‘Europeanisation’ of the Judiciary in Southeast Europe

Sanja Bogojević

1 Introduction

With the creation of what today is the European Union (EU) began the practice of ‘Europeanisation’ of laws in Europe. This signifies the processes of endorsing EU law and European integration by, *inter alia*, implementing the corpus of laws stemming from European law making, as well as adapting and training domestic official bodies to cooperate with EU-based institutions.[1] This process was catalysed by the Court of Justice of the EU (CJEU), which proclaimed EU law a ‘new legal order’, distinct from both national and international law,[2] and having supremacy over national bodies of laws of the Member States.[3] In this chapter, what is examined are the ways in which the judiciary in Southeast Europe—covering Slovenia, Croatia, Bosnia and Herzegovina (BiH), Serbia, Kosovo*,[4] the Former Yugoslav Republic of Macedonia (FYR Macedonia), and Albania—has dealt with the process of Europeanisation in the light of EU membership and membership aspirations. The courts in Southeast Europe make a fascinating study for at least two reasons.

To start with, they are the legal cornerstones of countries that share a common political and legal history; or, in the recent past they were run according to communist ideology. The Communist Party seized control of Albania following

[1] Howell (2004), p. 20. For an overview of the Europeanisation of different areas of law in Europe, see Snyder (2000).

[2] Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

[3] Case 6/64 *Costa v. ENEL* [1964] ECR 585.

[4] This designation is without prejudice to positions on status, and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

S. Bogojević (✉)
Lund University, 22100 Lund, Sweden
e-mail: Sanja.Bogojevic@jur.lu.se

S. Rodin, T. Perišin (eds.), *Judicial Application of International Law in Southeast Europe*, DOI 10.1007/978-3-662-46384-0_5

the Second World War, and officially it became the People's Republic in 1946.[5] In the same period, Slovenia, Croatia, BiH, Montenegro, Serbia, Kosovo and FYR Macedonia formed part of the Socialist Federal Republic of Yugoslavia (SFRY, 1945–1991).[6] This communality is significant because it implies that the judiciary in Southeast Europe has, due to its history, had similar attitudes towards law and the legal profession. Rodin explains that in a communist legal system:

> [j]udges were supposed to follow, not to interpret, the will of the legislature not only and not primarily because of the hierarchical structure of the legal system, but because of the authoritarian nature of the political system.[7]

This technocratic role of judges meant that law was understood as being objective, and the act of legal interpretation 'a process of deduction, void of any contextual considerations'.[8] Examining the application of international law, as well as the national courts' reasoning in this regard, allows us to analyse whether, and if so, how, the judiciary in Southeast Europe has moved away from its communist-oriented legal reasoning.

Moreover, countries in Southeast Europe share a common political and legal goal: to be part of the 'new legal order', or the EU. They, nevertheless, are at different stages of fulfilling this objective. Slovenia has formed part of the EU since 2004 and Croatia, joining on 1 July 2013, is the EU's newest member. BiH, Albania, Serbia, FYR Macedonia and Kosovo are at different stages of being granted or of negotiating their candidacy.[9] Examining whether the respective national courts have embraced these legal aspirations and applied international law is a useful exercise in analysing the extent to which both the idea and realisation of EU membership have impacted on the legal reasoning of the national courts.

There are a number of important caveats to bear in mind when analysing the application of international law by the domestic courts in Southeast Europe. To start with, this is not an exercise in simply spotting the formal rules and procedures allowing such application. Rather, the actual life given to international law, that is, the meaning and the legal implication that follow such interpretation, is the focal part of this investigation. Another important limitation is that such an enquiry does not seek to prescribe a particular judicial route for national judiciaries in new, or aspiring, EU Member States. Instead, this study has the objective of identifying *whether* national courts in the Southeast parts of Europe have taken international law into consideration and, if so, *how* this has been done.

---

[5] For an overview, see Oakes and Verrija (2002), p. 25.

[6] In line with the 1974 Constitution of SFRY, the Federation was constituted by Bosnia, Croatia, Macedonia, Montenegro, Serbia and Slovenia, as well as two 'socialist autonomous provinces'—Kosovo and Vojvodina.

[7] Rodin (2009). See also Kühn (2006), p. 19.

[8] Rodin (2009). p. 2.

[9] Serbia, FYR Macedonia and Albania are 'candidate countries' and Kosovo, BiH are 'potential candidate countries'. For an overview, see http://ec.europa.eu/enlargement/countries/check-current-status/index_en.htm.

