d). There is also a failure of police to arrest perpetrators of attacks, and failure of the government to condemn discrimination against the LGBTI community (US DOS, 2018d).

## **Asylum framework**

Macedonia's Law on Asylum for granting asylum or refugee status is largely harmonized with the EU. It was put to the test in 2015 with large migration flows, although most asylum seekers were only passing through the country (Imeri et al., 2018). The UNHCR reported, however, that the mechanism for adjudicating refugee status failed to provide basic procedural guarantees and proper determinations as prescribed in the law (see US DOS, 2018d). The UNHCR found specifically that asylum seekers from countries with active conflicts, such as Libya and Yemen, were reportedly denied entry, in violation of the 1951 Refugee Convention and Protocol 4 to the European Convention on Human Rights (US DOS, 2018d).

## **7. Montenegro**

### **Judicial independence**

The key objectives of the Judicial Reform Strategy 2014-2018 include strengthening the independence, impartiality and accountability of the judiciary. The latest amendments to the constitution, adopted in 2013, followed by the adoption of a new legal framework in 2015, have strengthened the independence of the judiciary (McDevitt, 2016). Despite the adoption of a legal framework and the establishment of new institutions, however, significant changes in judicial practice have yet to happen (BTI, 2018e).

Attempted political interference, including by authorities internal to the judiciary, remains a key issue of concern (EC, 2018e). The remuneration of judges, prosecutors and administration needs to be increased in order to match the weight and duties of the judicial function. This is a precondition for independence and autonomy in their work (BTI, 2018e). A stronger political commitment is needed to ensure the full independence of Montenegro's justice system (EC, 2018e).

### **Judicial and prosecutorial councils**

Judicial reforms in Montenegro include the introduction of the principle of the immovability of judges and limits on political influence on the process of appointment of judges (McDevitt, 2016). The capacities of the judicial and prosecutorial councils have improved, indicated by the recruitment of judges and prosecutors under the new system and implementation of the new IT strategy (EC, 2018e). Recruitment, professional appraisal and the promotion system of judges has yet to be fully implemented, however. In addition, a track record of disciplinary responsibility is still lacking (EC, 2018e). Issues remain regarding the appointment and promotion of judges and state prosecutors, transparency in relation to the appraisal system, criminal liability and disciplinary and ethical responsibility, as well as the rationalization of the judicial network (Vavić et al., 2016). The capacity of the new Prosecutorial Council has improved, but still lacks transparency and strategic planning for budget and human resources (BTI, 2018e).

According to public perceptions, almost half of citizens do not trust the independence of the judiciary or state prosecution in Montenegro and the majority consider that judges do not make their decisions impartially (Vavić et al., 2016).

### **Judicial academy**

The EU funded a project, under IPA 2012, supporting the rule of law that included several objectives related to judicial independence. IPA resources also targeted the capacities of the Judicial Training Centre, including improved teaching methodologies and an upgrading of the Centre to a fully independent Judicial Academy (Fagan and Sircar, 2015).

## **Corruption and organised crime**

### **Corruption**

Montenegro has achieved some progress in the fight against corruption. However, corruption remains prevalent in many areas (EC, 2018e). Politicisation of public institutions, poor salaries, and lack of motivation and training of public servants create an enabling environment for corruption. The public procurement system also remains problematic, with limited access to information remains difficult to achieve (US DOS, 2018e). There is evidence that some government officials engaged in corrupt practices with impunity (US DOS, 2018e). The public perceives corruption as endemic in the government and elsewhere in the public sector at both local and national levels, including in the judiciary, customs, police, political parties (US DOS, 2018e).

### **Anti-corruption**

Montenegro has in place the legal and institutional preconditions and the strategic framework for the prevention and prosecution of corruption (US DOS, 2018e). Agencies tasked with fighting corruption acknowledged that their capacity improved but remained limited and that cooperation and information sharing among them was inadequate (US DOS, 2018e).

The government has not implemented the law effectively. There is a consistently poor track record in terms of punishing corruption, especially among high-level officials, which undermines public trust in institutions, their integrity and any commitment to fighting corruption (US DOS, 2018e; McDevitt, 2016). Where cases proceed, they are usually against lower-ranked officials convicted of petty corruption and sentenced to prison, whereas convictions are low for larger corrupt acts by state officials (McDevitt, 2016).

