



UNIVERSITY OF
GOTHENBURG

DEPARTMENT OF POLITICAL SCIENCE
CENTRE FOR EUROPEAN STUDIES (CES)

EFFECTS OF EUROPEANISATION ON RULE OF LAW IN SERBIA

A Case Study on Judiciary Reforms in Serbia and EU's Pathological Power

Nevena Zindović

Program and/or course: MAES - Master in European Studies, Master thesis 30 HEC
Semester/year: Spring 2017
Supervisor: Ann-Kristin Jonasson
Words: 23 595

I dedicate my postgraduate studies and this master thesis to my beloved parents as a sign of my unconditional love and gratitude for everything that they have given to me, to my sister who always supported me and who gave birth to my first nephew during these studies, and to my Aldin who stood beside me during this whole journey...

Ovaj master rad i postdiplomske studije posvećujem mojim divnim roditeljima u znak neizmerne ljubavi i zahvalnosti za sve što su mi pružili, mojoj sestri koja me je uvek bodrila i rodila mog prvog sestrića tokom mojih studija i mom Aldinu koji je bio tu, uz mene, tokom celog ovog puta...

ABSTRACT

Contrary to the widespread opinion of Europeanisation scholars that the EU transforms states, having transformative power, the theory of the EU's pathological power argues that in the area of rule of law the EU has negatively reinforcing effects on certain rule of law dimensions which results in weak rule of law. The thesis will test the theory of EU's pathological power against rule of law in Serbia, through a case study on judiciary reforms. The thesis aims to find out if the EU has pathological effects on Serbia's rule of law after Serbia became a candidate country in 2012 as well as to contribute to the development of the theory of the EU's pathological power on the case of Serbia. In order to trace developments of rule of law during the four-year period, the thesis will employ a qualitative content analysis with process tracing of new empirical material, i.e. three types of reports which provided information about the state of the Serbian judiciary from 2013 to 2016. If results confirm the theory, the theory of the EU's pathological power will be strengthened, which is of vast importance not just for academia, but for society and the policy-making process on the EU level, as it will be showed that EU reforms do not improve but rather worsen the state of rule of law.

TABLE OF CONTENT

ABSTRACT	II
1. INTRODUCTION.....	1
1.1. Outline.....	2
2. EUROPEANISATION: GENERAL TERMS.....	3
2.1 Rule of Law in the EU Context	3
2.2. The Notion of Europeanisation	3
2.3. Two Approaches: Logic of Consequentiality and Logic of Appropriateness	4
3. EFFECTS OF EUROPEANISATION	6
3.1. Transformative effects.....	6
3.2. Limited Transformative Effect.....	7
3.3. Reinforcing Effects.....	7
3.4. The EU's Pathological Power	9
4. THE JUDICIAL SYSTEM IN SERBIA FROM THE BEGINNING OF EUROPEANISATION...	12
4.1. Previous research.....	12
4.2. Summary of Previous Research.....	15
5. PRESENTATION OF THE RESEARCH PROBLEM, AIM, RESEARCH QUESTION, AND HYPOTHESIS.....	17
6. DESIGN OF RESEARCH PROJECT.....	18
6.1. Analytical Framework.....	18
6.2. Methods and Data for Analysis	21
6.3. Limitations and Ethics.....	22
6.4. Content Analysis and Process Tracing	22
7. ANALYSIS AND RESULTS	25
7.1. The EC Progress Report 2013	25
7.2. Protector of Citizens' 2013 Annual Report.....	26
7.3. Anti-Corruption Council Report on Judicial Reform from 2014	28
7.4. The EC Progress Report 2014	30
7.5. Protector of citizens' 2014 Annual report	31
7.6. The EC Progress Report 2015	33
7.7. Protector of citizens' 2015 Annual report	35
7.8. The EC Progress Report 2016	37
7.9 Protector of citizens' 2016 Annual Report.....	38
7.10. Anti-Corruption Council's Report on Judicial Reform from 2016	39
7. CONCLUSION	43
8. SOURCES	47
9. APPENDIX	51

1. INTRODUCTION

With the beginning of the new century, countries of the Western Balkans commenced a long process of state and economy transformation and began official relations with the European Union (EU). One of the areas that particularly needed to be reformed and improved was the rule of law. However, having a satisfactory level of rule of law was a problem not just for candidate states but also for Member States (MSs).¹ Bulgaria and Romania have continued to face problems with rule of law even after they joined the Union in 2007, because of which judiciary reforms, through which the rule of law is promoted, became a priority for the European Union (EU) in relation to future enlargement.²

Nevertheless, despite the importance of the issue, there is little research on Europeanisation of the judiciary in candidate states.³ When analysing how Europeanisation affects countries, scholars mainly argue that the EU has transformative powers, which entails that it transforms the state and the economy.⁴ To the contrary, the theory of the EU's pathological powers argues that the EU has negatively reinforcing, i.e. pathological effects on certain rule-of-law dimensions in countries with unfavourable domestic conditions, which results in countries having weak rule of law after EU reforms were conducted. With this in mind, this thesis intends to investigate the effects of EU reforms on rule of law in Serbia. Serbia is chosen to be examined, as Serbia is among "the most reluctant Europeanizers... persistently understudied and undertheorized in the Europeanisation literature."⁵

Previous research in relation to Serbian rule-of-law reforms until 2012 has showed that EU reforms did not improve certain dimensions of the rule of law, which was particularly the case with judicial independence, while Mendelski who examined Serbia through his comparative case study of the South Eastern European countries (SEE) argues that the EU's power had pathological effects. Being a Serbian lawyer since five years back, I witnessed changes in relation to the state of the judiciary through my work. I noticed progress in some of the areas but I also saw that there was greater legal uncertainty as laws and regulations were often amended. However, Serbia has gained candidate status in 2012 which implies that it progressed in its road towards the EU. As membership is now closer, it can be assumed that Serbia also made progress in relation to the rule of law. This thesis will analyse the state of rule of law in Serbia after it became a candidate country by testing and developing the theory of the EU's pathological powers against the case of Serbia.

Aside from my personal interest in such an analysis the choice of writing this master is made as the issue of rule of law in EU terms is highly relevant socially, culturally, politically and economically. As Serbia is in the process of becoming an EU MS, at the same time as the EU is facing an existential crisis following the UK's exit, the effects of the process of Europeanisation is heavily debated in political and academic discourse, particularly with respect to the rule of law, which is a key in the context of European integration as a politically driven process. Namely, rule of law affects every

¹ Kmezić, Marko (2017) EU Rule of Law Promotion: Judiciary reforms in the Western Balkans, p.5.

² Dallara, Cristina. (2014), *Democracy and judicial reforms in South-East Europe. Between the eu and the legacies of the past*, XIX; Kmezić, M. (2017), p.5, 52.

³ Kmezić, Marko (2014) Europeanisation by Rule of Law Implementation in the Western Balkans, p.61.

⁴ Vachudova, M. A. (2005), Chapter 7, p.3.

⁵ Subotić, J. (2010), *Explaining Difficult States The Problems of Europeanisation in Serbia*, East European Politics and Societies, SAGE publications.

aspect of citizens' lives, and without satisfactory rule of law it is not possible to have a fully democratic state which ensures citizens' rights and liberties.

This study is relevant for research in European studies, as it contributes to the study on how the rule of law develops during the process of Europeanisation. It is also relevant for legal research as it examines how rule of law is exercised in practice. Finally, the study is important in relation to the EU policy-making process, since the findings can show how successful the reform approach that the EU pursues is and therefore perhaps provide guidelines for a change in EU policy making.

The thesis aim is therefore to test the theory of the EU's pathological powers against case of Serbia as well as to contribute to further development of the theory, in order to assess whether rule of law in Serbia improved after Serbia became a candidate country. The thesis will be a qualitative deductive case study that will test new empirical data against the mentioned theory by doing a content analysis and process tracing of three types of reports about the state of rule of law from 2013 to 2016.

1.1. Outline

This thesis will first discuss the notion of rule of law, after which the theoretical part which relates to the concept of Europeanisation will be presented. Aside from other sections, the theoretical part will introduce the theory of the EU's pathological powers against which Serbian rule of law will be tested. Following this, the thesis will continue by providing previous research about judiciary reforms in Serbia from the beginning of the Europeanisation process. This part will conclude with a section that presents the aim of the thesis, research problem, research question and hypothesis. Following this, the method and design of the study will be introduced and the thesis will continue with an analysis of three types of reports that will be presented chronologically. Finally, the findings of the study will be presented in the conclusion.

2. EUROPEANISATION: GENERAL TERMS

2.1 Rule of Law in the EU Context

In EU documents, the principle of rule of law is often presented together with notions such as democracy, fundamental rights and liberty.⁶ It is listed as one of the values on which the Union is founded and which, according to Article 2 of the EU Treaty, must to be respected.⁷ It presents one of the Copenhagen political criteria that a country needs to fulfil before it becomes a member state.

European Commission Progress Reports measure rule-of-law criteria through benchmarks of judicial independence, judicial capacity, right to a fair trial and efficiency of the court system. Reforms of the judicial system thus became the main pillar for assessment of rule-of-law criteria, which were included in Progress reports under political criteria and the specific section of the “Judicial System” since 1998.⁸ After the 2007 enlargement the EU took a stand that judiciary reforms particularly need to be taken into account when negotiating with future MSs, since Bulgaria and Romania continued to have problems with the rule of law even as MSs. Serbia and Montenegro thus became the first candidate countries after Croatia for which the EU applied a new approach placing at the centre of negotiations Chapter 23 (Judiciary and Fundamental Rights) and 24 (Justice, Freedom and Security), in which the rule of law is discussed.⁹

2.2. The Notion of Europeanisation

The study on the effects of EU reforms on Serbia’s rule of law is inseparable from the concept of Europeanisation. This part of the thesis will therefore present how Europeanisation is defined and what its effects are.

According to the most commonly adopted meaning, Europeanisation is the process of adaptation of national governance to the European system of rules and governance. This does not relate solely to the changes in policy and structure, but also to changes in domestic identities and discourses which happen with the acceptance of European values.¹⁰ Ladrech (1994) was among the first to provide a definition explaining Europeanisation as an “incremental process re-orienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organizational logic of national politics and policy-making”.¹¹ Nevertheless, scholars explain that the European integration process is a complex process influenced also by domestic actors, from bottom-up, although majority of definitions presented Europeanisation as a top-down process.¹² This, because in the

⁶ Kmezić, M. (2017), p.13.

⁷ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01, Article 2; Article 2, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, European Commission (2007/C 306/01), Lisbon 2007.

⁸ Dallara, C. (2014), XIX.

⁹ Kmezić, M. (2017), p. 5 & p. 52.

¹⁰ OLSEN, JOHAN P. (2002), THE MANY FACES OF EUROPEANIZATION, P. 924, P. 932 & P. 935.

¹¹ Ladrech, R. (1994) Europeanization of Domestic Politics and Institutions: The Case of France, p. 69.

¹² Vink, Maarten (2003), What is Europeanization? and other questions on a new research agenda, p.66; Graziano Paolo, Vink Maarten P. (2013) Europeanization: Concept Theory and Methods, p.38

Europeanisation process states were not just “downloading” EU rules and policies but were also “uploading” their “preferences“ knowing it would be easier to adapt to these EU policies and rules if they are similar to their preferences.¹³

The concept of Europeanisation refers to MSs, candidate states, states that have a membership perspective, quasi members (members of EEA but not of the EU) but it goes also beyond Europe, to the states that are part of the European Neighbourhood Policy (ENP).¹⁴ When it comes to candidate states, it is argued that the Europeanisation of candidate countries is a distinctive area of research, a sub-field of general Europeanisation literature especially when taking into account Europeanisation of CEE countries.¹⁵ This is because the EU mainly exercised a conditionality mechanism when it was transferring rules to future MSs, applying the “top-down” approach, instead of the “two way nature of Europeanisation”.¹⁶ Moreover, there was great asymmetry in the power between the EU and these states and Europeanisation of these countries was also distinctive due to their post-communist characteristics.¹⁷

2.3. Two Approaches: Logic of Consequentiality and Logic of Appropriateness

There are two contrasting approaches that explain how countries involved in the Europeanisation process adopt EU rules: *rationalist*-institutionalism and *constructivist*-institutionalism.¹⁸ They have roots in March & Olsen’s distinction between the logic of appropriateness and the logic of consequentiality.¹⁹

According to the rationalist-institutionalists’ approach, which employs the *logic of consequentiality*, a country acts strategically in order to maximize its utility and it chooses to abide to EU conditions on the basis of its cost-benefit calculations.²⁰ Advocates of this approach argue that “the cost-benefit calculations of the candidate country can be successfully manipulated by the EU through external incentives (sanctions and rewards).”²¹ Namely, the EU provides a reward to a state if the country fulfils the conditions that the EU sets, while it withholds the reward if a state fails to fulfil the requirements. Within this model, the EU uses a conditionality mechanism as a strategy to incentivize the candidate state to comply with EU rules.²² Arguably, the mechanism of EU conditionality is more probable to be successful if the accession state is conditioned by greater rewards (of which the greatest is the membership perspective) and if rewards are credible—if the target country is assured that it will

¹³ Bache, Ian (2008) *Europeanization and multilevel governance: cohesion policy in the European Union and Britain*, p.10.

¹⁴ Schimmelfennig, Frank (2012) *Europeanization beyond Europe*, p.5.

¹⁵ Sedelmeier U. (2011), *Europeanisation in new member and candidate states*, p. 29.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Vink, M. (2003), *What is Europeanization? and other questions on a new research agenda*, p. 67-68; See March, J.G. & Olsen, J.P. (2004) *Logic of appropriateness*, Arena Working paper 04/09, Centre for European Studies University of Oslo.

¹⁹ See March & Olsen, *Logic of appropriateness*, Arena Working paper 04/09, Centre for European Studies University of Oslo.

²⁰ Schimmelfennig, F. (2012), p. 6-7.

²¹ Kmezić, M. (2017), p. 22- 23.

²² Schimmelfennig, F. & Sedelmeier, U. (2004) “Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe”, p .663; Sedelmeier Ulrich (2011), *Europeanisation in new member and candidate states*, p. 29; Schimmelfennig Frank (2012) *Europeanization beyond Europe*, p. 7.

receive the promised reward. Further factors that increase the probability of success are that requirements are clear (so that the target state knows precisely what conditions it must fulfil) and that the domestic costs are not excessive to the point where the power base of incumbent governments is threatened.²³

On the other hand, according to the constructivist-institutionalists' approach, the target country adheres to EU norms and rules, as these are perceived as appropriate and legitimate, and is therefore driven by the *logic of appropriateness* and not by external incentives.²⁴ The argument goes that "rules are followed because they are seen as natural, rightful, expected, and legitimate."²⁵ Namely, the EU educates domestic societies (e.g. civil societies, parties, NGO's, companies), about EU policies and norms by a social-learning model which uses mechanisms of socialization and persuasion that in the end stimulate domestic societies to adopt EU rules.²⁶ Or in the so-called lesson-drawing model, states adopt EU norms as they themselves are unsatisfied with the current conditions in their country and find EU norms appropriate to solve their domestic problems.²⁷

²³ Schimmelfennig F. (2012), p. 8; Sedelmeier, U. (2011), p. 29.

²⁴ Kmezić, M. (2017), p. 23.

²⁵ See March James G. & Olsen Johan P. (2004), ABSTRACT.

²⁶ Schimmelfennig, F. (2012), p. 8-9; Kmezić, M. (2017), p. 23.

²⁷ Schimmelfennig, F. (2012), p.7, 9.

3. EFFECTS OF EUROPEANISATION

Hix and Goetz stated that it is not important by whom European integration is driven, “whether delegation is determined by domestic government preferences, driven by transnational economic actors, or 'cultivated' by supranational agents”, but how it affects the domestic arena.²⁸

This section will present theoretical standpoints of scholars in relation to the effects of Europeanisation, of which one relates to the theory against which the case of Serbian rule of law will be tested.

3.1. Transformative effects

Scholars of Europeanisation mainly argue that Europeanisation has a transformative effect, especially when taking into account CEE countries that joined the Union in 2004 (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia).²⁹ They argue that eight East Central European post-communist states profited from the EU prospects of membership, from their institutional and knowledge transfers and in general from relations with the EU.³⁰ Ekiert, Kubik and Vachudova (2007) find that “the European Union may be presiding over the most successful democracy promotion program ever implemented by an international actor... every democratizing state that has become a credible future member of the European Union (except perhaps Serbia) has made steady progress toward liberal democracy”.³¹ They claim that without EU enlargement, the political and economic paths of EU neighbours “would have visible costs”.³²

According to Vachudova, the EU possesses so-called passive and active leverage by which it influences future MSs. Passive leverage is reflected in the economic and political benefits that EU membership entails and which in fact attract other countries to join the Union. On the other hand, active leverage is explained as “deliberate conditionality exercised in the EU's pre accession process”.³³ It refers to three groups of criteria—the Copenhagen political criteria, the Copenhagen economic criteria and the *acquis communautaire* or EU legislation—that a candidate country has to fulfil in order to gain EU membership.³⁴

Vachudova clarifies that there are three mechanisms that “translate the EU's active leverage into reforms of the state and the economy”—EU conditionality, credible commitment and empowering of certain groups of society.³⁵ The EU conditionality mechanism affects countries to adopt reforms due to (1) the existence of asymmetrical interdependence on the side of the Union, (2) the duty of a candidate country to enforce the EU requirements before accession, and (3) the reward which a candidate

²⁸ Hix, Simon and Goetz, Klaus H. (2000) *Introduction: European integration and national political systems*, p.3-4.