The next part of this chapter goes on to explain why national courts matter in the process of the 'Europeanisation' of law. In the third section, the different judicial systems examined in this book are introduced: first, against their historical backgrounds, and then by outlining their judicial constructions. Here, discussion focuses on legal culture or the importance of going beyond the mere wording of the law in order to appreciate the implications of law. In the fourth section, the national reports are analysed in a comparative manner and, finally, fifth section evaluates these, together with the general findings of this chapter.

2 What Have National Courts Got to Do with It?

At the risk of stating the obvious, a necessary condition for effective judicial control is a rational judicial architecture.[10] It is crucial to consider national courts, as well as international courts, in any investigation of the exercise of law. Along similar lines but in a more general context, Ewing and Kysar describe the role of the judiciary as forming part of a system of 'prods and pleas'. This refers to the capacity of different authorities to push each other into action; in the case of judges, they are understood to perform their roles with a view to catalysing activity somewhere else in the system.[11] This means that the role of the court is ultimately to activate a series of actors, including governments or businesses, to take measures to make international law both effective and possible. Over and above these considerations, it is crucial to examine the judiciary in the process of the 'Europeanisation' of law for at least two reasons.

First, the EU is based on a system of cooperative federalism, meaning that all courts—national, as well as EU courts—are entitled and obliged to apply EU law to the disputes before them.[12] Following Article 4(3) TEU[13]—and more precisely, the principle of loyal cooperation—the national courts have a duty to apply EU law. Article 19(1) TEU, which states that Member States shall provide sufficient remedy to ensure effective legal protection in all fields of EU law, supports this duty. From this perspective, national courts are the 'guardians' of the EU legal order,[14] and, as such, the key players in making EU law effective. This means that the Europeanisation of laws in Southeast Europe depends, and will depend once all Southeast European states become EU members, on the national judiciaries.

Second, national courts are crucial actors in the process of shaping the EU legal system. It is primarily via preliminary rulings that a cross-judicial dialogue between domestic and EU courts is created, which tends to lead to this shaping process.

[10] Craig (2012), p. 261.

[11] Ewing and Kysar (2011), p. 350.

[12] Schütze (2012), p. 289.

[13] Consolidated Versions of the Treaty on European Union (TEU) [2008] OJ C115/13.

[14] Schütze (2012).

Indeed, as a result of manifold initiatives from the national courts demanding clarification of EU law, core doctrines of EU law have been established, including direct effect (in *Van Gend en Loos*), the principle of supremacy (*Costa v. ENEL*, *Simmenthal II*), state liability (*Francovich and Bonifaci*), horizontal direct effect (*Defrenne II*), direct effect of directives (*Van Duyn, Marshall*), as well as indirect effect (*Von Colson*).[15] It is mainly, although not exclusively, the lower national courts that have pushed for these references, meaning that in investigating the 'Europeanising' effects in Southeast Europe, the judiciary is a necessary case study—and one that needs to cover all instances.

In short, in the EU legal system, national courts are obliged to follow EU law and ensure its effective application. In doing so, Čapeta explains, the national judges

> were willing to challenge established legal rules. . .[t]hey challenged either domestic rules, relying on the new values imported by the new European legal order, or the newly-established rules of the European legal order, defending the values of the domestic legal order. They were creative judges who used all the possibilities of the two legal orders to try and improve legal rules.[16]

To what extent such creativity exists in the courts in Southeast Europe is the query investigated next.

3 Starting Point: Looking Back, Going Forward

With the exception of Albania, countries in Southeast Europe were, until recent history, part of a single jurisdiction: SFRY (1945–1991).[17] Like other socialist states, SFRY attempted to create a legal system based on Marxist principles.[18] This changed following the break with Stalin in 1948 when Yugoslavia started creating versions of its own socialist laws,[19] which, following Kühn's explanation, served 'solely the interest of the Party'.[20] This body of law was also uniformly applied through a centralised judiciary, which was created by the federal authorities, and the federal Supreme Court, whose aim was to ensure uniformity in judicial decisions.[21]

This legal system was largely decentralised once the constitution was revised in 1974; each federation received its own constitutional court, leaving the Federal Court with little power. With the proclamation of independence by Slovenia and

[15] Čapeta (2005), pp. 23–53. For a more general overview of the procedure of preliminary references, see Tridimas (2003), p. 9.