There has recently been limited progress in establishing an initial track record of investigation, prosecution and final convictions in high-level corruption cases has been established (EC, 2018e). This is due in large part to the work of the Special Prosecutor's Office. The Office was established in 2017 to fight against corruption, organised crime, war crimes, terrorism and money laundering. It has become more proactive and has started some investigations based on media and NGO reporting (BTI, 2018e; Milošević et al., 2018).

The Office has faced obstructions to its work, however. These include criticism by the opposition for not opening certain cases in which the general public suspects corruption; lack of cooperation from the Director of Police; inability to directly access the databases of other state authorities; and lack of adequate capacities, IT equipment, premises and the budget necessary to conduct its work (BTI, 2018e; Milošević and Muk, 2016; Vavić et al., 2016). According to an opinion poll

conducted by the Institute Alternative, by the end of 2017 most Montenegrin citizens (56 percent) did not think that the Office was contributing to the fight against corruption and organised crime, while one fifth of citizens did not recognize that the Office was making any contribution at all to solving this problem (Milošević et al., 2018, 21).

The Anti-Corruption Agency also suffers from challenges to its credibility, independence, and transparency (EC, 2018e; Vavić et al., 2016). Allegations of political influence and instrumentalisation persist due to personal ties between its management and the political elite (BTI, 2018e; EC, 2018e). Inadequate capacities to perform its tasks is another key challenge, which requires attention (BTI, 2018e; Vavić et al., 2016).

Montenegro has been frequently urged by the European Union to prosecute a greater number of high-profile corruption cases. Further improvements of the track record of successful investigations and convictions will only be possible in an environment where independent institutions are shielded from any undue political influence and given incentives to fully use their powers (EC, 2018e).

### **Organised crime**

There is an initial track record in Montenegro of prosecutions in the fight against smuggling of migrants and against drug trafficking. Further results are needed, however, to produce a convincing track record, particularly in the fight against money laundering and trafficking in human beings (EC, 2018e).

### **Media freedom and protection**

Montenegro's poor rankings on media freedom indicate a worrisome situation (Milošević et al., 2018). The country has achieved some progress in the area of freedom of expression (EC, 2018e). However, institutional capacity to ensure freedom of expression and media protection remains weak (Vavić et al., 2016). The media landscape remains highly polarised and challenges in understanding the role of free media persist (EC, 2018e).

Journalists who investigate corruption cases are often accused of being a threat to national interests (McDevitt, 2016). While new attacks have emerged, there have yet to be any notable developments regarding investigations into old cases of violence against journalists (EC, 2018e). Such harassment, threats and attacks result in self-censorship by journalists, who refrain from investigating sensitive issues and from criticising the government or other power interests (McDevitt, 2016).

Montenegro established the Commission for Monitoring Competent Authorities in Investigating Cases of Intimidation and Violence Against Journalists in 2014. It has faced many challenges and obstacles, however. This included lack of cooperation by the police, such as limiting timely access to relevant data. There were also issues of conflict of interest, as some members of the Commission who were investigating attacks on journalists had come from the police or the prosecutor's office, the same bodies that were the subject of scrutiny from the Commission (Milošević et al., 2018).

### **Minority protection**

The EU's 2016 Progress Report highlights that the Romani minority remains the most vulnerable and discriminated community in various areas, including representation in politics, access to the

labour market and to health care (BTI, 2018e; EC, 2018e). According to the Roma Education Fund, the poverty rate among Romani, Ashkali, and Balkan Egyptians was 36 percent compared to 11 percent for the general population (US DOS, 2018e, 27). Gender-based violence and violence against children also remains a serious concern in the country (EC, 2018e).

Other ethnic minorities, in particular Albanians and Bosniaks in the northern and southern parts of the country, complained often that they suffered from discrimination by central government and economic neglect. Ethnic Serbian politicians also claimed that the government discriminated against the Serbian national identity, language, and religion (US DOS, 2018e).

Montenegro has made progress in adopting anti-discrimination legislation, however implementation of the legislation remains weak. The country needs to ensure that adequate institutional mechanisms and capacity are in place to protect vulnerable groups from discrimination (EC, 2018e).

## **Asylum framework**

Decision on whether to accept refugees in Montenegro is, in the final instance, purely political, with the government deciding whether to accept refugees. This was reiterated at the February 2016 parliamentary control hearing of the minister of labour and social care (Vavić et al., 2016).