²⁹ See Vachudova M. A (2005); See Grabbe, H. 2006. *The Eu's transformative power. Europeanization through conditionality in Central and Eastern Europe*.

³⁰ Ekiert, G., Kubik, J. and Vachudová, M. A. (2007), “Democracy in the Post-Communist World: An Unending Quest?”, p. 12.

³¹ Ekiert, G., Kubik, J. and Vachudová, M. A. (2007), p. 22.

³² Id, p. 24.

³³ Vachudova M. A. (2005), Chapter 3, p. 2 & p. 5.

³⁴ Id, Chapter 5, p. 22.

³⁵ Id, Chapter 7, p. 3.

country gets when it fulfils the requirement (meritocracy).³⁶ As regards to credible commitment, she argues that by adopting reforms the candidate state shows to domestic and international actors that the country is committed to reforms, thus presenting a promising signal for a stable economic environment because of which future governments also continue with reforms. On the other hand the EU empowers different groups of society that will benefit from EU membership, which causes these civic groups to call for reform of the state.³⁷ These three mechanisms thereby induce reforms in candidate countries through “transformative” conditionality—a long-lasting process through which the state, the society, and the economy are transformed.³⁸

3.2. Limited Transformative Effect

Some scholars argue that Europeanisation has limited transformative effects. Jonasson (2013) examined EU democracy promotion within the ENP framework in neighbouring Mediterranean countries, Jordan and Turkey, and concluded that EU conditionality was limited as EU policy has yielded little results in relation to democracy in both countries.³⁹ According to Jonasson EU conditionality alone is not a sufficient mechanism for successful democracy promotion if there is no *orientation* of the candidate state towards European norms, *local ownership* of the project, and *dialogue* between the candidate country and the Union. These are not the only necessary conditions for the existence of democracy but they increase the chance for the success of democracy promotion.⁴⁰

Börzel and Pamuk (2012) argue that Europeanisation has very limited transformative effects beyond its borders. Their research on neighbouring countries of the Southern Caucasus region (Armenia, Azerbaijan, and Georgia) which face great problems with corruption showed that EU reforms in fact strengthened the corrupt governments. Governments instrumentalised reforms for the fight against corruption and used them to decrease the power of their political opponents, and Europeanisation did not manage to remove patronage and clientelistic networks.⁴¹ Börzel and Pamuk named these opposite negative effects of the EU reforms “pathologies of Europeanisation”, arguing that they in fact reveal the “dark side of Europeanisation”. They stated that “Europeanisation can have unintended and negative effects on the domestic structures of states. EU policies and institutions... can also bolster the power of incumbent authoritarian and corrupt elites.”⁴²

3.3. Reinforcing Effects

Mendelski (2014) claims that the EU’s judicial reforms, i.e. EU conditionality in rule-of-law, does not have transformative but *reinforcing* effects, which could be either healthy (positive) or pathological (negative), depending on existing country conditions.⁴³ In countries with solid rule of law that conduct

³⁶ Id, Chapter 5, p. 6.

³⁷ Vachudova, M. A. (2005), Chapter 7, p. 7, p. 11, p. 14 & p. 16.

³⁸ Id, Chapter 7, p. 3.

³⁹ Jonasson, Ann-Kristin (2013), *The EU’s Democracy Promotion and the Mediterranean Neighbours, Orientation, ownership and dialogue in Jordan and Turkey*, p. 3 & p. 240.

⁴⁰ Jonasson, Ann-Kristin (2013), p. 34.

⁴¹ Börzel, T. A. and Pamuk, Y. (2012), “Pathologies of Europeanisation: fighting corruption in the Southern Caucasus”, p. 1-2, p. 5-6 & p. 11.

⁴² Börzel, T. A. and Pamuk, Y. (2012), p. 1-2.

⁴³ Mendelski, Martin (2014), *Dissertation: The Limits of the European Union’s Transformative Power: Pathologies of Europeanization and Rule of Law Reform in Central and Eastern Europe*, Abstract and p.8.

reforms in a healthy (e.g. non-politicised) way, EU conditionality reinforces healthy reform pathways. On the other hand, in countries where rule of law is weak, where domestic reforms are conducted in a deficient way, EU conditionality reinforces negative trends or pathologies which is why the EU has pathological power.⁴⁴ The latter contributes to the *dark side* of Europeanisation that was mentioned above under 4.2.⁴⁵ This difference in the two reform pathways exists because weak rule of law countries, contrary to strong rule of law countries, lack domestic independent horizontal-accountability institutions (e.g. Ombudsman, Judicial Council etc.) which would constrain both the EU and domestic reformers to instrumentalise and misuse rule-of-law reforms.⁴⁶ Therefore, according to Mendelski, the effects of the reforms depend on the interplay between domestic conditions and the EU reform approach.

This part of the thesis will present the theory against which Serbian rule of law will be tested. The thesis is however delimited to including only those of Mendelski's studies that are made in relation to SEE countries, including Serbia.

3.3.1. Multi-dimensional Concept of Rule of Law

Mendelski analysed the effects of EU reforms on the rule of law by examining *de jure* rule of law and *de facto* rule of law, as two components of the multi-dimensional concept of rule of law of which each one contains two more elements.

De jure rule of law refers to the quality of laws and it contains *formal legality and substantive legality*. *Formal legality* implies that laws are clear, non-contradictory, and coherent (easy to follow and to apply) as well as that they are stable and non-changing in the long term (which provide predictability in the decision-making process).⁴⁷ *Substantive legality* implies that laws ensure certain rights and principles that are internationally accepted (e.g. by the United Nations), while aligning a state's legislation with these principles and rights (e.g. by accepting EU standards), is called "legal approximation".⁴⁸

On the other hand, *de facto* rule of law refers to the quality of the judicial system and it includes *judicial capacity and judicial impartiality*. *Judicial capacity* relates to human, technical and financial resources which are necessary for the judiciary to function efficiently, timely and effectively.⁴⁹ *Judicial impartiality* implies that verdicts are made by an independent and accountable judge who exercised rule of law without biases and was not bribed. Judicial impartiality contains six principles: independent judiciary, principle of separation of powers, judicial accountability, non-corrupted judiciary, law accountability in a broader sense (both horizontal and vertical) and "citizens' trust in justice" which indicates the extent of the judiciary's independence and fairness.⁵⁰ However, Mendelski, stressed that higher judicial capacity does not necessarily mean that there exists rule of

⁴⁴ Mendelski, M. (2014), Abstract and p.8; Mendelski, M. (2015), "The EU's pathological power: The failure of external rule of law promotion in South Eastern Europe", p. 320.

⁴⁵ See Börzel, T. A. and Pamuk, Y. 2012. "Pathologies of Europeanisation: fighting corruption in the Southern Caucasus".

⁴⁶ Mendelski, M. (2016), Europeanization and the Rule of Law: Towards a Pathological Turn, p.348-349;

Mendelski, M. (2014), p. 13.

⁴⁷ Mendelski, M. (2015), p. 321.

⁴⁸ Id, p. 322.

⁴⁹ Id, p. 321-322.

⁵⁰ Id, p. 322-323.

law, since resources can be misused for the purpose of someone's particular interests. Thus, *judicial impartiality* presents the crucial component of *de facto* rule of law.⁵¹

Mendelski argues that reformers should pay attention to improve all four dimensions respectively as enhancing of one dimension does not lead to the improvement of rule of law.⁵² Namely, he argues that “aligning domestic legislation with international standards will not establish the rule of law if the new laws and regulations become unstable, incoherent or are not enforced. Similarly, creating capable but not sufficiently impartial judiciaries (and vice versa) will not necessarily improve the rule of law.”⁵³

3.4. The EU's Pathological Power

Mendelski claims that the EU has pathological powers, i.e. negatively reinforcing effects on the rule of law in countries where domestic conditions are unfavourable. He explains that EU reforms in combination with domestic reforms that are pathological reinforce negative trends, i.e. pathologies which undermine two crucial rule-of-law dimensions of judicial impartiality (*de facto* rule of law) and formal legality (*de jure* rule of law). Although it does not have negative effects on all four rule-of-law dimensions, the negative effect is predominant as it undermines two crucial dimensions and thereby the power is pathological. The EU and domestic reformers thus weaken the rule of law instead of improving it.⁵⁴ Mendelski clarified that “the EU's pathological power, though, is an indirect effect, as its outcome depends on a country's domestic conditions, and in particular on the already existing level of its rule of law and the way in which reforms are conducted.”⁵⁵

Mendelski found that reforms in weak rule of law countries were conducted in a vicious “pathological reform cycle”, which he explained by using Myrdal's *logic of circular cumulative causation*, i.e. reinforcement of dynamics that are negative.⁵⁶ Namely, he stated that negative trends or pathologies were created or reinforced in countries with unfavourable domestic conditions where domestic authorities have used a pathological reform approach (by instrumentalising and politicising reforms) and where the EU with its pathological power applied a reform approach that was inconsistent and partisan. Negative trends or pathologies deteriorated judicial impartiality and formal legality, i.e. two out of four rule-of-law dimensions, resulting in a weakening of absolute rule of law.⁵⁷

Mendelski explained that unfavourable domestic conditions were **the initial negative dynamic** that was probably a consequence of communist legacies and transition processes. In such domestic conditions, **the second negative dynamic** occurred, i.e. “the domestic reform approach became pathological”.⁵⁸ Namely, domestic authorities were instrumentalising reforms by conducting them according to their personal interest, in order to secure their positions or to fight their political opponents. They did this through the misuse of adoption of laws under urgent procedures and they politicised both new and old bodies and institutions, as was the case with the Judicial Council, which

⁵¹ Id, p. 322.

⁵² Mendelski M. (2016) The EU's rule of law promotion in Central and Eastern Europe: Where and why does it fail and what can be done about it?, p. 5.

⁵³ Mendelski M.(2016), p. 5.

⁵⁴ Mendelski, M. (2015), p. 319; Mendelski, M. (2014), p. 9.

⁵⁵ Id, p. 319.

⁵⁶ Id, p. 334.

⁵⁷ Ibid.

⁵⁸ Id, p. 335.

“opened up a different channel of political influence“, in many countries.⁵⁹ The EU’s pathological power further reinforced this pathological domestic reform approach thereby being **the third negative dynamic** of the pathological reform cycle. The EU used a partisan and inconsistent method when conducting reforms, as it was biased in relation to veto players and domestic change agents, as well as in the evaluation of progress reports.⁶⁰ According to Mendelski “the EU tended to support reformist change agents, no matter how pathologically they conducted reforms or how undemocratically they behaved...the EU supported or cooperated with clientelistic and corrupt elites or even with members of governments that collaborated or were part of organized crime”.⁶¹ Moreover, the EU evaluated and monitored reforms, with progress reports that relied on information from pro-Western NGO’s and experts that were not objective while negative information from other (e.g. Council of Europe’s) reports were left out in order to show domestic change agents more positively.⁶² The pathological reform approach further reinforced or created the so-called *systemic pathologies*, i.e. “pathologies of Europeanisation”, which was **the fourth negative dynamic** that happened.⁶³ Pathologies on the other hand negatively affected and decreased judicial impartiality and formal legality thereby undermining the rule of law which was **the fifth negative dynamic**. The latter resulted in the overall low level of the rule of law, which was **the final negative dynamic** of the pathological reform cycle.⁶⁴

According to Mendelski, there are three Europeanisation problems that undermine rule of law and cause pathologies. The first one is that the EU reform approach is based on a quantitative “the more the better” concept (e.g. number of laws introduced, number of verdicts) and not on the quality of the reforms.⁶⁵ The second one is that the EU reforms cause *partisan empowerment of change agents*, i.e. the Union supported domestic reformers who were pro-European, regardless if they were controversial politicians that behaved undemocratically.⁶⁶ The third Europeanisation problem is that the EU evaluates reforms of rule of law in a biased way. Namely, the EU was more positive in the evaluation of rule of law of pro-European governments than of anti EU, illiberal countries’ governments, although both groups of countries similarly behaved and did not respect the rule of law.⁶⁷

3.4.1. Pathologies of Europeanisation

The pathological reform approach of the EU and domestic reformers created or reinforced negative trends—pathologies of legal instability, legal incoherence, politicization of judicial structures, lack of enforcement of law and lack of generality of law.

Mendelski explains that the **pathology of legal instability** implies an increase of legal instability, which happened as laws were rapidly changed and adopted by domestic parliaments under fast legislating procedures. Domestic reformers misused urgent adoption of laws for their personal interest, while the EU pressured for approximation of domestic legislation with the EU *acquis* and it evaluated country progress according to the quantity of the adopted laws.⁶⁸ The **pathology of legal incoherence**

⁵⁹ Id, p. 335-336.

⁶⁰ Mendelski, M. (2015), p. 336-337.

⁶¹ Id, p. 337.

⁶² Id, p. 338.

⁶³ Id, p. 339.

⁶⁴ Ibid.

⁶⁵ Mendelski, M. (2016), p. 357-358.

⁶⁶ Id, p. 359.

⁶⁷ Id, p. 365.

⁶⁸ Id, p. 339.

implies that laws were contradictory and incoherent which caused inconsistency in judicial decisions. It happened because legislation quality deteriorated due to the instrumentalised and executive-driven domestic reforms, as well as because various international experts and donors applied and proposed different methods and laws from their own countries which further worsened legal incoherence in the domestic judiciary.⁶⁹ As regards to the **pathology of politicisation of judicial structures**, this implies that the new and old judiciary bodies and institutions (e.g. anti-corruption agencies, judicial councils etc.) were misused, controlled and captured by change actors, since change actors used these institutions in non-democratic and non-transparent ways for advancing their political agenda.⁷⁰ When it comes to the **pathology of lack of enforcement of laws**, this implies that laws were formally adopted but not implemented in practice, due to high domestic costs and veto players who were against these reforms.⁷¹ Lastly, the **pathology of lack of generality of law**, implies that laws were not neutral, because new laws were introduced and amended with the aim “to fulfil particular interest of influential captors” who wanted to fight their competitors.⁷²

Mendelski concludes that the abovementioned pathologies are systemic, with long-term effects which are constantly repeated when reforms are conducted, regardless if change actors or veto players are driving reforms. His research on SEE countries showed that EU reforms in combination with the domestic factors improved substantive legality and judicial capacity, but did not improve judicial impartiality and formal legality. Since the two crucial rule-of-law dimensions were undermined, the pathological effect was predominant and the EU powers therefore had pathological effects.⁷³ The thesis will present the findings from Mendelski’s comparative study on SEE countries in the next section which presents previous research in relation to the judicial system in Serbia.

⁶⁹ Ibid.

⁷⁰ Mendelski, M. (2015), p.340; Mendelski, M. (2016), p.352-353.

⁷¹ Mendelski, M. (2016), p. 351.

⁷² Id, p.354 & p. 351.

⁷³ Mendelski, M. (2015), p.323 & p. 329.

4. THE JUDICIAL SYSTEM IN SERBIA FROM THE BEGINNING OF EUROPEANISATION

4.1. Previous research

Serbia started official relations with the EU after the “October revolution” in 2000 when president Milošević’s regime ended. It became involved in the EU Stabilisation and Association process (SAP) and in 2012, Serbia became a candidate country.⁷⁴

This section will present what has previously been written in relation judiciary reforms in Serbia after it was involved in the process of Europeanisation in 2000. As a notice, it should be mentioned that there is much more literature in regard to CEE countries than in regard to the SEE countries. According to Kmezić (2014) “research on Europeanization of the judiciary in candidate countries remains rare”.⁷⁵ As regards rule-of-law reforms, Serbia was mainly examined in comparative studies of SEE countries and seldom alone.

This section includes only previous research in relation to the EU judiciary reforms in Serbia, although at some points it briefly mentions some results in relation to other SEE countries that were examined together with Serbia. It does not, however, include literature that discusses Serbia’s EU integration process in general.

Dallara had studied four South East European countries (Slovenia, Croatia, Romania and Serbia) from 2000 to 2012 and her results showed that the EU judicial reforms in each country were influenced by domestic factors and forces. In Romania and Serbia “domestic actors challenged judicial reforms and hampered the influence played by the EU strongly opposing the empowerment of judicial institutions and actors.”⁷⁶ In some periods, EU conditionality was effective, while in other it was not, as a consequence of post-communist legacies, credibility of membership perspective and EU rewards and sanctions in different pre-accession phases.⁷⁷ Dallara explained that Serbia was euphoric as it engaged in reforms after the start of its official relations with the Union, which is why the period between 2000-2003 is called the “honeymoon” era.⁷⁸ However, she clarified that adopted laws often lacked practical implementation and enforcement. Serbian domestic actors were influenced by legacies of the previous regime of president Milošević and the judiciary was “a potential political weapon” for political actors who wanted to retain control over the judicial system.⁷⁹ She claims that “a truly free judiciary was almost impossible because its genuine independence would have profoundly undermined the basis of elite power”.⁸⁰

In line with Dallara, Hiber and Begović who examined the Serbian judiciary up until 2006 argue that it was in the personal interest of both judges and some of the politicians from Serbia not to pursue reforms. According to them “one of the puzzling alliances is the one between judges feared to be

⁷⁴ Dallara, C. (2014), p. 82.