[16] Čapeta (2005), pp. 30–31.

[17] See n 6.

[18] Hayden (2002), pp. 1799, 1801. For an overview, see Collins (1982).

[19] Hayden (2002). For an overview, see Chloros (1970).

[20] Kühn (2011), p. 64. Note that Kühn discusses socialist laws more generally.

[21] Hayden (2002), p. 1802.

Croatia on 24 June 1991, SFRY began its process of disintegration, and moved toward independent, liberal legal systems.[22] That same year, communism fell also in Albania, where the Communist Party had seized control in 1946.[23]

Today, different legal jurisdictions with distinct judicial structures exist in Southeast Europe. For the most part, judicial power is organised in a four- or three-tiered hierarchical structure with the Supreme Court on top, followed, for example, by courts of general jurisdiction, and administrative and commercial courts. In this type of legal structure, the constitutional court formally falls outside the judicial branch; its role is to rule on the conformity with the constitution of national, and, in certain regards, also international laws. This is the case, for instance, in Albania,[24] FYR Macedonia,[25] and Serbia.[26]

In Slovenia and Croatia,[27] EU law has precedence over national law, and it is the CJEU that is entrusted with the highest authority to rule on its validity. Similarly, the jurisdiction of the European Court of Human Rights is binding. The national courts are organised into courts of general and specialised jurisdiction, the highest court being the Supreme Court. Any questions concerning the constitutionality of laws, however, are—similarly to the jurisdictions mentioned previously—referred to the constitutional court.[28]

Kosovo and BiH share similar judicial structures to the extent that international judges were installed in the national court systems following the Kosovo conflict and the Bosnian War respectively. In accordance with the Dayton Accord that marked the end of the Bosnian War, BiH is composed of two separate entities: a joint Muslim-Croat Federation of Bosnia and Herzegovina (the Federation), and the Serbian Republic of Bosnia and Herzegovina (Republic of Srpska, 'RS').[29] This division is reflected also in the country's judicial system, which has two separate three-tier judicial systems, that is, two different constitutional courts, supreme courts and district courts. BiH also has a national Constitutional Court which has binding legal authority across the entire country—including both the Federation and the RS. This court, which has nine members, is composed of four judges elected by the Federation's House of Representatives, two are appointed by the RS National Assembly and three are international judges named by the president of the

[22] Ibid.

[23] For an overview, see Oakes and Verrija (2002), p. 25.

[24] The High Court, the courts of appeal and the courts of first instance exercise judicial power in Albania. In addition, the Constitutional Court interprets the constitution and decides on the constitutionality of laws via judicial review. See *ibid*, 29–30.

[25] See Risteska and Miševa in this book.

[26] In Serbia, the judicial structure consists of courts of general and specialised jurisdiction. See Mirjana Drenovak Ivanović and Maja Lukić in this book.

[27] For an overview of the Croatian legal structure, see Uzelac (2002), pp. 389, 393. Note, however, that with Croatia joining the EU, the Court of Justice of the European Union has sole competence to interpret the compatibility of Croatian national law and EU law.

[28] Klemenčić (2002), p. 1465.

[29] Gould (2002), pp. 175, 176.

European Court of Human Rights.[30] The Constitutional Court has the sole jurisdiction to resolve any constitutional conflicts between the Federation and RS, as well as to review the laws of the two entities and their conformity with the Bosnian constitution, in addition to decisions made by any other courts in the country.[31] Similarly in Kosovo, international judges form part of the Kosovo judiciary both in the Constitutional Court and the courts of general jurisdiction. These exist within the framework of the European Union Rule of Law Mission in Kosovo (EULEX), which was created and instituted to help adjudicate, for example, crimes committed during the Kosovo conflict.[32]

What this shows is that following the break-up of communism in Southeast Europe in the early 1990s, distinct judicial structures took shape. For the most part, the judiciary in this region consists of a three- or four-tier court system with the Supreme Court entrusted with the highest judicial authority and the constitutional court with the interpretation of constitutional law matters. EU Member States—here, Slovenia and Croatia—follow a slightly different judicial architecture in that it is the CJEU that interprets EU law, which ultimately is also national law. In Kosovo and BiH, on the other hand, the judiciary construction is distinct from all others in Southeast Europe, with international judges forming an important part of the higher court structures. It is important to bear these distinct institutional features in mind in order to understand *how* the judiciary in Southeast Europe is built and how it ultimately functions. This, however, is only part of the story. To appreciate the meaning given to law by these different courts, the legal culture in which these exist and from which they derive must first be examined.