## **8. Serbia**

### **Judicial independence**

While Serbia has made progress in the Europeanisation of judicial independence, various problems concerning judicial independence, impartiality and accountability persist. The judiciary in Serbia is not considered to be independent, but rather influenced by political influences and pressures from the executive. The current reforms, adhering to European standards, encourage separation of powers, but this has not been implemented in Serbia. The country's constitution establishes judicial independence as a principle and rule, but it still also stipulates that the three branches of power are to control each other, which leaves room for influence on the judiciary (BTI, 2018f; EC, 2018f; Gome, 2017). It is thus potentially risky to remove any oversight by legislative and executive branches in the judiciary. The current European consensus on self-governance of the judiciary is pushing Serbia in that direction, however, resulting in possible adverse consequences (Fagan and Sircar, 2015).

Perceptions of judicial independence remains low in Serbia, declining over time. This undermines the credibility of the judicial system and users' trust and confidence in it (World Bank, 2014). Prosecutors are considered autonomous but not yet independent, working under excessive influence of the executive (Elek et al., 2016).

The implementation of comprehensive reforms to the judicial system and rule of law in Serbia require not only significant training and educational programs, but the transformation of long held traditional beliefs and attitudes by the judiciary as well as the executive (Gome, 2017).

### **Judicial and prosecutorial councils**

Amendments to the Law on the High Judicial Council (HJC) and the Law on the State Prosecutorial Council (SPC) were adopted in December 2015. While the councils have continued

to build their capacity, they have not yet fully assumed their role due to legislative and administrative delays (EC, 2018f). Specifically, the transfer of full responsibility for the judicial budget from the Ministry of Justice to the councils has been repeatedly delayed. Both councils need to improve their capacity for strategic, budget and human resources planning, and for public communication. They also need to improve the transparency of their work, including by publishing decisions on and giving full reasons for appointments and promotions (EC, 2018f).

Specific ongoing problems with the councils' appointments and promotions include the persistence of political pressure in the election of prosecutors and judges (Elek et al., 2016) and limited progress in establishing a fully objective, transparent and merit-based system for the appointment of judges and prosecutors (BTI, 2018f; EC, 2018f; Milošević and Muk, 2016). The work of the Judicial Council has been compromised by lack of clear criteria in decision-making; problems with the selection its members; bans on making voting and other Council proceedings public, and inconsistency in the implementation of (re)appointments, due to long-standing political pressure in Serbia's judiciary (Bokic, 2017).

There is evidence of the appointments of prosecutors and court presidents based on political ties in several prominent cases (McDevitt, 2016). The three-year probation period for judges affects the independence of the judicial system as newly-appointed judges may feel they have to act in particular ways in order to become permanent (Gome, 2017; Fagan and Sircar, 2015). In addition judicial salaries remain low, thus producing an environment conducive to corruption (Gome, 2017).

In the absence of an enabling culture and environment for prescribed judicial reforms, the situation in Serbia is considered by some to have worsened with the establishment of a judicial council, as the new institution has slowed down reform activities in Serbia (Bošković, 2015). In particular, the institutional design of the judicial councils is such as to give prominence to more senior members of the judiciary, possibly by appointment and re-electing them to important positions in the council and in the courts. In transitional societies, however, those with more experience are more likely to adhere to the old system and other values than those that the current reforms are trying to achieve (Bošković, 2015).

### **Judicial academy**

The core issue in reforming judicial independence in Serbia, as in other countries in the Western Balkans, has been the understanding and application of the concept of "independence" amongst judicial practitioners. In order to transform understanding and behaviour among current and new judicial practitioners, the EU and other international actors have focused their efforts on establishing and continually improving the Judicial Academy (Fagan, 2016). The adoption of the Law on the Judicial Academy in 2009 established its responsibility for initial and continuous training of judicial practitioners (judges, prosecutors and court assistants) (Fagan, 2016).

The process of upgrading the Judicial Training Centre in Serbia into a national Academy has relied heavily on EU assistance and support. Judges and lawyers in the country have depicted the Judicial Academy as a positive example of internationally assisted judicial reform. This is to the extent that it has actively involved civil society in its trainings, and is considered to have the potential to become a forum where judges can openly discuss political interference and threats to their independence (Fagan, 2016). There have been setbacks to the development of the Academy into a full-fledged national training authority, however. In particular, the Constitutional Court declared that graduates of the Academy could no longer be treated preferentially and

guaranteed immediate employment and the support of the High Judicial Council (Fagan, 2016). There are also concerns that the Academy lacks sufficient independence, evident by the fact that the Ministry of Justice holds much influence over the composition of the Academy. Creating a more powerful Academy, without resolving the problem of governmental interference, renders it at a high risk of political influence (Fagan, 2016).