⁷⁵ Kmezić, M.(2014), p. 61.

⁷⁶ Dallara, C. (2014), XXI.

⁷⁷ Id, XXIII-XXIV.

⁷⁸ Id, p. 82.

⁷⁹ Id, p. 81 & p. 98.

⁸⁰ Id, p. 101.

removed from the office, seeking no change and political parties/executive government, incumbent of the future one, seeking no change for preserving effective control over judicial system”.⁸¹ Hiber and Begović clarified that political actors and powerful elites wanted to keep their influence. This was evident especially in the case of the High Council of Judiciary, a special body created according to EU reforms in 2001. The High Council of Judiciary was introduced as the only body with the authority to propose judicial officials that should be appointed to a function. This however led to conflicts of interest between three branches of power and resulted with the High Council being deprived of its power to propose presidents of the courts. As Hiber and Begović stated “*one may easily conclude that there was a power struggle with regard to influence over the procedure for the appointment of judiciary officials, and this implies that the most important criteria were not those of professional quality...those who decide on appointment, or promotion, have leverage over appointees or candidates for appointment.*”⁸² They argue that the judiciary after the “October revolution” in 2000 did not change significantly as domestic change actors, in contrast to domestic veto players, were not strong and the external EU impact was rather limited.⁸³

Kmezić & Kmezić (2014) on the other hand stated that the EU does not have some benchmarks according to which it assesses the rule of law in candidate countries. They argue that the *term rule of law* is unclear but “to the advantage of the EU” which could be misused by the Union.⁸⁴ However, they studied judicial reforms in Serbia by examining judicial independence, efficiency, professional competence and accountability, as four benchmarks that are important for the existence of rule of law,⁸⁵ while later Kmezić (2017) examined judicial reforms of five Western Balkan countries (including Serbia), during a 15-year period starting from 2000.⁸⁶ Their results showed that despite an “impressive legislative framework” of Serbia which guarantees judges *de jure* independence, judges were in practice very much influenced and dependent. The efficiency of the judiciary was still unsatisfied although EU reforms were conducted.⁸⁷ Kmezić claims that the proverb used in Serbia “*Pravda je spora ali dostižna*”—“Justice is slow but attainable”—was untrue, that “rather, justice delayed became justice denied.”⁸⁸ On the other hand, professional competence which entails that judges are competent and skilled to exercise judicial functions, was according to Kmezić undermined in whole Western Balkan judiciary and even judicial decisions were questioned for their quality.⁸⁹ In relation to accountability, which is tightly connected to judiciary independence which includes that judges are evaluated for their work in terms of “quantity, quality and commitment to judicial work,” Kmezić explained that many NGOs or the so-called watchdogs evaluate judges in their work.⁹⁰ The overall conclusion of their analysis showed that the judiciary reform process had been “slow, inconsistent and dependent on the change of the ruling elites.”⁹¹ They claim that the EU approach was mainly based on Europeanisation conditionality mechanism as judicial reforms were one of the

⁸¹ Hiber, D. and Begović, B. (2006), *EU Democratic Rule of Law Promotion: The Case of Serbia*, p. 3.

⁸² *Id.*, p. 4

⁸³ *Id.*, p. 3.

⁸⁴ Kmezić, S. and Kmezić, M. “The Rule of Law in EU Enlargement Policy- Impact and Obstacles in Serbia” in Kmezić, M. (2014), p.188.

⁸⁵ *Id.*, p. 190.

⁸⁶ Kmezić, M. (2017), p. 7-8.

⁸⁷ Kmezić, M. (2017), p. 79; Kmezić, S. and Kmezić, M. (2014), p. 210.

⁸⁸ Kmezić, M. (2017), p. 94.

⁸⁹ Kmezić, S. and Kmezić, M. (2014), p. 207; Kmezić, M. (2017), p. 105.

⁹⁰ Kmezić, S. and Kmezić, M. (2014), p. 205; Kmezić, M. (2017), p. 93.

⁹¹ Kmezić, S. and Kmezić, M. (2014), p. 211.

conditions that Serbia had to fulfil in order to be closer to membership status.⁹² However, they argue that clarity of requirements and credibility criteria, which according to many scholars increase the effectiveness of rationalist-institutionalist strategy of conditionality in relation to the transfer of norms, were partly satisfied in Serbia and thus the transfer of EU norms was hindered. They pointed out that the EU should use both top-down (conditionality) and bottom-up mechanisms (socialisation) in order for the EU rule of law reforms to have successful transfer in countries in the accession process.⁹³ Namely, the EU should also employ soft EU mechanisms of constructivist-institutionalist, i.e. socialization and persuasion when transferring its norms in order to convince the “wider community” about the legitimacy and appropriateness of the EU reforms.⁹⁴

Dallara also found that EU conditionality did not have a strong effect in relation to the rule of law reforms in Serbia. She clarifies that judicial reforms were obstructed by domestic actors and the EU contributed to it as it set “broadly-framed conditions without clear requirements, which give great freedom to the government to adopt and interpret them according to their interests and standards”.⁹⁵ The EU reform approach was more concentrated on enhancing the judiciary efficiency by modernising the judiciary, while judicial independence as the main problem of Serbia’s judiciary was neglected.⁹⁶ She argues that the Union did not provide some exact recommendations but merely broadly claimed that Serbia should pay attention to judicial independence, which needs to be improved.

In addition, Mendelski also argues that there had been much more change in judicial capacity than in judicial impartiality according to findings from his studies. He did a case study on Serbia’s rule of law for the period of 2001-2012⁹⁷ as well as comparative study on rule-of-law reforms in SEE countries in which he argues that the EU had pathological effects.⁹⁸

Results from his case study showed that EU and the US donors had a mixed impact on Serbia’s rule of law as they positively affected the capacity of the Serbian judiciary during one period when they increased judges’ salaries and provided electronic equipment which resulted in the modernisation of the judiciary. On the other hand, with the reform from the 2010 which restructured the court network, the number of judges and other court staff had been reduced by one third which caused an increase in backlog cases.⁹⁹ As regards to judicial impartiality, there had not been any significant progress as reforms were conducted in a *politicised and instrumentalised* way and reform of judiciary restructuring was used to remove judges who were not willing to serve the political establishment. Mendelski concluded that rule-of-law reforms in Serbia failed.¹⁰⁰ On the other hand, his mix-method study on the SEE rule of law showed that EU reforms in combination with domestic factors improved substantive legality and judicial capacity, but undermined judicial impartiality and formal legality.¹⁰¹ In relation to *de jure* rule of law, there had been a positive trend in *substantive legality* as SEE countries mainly adopted and ratified international treaties after the fall of communism (1991-1995)

⁹² Kmezić, S. and Kmezić, M. (2014), p.210.

⁹³ Kmezić M. (2017), p. 159, 161.

⁹⁴ Kmezić, S. and Kmezić, M. (2014), p. 210-212.

⁹⁵ Dallara, C. (2014), p.83 & p. 99.

⁹⁶ Ibid.

⁹⁷ Mendelski M. (2013) They Have Failed Again! Donor-driven Promotion of the Rule of Law in Serbia.

⁹⁸ See Mendelski, M. (2015).

⁹⁹ Mendelski, M. (2013), p. 90 & p. 95.

¹⁰⁰ Id, p. 106 & p. 110-112.

¹⁰¹ Mendelski, M. (2015), p. 323.

and in the pre-accession process due to EU conditionality (2000-2004).¹⁰² Croatia, Romania, Bulgaria and Bosnia were frontrunners, while Albania, Macedonia and particularly Serbia were laggards.¹⁰³ On the other hand, the dimension of *formal legality* or stability of laws declined due to the high legislative growth, or fast adoption of large number of new laws in the pre-accession period. When it comes to *de facto* rule of law, the dimension of *judicial capacity* remarkably improved during the period between 2002-2010 due to EU and international funding.¹⁰⁴ *Judicial impartiality* on the other hand did not improve, except slightly for judicial independence indicator in one period. It particularly decreased in Romania, Bulgaria, Serbia, Montenegro and Albania, due to politicisation of the judiciary. EU reforms had reinforcing effects on certain dimensions in a negative way, being pathological and not transformative as expected.¹⁰⁵

Hiber and Begović argue in a similar vein as Mendelski, in relation to judicial independence. They explain that although Serbia had separated the three branches of power (executive, legislative and judicial), executive power often interfered with judicial power when it comes to specific cases. Institutional corruption was present and judges were making biased decisions that suited the executive or legislative, in order to be promoted to higher positions or to be given some material advantages.¹⁰⁶ The executive branch had influenced judicial proceedings before decisions were made so that final decision was in accordance with its interests.¹⁰⁷ As regards to judicial capacity Hiber & Begović explained that “international players are very interested in the subject of changing (reducing) the number of judges, hence the majority of the foreign assistance is based on the rather straightforward improvement of the premises and IT.”¹⁰⁸ They clarified that EU funding increased judges’ salaries, which was of importance for the prevention of corruption but that donated electronic equipment was left unused in practice as judicial staff was not trained to use it.¹⁰⁹

4.2. Summary of Previous Research

It can be concluded that studies presented in this thesis complement each other. Scholars agree that EU reforms had positive effects on judicial capacity in one period as the judiciary was modernised and salaries were increased, but that reforms in one period made the problem of backlog cases even worse. They agree that reforms did not improve the level of judicial independence due to the forces of domestic politicians who under influence of the past post-communist legacies struggled to retain power over the judiciary, as well as because of the EU reform approach. Kmezić and Kmezić study also showed that the level of professional competence in the Western Balkan judiciary was low, while it can be assumed that judges’ accountability was satisfied.¹¹⁰ Mendelski’s comparative study showed that reforms positively affected substantive legality, as SEE countries were adopting international treaties and standards, while at the same time reforms negatively affected formal legality or laws’ stability.¹¹¹ Studies showed that the EU conditionality mechanism was limited, as EU reforms did not

¹⁰² Id, p. 324 & p. 330.

¹⁰³ Id, p. 324.

¹⁰⁴ Mendelski, M. (2015), p. 326-327 & p. 330-331.

¹⁰⁵ Id, p.329 & p. 332.

¹⁰⁶ Hiber, D. and Begović, B. (2006), p. 8.

¹⁰⁷ Id, p. 9.

¹⁰⁸ Id, p. 5 & p. 10.

¹⁰⁹ Id, p. 5 & p. 7.

¹¹⁰ Kmezić M. (2017), p. 93 & p. 105.

¹¹¹ Mendelski, M. (2015), p. 324 & p. 330.

have success in relation to certain aspects of the judicial system, while Mendelski's comparative study on the SEE countries, which also included Serbia, showed that EU conditionality had pathological effect.

Previous studies mainly examined rule of law in Serbia from 2000 up to the year 2012, with exception of Kmezić's analysis of Western Balkan countries.¹¹² Nevertheless, although Kmezić examined a longer period providing a detailed normative analysis, his analysis of the effects in practice mainly concentrated on the period before 2012 with only few examples from 2012 and 2013. On the other hand, Mendelski examined SEE countries using a mixed method research design (quantitative and qualitative analysis), but the period that he examined is unclear. The tables from his analysis show that he did a quantitative analysis of formal legality dimension until 2012, substantive legality/rule approximation until 2013, judicial impartiality until 2012, while for judicial capacity he mentions earlier periods (year 2010).¹¹³ He provided results for SEE countries in general and only occasionally mentioned examples from concrete SEE countries.

The thesis will therefore contribute to an empirical gap in present research, as it will examine specifically the period from 2013 until 2016 by testing the theory of EU's pathological power against a new period, and only in relation to Serbia. As Serbia was rarely thoroughly examined in case studies, this study will thereby contribute to the literature on Europeanisation in SEE countries, Europeanisation of candidate countries, which is according to some a sub-field of the Europeanisation literature,¹¹⁴ to the literature on Europeanisation of the judiciary in candidate countries, which remains rare,¹¹⁵ as well as to the literature on the Dark side of Europeanisation. The study will thus in general contribute to the research field of European studies, but also to legal studies as it examines rule of law in practice. Since this will be a deductive study, if empirical findings confirm the theory of EU'S pathological power, there will be a generalisation of the theory as the study will contribute to the existing theoretical understanding of Mendelski. The study is thereby important for EU policy makers since findings of the study can result in some possible changes in the EU reform approach, having in mind that Mendelski's theory argues that EU reforms negatively affect the overall rule of law.

¹¹² See Kmezić M. (2017).

¹¹³ Mendelski, M. (2015), p. 324-328.

¹¹⁴ Sedelmeier U. (2011), p. 29.

¹¹⁵ Kmezić M. (2014), p. 61.

5. PRESENTATION OF THE RESEARCH PROBLEM, AIM, RESEARCH QUESTION, AND HYPOTHESIS

Having in mind findings from the previous research as well as that Serbia gained candidate status, the thesis will examine whether the EU has negatively reinforcing effects on Serbian rule of law after its membership perspective became more credible. This is because, as already mentioned in the beginning of the thesis, according to Europeanisation scholars the conditionality mechanism, as the most effective strategy for transfer of EU norms, works particularly when membership perspective is more credible.¹¹⁶ With the latter in mind, it can be assumed that Serbian rule of law improved after 2012.

The thesis will examine the period from 2013 until 2016, as Serbia became a candidate country in 2012 while in July 2016 it opened Chapter 23 which discusses the rule of law and judiciary reforms.

It will test the theory of EU's pathological power against Serbian rule of law by using a different method than Mendelski, which implies that the theory of EU's pathological power will first be adapted, i.e. developed analytically and then developed empirically, in relation to the findings of the study. The thesis' general aim is to obtain knowledge about how successful Europeanisation is in transferring its norms and values, and particularly in the promotion of rule of law in one Western Balkan candidate country. More concretely, the thesis aim is to use Mendelski's theory in order to find out whether the EU has a pathological effect on Serbian rule of law after Serbia gained its candidacy as well as to develop Mendelski's theory both analytically and empirically.

Thereby, the research question of the thesis will be the following:

- Is the Europeanisation process having a pathological effect on Serbian rule of law after Serbia became an EU candidate country?

If results from the analysis show that the EU has pathological effect, the specified research question of the thesis will be the following:

- To what extent and how the EU is having pathological effects?

In order to answer the research questions, the following hypothesis that is derived from Mendelski's theory of EU's pathological power will be employed in the analysis:

- a) *In states with initially a low level of rule of law, the EU reforms together with domestic actors' reform approach reinforce pathologies which decrease judicial impartiality and formal legality.*
- b) *In states with initially a low level of rule of law, the EU reforms together with domestic actors' reform approach improve judicial capacity and substantive legality.*

¹¹⁶ Schimmelfennig F. (2012), p. 8; Kmezić, M. (2014), p. 31.

6. DESIGN OF RESEARCH PROJECT

6.1. Analytical Framework

The thesis will test the previously mentioned hypothesis on new data and period by examining rule of law through its four dimensions that were presented with Mendelski’s theory, and which in this case present a variable with four sub-variables. Namely, the paper will analyse **(1) substantive legality, (2) formal legality, (3) judicial capacity, and (4) judicial impartiality** in order to verify outcomes specified from the hypothesis, which shows in which way the independent variable, i.e. EU reforms with domestic actors, affected each sub-variable of the dependent variable, i.e. rule of law. This is outlined below, in the Analytical Framework, in Table 1.

Table 1: Analytical Framework

	<i>Independent variables</i>		<i>Dependent variables</i>
Dimensions	Domestic trends in rule of law	The EU reforms impact	Effects on Rule of law, i.e on 4 sub-variables
1. Substantive legality	Positive	Positively reinforcing	Improved
2. Formal legality	Negative	Negatively reinforcing	Didn’t improve
3. Judicial capacity	Positive	Positively reinforcing	Improved
4. Judicial impartiality	Negative	Negatively reinforcing	Did not improve

As already mentioned in the previous section, the thesis will adapt the testing theory to this study without using the same quantitative indicators that Mendelski used when measured the four rule-of-law dimensions. Namely, the thesis will develop analytically the theory by drilling deeper into mechanisms of the theory of EU’s pathological power and reaching deeper in their understanding. On the basis of the latter it will use self-defined analytical indicators which are derived from the theoretical concept of rule-of-law that Mendelski used, as discussed in section “Multi-dimensional Concept of Rule of law” and which will serve to identify and detect the level of progress of four dependent sub-variables.