3.1 Beyond Words: The Importance of Legal Culture

'Legal culture' is a ubiquitous concept.[33] It reflects a fusion of social, political, and economic forces that impacts on a law's development, significance and process of implementation, and also expresses the institutional and historical traditions through the legal language in a particular jurisdiction.[34] Each rule or legal framework has a particular meaning tied to a particular place and time,[35] and each legal concept and line of legal argument operates in predetermined traditional contexts that spring from different cultural traditions, or according to a so-called *mentalité*.[36] As such, a rule or regime cannot be examined only as a black-letter text; rather, it

[30] Ibid, p. 178.

[31] Ibid.

[32] See Istrefi and Morina in this book.

[33] Gibson and Caldeira (1996), p. 55. See also Cotterrell (1997), p. 14.

[34] Bogojević (2013), ch. 3.

[35] Legrand (2001), pp. 57–58.

[36] Ibid, p. 65.

must be scrutinised through a culture-specific lens, taking into consideration its legal culture.[37] Such a study may be carried out in various ways: for instance, by focusing on legal culture as a series of 'internal' factors—including judicial decisions, scholarly comments, the architecture of legal institutions—and/or 'external' elements—comprising social behaviour, attitudes to judicial decisions and the informal organisation of behaviour within a community.[38] In this collection of papers, legal culture is explored by examining judicial decisions and how the courts have given effect to international law in Southeast Europe.

Here, it is important to highlight the historical commonality of the countries of Southeast Europe examined, as this explains how the judiciary has traditionally viewed (international) law, as well as the judicial profession. It has already been noted that the judiciaries of Southeast Europe come from authoritarian and totalitarian traditions: its members were trained under a centrally planned economy, receiving a legal education different from that in Western Europe at the time.[39] In Kühn's description, following World War II, continental legal culture underwent a gradual transformation—distinct from that of Southeast Europe. Having strictly adhered to the letter of laws under the Nazi era—leading to some grossly unjust and horrific verdicts—meant that, once the war came to an end, the law and its implications were thoroughly reconsidered.[40] For instance, during this period judicial review of constitutional laws was increasingly practised. This, together with the expansion of state powers and the building of welfare and regulatory social structures, contributed to the transformation of the concept of law. As a result, in 1990—when Southeast European states emerged from their five decades of intellectual isolation from modern Western thought—Western legal culture was very different from what it had been before World War II.[41]

During the same period, in the post-communist countries, the emphasis of the legal profession was placed on the written law with no role, or only a minor one, for interpretation.[42] Rodin explains that, for over 50 years, the development of law in the Southeast Europe was facilitated by:

> an understanding of law as an autonomous science, and an understanding of the task of jurists, both practitioners and legal theorists, as finding the 'right answers' for all legal questions exclusively within the legal system, regardless of social reality.[43]

This static understanding of law had a huge impact on how the judicial profession in the Southeast parts of Europe at the time was viewed. More precisely, legislative sovereignty was put on a pedestal, and law 'operated with the notion of

[37] Ibid.

[38] See Friedman (1997), p. 33.

[39] Kühn (2004), p. 531. Note that reference to 'Western' connotes countries that where on the non-communist side of the Iron Curtain, see also Komàrek (2014a).

[40] Kühn (2004), p. 535.

[41] Ibid.

[42] Ibid, p. 540.

[43] Rodin (2005), pp. 1, 6.

unity of state power, not the separation of powers'.[44] Indeed, in the Communist legal systems, 'judges had no discretion at all, even within the bounds of the law',[45] and so both the legal texts, and the judiciary applying these, were understood to operate void of their social context.