In order to improve the functioning of the Academy, further reforms are needed to increase its power in relation to the executive; to increase its capacity as a training and professional standards body; to improve the quality and responsiveness of training programmes; and also to better link it with the High Judicial Council (EC, 2018f; Fagan, 2016).

## **Vetting**

While Serbia has adopted the basic legislative conditions and founding stones for vetting, the current government has failed to design a comprehensive vetting process and institutional restructuring. This is due in large part to a lack of political will (Maxhuni and Cucchi, 2017). There are also concerns that Serbia's vetting measures may be incompatible with European fair trial standards as the re-appointment procedures for existing judges allows for the possibility of removal of judges from office who are not guilty of any misbehaviour (Anastasi, 2018).

## **Judicial efficiency**

Serbia's judicial system performs at a lower standard than that of EU member states (World Bank, 2014). Judicial efficiency and public confidence in the judiciary is undermined by a large backlog of cases; inadequate levels of competence; a high level of bureaucracy and red tape; and unchecked procedural abuses (Gome, 2017; Elek et al., 2016 World Bank, 2014). There has been some progress, notably a reduction in the backlog of old enforcement cases and the adoption of measures to harmonise court practice (EC, 2018f).

## **Access to justice**

Access to justice is hindered by high legal fees; lack of an efficient free legal aid system and delays in the adoption of the Law on Free Legal Aid; the poor availability and quality of performance of appointed defence lawyers; delays in case processing; inefficient procedures for awarding compensation; and weak enforcement of final judgments (EC, 2018f; World Bank, 2014). Women experience the judicial system differently from men. In particular, they are more likely to experience barriers to access to justice and to find attorney fees to be cost-prohibitive (World Bank, 2014).

## **Corruption and organised crime**

### **Corruption**

Corruption remains a serious and widespread problem in Serbia, typically embedded in the state (EC, 2018f; Ciero, 2016). Serbia lags EU member states and neighbouring countries on all comparative indices of perceived corruption in the judiciary (World Bank, 2014). The prevalence of corruption stems in large part from inadequate investigation; corrupt judges and politicians; insufficient sentencing; and lack of coordination of anti-corruption efforts (Cierco, 2016).

While corruption is classified as a crime in the Serbian Penal Code, it is not stated as corruption, but is covered instead by "crimes against the office", which includes abuse of the official function

(Gome, 2017). EU experts noted problems with the overuse of the vague “abuse of office” charge (US DOS, 2018f).

Justice and political parties are the two institutions most affected by corruption (Transparency International; cited in Gome, 2017). Corruption is a weak point of the judiciary. An analysis, conducted by the UNDP and Transparency International, finds that 82 percent of people surveyed in Serbia think the judiciary is the most corrupt institution in the country and 63 percent did not trust the courts (Avramovic, 2015). High ranking politicians continue to influence courts, at times publicly criticising court proceedings (BTI, 2018f). Judicial salaries remain low, resulting in an environment conducive to corruption (Gome, 2017). Bribery of court staff seems to be more common than the bribery of judges (World Bank, 2014). The presence of corruption, in turn, hinders judicial reforms. Corruption remains a threat to rule of law and the development of democracy (Avramovic, 2015). The Anti-corruption Council and the NGO Transparency Serbia point to a continued lack of governmental transparency (US DOS, 2017f).

### **Anti-corruption**

There has been some progress in the fight against corruption in Serbia (EC, 2018f; Elek et al., 2016). The country has established the legal framework to fight corruption, abuse of power and other corrupt practices, including more recently the introduction of whistle-blower protection (BTI, 2018f). EU funding has supported significant improvements in Serbia’s institutional framework for fighting corruption, including the adoption of better laws and amendments; establishment of anti-corruption agencies and strategies, action plans for information and prevention activities; and addressing of conflict of interest issues in public administration (EC, 2018f; Ciero, 2016).

Various challenges remain in countering corruption, including: violation of anti-corruption laws; lack of sufficient capacities and equipment of entities involved in anti-corruption; and lack of transparency in decision-making processes (Ciero, 2016). In addition, there has been a serious delay in adopting the new law on the Anti-Corruption Agency, in order to enable it to better assume its role as the key institution in this area (BTI, 2018f; EC, 2018f). There is also confusing overlap in the mandates and tasks of the three key organisations associated with anti-corruption (the Anti-Corruption Agency of Serbia (ACAS), the Group for Coordination of Implementation of the Anti-Corruption Strategy and the newly established Government's Coordination Body for Implementation of the Action Plan). This contributes to unsatisfactory implementation of the Strategy and Action Plan (Elek et al., 2016; McDevitt, 2016). Lack of cooperation among anti-corruption, judicial and law enforcement bodies also undermines the ability to effectively counter corruption (McDevitt, 2016).