The thesis will examine the following:

- **Substantive legality**, by mapping out what is stated in the reports in regard to some of the following indicators, namely whether **Serbia aligns legislation with international rights and principles** and/or **EU standards**. This is because according to the theoretical concept, substantive legality implies that domestic laws ensure internationally accepted principles and rights.¹¹⁷ Mendelski measured substantive legality by using an indicator of human rights treaty ratification.
- **Formal legality**, by mapping out what is stated in the reports in regard to some of the following indicators, namely whether **Serbian laws are coherent (non-contradictory)** and **stable (i.e. if laws frequently change)**, and/or **clear**. This is because according to the theoretical concept, **formal legality** implies an existence of non-contradictory, clear, stable laws which do not change in the long term.¹¹⁸ In this way, the thesis uses and develops Mendelski's theory, since Mendelski measured formal legality by indicator of national legislative outputs in parliaments.
- **Judicial capacity**, by mapping out what is stated in reports in regard to some of the following indicators, namely **whether the Serbian judiciary has resources** (financial, technical, human, spatial), **and if the judiciary provides justice in efficient** (e.g. by respecting right to a trial within reasonable time) and/or **effective way** (by having judicial experts i.e. level of professionalization). This is because according to the theoretical concept, **judicial capacity** implies the existence of enough human, technical and financial resources that create a capable judicial system where legislation is applied efficiently, effectively and timely.¹¹⁹ Mendelski measured judicial capacity through quantitative indicators that relate to resources, while this study aside from indicators of resources has chosen also indicators of judicial efficiency and judicial effectiveness, as inexistence of the latter would mean that the judiciary does not have enough capacity to provide justice in an efficient and effective way. In this way, the thesis uses and develops Mendelski's theory.
- **Judicial impartiality**, by mapping out what is stated in reports in regard to some of the following indicators, namely **whether the Serbian judiciary has judicial independence** and/or **impartiality** and/or **judicial accountability** and/or **citizens' trust** and/or **judicial corruption**. This is because according to the theoretical concept, **judicial impartiality** implies that law is enforced in an unbiased way, by judges that are independent, accountable and non-corrupt with executive and legislative power that do not influence judicial power and citizens who trust their judicial system.¹²⁰

Furthermore, when examining the four sub-variables the thesis will look whether pathologies which Mendelski argues are created or reinforced, are presented in the thesis section "Pathologies of

¹¹⁷ Mendelski, M. (2015), p.321-322; p. 324.

¹¹⁸ Id, p. 321.

¹¹⁹ Id, p. 322.

¹²⁰ Ibid.

Europeanisation,¹²¹ exist in the Serbian judiciary, as well as how they affect the outcome of rule of law. The thesis will identify pathologies by relying on indicators in the following way:

1. If reports show that the judiciary is faced with **inconsistency in judicial decisions and case law**, as a result of laws that are contradictory, incoherent (non-harmonised with other legislation), that will indicate the existence of the **pathology of legal incoherence** which **undermines sub-variable formal legality**.¹²²
2. If reports show that laws are not stable, that they are **frequently changed/amended and adopted under urgent procedures** in order for Serbia to comply with EU legislation and/or for domestic actors to advance their particular interest, that will indicate the existence of the **pathology of legal instability** which **undermines sub-variable formal legality**.¹²³ In this way the thesis uses and develops Mendelski's theory since Mendelski discovered it through indicator of formal legality, i.e. through growing national legislative output in parliaments.¹²⁴
3. If reports show that adopted **laws are not implemented/unevenly implemented in practice** and/or that **judicial decisions are not enforced**, it will indicate the existence of the **pathology of lack of enforcement of law**.¹²⁵ This pathology **undermines sub-variable formal legality** and Mendelski discovered it through interviews.
4. If reports show that **newly-adopted or amended laws** are not impersonal and general, but **provide benefits to certain groups** and/or **constrain specific group of people**, according to personal interest of reformers that will indicate the existence of the **pathology of lack of generality of law** which **undermines sub-variable formal legality**.¹²⁶ In this way the thesis uses and develops Mendelski's theory, since Mendelski measured this pathology through a quantitative indicator of corruption in parliament/legislature.¹²⁷
5. If reports show that **new** and/or **old judicial structures** do not serve their role but **lack independence**, being used by domestic change actors in non-democratic and non-transparent ways for advancing their political interests, this will indicate the existence of the **pathology of politicisation of judicial structures** which **undermines sub-variable judicial impartiality**.¹²⁸ In this way the thesis uses and develops Mendelski's theory, since Mendelski detected this pathology through a quantitative indicator of judicial independence.

At the same time, the thesis will also examine and identify if there are some new negative trends that pervade the Serbian judiciary from year to year, i.e. if **new pathologies** are created, and in that way, on the basis of new data this study will try to develop Mendelski's theory of the EU's pathological power.

The thesis will examine three types of reports that will be presented in the next section. Note, however, that the indicators examined by each report differ do not necessarily overlap, and if they do,

¹²¹ Mendelski, M. (2015), p. 339-340; Mendelski, M. (2016), p. 350-353.

¹²² Id, p. 339.

¹²³ Mendelski, M. (2015), p. 339; Mendelski, M. (2016), p. 351.

¹²⁴ Mendelski, M. (2015), p. 339.

¹²⁵ Mendelski, M. (2016), p. 351.

¹²⁶ Id, p.351 & p.354.

¹²⁷ Id, p.354.

¹²⁸ Id, p.352 & p. 355.

they don't necessarily overlap each year. Due to this it will not be possible to state in the Analysis part whether each indicator progressed over time, but it will be stated whether the level of a certain indicator was satisfied or not.

6.2. Methods and Data for Analysis

Considering that the thesis examines only rule of law in Serbia, the thesis will apply the case study method. According to Robert Stake, in a case study the case itself is central and not the methods that are used.¹²⁹ Since the study aims to get a deeper understanding of how EU reforms affect Serbian rule of law by testing the case of Serbia against the theory of the EU's pathological power, the most suitable method for such an explanatory and descriptive thesis is a qualitative case study method with a deductive logic.¹³⁰

This study examines Serbia since Serbia is aside from being non-researched also particularly interesting case. Namely, Serbia was the only country in the region that had active political parties who were against Serbia's EU membership.¹³¹ Thereby, it can be said that Serbia presents a unique case comparing to other countries from the region. However, although this will be a study or one country, the results can be generalized. According to Johansson "generalisation from cases are not statistical, they are analytical"¹³². In deductive case studies, when the findings from the case are tested against hypothesis, there will be analytical generalisation if results confirmed the theory¹³³. Thus, if empirical findings show that EU reforms had pathological effects on rule-of-law reforms in Serbia, there will be confirmation of Mendelski's theory of the EU's pathological power.

In order to find out if EU reforms have pathological effect on the rule of law in Serbia, the thesis will examine the Serbian judiciary by looking at different reports for the period from 2013 until 2016 using the method of content analysis and process tracing. The thesis has chosen to examine European Commission Progress Reports for Serbia, Protector of Citizens' reports and reports of the Serbian Anti-Corruption Council. Progress reports are published annually by the European Commission. They serve to show if the country made progress during the period examined and on the basis of these reports, the Union decides when a candidate country will close specific chapters, finish negotiations and finally become a MS.¹³⁴ According to Mendelski, in some cases the EU was biased when assessing and monitoring rule-of-law reforms, as it supported domestic pro-EU reformers even though they conducted reforms pathologically.¹³⁵ With this in mind and in order to increase the quality and validity of the study and to get a broader picture of the progress in various rule-of-law dimensions, this study will also include Anti-Corruption Council reports and Ombudsman (Protector of citizens) reports, of which none has been previously examined by Mendelski. The thesis has chosen these reports since the Anti-Corruption Council and Ombudsman are bodies that scrutinise and detect irregularities in the work of Serbian public authorities and institutions, providing analysis also in relation to the judiciary. Namely, the Anti-Corruption Council specifically publishes reports about the judiciary every two years, while the Ombudsman, who is a non-party member and a protector of

¹²⁹ Johansson, R. (2003), *Case Study Methodology*, p. 2.

¹³⁰ See Hesse-Biber S.N. and Leavy, P. (2011), *The practice of qualitative research*.

¹³¹ Dallara, C. (2014), p. 102.

¹³² Johansson, R. (2003), p. 8.

¹³³ Id, p. 9.

¹³⁴ Vachudova, M. (2005), Chapter 5, p. 34-35; European Commission—Neighbourhood-Enlargement-Steps towards joining.

¹³⁵ Mendelski, M. (2015), p. 337-338.

citizens' rights publishes reports annually and provides information about the judicial system, on the basis of citizens' complaints. Previous research found that the Ombudsperson is among the actors and institutions that are opposing anti-reformers and whose "voice is largely marginalized and dependent on the willingness of government incumbents to hear it."¹³⁶ The analysis of three types of reports will provide the comparative picture in relation to state of rule of law from the three different sources and in that way it will provide a broader picture about state of rule of law dimensions in Serbian judiciary.

The thesis expects that findings of this study will partly support the theory of the EU's pathological power. Findings could possibly show that some rule of law dimensions progressed, but that despite of the progress, the overall rule-of-law level is still unsatisfactory.

6.3. Limitations and Ethics

According to some scholars the combination of quantitative and qualitative methods, i.e. the use of contrasting methods which is called *triangulation*, increases the validity and credibility of the results.¹³⁷ With this in mind, it would be better if this study aside from a qualitative analysis of reports also did a quantitative analysis. However, since Mendelski mainly did mix-method studies, this study turned towards different a method, i.e. towards a thorough analysis of the data with qualitative content analysis and process tracing aiming to develop his theory. In addition, time limitation was a hurdle for doing a quantitative analysis combined with the content analysis. Another limitation is that not all reports provided data in relation to certain rule of law areas for each year, because of which it was not possible to measure the level of progress of each indicator during the four-year period, as it is already stated in the Analytical Framework. Furthermore, the study has limitations in relation to the time-frame considering that Serbia has only recently (in July 2016) opened Chapter 23 that relates to the rule of law. Examination of rule-of-law development a little bit further in the future would be particularly interesting, but this limitation however, leaves room for future studies. On the other hand, my profession as a lawyer could possibly be another limitation of the study, since it can be assumed that a researcher who does the study in relation to his workplace can be biased when doing an analysis. Nevertheless, I am aware of that which is why I have chosen to examine three different kinds of reports, as results from various sources increase the validity and credibility of the results.

Although the study examines policy documents, there should be respect in relation to the objects that are examined in the study.¹³⁸ Judicial independence is a sensitive issue for actors directly involved in the process in which sometimes the highest state functionaries are involved. Having in mind ethical concerns, the thesis will not include names of judges or other persons that are possibly listed in reports, as that could compromise these people which is not the aim of this master's thesis.

6.4. Content Analysis and Process Tracing

By doing a content analysis of three types of reports, the thesis will find out what is the contextual meaning of the texts from the examined reports and also develop the theory on the basis of empirical

¹³⁶ Kmezić, M. (2017), p.151.

¹³⁷ Tracy, Sarah (2012) *Qualitative Research Methods: collecting evidence, crafting analysis, Communicating impact*, p. 236; Silverman, D. (2015), *Interpreting Qualitative Data. A Guide to the Principles of Qualitative Research*, p. 290.

¹³⁸ Tracy, S. (2012), p. 245.

data.¹³⁹ The thesis will do a directed content analysis, since the latter is often applied in deductive studies and aims “to validate or extend conceptually a theoretical framework or theory”¹⁴⁰. When doing a directed content analysis, the thesis will use Mendelski’s theory of the EU’s pathological power as a ground according to which it will set elements (indicators, sub-variables) that the thesis will analyse in three kinds of reports, which is already done in the section “Analytical Framework”. Nevertheless, directed content analysis can be biased, which presents a limitation of this approach, considering that it entails subjective analysis of the content where a researcher can analyse texts in order to find evidences that support the tested theory instead of doing the contrary.¹⁴¹ This study will however be aware of this limitation during the whole analysis, not aiming to find neither supporting theory evidences nor contrary, but aiming to analyze data objectively.

The analysis will be guided by empirical indicators introduced in the section “Analytical Framework”. Empirical indicators will serve to identify four sub-variables in reports and to detect the level of progress achieved in these four sub-variables. The analysis will be done in the following way:

- I. The thesis will map out what is stated—implicitly or explicitly—in the report in relation to the indicators from section “Analytical Framework” for each of the four sub-variables.
- II. On the basis of what is stated about indicators, the thesis will draw conclusions about the state of a specific indicator.
- III. In the same way, the thesis will map out indicators of pathologies and in that way the thesis will find out which of the listed pathologies from section “Analytical Framework” exist in the Serbian judiciary.
- IV. At the same time, the thesis will map out some new negative trends, i.e. pathologies that are created or reinforced in the Serbian judiciary.
- V. The thesis will map out what is stated in the reports about the relation between reforms that were conducted and indicators of four sub-variables and pathologies.
- VI. The thesis will compare findings from the reports from the same year in order to draw conclusion what was the state of four sub-variables for each specific year.

Aside from content analysis, when analysing reports the study will also apply process tracing to previously explained analysis steps, as the other part of the method used in this study. Since process tracing entails the tracing of the development of the events over time¹⁴² the thesis will look at how four sub-variables developed during the four-year period. This entails that results from the content analysis will be examined in light of reforms that were introduced in the Serbian judiciary and which are discussed in the reports. This will enable the thesis to find out causalities between differences in rule-of-law progress over time and conducted reforms, i.e. to find out how rule of law was affected over time by conducted reforms and if these developments are in accordance with Mendelski’s theory. This is because the purpose of process tracing is “the systematic examination of diagnostic evidence

¹³⁹ Hsieh, Hsiu- Fang and Sarah E. Shannon (2005) “Three Approaches to Qualitative Content Analysis” , p. 1278.

¹⁴⁰ Hsieh and Shannon (2005), p. 1281.

¹⁴¹ Id, p. 1283.

¹⁴² Collier, David (2011), *Understanding Process Tracing*, p. 824.

selected and analysed in light of research questions and hypotheses posed by the investigator”.¹⁴³ The thesis will thereby use process tracing to examine empirical results from the content analysis in order to detect if the results correspond to what is argued in the theory of the EU’s pathological power, i.e. if results match the hypothesis derived from the theory of the EU’s pathological power, as well as to develop the theory. The starting point for the analysis is the period after the year 2012 when Serbia became a candidate country.

¹⁴³ Id, p. 823.

7. ANALYSIS AND RESULTS

This part of the thesis will analyse eleven reports in total: four European Commission Progress Reports for Serbia (ECPR) from 2013, 2014, 2015, and 2016; four Protector of Citizens' Reports (PCR) from 2013, 2014, 2015, and 2016; and three Anti-Corruption Council Reports (ACCR)—report and supplement report from 2014 and report from 2016). The analysis will be done chronologically, meaning that reports from the same year will be analysed one after another, since the aim is to get a broader picture about the state of rule of law in Serbia for each year. The analysis will rely on indicators presented in the section “Analytical Framework” above and by using analysis steps presented in section “Content Analysis and Process Tracing” above, while the process tracing will be embedded throughout the text.

7.1. The EC Progress Report 2013¹⁴⁴

According to the EC's progress report 2013, which examined the period between October 2012 and September 2013, Serbia achieved some progress in the judiciary and fundamental rights and the Commission is of the opinion that “reforms are on the right track.”¹⁴⁵

The EC report argues that the Serbian Constitution and legislation need to be amended in relation to the appointment and dismissal procedure of judicial officials as they leave room for political influence on the judiciary. It also reports that judicial bodies of the High Judicial Council (HJC) and the State Prosecutorial Council (SPC) still share a court budget with the Ministry of Justice, which therefore indicate that the **judiciary lacks independence** from other branches of power both *de jure* and *de facto*. In relation to impartiality of judges, the EC argues that conflict of interest and random allocation of cases to judges have their bases in laws but that some courts either face problems with or lack a electronic data management system. This indicates that judges' **impartiality is not satisfied** in practice as random allocation of cases to judges is not always applied due to **lack of technical resources**. However, it is clear that judicial impartiality is perceived much narrowly in EU report than in Mendelski's theory, where judicial impartiality presents the most important rule-of-law dimension.¹⁴⁶

As regards to judicial accountability, the EC explains that one judge was sanctioned disciplinarily and one deputy of the public prosecutor was dismissed in 2013 although allegations in relation to **judiciary corruption** still persist. The EU therefore indirectly stated that **accountability**—which entails that laws are not enforced—**is not ensured** in practice and indicates the **pathology of lack of enforcement of law**. The EC particularly stressed that the judiciary faces problems with backlog cases, imbalances between the workload of judges, and problems with proceedings' length, which indicate that the judiciary **lacks efficiency**. It also mentions that there is a need for training of administrative judges in specific areas, which indicates that the judiciary lack the capacity to be **effective** in some areas.

On the other hand, the EC stated that all of the main international human rights instruments were ratified by Serbia and that Parliament had been very active in adopting new legislation in order to

¹⁴⁴ ECPR 2013.

¹⁴⁵ ECPR 2013 p. 48.