In Kühn's view, judicial discourses in the post-communist European states still adopt formalist understandings of the law, although these are 'often clothed in a new legal vocabulary'.[46] Indeed, the national reports that form part of this collection of essays similarly illustrate that the judiciary in Southeast Europe conducts a formalistic reading of the law, even if hints of change are noticeable. This, Kühn explains, is because the effects of Marxism–Leninism run deep into the layers of legal culture, generating 'a significant time lag in the intellectual development of Central and Eastern Europe which could not be overcome within the first post-Communist decade.'[47] Komàrek, however, offers a more nuanced explanation as to why the legal consciousness emerging in post-communist Europe is different from that of its Western counterpart, arguing that:

> 1989 revolutions were somehow taken away from the people of post-communist Europe who never got control over their lives. Liberal democracy coupled with market economy was presented to them as the only alternative. . .More critical accounts of the post-1989 period thus show how the collapse of communism helped to cement the dominant political-economic order of the last twenty years, which now goes under the name of neoliberalism – and has become contested in the last few years.[48]

What Komàrek vividly points out is that although history is crucial in understanding how a particular legal culture views law, this exercise is rarely straightforward or easy. Clearly, what is needed is a more open engagement with the past. Although this falls outside of the scope of this book, an important first step, as part of such an exercise, is to analyse how the national courts apply (international) law, and whether this has changed, in this case, through the process of the Europeanisation of laws.

4 State of Affairs According to the National Reports

The countries discussed in this book created new constitutions and legal frameworks in the years following the transition from communist to capitalist legal systems. The national reports, examining the institutional capacity to identify and apply international law and international law standards, show that although ratified international law is given preference to national law by the courts examined, the

[44] Bobek (2011), pp. 1, 4.
[45] Ibid.
[46] Kühn (2004), p. 550.
[47] Kühn (2011), p. 160.
[48] Komàrek (2014b).

judiciary remains largely reluctant to apply non-domestic law. It seems, as will be discussed later, that education is a key factor in turning this trend around.

4.1 Constitutional Status of International Law

Ratified international treaties and law are widely incorporated in the constitutional bases of the countries in Southeast Europe—indeed, many of these constitutions are founded on international law. In BiH, for example, the constitution is based on the Dayton Peace Agreement, signed in 1995. Similarly, in FYR Macedonia, the constitution was developed in a 'laboratory' fashion, founded on an extensive list of international treaties,[49] protecting, for example, human rights, largely corresponding to the ECHR, as well as the International Convention on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.[50] A similar bill of rights exists in the Albanian constitution, as well as in the remaining Southeast European countries, where explicit reference to the ECHR exists.[51] In Croatia, one of the highest constitutional values is the concepts of civil, social and human rights, sometimes directly borrowing the language of the ECHR.[52] The Slovenian constitution also contains a number of elaborated human and social rights and civil liberties based on the ECHR,[53] as does Kosovo's, which was set up following a 'strong regime of domestic incorporation of international law'.[54]

In many of these jurisdictions, a continuous 'Europeanisation' of the national constitutions is taking place. As explained by Meškić and Samardžić, in BiH, international law is incorporated in the domestic legal system in a cooperative, as opposed to hierarchical, fashion.[55] This approach reflects the so-called Solange approach in determining the relationship between different legal orders.[56] In the remaining legal systems in the region, the constitution is traditionally the supreme normative source of law, meaning that all legislation—including applicable international law—must be in conformity with it.[57] Here, international law is normally given effect through ratification, primacy and domestication, or through the incorporation and reproduction of international law and jurisprudence.[58]

[49] Risteska and Miševa in this book.

[50] Krug (2002), pp. 931, 933. For a general overview, see for instance Brashear (1997), p. 18.

[51] Oakes and Verrija (2002), p. 28.

[52] Uzelac (2002), p. 392.

[53] Klemenčić (2002), pp. 1460, 1462.

[54] Istrefi and Morina in this book.

[55] Meškić and Samardžić in this book.

[56] Ibid.

[57] See for instance FYR Macedonia, Krug (2002).

[58] See for instance Kosovo, Istrefi and Morina in this book.

In Slovenia and Croatia, independence in 1991 brought new constitutions that allow for the application of international law, or, more precisely, they provide that laws and regulations must be in compliance with the international agreements that bind them. Moreover, ratified and proclaimed international treaties are directly applicable and have legal force above that of regulatory statutory law. In the initial format, however, supremacy was reserved for the constitution—as tends to be the case in civil law countries. Once Slovenia joined the EU in 2004, and Croatia in 2013, constitutional amendments were required to secure the supremacy of EU law.[59]

Ultimately, what this overview shows is that the jurisdictions in Southeast Europe, as examined in this book, are open to and accepting of international law. To understand to what extent the judiciaries in actual fact apply international law, court practice in this regard needs to be examined. It is to this exercise that we now turn.