The Anti-Corruption Council, in its advisory role to the government, has remained active in exposing and analysing cases of systemic corruption. The government, however, has not systematically follow up on its recommendations. It also did not follow the Council’s rules of procedure and appointed two new members of the Council without consulting it (EC, 2018f).

The law provides criminal penalties for corruption by officials (US DOS, 2017f). However, there is a limited track record of investigations, indictments and final convictions in corruption cases involving high-level public officials (BTI, 2018f; McDevitt, 2016). Instead, allegations of corruption among politicians are often used as a political weapon against other parties and leaders (BTI, 2018f). This all contributes to a lack of public trust in the institutions connected to fighting corruption.

### **Organised crime**

Serbia also remains vulnerable to organised crime, despite some progress toward countering it (EC 2018f; Ciero, 2016). Progress was made in various areas, such as improvements in human resource management in the Ministry of the Interior and the police and in the operational capacity of the Prosecutor's Office for Organised Crime and the Prosecutor's Office for Cybercrime (EC, 2018f). There have also been improvements in the institutional framework, with the adoption of a new strategy and action plan to prevent and fight trafficking in human beings and a new Law on the Prevention of Money Laundering and Terrorist Financing; and the appointment of a National Coordinator for Combating Trafficking in Human Beings (EC, 2018f). Despite these developments, Serbia has yet to establish an initial track record of effective financial investigations; there are still very few convictions for organised crime (EC, 2018f).

In order to effectively tackle organised crime, law enforcement agencies in Serbia need to establish a better track record; enhance their analytical capacities; improve inter-institutional cooperation; and create regional networks for fighting organised crime (Elek et al., 2016). Elek et al. (2016) finds that a key milestone in the development of analytical capacities was reached with the production and publishing of the first national Serious and Organised Crime Threat Assessment (SOCTA) in 2016. The report aims to improve the effectiveness of police work in the fight against organised crime and to allow for more efficient use of human and technical resources. In order to have a genuine impact on policies and the work of law enforcement agencies, though, SOCTA needs to be operationalised and applied (Elek et al., 2016). There also needs to be greater progress with establishing a reliable criminal-intelligence system, in order to allow for efficient and secure exchange of information between various law enforcement agencies. Currently, this exchange is undermined by various non-compatible systems of data collection and formats across institutions, making it difficult, for example, to trace a single case throughout the judicial system (Elek et al., 2016).

Corruption and organised crime in Serbia contribute to the lack of trust of the citizens in existing institutions. According to the Eurobarometer (2013), the majority of Serbs tend to not trust in national political institutions (67 percent do not trust in the national government and 70 percent in the national parliament (see Cierco, 2016, 125).

## **War crimes prosecution**

The war crimes prosecutorial strategy has been severely delayed. A draft strategy was published in March 2018. Key elements for the prosecutorial strategy include investigating and prosecuting the perpetrators most responsible for the crimes irrespective of their rank; a victims-focused approach, with particular attention to witness protection; and strengthened cooperation among various stakeholders (EC, 2018f).

There have been various challenges in carrying out war crimes prosecutions in Serbia. These include significant delays in the appointment of additional deputy prosecutors; the practice by the executive of publicly commenting on trials, undermining judicial independence; statements by senior politicians calling into question ICTY rulings; and the politicisation of investigations (EC, 2018f; McDevitt, 2016).

While progress was made with regard to prosecutions for sexual violence in the ICTY and by local courts in BiH, the Special War Crimes Chamber in Belgrade has concluded only two trials for rape relating to the conflict over Kosovo (Ungar, 2017)



## Media freedom and protection

There have been worsening tendencies and backsliding in the exercise of freedom of expression, freedom of the press and media plurality in Serbia (Huska, 2018; Elek et al., 2016), with a rise in self-censorship and undue influence on editorial policies and websites (McDevitt, 2016). This downward trend is considered to be linked to the broader political context, in particular the authoritarian tendencies of the government (Huszka, 2018; Marić and Bajić, 2018). While independent media organisations were generally active and expressed a diversity of views, there were reports that the government pressured media by withholding advertising, abusing tax audits, and restricting access to public information (US DOS, 2017f). Further, the Anti-Corruption Council report confirms key problems with fostering an independent media in Serbia. They include: non-transparency of media ownership; non-transparent financing and economic pressure through the budget; and censorship and self-censorship (Marić and Bajić, 2018). Huszka, (2018) critiques the EU for not having sanctioned Serbia for the lack of compliance with meeting EU conditions on freedom of speech and media freedom (Huszka, 2018).