¹⁴⁶ Mendelski, M. (2015), p. 322-323.

align with the EU *acquis communautaire*, which indicates **positive results** in that regard. However, the EC argues that “inconsistency in case-law remains a concern, especially at the level of appellate courts”¹⁴⁷ which indicates the **pathology of legal incoherence**. It also argues that Serbia’s Parliament still extensively uses urgent procedures when adopting new legislation and in that regard it provides the recommendation that:

*The transparency of the legislative drafting process should be further enhanced and sufficient time given for effective consultation of all interested parties to ensure a more predictable legal environment. More attention also needs to be given to the implementation and monitoring of enacted legislation.*¹⁴⁸

This statement specifies that laws are not stable and not enforced which indicates the presence of the **pathology of legal instability** and the **pathology of lack of enforcement of law**. Legal instability and adoption of laws under urgent procedures indicate a lack of predictable legal environment, i.e. **lack of legal certainty**, which could possibly be a **new negative trend**.

The EC also argues that a recently introduced offense in Article 234 (“abuse of position by a responsible person”) of the Criminal Code should be monitored as it relates to private operators. This is because the majority of cases that were previously qualified as offenses from Article 359, “abuse of office”, are now requalified under a new criminal offense. This indicates that this article was introduced in order for specific private operators to be constrained, which is an indication of the **pathology of lack of generality of law**.

7.2. Protector of Citizens’ 2013 Annual Report¹⁴⁹

According to PC’s report which analysed the year 2013, there were no “palpable improvements” in the judicial system, although this was the second round of reforms, which followed the first unsuccessful reform round. Report finds that judicial independence continued to be threatened and in that regard it provides one of the examples. It explains that the chamber of the Court of Appeals in Kragujevac was pressured to change the decision of a lower-instance court but refused to do so which caused the members of the chamber to be removed from office, while against the president of the chamber disciplinary proceedings were initiated. The report explains that HJC which should ensure judges’ independence continued to be “tight-lipped” in public in relation to cases that were a matter of concern, and that powerful politicians could decide upon the implementation or non-implementation of laws over the rule-of-law certainty. The report claims that:

*The work of institutions remains susceptible to party politics and public officials at various levels have been using them to promote their parties’ and their own personal agendas.*¹⁵⁰

These statements indicate that the **judiciary lacks independence**, while the non-acting of the HJC and misuse of institutions for personal interest of politicians indicate the **pathology of politicisation of judicial structures**. Moreover, non-implementation of laws indicates the **pathology of lack of**

¹⁴⁷ ECPR 2013, p. 41.

¹⁴⁸ ECPR 2013, p. 7.

¹⁴⁹ PCR 2013.

¹⁵⁰ Id, p. 7.

enforcement of law that resulted in **lack of legal certainty**, which could possibly be a **new negative trend**.

The report further explains that the PC in 2013 received a large number of citizens' complaints in relation to violation of right to a trial within reasonable time, right to a fair trial, non-enforcement of court decisions, complaints for non-acting pursuant to Constitutional Court decisions etc. In that regard report claims that:

Reliable, robust, quick and efficient judicial enforcement of human rights is the cornerstone of any human rights protection system, and the one in Serbia is currently on shaky foundations.¹⁵¹

This indicates that the judiciary **lacks efficiency**, while non-enforcement of court decisions indicate the **pathology of lack of enforcement of law** since citizens cannot reach justice even when they have a court decision. The report also pointed that there is a lack of will on the side of the Bar associations to discipline lawyers when citizens complain on their work which negatively affects **citizens' trust in justice** and creates **legal uncertainty**. However, the PC welcomes laws that were adopted in 2013 and which will be in effect as of January 2014 since these laws aim to improve citizens' access to justice, citizens' right to a trial within reasonable time and right to a fair trial which the PC expects will improve judicial efficiency.

7.2.1. Summary of Analysis for year 2013

When comparing the EC Progress Report with the PC Report it can be noticed that the EC mentions to a much lesser degree the problem with judicial independence, than the PC who provides particular examples when judicial independence was threatened which clearly indicates the pathology of politicization of judicial structures.

Nevertheless, the data from the two reports indicate that the Serbian judiciary in 2013 lacked judicial independence, impartiality and accountability (**indicators of sub-variable judicial impartiality**). It had indications for judicial corruption and a lack of citizens' trust in justice, judicial efficiency, effectiveness and technical resources (**indicators of sub-variable judicial capacity**). It also had problems with frequent adoption of laws/unstable laws, inconsistency in case law/incoherent laws, lack of implementation of laws which indicates the pathology of legal instability, pathology of legal incoherence and pathology of lack of enforcement of laws (all three pathologies **undermine sub-variable formal legality**). It also identified the pathology of politicisation of judicial structures (which **undermines sub-variable judicial impartiality**) and an indication for the pathology of lack of generality of law (which **undermines sub-variable formal legality**). Furthermore, it identified a **lack of legal certainty** which could possibly be a new negative trend. On the other hand Serbia has positive results in terms of ratification of international human rights instruments and alignment with the EU *acquis* (**indicators of sub-variable of substantive legality**).

Therefore, the state of four sub-variables is the following. **Substantive legality** is satisfied according to the EC (the PC does not provide data about it), while empirical results indicate that **formal legality, judicial impartiality** and **judicial capacity** are not satisfied according to both reports. The PC Report implicitly stated that the second round of reforms did not improve state of the judiciary, The PC's

¹⁵¹ PCR 2013, p. 10.

report implicitly stated that the state of reforms did not improve, while the EC stated that reforms are going in the right direction although it can be seen that results are mainly negative than positive. A summary of the results are found in the Appendix.

7.3. Anti-Corruption Council Report on Judicial Reform from 2014¹⁵²

The ACC Report analysed the Serbian judiciary “from the moment it was finally established that the judicial reform had failed up until the present day”¹⁵³, in order to examine if there had been any improvement from its previous 2012 report.

It claims that judicial independence in Serbia does not satisfy any of the European Court of Human Rights criteria for judicial independence stating that:

*...judicial officials have no guarantee against outside pressures from the executive and legislative power branches, as well as against the internal pressure from court presidents, public prosecutors and political parties.*¹⁵⁴

The ACC explains that “the biggest problem” presents that the Ministry of Justice and Chairmen of National Assembly are involved in the work of the HJC and SPC (the highest judicial bodies which elect judicial officials), i.e. members of executive and legislative take part in judiciary power. It provides concrete examples of law provisions that were introduced with the reforms and which worsened the state of judicial independence. For example, under current Law on Judges, judges can be assigned to work in the office of the Minister of Justice (executive), although this was not the case before the reform as these functions are incompatible. The same is with the term of office of judges, which previously was permanent, but which changed with the Constitution in 2006. It states that amendments of The Law on Organization of Courts and the Law on Public Prosecution from 2013 did not make significant changes in relation to judicial independence and that the judiciary continued to lack financial independence. It also presented an example of pressure on judges when acting president of the court pressured a judge to withdraw a decision to return a passport to a defendant, while the HJC failed to protect a judge. Furthermore, the ACC argues that public survey about how citizens perceive judiciary showed even much worse data comparing to previous ACC’s report from 2012 (82% citizens have the opinion that court is biased, 83% have the opinion that the judiciary is dependent on political parties, and 84 % of citizens have the opinion that the justice system is inefficient).¹⁵⁵ The above mentioned data therefore indicates that there is a **lack of judicial independence** and that there exists **pathology of politicisation of judicial structures**, i.e. judicial structures are misused for personal interest of domestic change actors, as well as that there is a **lack of citizens’ trust in justice**.

The ACC further reports that holders of judicial offices are inadequately paid for their work, especially in Belgrade, where they face greater workloads. Aside from low salaries (financial resources), the judiciary also faces lack of consumables. Although a new court network was introduced in January 2014 all three Basic Courts continued to have non-functional premises. The ACC particularly provided example of the Misdemeanour Court which is located in 15 different buildings in Belgrade and which

¹⁵² ACCR 2014.

¹⁵³ Id, p. 1.

¹⁵⁴ ACCR 2014, p. 5.

¹⁵⁵ Id, p. 9.

also lacks technical equipment and an electronic database system for assigning cases, due to which the right to get a natural judge is threatened (**impartiality of judges**). The ACC explains that the new court network caused an increase in costs, trials to be postponed, proceedings to last longer, and a manifold increase in differences of judges' workload. The abovementioned data therefore indicates that the judiciary **lacks resources** (financial-spatial, technical and also human in Belgrade courts) and that reform with the new court network negatively affected overall **judicial efficiency**.

The ACC also found that the Law on the Organization of Courts did not make any step in regard to harmonization of court practice for which there exists "striking" difference among the four Appellate Courts which indicates the **pathology of legal incoherence**. Bearing in mind that lack of uniform court practice entails lack of predictability in the judicial decision-making process, it can be argued that legal incoherence caused a **lack of legal certainty**, which could be a **new negative trend**.

7.3.1. Anti-Corruption Council Supplement to the second report on judicial reform for 2014¹⁵⁶

This ACC's report analysed the introduction of notaries and bailiffs in the Serbian judiciary. It stated that the Law on Public Notary Service from 2011 was amended three times before it was finally adopted in 2014, which according to the ACC speaks about the quality of that law. It claims that provisions of Law on Public Notary Service were not in accordance with the Serbian Constitution, systemic laws and comparative standards and that it is unclear why Government granted a monopoly to notaries to draw up non-public documents. The ACC argues that:

The fact that the law had been changed three times before being implemented clearly indicates that the Government was adjusting the law to some future notaries because of which the Notary Office began working even before the requirements for it were met.¹⁵⁷

On the other hand, the ACC explains that granting of exclusive rights to notaries for drawing certain contracts caused a lawyers' strike because of which courts were not working from October 2014, which together with the adoption of laws under emergency procedures caused "total chaos in the judiciary". Data shows that 120,386 court proceedings were postponed, which the ACC says clearly indicates that there would be enormously many pending cases by the end of 2014.¹⁵⁸ It also argues that there is a possibility that notaries were elected not according to their quality but according to their affiliations. As regards to private bailiffs (who, together with courts, enforce court decisions) the ACC reports that they are the only one with authority to collect fees from public utilities and that uneven distribution of cases between bailiffs caused the creation of privileged bailiffs groups.

Lastly, the ACC explains that low quality of laws caused frequent changes in legislation—"what is born with a hump shall not be rectified by time".¹⁵⁹ It argues that low-quality laws are the result of adoption of laws under emergency procedures without public debate which presents a systemic problem in the Serbian judiciary.

In conclusion, this statement clearly indicates the presence of the **pathology of legal instability** which arguably caused **another negative trend** i.e. **legislation that lack quality**. On the other hand, the

¹⁵⁶ ACCR Supl. 2014

¹⁵⁷ ACCR Supl. 2014, p. 4.

¹⁵⁸ Id, p.3.

¹⁵⁹ Id, p.3. An old legal proverb.

ACC statements about notaries and bailiffs indicate that laws were amended to serve the interest of particular groups that became privileged which indicates the **pathology of lack of generality of law**. In addition, incoherence of notaries' law with other laws indicates the existence of the **pathology of legal incoherence**, while suggestions that notaries were elected according to particular political interest indicates the **pathology of politicisation of judicial structures**. Furthermore, data from the report indicates that the introduction of notaries which caused lawyers' strike indirectly **decreased judicial efficiency** in 2014.

7.4. The EC Progress Report 2014¹⁶⁰

According to the EC's progress report 2014, which examined period between October 2013 and September 2014, there had been limited progress in the area of the judiciary and fundamental rights. This indicates that the EC found that the state of judiciary is worse comparing to report 2013 which stated that "there has been some progress" in the latter.¹⁶¹

The EC Progress Report claims that current laws and the constitution continue to leave room for political influence in the area of judicial independence. It argues that the judiciary lacks financial independence and that another serious concern is that public authorities comment on trials and arrests before a court decision is made. It indirectly claims that impartiality of judges is not ensured in practice since the system of random allocation of cases does not work properly in all courts due to problems with or lack of an electronic data management system. In relation to accountability, the report states that four charges against judges were processed, which presents improvement comparing to 2013 but there is still a need for effective implementation in relation to disciplinary procedures. This implies that the EU indirectly stated that **accountability is not ensured in practice**. The abovementioned data therefore suggests that the judiciary continued to **lack independence and impartiality** while non-implementation of laws in relation to accountability and impartiality indicates that the **pathology of lack of enforcement of law** still exists, as well as that judiciary **lacks technical resources**.

The EC reports that the Supreme Court of Cassation was involved in the national programme for reduction of backlog cases, which is a step forward but that varying workload between judges as well as backlog cases remain a concern. The Constitutional Court had an increase in backlog cases in 2013 (with 16 000 pending cases in 2013, compared to 12 000 cases at the end of 2012)¹⁶², which indicates that **judicial efficiency was worsened**. One improvement that is mentioned is that the first generation of notaries had been appointed in July, but the EC expresses concerns in relation to the procedure and selection of appointed candidates. This statement indicates possible irregularities and the existence of the **pathology of politicisation of judicial structures** in relation to notaries who present new judicial structures.

Furthermore, Serbia ratified all international human rights instruments and it continued to implement EU legislation, which as before indicates **positive results** in that regard. It reported that Parliament was involved in intensive legislative activities and that the practice of adoption of laws under urgent procedure without debate increased even more in 2014 which indicates the **pathology of legal instability**. It stressed that case law remains inconsistent particularly among appellate courts,

¹⁶⁰ ECPR 2014.

¹⁶¹ ECPR 2013, p. 48.

¹⁶² ECPR 2014, p. 42.

suggesting the **pathology of legal incoherence**. All this indicates a lack of a predictable legal environment, a possibly **new negative trend- lack of legal certainty**. As in its previous report, the EC pointed that there is an increase in requalification of cases from article 359 to new article 234 (abuse of position) according to amendments of the Criminal Code, stating that:

*This illustrates a continuing tendency to overuse these offences in the context of business disputes, which is harmful to the business climate and legal certainty.*¹⁶³

This statement indicates the **pathology of lack of generality of law**, i.e. that the new article 234 was introduced in order to constrain specific groups of people and to be misused in context of business disputes.

7.5. Protector of citizens' 2014 Annual report¹⁶⁴

The PC explains that the highest number of citizens' complaints that it received in 2014 relates to the violation of right to a trial within a reasonable time and that there had not been corresponding reduction of these complaints although the Law on Organisation of Courts was introduced. This indicates that previously mentioned laws whose adoption was welcomed by the PC's report in 2013 did not provide expected results and **did not improve judicial efficiency**.

The PC further argues that citizens are in the situation that their previously enjoyed rights are restricted, with often contentious legal provisions in relation to formal law which negatively affected the most vulnerable citizens and undermined **legal certainty**. The PC argues that this is a consequence of a "worrying trend" of Parliament's adoption of laws under urgent procedures without public discussion. It explains that:

*The provisions of laws passed in this way are often unenforceable and non-harmonised with the provisions of other regulations, which poses a serious threat to the unity of the legal system and undermines legal certainty and the ability of citizens to exercise their rights guaranteed by the Constitution and laws.*¹⁶⁵

The abovementioned clearly indicates the existence of the **pathology of legal incoherence and pathology of legal instability** which also derived a new negative trend, i.e. **lack of legal certainty**. Namely, the PC provided an example that one complainant was in May charged to pay a court stamp duty of RSD 39 300 but that this amount was decreased to RSD 390 in December, after the Court of Cassation took a different legal stand in the matter. This case therefore indicates that rules and legal stands are changing even within a couple of months without ensuring predictability, which suggests that the Serbian judiciary was faced with a new **negative trend of lack of legal certainty**.

The PC further discussed the introduction of notaries and bailiffs in the Serbian judiciary and it stated that in relation to the problem with urgent adoption of laws without public debate the Law on Public Notaries presents "one of the most dramatic examples" which caused enormous problems in practice. It explained that:

¹⁶³ ECPR 2014, p. 45.

¹⁶⁴ PCR 2014.

¹⁶⁵ Id, p. 14.

The ill-advised, rushed and (for the citizens) costly exercise in introducing the profession of notary public in Serbia, coupled with an unwillingness of the Ministry of Justice to admit and remedy the mistakes in due time...culminated in a strike by attorneys.¹⁶⁶

The PC clarified that granting notaries the exclusive right to draw up property sale contracts caused a strike of attorneys which then paralysed the justice system and even further worsened citizens' right to efficient and accessible justice. It stated that:

...Rather than providing an impetus to legal certainty of citizens, the introduction of the office of notary public has become yet another acrimonious and harmful episode in the all too well known saga that is the judiciary reform in Serbian.¹⁶⁷

As regards private bailiffs, the PC argues that their work was inefficient and unfair, that cases were unevenly assigned which caused corruption. The abovementioned data therefore indicates that introduction of bailiffs as well as notaries did not provide expected results, i.e. it **did not improve judicial efficiency and legal certainty**, but rather worsened the situation and made space for even more irregularities.

In relation to judicial independence, the PC argues that judicial bodies of HJC and SPC still consist of members who violated the rule of law and that the HJC did not protect judges that were pressured but rejected disciplinary reports in that regard which indicates that the **judiciary lacks independence** and the existence of the **pathology of politicisation of judicial structure**.