4.2 The Application of International Law by National Courts

The national reports show that, on a general level, courts in Southeast Europe practise the application of international law. These are primarily higher courts that focus on rights codified in the ECHR, as exemplified by the report on Kosovo, as well as FYR Macedonia and BiH[60]—at least in relying on international law directly. The remaining court instances refer to international law more frequently once it is transposed in national law. Thus, international law is applied to different degrees depending on which court deals with the particular case.

The most frequently applied source of international law, according to all national reports, is the ECHR. In Kosovo, 90 % of the case law concerning international law in a domestic context is related to rights derived from the ECHR. Similarly, in Slovenia, BiH and FYR Macedonia, the ECHR and its case law are the main international source of law referred to. In Serbia, the judiciary is under an obligation to take international law and its practice into consideration. There, international law has been used to interpret Serbian law, and although it may not have any legal binding force, it is deemed to carry 'moral and political value'.[61] This includes referring to ECHR case law (mainly in specific cases concerning damages for defamation, family disputes, and property disputes), if only to justify the court's

[59] See Klemenčić (2002), p. 1462; Uzelac (2002), p. 392.

[60] The *Kalinic* case is particularly interesting in this regard where the Constitutional Court of Bosnia and Herzegovina concluded that BiH had violated Article 13 of the ECHR also when international territorial administrations were responsible for the breach, see Schaap (2011). Available at: http://www.academia.edu/4076996/The_strained_relationship_between_international_administrators_and_local_institutions_Judicial_activism_in_BiH_and_the_demand_for_access_to_justice.

[61] Mirjana Drenovak Ivanović and Maja Lukić in this book.

decision.[62] Along similar lines, the Albanian judiciary has in almost all human rights-related cases pointed to the ECHR.

When it comes to EU law, Slovenia and recently also Croatia, as EU Member States, are under a legal obligation to apply EU law. Slovenia, however, reports little EU-law activity before the national courts; the few cases that deal with this body of law concern mainly asylum and taxation. The Slovenian judiciary has, nonetheless, included references to the Italian, German and North American constitutional courts in interpreting its own constitution. Interestingly, the Albanian judiciary has made direct references to EU law, as has the Supreme Court in Serbia, raising issues relating to the Charter.

In the non-EU states, focus is on the application of SAA, as opposed to the direct application of EU law. These agreements tend to be granted direct effect, which is at least the case in BiH and FYR Macedonia. In the case of the latter, since 2004, when the SAA was signed, a series of new institutions have been created and the WTO, ICTY and the Århus Convention ratified. However, the impact of these institutional changes has been limited, as the judiciary rarely makes reference to any of these international bodies of law (apart from the ECHR).[63] In Albania, on the other hand, the SAA has been in force since 2009 but not all the necessary institutional reforms have been carried out. In Serbia, the SAA is not yet in force. At the time of writing, accession talks are set to open in January 2014 but the Interim Agreement of 2010 is enforced.[64]

Several Southeast European states have also established special institutions and judicial pathways to facilitate the application of international law. In Serbia, a special institution—the Commission for Information of Public Importance and Personal Data Protection—has been set up to help litigators make the necessary international law reference. Additionally, in BiH, litigants have the right to appeal to the provincial Human Rights Commission after they have exhausted all access to the domestic judiciary. This system is understood to help ensure that judicial decisions are in line with European and international principles of human rights.[65] Similarly, the lower courts may refer to constitutional court issues concerning the ECHR or matters of public international law.[66]

Thus, the following national reports on the Europeanisation of laws by the judiciary in Southeast Europe show that institutional structures have been established in such a way so as to facilitate the court's consideration of ratified international law. Although the reports illustrate that such consideration is steadily increasing in number, it is a trend mainly referring to the application of the ECHR, as opposed to international law more generally. The question that emerges, and

[62] *Ibid*.

[63] See Risteska and Miševa in this book.

[64] Mirjana Drenovak Ivanović and Maja Lukić in this book.

[65] Gould (2002), p. 179.

[66] Ibid, p. 178.

which is dealt with in the following and final part of this chapter, is the way in which, if at all, such a trend could be turned around.

5 Reflections

The Southeast European countries examined in this book share a similar recent legal history, but also a future goal: accessing the EU. Indeed, and as illustrated by the national reports, Kosovo, BiH, FYR Macedonia, Serbia, and Albania are all oriented toward signing and joining the EU. In the case of Croatia and Slovenia, this goal has already been reached, but the obligation remains for them to respect their legal commitments. From this perspective, a general political will exists to abide by international law, which, moreover, is clearly expressed in the respective constitutions, allowing supremacy, or at least direct applicability, of ratified international agreements. Still, as the national reports show, national courts are generally reluctant to apply international law directly—unless it is expressly incorporated into national law.[67] This indicates that it is not sufficient to look at the formal rules allowing international law to be part of national jurisprudence when examining the Europeanisation of the judiciary, or when furthering this particular legal development.