Intimidation of journalists, threats, intimidation and violence against journalists remain a concern. There are numerous credible reports of verbal and physical attacks against journalists; and attacks against the property of journalists (EC, 2018f; US DOS, 2018f).

The law in Serbia prohibits threatening or otherwise putting pressure on public media and journalists or exerting any other kind of influence that might obstruct their work (US DOS, 2018f). Serbia needs to elaborate guidelines, clarifying their classification as criminal or other type of offences and closely monitor their follow-up by the law enforcement authorities. Several cases have been solved and some criminal charges filed, but authorities rarely file criminal charges in the case of threats against journalists. Moreover, there are still few convictions, resulting in a climate of impunity (EC, 2018f; Marić and Bajić, 2018).

## Minority protection

Serbia has a strong legislative framework in place, aligned with EU standards, concerning guaranteeing and protecting human rights and protection minorities from discrimination. This includes the introduction of the concept of a “hate crime”. The country also has an institutional framework in place, with the Office for Human and Minority Rights and the Equality Commissioner’s Office, established to implement anti-discrimination legislation. Implementation of the legal framework remains problematic though, lacking a positive track record (BTI, 2018f; Marić and Bajić, 2018; Elek et al., 2016). This is largely due to budgetary weaknesses and poor levels of human resources in the organisations. In addition, prosecutors and judges tend not to have sufficient anti-discrimination knowledge, often resulting in misapplication of the notion of discrimination, despite the existence of some training sessions (Marić and Bajić, 2018).

A survey examining discrimination and violence against minorities ranks Serbia 95<sup>th</sup> out of 128 examined countries, amounting to the weakest results of all the EU member states and enlargement countries (see Marić and Bajić, 2018, p. 22). The Romani are considered to be subject to the greatest discrimination of any ethnic minority in Serbia. They continue to face prejudices and discrimination in society, particularly poor access to employment, health and education services; sub-standard living conditions; forced eviction; and discriminatory treatment in the media and public discourse (BTI, 2018f; US DOS, 2017f; Elek et al., 2016). This is despite positive developments with the adoption of a government strategy for social inclusion of Roma and the establishment of a new Regional Roma Office (Elek et al., 2016).

Other marginalised groups in Serbia include LGBTI persons, persons with disabilities, and victims of gender-based violence. While research from 2016 indicates that a large majority of citizens reject direct, physical violence towards LGBTI persons, they do not perceive other forms of violence (i.e. demeaning insults, avoidance, discrimination in the work place etc.) as such (Elek et al., 2016). In 2017, the first openly LGBTI Prime Minister was appointed in Serbia. Nonetheless, discrimination and violence against LGBTI person remains widespread (Marić and Bajić, 2018).

Persons with disabilities suffer from inaccessibility of facilities and services, despite the existence of a sufficient normative framework. They have submitted the third largest share of complains to the Commissioner for the Protection of Equality, demonstrating significant obstacles in their ability to exercise their rights (Elek et al., 2016).

Gender equality has also deteriorated, with the country declining in its ranking in the World Economic Forum's 2016 Gender Equality Gap Index. Results were particularly troubling in the area of political empowerment of women (see Elek et al., 2016).

## Asylum framework

Serbia was massively affected by the "refugee crisis" in 2015-16. While the EU and the EC praised the country's performance during the crisis, EC country reports have highlighted key problems and deficiencies of the Serbian asylum system. This relates to a deficient implementation of the asylum law in force; slow and ineffective asylum procedure; lack of human resources; knowledge and skills of the existing staff on asylum matters, which results in deficient asylum decisions; and the lack of accommodation capacities (Imeri et al., 2018; Marić and Bajić, 2018). These constraints have undermined the access of asylum seekers to prompt and effective individual assessment of their protection needs (US DOS, 2018f). Further, there is no relevant policy or solution for the possible permanent stay of refugees. While there is a governmental body responsible for refugees, this body focuses more on refugees from the former Yugoslav territories. While it is also responsible for taking care of refugees from Syria and other turbulent areas, a review of documents indicate that it deals simply with the provision of basic living needs for refugees on their way toward Western European countries (Stančetić, 2018). Serbia needs to adopt a proactive approach to developing a policy and solution for the permanent stay of refugees in the case of possible future events (Stančetić, 2018).

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