7.5.1. Summary of Analysis for year 2014

When comparing the EC report with the PC and ACC reports for 2014, it can be noticed that judicial independence (**indicator of sub-variable judicial impartiality**), was not mentioned to be the problem to the same extent as it was in the PC report and particularly in the ACC reports. Data from the ACC and the PC reports indicate the pathology of politicization of judicial structures (which **undermines sub-variable judicial impartiality**), contrary to the EC report, which did not provide data in that regard. Moreover, the PC report and particularly the ACC supplement report discussed to great extent problems that came with the introduction of the so called new judicial professions, i.e. notaries and bailiffs, of which data in the ACC report indicates the pathology of politicization of judicial structures and the pathology of lack of generality of law in relation to notaries and bailiffs.

Nevertheless, data from the three types of reports indicate that the Serbian judiciary in 2014 was either facing problems or did not progress comparing to the previous year in regard to judicial independence, impartiality, citizens' trust in justice (**indicators of sub-variable judicial impartiality**).

Accountability of judges (**indicator of sub-variable judicial impartiality**) improved when compared to year 2013 (with 4 disciplinary procedures compared to only 1 in 2013), but lack of effective implementation indicates that accountability is still not ensured in practice. Judicial efficiency (**indicator of sub-variable judicial capacity**) worsened comparing to year 2013, and the judiciary lacks financial (spatial) and technical resources (**indicator of sub-variable judicial capacity**), while Belgrade courts particularly lack all resources (**indicator of sub-variable judicial capacity**). Serbia continued to align its laws with EU legislation (**indicator of sub-variable substantive legality**), so

¹⁶⁶ PCR 2014, p 8.

¹⁶⁷ Ibid.

results are positive in that regard. It continued to have problems with frequent changes in laws (unstable laws), inconsistency in case law (incoherent laws), lack of generality of law, lack of implementation of law which indicates the pathology of legal instability (that increased), the pathology of legal incoherence, the pathology of lack of generality of law and the pathology of lack of enforcement of law (all four pathologies **undermine sub-variable formal legality**). Furthermore, the pathology of politicisation of judicial structures was identified (which **undermines sub-variable judicial impartiality**). Data from reports also indicate the presence of a **new negative trend** detected in 2013, i.e. **lack of legal certainty** as well as **another new negative trend**, namely **lack of legal quality**.

Therefore, the state of four sub-variables is the following. **Substantive legality** continues to be satisfied according to the EC report (the PC and the ACC did not provide data about it), while empirical results from all three reports indicate that **formal legality, judicial impartiality and judicial capacity** are still undermined and without progress comparing to the previous year. A small improvement in accountability of judges (one indicator of sub-variable judicial impartiality) is however not enough for the conclusion that there had been progress in overall judicial impartiality, bearing in mind other indicators of judicial impartiality.

In January 2014 Serbia began formal accession negotiations with the Union, and a new network of courts started to function. Data indicates that negative results of the state of judiciary in Serbia are a consequence of the new network of courts and the reforms that introduced notaries, which caused a lawyers' strike that paralysed the judiciary from middle of September 2014 until middle of January 2015. A summary of the results are found in the Appendix.

7.6. The EC Progress Report 2015¹⁶⁸

According to Progress report 2015 which examined period between October 2014 and September 2015, "Serbia's judicial system has **some level of preparation. Some progress** has been made."¹⁶⁹ This indicates better state of judiciary compared to report 2014 where it was stated that progress had been limited.

The EC Report continues to stress that both the Constitution and the legislative framework need to be amended to ensure judicial independence. According to the EC:

*Judicial independence is not assured in practice. There is scope for political interference in the recruitment and appointment of judges and prosecutors.*¹⁷⁰

The EC clarifies that the HCJ and the SPC did not protect judges and prosecutors in specific cases when their independence was threatened and that public authorities continued to undermine judicial independence, by commenting on ongoing judicial proceedings. It also stated that random allocation of cases in courts is not fully implemented in practice and leaves room for interference by the president of the court or the administration. Previously mentioned data therefore indicates that **judicial independence and impartiality** are **threatened** and the **pathology of politicisation of judicial structures** while practical problems with random allocations of cases indicates that laws are not

¹⁶⁸ ECPR 2015.

¹⁶⁹ ECPR 2015 p. 11.

¹⁷⁰ Id, p. 11.

implemented in practice which indicates the **pathology of lack of enforcement of law**. In relation to **accountability**, the EC reports that in eleven cases the HJC brought final decisions and dismissed five judges which suggests an **improvement** comparing to the previous year, although the EC states that sanctions were not high. It stated also that there had been fourteen cases against judges who did not want to declare important changes in their property ownership, and that “corruption remains prevalent in many areas”,¹⁷¹ which indicates the existence of **corruption in judiciary**.

The EC found that **judicial efficiency is still a matter of serious concern**, due to the existence of a great number of old backlog cases. It stated that targets from the national programme for reduction of backlog cases from 2014 have not been met, partly due to the lawyers’ strike. However, the number of backlog cases fell in Basic, Higher and Administrative Courts, due to the adopted law on protection of the right to trial in a reasonable time in May 2015, while it increased in the Supreme Court of Cassation. This therefore indicates a **small improvement in the reduction of backlog cases** in specific courts. The EC found that the problem with workload of cases still persists, with Belgrade courts being the most burdened. Prosecutors who started to lead investigations, were not provided with staff and other resources for their extended workload, which indicates that prosecution and particularly Belgrade courts **lack human** and other **resources**. On the other hand, the EC stated that public notaries which were introduced with the objective to improve efficiency and reduce workload of courts, instead created problems, due to their monopoly on real estate transactions.

According to the EC, the Serbian Parliament continued to adopt a vast number of laws and to align itself with the EU *acquis communautaire* which indicates **continuing progress** in that regard. Nevertheless, the EU stated that:

*The use of urgent procedures, including on draft legislation linked to the EU accession process, remained extensive.*¹⁷²

On the other hand, the report welcomed that the Supreme Court of Cassation adopted an action plan in May 2015 in relation to harmonisation and monitoring of court practice, which indicates a step forward in solving a problem with inconsistency in judicial decisions, i.e. the **pathology of legal incoherence**. It stressed that the Judicial Academy which continued to provide training to judges, should become an entry point for judicial profession stating however that:

*The offered continuous training is insufficient to help practitioners overcome the serious challenges posed by numerous changes in the law and the poor overall quality of the laws*¹⁷³.

The above mentioned statement about numerous changes in the law indicates the existence of **pathology of legal instability, lack of judicial effectiveness** as judges are in problem to respond to law challenges, as well as that Serbian judiciary faces problems with legislation which lack quality. The latter therefore indicates the presence of a new negative trend, i.e. **lack of legal quality**.

¹⁷¹ ECPR 2015, p. 49.

¹⁷² ECPR 2015, p. 6.

¹⁷³ Id, p. 12.

7.7. Protector of citizens' 2015 Annual report¹⁷⁴

The PC report argues that in 2015 many citizens of Serbia were faced with legal uncertainty. Urgent adoption of laws remains to be a problem. The report exemplifies that the Law on Public Notary was amended as much as two times in 2015. It explains that:

*Laws passed in a deficient, excessively short procedure, lacking mutual harmonisation and with conflicting provisions of the same law or other laws, stipulating solutions that often baffle experts, let alone all those who are affected with the specific legislation, and with uneven and selective implementation, coupled with uncertainties surrounding the case law applied in the disputes arising from or in connection with their implementation, have resulted in excessive formal normativism and not much in the way of actual legal certainty in Serbia.*¹⁷⁵

This statement indicates that the **pathologies of legal incoherence, legal instability, and lack of enforcement of law** continued to exist. Furthermore, it can also be concluded that the pathology of legal instability derived, as already was mentioned in previous reports, a new negative trend which citizens face, i.e. **lack of legal certainty**. The latter is also confirmed with Protector of citizens' statement in relation to the Criminal Code Procedure, for which experts found that it did not provide results after two years of application. In regard to the Criminal Code Procedure the report stated that:

*It fails to provide sufficient guarantees for the protection of human rights due to both inherent systemic shortcomings and significant technical legal shortcomings which leave much room for different interpretations, thus leading to potential legal uncertainty and inequality of citizens before the law.*¹⁷⁶

On the other hand the report found that adoption of the Law on Protection of Right to Trial within a Reasonable Time caused considerable improvements in relation to citizens' right. The PC however explained that judges tend to sacrifice the quality of trials, in order to provide more efficient judgments which leads to lower quality of judgement and quashing of court decision after appeal. This data therefore implies that there had been **improvements in judicial efficiency** but that introduced measures negatively affect the state of judicial efficiency in the long run. In relation to judicial independence, the PC stated that:

*There is a strong – yet difficult to substantiate – perception that judicial and prosecutorial functions are heavily influenced by the political authorities.*¹⁷⁷

The report presented an example of a judge who was publicly criticized by the Minister of Justice for its decision to give back the passport to an accused businessman, and who was later disciplinarily charged by the HJC for disclosing to newspapers information in regard to his decision, after which judges' term in the Special Chamber of the Higher Court had not been renewed and he left the

¹⁷⁴ PCR 2015.

¹⁷⁵ Id, p. 10.

¹⁷⁶ Id, p. 29.

¹⁷⁷ Id, p. 28.

profession of judge. This example therefore indicates that **judicial independence continues to be threatened** and that the **pathology of politicisation of judicial structures** (HJC) remained.

7.7.1. Summary of Analysis for year 2015

When reading the EC reports it can be noticed that the EC became clearer and provided more specific evaluation of the situation in relation to the judiciary comparing to its previous two progress reports. It also commented for the first time that the HJC and the SPC did not protect judges and prosecutors when they were pressured which was an indication for the pathology of politicization of judicial structures (which **undermines sub-variable of judicial impartiality**) that has been detected earlier in the ACC and PC reports from 2013 and 2014.

Nevertheless, data from the two reports indicate that the Serbian judiciary in 2015 was either facing problems or did not progress comparing to previous years in regard to judicial independence, impartiality, corruption in judiciary (**indicators of sub-variable judicial impartiality**). The same applies to judiciary resources, effectiveness (**indicators of sub-variable judicial capacity**), frequent changes of laws/unstable laws, lack or uneven implementation of law, inconsistency in case law/law incoherence, which indicates the pathology of legal instability, the pathology of lack of enforcement of law, and the pathology of legal incoherence (all three pathologies **undermine sub-variable formal legality**). It is also identified the pathology of politicisation of judicial structures (which **undermines sub-variable judicial impartiality**). Data indicates a small improvement in relation to accountability of judges (**indicator of sub-variable judicial impartiality**) as well as in judicial efficiency, which in some courts progressed, while it worsened in other (**indicators of sub-variable judicial capacity**). As in the previous years Serbia still aligns its legislation with the EU *acquis* (**indicator for sub-variable substantive legality**). However, data from reports indicate new negative trends that are detected in previous years' reports, namely **lack of legal certainty** and **lack of legal quality**.

Therefore, the state of the four sub-variables is the following. **Substantive legality** continued to be satisfied according to the EC report (PC did not provide data about it), while empirical results indicate that **formal legality, judicial impartiality and judicial capacity** are undermined according to both reports. Small improvements in accountability of judges (one indicator of sub-variable judicial impartiality) are however not enough for the conclusion that there had been progress in overall judicial impartiality, having in mind other indicators. The same applies to judicial efficiency (one indicator of sub-variable judicial capacity) where small improvements were noted although overall judicial efficiency is still unsatisfied and although other indicators of sub-variable judicial capacity are not satisfied.

In September 2015 Serbia finished an action plan for opening of Chapter 23. The data indicates that reforms with notaries and the lawyers' strike left consequences also on the state of the judiciary in 2015 but that the adopted law on protection of the right to trial in a reasonable time improved judicial efficiency in some courts, although it negatively affects judicial efficiency in the long run according to the PC. A summary of the results are found in the Appendix.

7.8. The EC Progress Report 2016¹⁷⁸

According to the progress report 2016 which examined period between October 2015 and September 2016, it is stated that “Serbia’s judicial system has **some level of preparation**,”¹⁷⁹ which indicates the same level of progress as in the last year’s report.

The EC report continues to stress that judiciary lacks independence in practice. However, the EC for the first time explicitly stated that the role of the National Assembly in regard to the appointment of the highest judicial officials should completely be erased from the Constitution as well as that courts’ presidents and prosecutors’ offices threaten independence and impartiality of judges and deputy prosecutors. Moreover, it claims that the HJC’s and the SPC’s indifferent attitude in relation to political authorities’ public commenting of court cases also negatively affects judicial independence. The abovementioned data therefore indicates a **lack in judicial independence and impartiality** as well as the **pathology of politicisation of judicial structures** in regard to HJC and SPC bodies. The EC further argues that a small number of judicial officials is sanctioned with only eight disciplinary proceedings and one initiated dismissal procedure in 2015. This indicates that judges’ **accountability is not ensured in practice** and that the **pathology of lack of enforcement of law** continues to exist. The EC claims that corruption is still highly present and without progress compared to previous year, which indicates the existence of **corruption in the judiciary**.

The EC pinpoints that the national plan for reduction of backlog cases yielded limited results, as well as the newly adopted law on mediation which resulted in increase of the overall backlog of court cases in 2015. However, it noted a positive impact in relation to the adversarial system which came with the new criminal procedure, and with its option to cancel criminal prosecution reduced significantly number of new cases that are reaching the courts before the courts. Nevertheless, the EC stated that :

*The overall length of proceedings and the backlog of cases remain serious concerns.*¹⁸⁰

The report further explains that significant differences in the workload of judges and prosecutors still persist, and that information and communication technology in the courts is not developed. Belgrade courts are the most overburdened and suffer from lack of space and IT equipment. The EC argues that:

*Specific resource challenges for the prosecution service stemming from a new prosecutor-led investigation model have not been solved. Further efforts are needed to ensure that budget planning and resource allocation match service delivery needs.*¹⁸¹

The abovementioned data therefore indicate **small improvements** in terms of judicial efficiency, although the **overall level of efficiency** is still **unsatisfied**. Moreover, lack of **financial resources** and **technical resources** impedes the judiciary from properly functioning. On the other hand, the EC reports that the Parliament’s role in the accession negotiations process increased and that Serbia continued to adopt EU legislation and to comply with *acquis communautaire* which as before indicate positive results in that regard. The EU stresses that the urgent procedure for adoption of laws should be limited, while transparency, quality of law making should be increased. This data indicates the

¹⁷⁸ ECPR 2016.

¹⁷⁹ ECPR 2016 p.12.

¹⁸⁰ Id, p. 14.

¹⁸¹ Id, p. 56.

existence of the **pathology of legal instability** as well as **lack of legal quality**, a new negative trend that was already mentioned in previous reports. The EC stated that courts of the same instances started to have meetings, in order to standardise court practice which presents an improvement. The EC explains that:

*Frequent changes in legislation and insufficient training make the legal environment challenging for the judiciary, which leads to inconsistency in court practice. There is a strong need for practical in-service training for all categories of staff responsible for the quality of justice.*¹⁸²

This EC statement indicates not just the continuing presence of the **pathology of legal incoherence**, but also that the judiciary has **problems with effectiveness** since there is a strong need for training of judiciary staff.

7.9 Protector of citizens' 2016 Annual Report¹⁸³

The PC's report stated that the public finds that judges and prosecutors are under political pressure and that they lack independence. It presented a case which happened in Belgrade district Savamala, when a group of masked men demolished objects one night in March for which media and police authorities remained silent. The report explained that prosecution did not achieve any progress in relation to investigation of the case while the PC who started to investigate the case was lynched in media. The report presented another example when the HJC announced the election of judges in specific courts without previously adopting specific Bylaw that regulate procedure and assessment of candidates in the election process. The HJC annulled the elections, after the professional community had reacted but irregularities in the HJC work however negatively affected citizens' trust in the work of that body. The above mentioned examples indicate **lack of judicial independence, lack of citizens' trust in judicial bodies** and the **pathology of politicisation of judicial structures**.

The PC further stressed that citizens continue to complain on the work of judiciary and that they are deprived of efficient, legal and timely work of the judiciary. It claims that the judiciary particularly faces problems in relation to the uneven workload between courts and the tendency of judges to sacrifice the quality of trial for efficient proceeding which does not improve efficiency of the courts in the long run. It also stated that from the beginning of the application of the new Criminal Code Procedure, there had not been enough prosecutors, although prosecutors' powers were increased by the stated law. Abovementioned data indicates that **judicial efficiency is undermined** and that the **judiciary lacks human resources** in prosecution. On the other hand, the lack of quality in verdict indicates that the judiciary lacks **legal quality**, which presents a new negative trend.

The PC for the first time stated that Serbia ratified the main international instruments and accepted the main human rights' standards to be the part of its national legislation, which indicates positive results in that regard. It explained that not respecting the latter would be in collision with Serbia's process of European integration. However, the PC pointed that Serbian citizens were faced with legal uncertainty in 2016 and it presented that 59% of all adopted laws in 2016 were adopted under urgent procedure. It clarified that adoption of laws under excessively short procedure caused conflicting provisions in laws, lack of mutual harmonisation of laws, as well as selective implementation of laws, which on the other

¹⁸² ECPR 2016, p. 14.

¹⁸³ PCR 2016 a, PCR 2016 b.

hand resulted in inconsistency and uncertainty in relation to case law and therefore negatively affected legal certainty of citizens. The PC exemplifies that the Criminal Code procedure, which was applied during a couple of years did not provide satisfactory results since its provisions leave room for a different interpretation which can cause legal uncertainty and inequality of citizens before the law, according to experts. Therefore the abovementioned data clearly indicate the presence of the **pathology of legal incoherence, pathology of legal instability, pathology of lack of enforcement of law** as well as new negative trends, i.e. **lack of legal certainty**. Namely, all three previously mentioned pathologies prevented citizens from having legal certainty.

7.10. Anti-Corruption Council's Report on Judicial Reform from 2016¹⁸⁴

The ACC has analysed the state of the Serbian judiciary from its last report, i.e. from 2014 until 2016 by stating that no one did an analysis of what is the effect of alleged reforms and if reforms led judiciary in the right direction and it argues that:

*The situation in the judiciary is very bad, not only due to trials within an unreasonable time, but also due to the enormous number of laws being frequently changed, and which do not mirror actual life but nevertheless need to be applied by judges.*¹⁸⁵

The report explains that laws are mainly adopted under urgent procedures, i.e. without public professional debate, which created low quality laws that are not aligned with country specifics and other systemic laws. Because of the latter, laws are changed several times even within one year which prevented the creation of uniform court practice that bred legal security and negatively affected citizens.

The report found that:

*Due to frequent changes in legislation, citizens experience problems in finding out their rights and obligations, and not only because of the frequent changes but also because the government does almost nothing to ensure transparency, consolidation of legislation and free access to consolidated legislation.*¹⁸⁶

The ACC claims that the Parliament was adopting laws in expedite procedures probably because Government wanted to show the EU how it implemented the reforms. The ACC however posits that the EU and the international community showed that they do not care about Serbian domestic characteristics, as they provided positive opinions about drafts of future laws although experts from Serbia argued to the contrary. According to the ACC:

*It does not mean that the EU knows our living conditions and our problems, and that if it gives positive opinion it means that we have got laws that regulate our life, taking into consideration our specificities.*¹⁸⁷

¹⁸⁴ ACCR 2016.

¹⁸⁵ Id, p. 6.

¹⁸⁶ Id, p. 25.

¹⁸⁷ Id, p. 8.

It stated that the World Bank's "Functional Analysis of the Judiciary" from 2014 provided mainly an overview of practice from foreign countries without taking into consideration Serbian specifics. The ACC pointed that:

*Some parts of the report are totally unacceptable because the World Bank sees judiciary as a company...that needs to operate profitably in terms of costs, and in almost all parts of the report it focuses on savings in costs in the judicial system.*¹⁸⁸

The abovementioned statements therefore indicate that the judiciary is faced with **lack of legal certainty** and **lack of legal quality**, i.e. two negative trends that were detected earlier. Data also indicates the existence of **unclear, unstable, incoherent laws** due to which there exist **pathology of legal instability** and **pathology of legal incoherence**. At the same time, data also indicates the presence of the third—a **new negative trend**. Namely, the existence of laws, which do not comply with country specifics and which were created as a consequence of external actors, caused the judiciary to be faced with **lack of legal provisions that mirror actual life**.

The ACC further argues that many laws bestowed power to a small number of people which was particularly evident in the case of laws that regulated privatization, where the Government was provided with authority for disposing of state property. Another issue was that laws which were changed several times were not implemented in practice. The ACC stated as follows:

*Speaking about implementation, particularly apparent is that state authorities do not apply legal provisions, frequently change laws in order to adapt them to a specific buyer of state property, interpret imperative norms as discretionary, and take all necessary actions so as to provide privileged position to specific subjects.*¹⁸⁹

This indicates the **pathology of lack of generality** of law since laws were changed in order to provide benefits to certain people and were not general. In addition, the lack of practical implementation of laws indicates the **pathology of lack of enforcement of law**.

On the other hand, the ACC argues that public commenting on trials and political influence on the judiciary, mentioned in ACC reports from 2014, did not decrease. According to the ACC:

*Each of these statements represent a guideline and a warning of what and how judges and prosecutors need to do in order to please the executive power.*¹⁹⁰

It argues that it is not possible to claim the independency of judiciary since the HJC and the SPC share autonomy with the Ministry of Justice in relation to the court budget, while court presidents presents the "extended arm of the executive".¹⁹¹ Moreover, the ACC provided examples of evident influence of the executive on the judiciary, when one case was reassigned to an obedient judge by illegally ruling the recusal of the natural judge. It also stated implicitly that the Constitutional court (CC) is not independent from the executive, since ten out of fifteen judges from the CC are chosen by the National

¹⁸⁸ Id, p. 7.

¹⁸⁹ Id, p. 11.

¹⁹⁰ Id, p. 15

¹⁹¹ Id, p. 18.

Assembly and the President of the Republic. The ACC also found that the Judicial Academy which began work in 2010, did not provide expected results and report pointed that organizational structure of the Academy prevents it from being independent body.

This data therefore indicates that the **judiciary is not independent** from executive power and that domestic political actors and executives misuse judiciary institutions for their interest which indicates the **politicization of old and new judicial structures** (Judicial Academy).

The ACC pointed out that their analysis showed that the judiciary needs three times more funds in order to function properly, as in over 70% of the times, the HJC's accounts had been in blockade. As regards to court administration, the ACC pointed out that "no one has analysed" how much staff is needed, according to the number of cases and the workload of the specific courts. According to ACC:

*We are not a rich country so as to allow for the number of judicial officials and employees to be determined on the basis of the number of party comrades that are to be employed in judicial institutions. In particular, we are not rich enough to have a slow, ineffective and inefficient judiciary.*¹⁹²

The report also stated that the Constitutional Court has great problems in relation to the efficiency and effectiveness presenting that the Court worked with total number of 24 791 cases in 2013 with only fifteen judges. The abovementioned statements indicate that the **judiciary lacks financial resources**, while specific courts (e.g. CC) **lack human resources**. As regards efficiency, the ACC reported that when reforms in 2009 began there were 1,318,059 pending cases, while the number of pending cases increased to 2,849,360 at the end of 2014 and lastly there were 2,837,468 pending cases at the end of 2015. According to the ACC the data showed that:

*The reform did not give results as it neither made the judiciary more efficient nor the new network of courts decreased costs of the process of achieving justice.*¹⁹³

However, the ACC reports that there had been progress comparing to their previous reports as the Supreme Court of Cassation adopted a program for solving the backlog of old cases which already provided results and it also adopted the Law on the protection of the right to trial within reasonable time. This indicates that there had been **small progress in relation to judicial efficiency** although overall the **judiciary lacks in efficiency and effectiveness**.

7.10.1. Summary of Analysis for year 2016

According to the three types of reports, which complement each other, the Serbian judiciary in 2016 was either facing problems or did not progress comparing to previous years in regard to judicial independence, impartiality, accountability, citizens' trust in justice, corruption in judiciary (**indicators of sub-variable judicial impartiality**) and the pathology of politicisation of judicial structures (**which undermines sub-variable judicial impartiality**). It also applies to frequent changes in laws (unstable laws), no or uneven implementation of laws, lack of generality of law, which indicates the pathology of legal instability, the pathology of lack of enforcement of law, and the pathology of lack of

¹⁹² ACCR 2016, p. 6.

¹⁹³ Id, p. 3.

generality of law (**all three pathologies undermine sub-variable formal legality**). However, courts started having meetings to standardize court practice which indicates a step forward in solving problems with inconsistency in judicial decisions, i.e. pathology of legal incoherence (**which undermines sub-variable formal legality**). Steps forward are also made in regard to the reduction of backlog cases, i.e. judicial efficiency. Still, the judiciary lacks financial resources, while some courts lack either technical, human, and/or spatial resources (**indicators of sub-variable judicial capacity**) and there is a lack of effectiveness. On the other hand, Serbia continued to comply with EU legislation and it ratified main international instruments (**indicator for sub-variable substantive legality**). Nevertheless, the same as in the previous reports, data from these reports indicate new negative trends, namely **lack of legal certainty and lack of legal quality**, as well as another new negative trend in the ACC report, i.e. lack of legal provisions that mirror actual life.

Thereby, the state of the four sub-variables is the following. **Substantive legality** continues to be satisfied according to the EC and the PC (the ACC does not provide data in this regard), while empirical results showed that **formal legality** and **judicial impartiality** are still undermined and without progress comparing to previous years in all three reports. Steps in relation to meetings for harmonisation of court practice are not enough for the conclusion that formal legality improved, having in mind other indicators which did not progress. Improvements were made in judicial efficiency, in terms of reduction of backlog cases (one indicator of sub-variable judicial capacity), but there has not been progress in overall judicial capacity, having in mind other indicators of judicial capacity, particularly lack of resources. Thus, sub-variable **judicial capacity** continues to be undermined with small improvements.

In July 2016 Serbia opened negotiating Chapter 23 and 24 which relates to rule of law. Aside from domestic reformers whose reform approach involved reforms that were instrumentalised and politicised, which is confirmed with identified pathologies, data indicates that external actors, i.e. the reform approach of the EU and the international community contributed to a negative state of judiciary, particularly in relation to legal incoherence and low quality of laws as Serbian specifics were not taken into consideration. On the other hand the data indicates that improvement in regard to reduction of backlog cases was a result of adoption of the Law on the protection of the right to trial within reasonable time and the program for reduction of backlog cases at the Supreme Court of Cassation, although it is stated that the introduced measures with the previously mentioned law do not improve judicial efficiency in the long run.

7. CONCLUSION

This study employed a content analysis with process tracing of three types of reports aiming to find out whether the EU has a pathological effect on Serbian rule of law after Serbia became a candidate country as well as to develop Mendelski's theory on the case of Serbia, both analytically and empirically.

The analysis has showed positive results in all indicators of the **sub-variable substantive legality** during the examined period, which implies that sub-variable substantive legality **improved** with conducted reforms. Namely, data from the two reports indicate that the Parliament has been very active in adopting and aligning its legislation with the EU *acquis communautaire* during the whole examined period as well as that Serbia ratified all the main international human rights instruments. The ACC report did not provide data in regard to substantive legality, although it stated that the Parliament was adopting large number of laws.

The analysis has showed that indicators by which the **sub-variable of judicial impartiality** was measured, either did not have a satisfactory level or did not improve or even worsened in some periods, which indicates that the sub-variable of judicial impartiality **did not improve** with the conducted reforms. The indicator of judicial accountability was the only indicator in which progress was detected (in 2014 and 2015) as there was a small increase in the number of disciplinary procedures against judicial officials, which nevertheless still was not satisfactory as reports stated that accountability is not ensured in practice. On the other hand, findings have showed that judicial independence, as the major indicator of sub-variable judicial impartiality was threatened both *de jure* and *de facto* and without progress during the whole examined period. The ACC report from 2014 provided data showing that reforms even worsened the state of judicial independence. However, the EU Progress reports discussed problems with judicial independence to a much lesser degree than the two other reports. The latter provided data which indicated the existence of the **pathology of politicisation of judicial structures** already from 2013, both in relation to old and new judicial structures (e.g. notaries), while the EU report provided data in that regard only from 2015. Namely, judicial structures did not serve their role, but were misused by domestic actors from other powers that did not improve over the years and thus undermined judicial impartiality.

The analysis has showed mixed results in relation to indicators of **sub-variable judicial capacity**, as there were fluctuations in the state of judicial efficiency, although the overall state of all indicators (judicial resources, judicial efficiency and effectiveness) was not satisfied. Namely, during the whole period courts lacked judicial resources (financial, human, spatial, technical), especially courts in Belgrade. According to data from the ACC report from 2016 the judiciary needs three times more financial resources in order to function properly, while data from some reports also indicate that the judiciary lack effectiveness. Moreover, during the whole period judiciary lacked efficiency. However, some progress is detected in relation to the reduction of number of backlog cases in 2015 and 2016, but reports continued to stress that backlog cases presents a serious concern. The already undermined state of judicial efficiency worsened even more in 2014 due to a lawyers' strike that lasted for four months as a consequence of the notary reform. Therefore, sub-variable of judicial capacity **did not improve** in the overall level with the conducted reforms, although **small progress** was identified over the examined period.

The analysis has showed that the state of **sub-variable formal legality** was undermined during the whole period, which was particularly detected through the presence of four pathologies in all three reports, which indicates that sub-variable formal legality **did not improve** with the conducted reforms. Namely indicators (coherent and stable laws) by which sub-variable formal legality was measured, was not on a satisfactory level or did not improve over time or even worsened in some periods. The Serbian judiciary was faced with laws that were contradictory and incoherent which caused inconsistency in judicial decisions and the **pathology of legal incoherence**. Laws were unstable and frequently changed under urgent procedures (even more times in one year), which caused the **pathology of legal instability**. Laws were introduced in order to provide benefits (e.g. to notaries and bailiffs) or to constrain certain groups (e.g. amended criminal provisions that were misused for business disputes) which indicates the **pathology of lack of generality of law**. Furthermore, laws were not implemented or unevenly implemented in practice which caused the **pathology of lack of enforcement of law**. Data from the ACC report indicates that external factors, i.e. the EU's and international communities' reform approach caused legal incoherence and legal instability of laws.

As already presented, the study identified presence of all five of Mendelski's pathologies in the Serbian judiciary during the examined period. Furthermore, the thesis identified **three new negative trends or pathologies** which pervaded the Serbian judiciary from year to year and in that way, on the basis of its empirical findings it developed the theory of the EU's pathological power. Namely, incoherent, partly enforced and frequently changed legislation caused a state of the judiciary in which citizens are deprived from legal certainty as there is no predictability in judicial decision making and citizens' rights and obligations remain unclear since provisions of laws constantly changed. The study therefore argues that the pathologies of legal instability, legal incoherence, and lack of enforcement of law derived the new **pathology of lack of legal certainty**. Furthermore, frequent changing of legislation under urgent procedures without professional debate and the involvement of experts caused adoption of laws which are not in coherence with other laws and which do not possess meaningful and quality solutions which resulted in adoption of low quality laws. The study therefore argues that the pathology of legal instability and the pathology of legal incoherence derived the new **pathology of lack of legal quality**. Lastly, urgent adoption of laws which are not in accordance with Serbian specifics, as a consequence of external forces who provided positive opinions and were giving the green light for laws to be adopted, caused adoption of laws which do not mirror actual life in Serbia. The study therefore argues that external actors' reform approach, together with the pathology of legal instability derived the new pathology of **lack of legislation that mirror actual life**. All three newly identified pathologies undermine sub-variable formal legality, i.e. *de jure* rule of law.

Therefore, the analysis of results has showed that the EU in combination with domestic actors, i.e. the independent variable, positively affected sub-variable of substantive legality, but had negatively reinforcing effects on sub-variables formal legality, judicial impartiality and judicial capacity during the four-year period of 2013-2016. This implies that three out of four sub-variables, i.e. rule of law dimensions, did not improve but that there had been small progress in the sub-variable of judicial capacity (See Table 2).

Table 2: Results

	<i>Independent variables</i>		<i>Dependent variables</i>
Dimensions	Domestic trends in rule of law	The EU reforms impact	Effects on Rule of law, i.e on 4 sub-variables
1. Substantive legality	Positive	Positively reinforcing	<u>Improved</u>
2. Formal legality	Negative	Negatively reinforcing	<u>Didn't improve</u>
3. Judicial capacity	Negative	Negatively reinforcing	<u>Small improvements, but still unsatisfied level</u>
4. Judicial impartiality	Negative	Negatively reinforcing	<u>Did not improve</u>

With regards to the two hypotheses that were presented under the Presentation in of the Research Problem, Aim, Research Question, and Hypothesis above, the study concludes the following.

The findings of the study supported the first (a) hypothesis since empirical results have showed that judicial impartiality and formal legality were not improved during the examined period. On the other hand the findings partly supported the second (b) hypothesis since empirical results have showed that substantive legality improved, while the state of judicial capacity was unsatisfactory with only minor improvements. Therefore it can be stated that the findings are largely in line with Mendelski's theory.

Having in mind previously mentioned findings of the analysis, the answer to the research question of the thesis—*Is the Europeanisation process having a pathological effect on Serbian rule of law after Serbia became an EU candidate country ?*— is that the Europeanisation process has had pathological effects on Serbian rule of law after Serbia became an EU candidate country. Since results have shown that the EU is having pathological effects, the answer to the specified research question of the thesis—*To what extent and how the EU is having pathological effects?*—is the following. Namely, the finding of the analysis showed that the EU is having pathological effect on Serbian rule of law to a great extent, since reforms did not manage to improve three out of four rule of law dimensions. The EU is having pathological effects by having negatively reinforcing effects on judicial impartiality, formal legality and judicial capacity dimension. EU reforms in combination with domestic actors thereby undermined the overall level of rule of law. The final result is that Serbia continues to have weak rule of law even though it became a candidate country.

This is however in accordance with previous research on Serbia, which showed that the EU had limited effect on rule of law and that the reform process was slow and inconsistent and dependent on

domestic actors who wanted to retain control over the judiciary influenced by their post-communist legacies. It is also in accordance with previous research of Mendelski's study on SEE countries which included Serbia, and which showed that the EU had pathological effects. Furthermore, the findings in relation to judicial capacity are partly in line with previous research and Mendelski's previous research on Serbia, where it was shown that EU reforms had mixed results in relation to judicial capacity. Namely, EU reforms improved judicial capacity in Serbia only in one period by increasing judges' salaries and by providing electronic equipment, while later they had negative effects.

Considering that the findings of the study confirmed the theory of the EU pathological power, the thesis contributed to the existing theoretical understanding of Mendelski's theory, as it strengthened the theory, which implies analytical generalization of the theory. The study contributed to the theory by developing it analytically, i.e. through the use of different indicators defined on the basis of the deeper understanding of the mechanisms from Mendelski's theoretical concept, as well as by developing it empirically, i.e. through identification of three new pathologies. Having in mind that it analysed one candidate country of South East Europe, the study also contributed to the research field of European Studies, i.e. to literature that discusses Europeanisation of candidate countries, Europeanisation of SEE countries as well as to literature that discusses the *Dark side of Europeanisation*. The findings of the study are particularly relevant for the present time when the EU is facing an existential crisis, as they show that Europeanisation is having pathological effects, which therefore cast doubt on the whole European Integration process in relation to future enlargement and also in terms of future endurance of the Union. This has particular importance for the policy decision making process, as it implies that EU policy makers should change their reform approach in order to prevent negative trends to be reinforced.

Having in mind the state of previous research in relation to Serbian rule of law reforms, it can be argued that the findings of the study were partly expected. Namely, it was expected that reforms did not manage to improve particularly the state of judicial impartiality. It was however unexpected that reforms had negatively reinforcing effects on three out of four sub-variables.

However, findings were unexpected in relation to the research problem, i.e. in regard to the arguments of Europeanisation scholars who argue that EU conditionality is prone to have more success, when membership perspective is more credible. Arguably, this was not the case with Serbia, as results have showed that despite Serbia became a candidate country in 2012, reforms did not cause improvement in the state of rule of law.

As regards to further research, it would be particularly interesting to examine the state of Serbian rule of law further in the future, as Serbia has opened Chapter 23 and 24, only recently, in July 2016. Moreover, although this thesis provided causality between the reform approach of the EU and domestic actors and rule of law development, and at some points it provided that the EU reform approach particularly caused negative effects in some areas, it will be interesting to examine in the future in more detail to what extent negative trends are the fault of the EU and to what extent negative trends are the fault of domestic reformers. Furthermore, it will be interesting that future deductive studies which are testing Mendelski's theory examine sub-variable substantive legality not just by examining if laws have internationally accepted rights and principles, but what is the state of their implementation, i.e. to what extent are these rights and liberties ensured in practice.

8. SOURCES

Reports

Anti-Corruption Council Report on Judicial Reform 2014 (ACCR 2014), Republic of Serbia, Belgrade April 2014, Government of the Republic of Serbia <<<http://www.antikorupcija-savet.gov.rs/en-GB/reports/cid1028-2486/report-on-judicial-reform>>>

Anti-Corruption Council Report on Judicial Reform 2014 Supplement (ACCR Supl. 2014), Republic of Serbia, Belgrade December 2014, Government of the Republic of Serbia <<<http://www.antikorupcija-savet.gov.rs/en-GB/reports/cid1028-2693/supplement-to-the-second-report-on-judicial-reform-or-report-on-adoption-of-judicial-laws-and-their-resulting-consequences>>>

Anti-Corruption Council Report on the Current state in the Judiciary 2016 (ACCR 2016), Republic of Serbia, Belgrade March 2016, Government of the Republic of Serbia <<<http://www.antikorupcija-savet.gov.rs/Storage/Global/Documents/izvestaji/REPORT%20ON%20THE%20CURRENT%20STATE%20IN%20THE%20JUDICIARY.pdf>>>

European Commission (2013), SERBIA 2013 PROGRESS REPORT (ECPR 2013), SWD, Brussels 16 October 2013 <<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/brochures/serbia_2013.pdf>>

European Commission (2014), SERBIA 2014 PROGRESS REPORT (ECPR 2014), SWD, Brussels 8 October 2014 <<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20140108-serbia-progress-report_en.pdf>>

European Commission (2015), SERBIA 2015 PROGRESS REPORT (ECPR 2015), SWD, Brussels 10 November 2015 <<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_serbia.pdf>>

European Commission (2016), SERBIA 2016 PROGRESS REPORT (ECPR 2016), SWD, Brussels 16 November 2016 <<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_serbia.pdf>>

Protector of Citizens 2013 Annual Report (PCR 2013), Republic of Serbia, Belgrade March 2014, Saša Janković <<http://www.ombudsman.org.rs/attachments/052_2013%20Annual%20Report%20of%20the%20Protector%20of%20Citizens.pdf>>

Protector of Citizens 2014 Annual Report (PCR 2014), Republic of Serbia, Belgrade March 2015, Saša Janković <<http://www.ombudsman.org.rs/attachments/052_Annual%20Report%202014.pdf>>

Protector of Citizens 2015 Annual Report (PCR 2015), Republic of Serbia, Belgrade March 2016, Saša Janković <<<http://www.ombudsman.org.rs/attachments/article/132/Annual%20Report%202015.pdf>>>

Redovan godišnji izveštaj zaštinika građana za 2016.godinu (PCR 2016 a), Republika Srbija, Beograd
Mart 2017, Saša Janković

<<<http://ombudsman.rs/attachments/article/5191/Godisnji%20izvestaj%20Zastitnika%20gradjana%20za%202016.%20godinu%20LATINICA.pdf>>>

Protector of Citizens 2016 Annual Report Introduction (PCR 2016 b), Republic of Serbia, Belgrade
March 2017, Saša Janković

<<http://www.ombudsman.org.rs/attachments/article/134/Introduction_2016%20Annual%20Report.pdf>>

Literature

Bache, Ian (2008), *Europeanisation and multilevel governance: cohesion policy in the European Union and Britain*. United States of America: Rowman & Littlefield Publishers, Inc.

Börzel, T. A. and Pamuk, Y. 2012. "Pathologies of Europeanisation: fighting corruption in the Southern Caucasus" *West European Politics* 35(1): 79–97.

Collier, David (2011), Understanding Process Tracing, *Political Science and Politics* 44, No.4, 823-30.

Dallara, Cristina. (2014), *Democracy and judicial reforms in South-East Europe. Between the eu and the legacies of the past* (Cham: Springer).

Ekiert, G., Kubik, J. and Vachudová, M. A. (2007), "Democracy in the Post-Communist World: An Unending Quest?" *East European Politics and Societies* 21(1): 7–30.

Grabbe, H. 2006. *The eu's transformative power. Europeanisation through conditionality in Central and Eastern Europe*, Palgrave Studies in European Union Politics.

Graziano, Paolo and Vink Maarten P. (2013) Europeanization: Concept Theory and Methods, Research Gate In book: *The Member States of the European Union*, Edition: Second Edition, Chapter: 2, Publisher: Oxford University Press, Editors: Simon Bulmer, Christian Lesquene, pp.31-54

Hesse-Biber Sharlene Nagy and Leavy Patricia (2011), *The practice of qualitative research*, SAGE publications.

Hiber, Dragor and Begović, Boris (2006), *EU Democratic Rule of Law Promotion: The Case of Serbia*. Stanford/CA 2006 (CDDRL Working Paper, September 2006).

Hix, Simon and Goetz, Klaus H. (2000) *Introduction: European integration and national political systems*. *West European Politics*

Hsieh, Hsiu- Fang and Sarah E. Shannon (2005) "Three Approaches to Qualitative Content Analysis" *Qualitative Health Research* 15(9):1277- 1288.

Johansson, Rolf (2003), *Case Study Methodology*, Conference Paper in *Open House International* 32(3):22–24.

Jonasson, Ann-Kristin (2013), *The EU's Democracy Promotion and the Mediterranean Neighbours, Orientation, ownership and dialogue in Jordan and Turkey*, Routledge.

- Ladrech, Robert (1994) Europeanisation of Domestic Politics and Institutions: The Case of France, *Journal of Common Market Studies*, Vol. 32.
- Mendelski, Martin (2013), They Have Failed Again! Donor-driven Promotion of the Rule of Law in Serbia, *Südosteuropa* 61 (1), 79-113.
- Mendelski, Martin (2014), Dissertation: The Limits of the European Union's Transformative Power: Pathologies of Europeanisation and Rule of Law Reform in Central and Eastern Europe, Université du Luxembourg.
- Mendelski, Martin (2015), "The EU's pathological power: The failure of external rule of law promotion in South Eastern Europe" *Southeastern Europe* 39(3): 318–346.
- Mendelski, Martin (2016), Europeanisation and the Rule of Law: Towards a Pathological Turn, *Southeastern Europe* 40, 346-384.
- Mendelski, Martin (2016) The EU's rule of law promotion in Central and Eastern Europe: Where and why does it fail and what can be done about it?, Bingham Centre for the Rule of Law Global Rule of Law Exchange Papers.
- March, James G. & Olsen, Johan P. (2004), Logic of appropriateness, Arena Working paper 04/09, Centre for European Studies University of Oslo.
- Olsen, Johan P. (2002), The Many Faces of Europeanisation, *Journal of Common Market Studies*, Volume 40, Number 5.
- Silverman, David (2015), *Interpreting Qualitative Data. A Guide to the Principles of Qualitative Research*. London: Sage.
- Tracy, Sarah (2012) *Qualitative Research Methods: collecting evidence, crafting analysis, Communicating impact*, Wiley: Blackwell.
- Kmezić, Marko (2014) Europeanisation by Rule of Law Implementation in the Western Balkans, Institute for Democracy SOCIETAS CIVILIS Skopje.
- Kmezić, S. and Kmezić, M. "The Rule of Law in EU Enlargement Policy- Impact and Obstacles in Serbia in Kmezić, M. (2014).
- Kmezić, Marko (2017) *EU Rule of Law Promotion: Judiciary reforms in the Western Balkans*, Routledge.
- Vachudova, M. A. 2005. *Europe undivided. Democracy, leverage, and integration after communism* (Oxford: Oxford University Press).
- Vink, Maarten (2003), What is Europeanisation? and other questions on a new research agenda, *European Political Science* 3, no. 1.
- Schimmelfennig, Frank (2012) Europeanisation beyond Europe, *Living Reviews in European Governance*, Vol. 7, No. 1.

Schimmelfennig, F. & Sedelmeier, U. (2004) "Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe", Journal of European Public Policy.

Sedelmeier, Ulrich (2011), Europeanisation in new member and candidate states , Living Reviews in European Governance, Vol. 6, No. 1.

Subotić, Jelena (2010), Explaining Difficult States The Problems of Europeanisation in Serbia, East European Politics and Societies, SAGE publications.

Regulation

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, European Commission (2007/C 306/01), Lisbon 2007 << <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=OJ%3AC%3A2007%3A306%3ATOC>>>

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01 <<<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A2012%3A326%3ATOC>>>

European Commission-Neighbourhood-Enlargement-Steps towards joining.

<<https://ec.europa.eu/neighbourhood-enlargement/policy/steps-towards-joining_en>>

9. APPENDIX

2013	Substantive legality	Formal legality	Judicial capacity	Judicial impartiality	New negative trends
The EC Progress Report	Serbia aligns with EU <i>acquis communautaire</i> and it ratified main international human rights standards	Incoherent and unstable laws <i>Pathology of legal instability</i> <i>Pathology of legal incoherence</i> <i>Pathology of lack of enforcement of law</i> Indication of <i>pathology of lack of generality of law</i>	Lack of technical resources Lack of judicial efficiency Lack of effectiveness	Lack of judicial independence Lack of judicial impartiality Lack of accountability Indications for corruption in judiciary	Lack of legal certainty
The PC Report	No data	<i>Pathology of lack of enforcement of law</i>	Lack of judicial efficiency	Lack of judicial independence Indications for lack of citizens' trust in justice <i>Pathology of politicisation of judicial structures</i>	Lack of legal certainty
The ACC Report					
Overall level	Positive/ Satisfied	Negative/Undermined	Negative/Undermined	Negative/Undermined	Negative

2014	Substantive legality	Formal legality	Judicial capacity	Judicial impartiality	New negative trends
The EC Progress Report	Serbia aligns with EU <i>acquis communautaire</i> and it ratified main international human rights standards	Incoherent and unstable laws <i>Pathology of legal instability</i> increased <i>Pathology of legal incoherence</i> <i>Pathology of lack of enforcement of law</i> <i>Pathology of lack of generality of law</i>	Lack of technical resources Lack of judicial efficiency, which worsened in Constitutional Court	Lack of judicial independence Lack of judicial impartiality Lack of accountability (but small progress) Indication of <i>pathology of politicisation of judicial structures</i> in relation to notaries	Lack of legal certainty
The PC Report	No data	Incoherent and unstable laws <i>Pathology of legal instability</i> <i>Pathology of legal incoherence</i> <i>Pathology of lack of enforcement of law</i>	Lack of judicial efficiency—no progress	Lack of judicial independence <i>Pathology of politicisation of judicial structures</i>	Lack of legal certainty
The ACC Report	No data except that Parliament is active in adopting legislation	Incoherent and unstable laws <i>Pathology of legal instability</i> <i>Pathology of legal incoherence</i> <i>Pathology of lack of generality of law</i>	Lack of financial (spatial) and human resources Lack of judicial efficiency, which decreased	Lack of judicial independence Lack of citizens' trust in justice <i>Pathology of politicisation of judicial structures</i>	Lack of legal certainty Lack of legal quality
Overall level	Positive/ satisfied	Undermined/did not improve	Undermined/did not improve	Undermined/did not improve	Negative/undermine formal legality

2015	Substantive legality	Formal legality	Judicial capacity	Judicial impartiality	New negative trends
The EC Progress Report	Serbia aligns with EU <i>acquis communautaire</i>	Incoherent and unstable laws <i>Pathology of legal instability</i> <i>Pathology of legal incoherence</i> <i>Pathology of lack of enforcement of law</i>	Lack of resources (in prosecution and in Belgrade courts) Lack of judicial efficiency—small progress (in reduction of backlog cases in specific courts) Lack of effectiveness	Lack of judicial independence Lack of judicial impartiality Lack of accountability (small progress) Corruption in judiciary <i>Pathology of politicisation of judicial structures</i>	Lack of legal certainty Lack of legal quality
The PC Report	No data except that Parliament is active in adopting legislation	Incoherent and unstable laws <i>Pathology of legal instability</i> <i>Pathology of legal incoherence</i> <i>Pathology of lack of enforcement of law</i>	Lack of judicial efficiency—small progress but not in the long run	Lack of judicial independence <i>Pathology of politicisation of judicial structures</i>	Lack of legal certainty
The ACC Report					
Overall level	Positive/satisfied	Undermined/did not improve	Undermined-small improvements	Undermined/did not improve	Negative/undermine formal legality

2016	Substantive legality	Formal legality	Judicial capacity	Judicial impartiality	New negative trends
The EC Progress Report	Serbia aligns with EU <i>acquis communautaire</i>	Incoherent and unstable laws <i>Pathology of legal instability</i> <i>Pathology of legal incoherence (step forward, start of meetings)</i> <i>Pathology of lack of enforcement of law</i>	Lack of resources (financial, technical; particularly in Belgrade courts) Lack of judicial efficiency—small progress in reduction of backlog cases Lack of effectiveness	Lack of judicial independence Lack of judicial impartiality Lack of accountability Corruption in judiciary did not decrease <i>Pathology of politicisation of judicial structures</i>	Lack of legal quality
The PC Report	Serbia ratified main international instruments and standards	Incoherent and unstable laws <i>Pathology of legal instability</i> <i>Pathology of legal incoherence</i> <i>Pathology of lack of enforcement of law</i>	Lack of human resources in prosecution Lack of judicial efficiency	Lack of judicial independence Lack of citizens' trust in justice <i>Pathology of politicisation of judicial structures</i>	Lack of legal certainty Lack of legal quality
The ACC Report	No data except that Parliament is active in adopting legislation.	Incoherent and unstable laws <i>Pathology of legal instability</i> <i>Pathology of legal incoherence</i> <i>Pathology of lack of enforcement of law</i> <i>Pathology of lack of generality of law</i>	Lack of financial resources , lack of human resources in specific courts (e.g. Constitutional Court) Lack of judicial efficiency—small progress in reduction of backlog cases Lack of effectiveness, particularly in Constitutional courts	Lack of judicial independence <i>Pathology of politicisation of judicial structures</i>	Lack of legal quality Lack of legislation that mirror actual life
Overall level	Positive/satisfied	Undermined/did not improve	Undermined/small improvements	Undermined/did not improve	Negative/undermine formal legality