Instead, and as argued by Bobek, the focus should be directed at the extent to which the judiciary engages in independent thinking. In other words, what is important is not the creation of institutional frameworks *per se*, but the degree to which the judiciary is able to critically assess and apply various, sometimes conflicting laws.[68] According to the Chief Justice of the Czech Supreme Court, the understanding of the law 'is a matter of legal culture',[69] which can be transformed or/and developed through education that indeed endorses critical thinking. Thus, robust education is the fundamental pillar in creating, and later maintaining, a progressive judicial system.

The national reports similarly point to the importance of education in considering international law within domestic legal systems. However, they paint a pretty dire picture of the extent to which international and EU law is taught at the various universities, and of the stability of these studying possibilities. In Kosovo, for instance, no legal education was available between 1990 and 1999, which is understood to have left the legal profession lagging behind international legal developments. Similarly in BiH, EU law has been taught only in the last 3 years, and in FYR Macedonia only a small percentage of the accredited universities in the country teach EU and international law. Along similar lines, the report from

[67] Uzelac (2002), p. 392. Observation made at least with regard to Croatia.

[68] Bobek (2008), p. 99.

[69] As quoted in Kühn (2004), p. 564. Here, the Chief Justice refers to the Czech judiciary more specifically.

Albania refers to the lack of in-depth training in international law as a possible explanation of why no case has to date dealt with any potential clashes between Albanian constitutional law and international law.

When it comes to educating judges in international and EU law, many Southeast European states provide such training at special institutions, such as the Judicial Academy in Serbia. These often teach EU law, international law, as well as ECHR and ECtHR jurisprudence, with the aim of educating the members of the judiciary in the most recent international law developments. Such training, however, is often dependent on external funding, meaning that it is an unsustainable or at least unreliable educatory system for judges in the region.

Here, Slovenia could be thought of as an exception. International law has been taught since 1992 both at undergraduate and graduate level and judges regularly receive training in both EU law and international law. However, also in this case, little awareness of international law is reported from the Slovenian courtrooms. Obviously, just because EU law is taught in domestic law schools does not mean that the domestic courts will necessarily apply EU law. The fact that the national courts within the EU use preliminary reference in a dramatically uneven number is evidence thereof.[70]

What is crucial, therefore, is not so much the mere *existence* but the *content* of EU law and international law courses, and legal education more generally. Indeed, and as argued by Malleson, robust education can be beneficial to a judicial system if it focuses on the *methods* by which judges arrive at their decisions, rather than simply studying the decisions themselves, or the black-letter law in isolation.[71] In other words, legal education ought to foster and encourage creative and critical thinking, as opposed to simply teaching future lawyers how to mimic the law. Ultimately, the extent to which the future of the Europeanisation of law by the judiciary in Southeast Europe is viable is a question that depends on the type of legal education provided in the region.

References

Bobek M (2008) The fortress of judicial independence and the mental transitions of the central European judiciaries. Public Eur Law 14

Bobek M (2011) Judicial transformations in post-communist societies: a study in institutions, administration and interpretation. CAS Sofia working paper series no. 4, p 1

Bogojević S (2013) Emissions trading schemes: markets, states and law. Hart, Oxford

[70] Hornuf and Voigt (2011).

[71] Malleson (1997), pp. 655, 667.

Brashear L (1997) A year in the Balkans: Macedonia and the rule of law. Hum Rights 24
Čapeta T (2005) Courts, legal culture and EU enlargement. Croatian Yearb Eur Law Policy 1
Chloros A (1970) Yugoslav civil law: history, family, property. Oxford University Press, Oxford
Collins H (1982) Marxism and law. Oxford University Press, Oxford
Cotterrell R (1997) The concept of legal culture. In: Nelken D (ed) Comparing legal cultures. Dartmouth, Aldershot
Craig P (2012) EU administrative law, 2nd edn. Oxford University Press, Oxford
Ewing B, Kysar D (2011) Prods and pleas: limited government in an era of unlimited harm. Yale Law J 121
Friedman L (1997) The concept of legal culture: a reply. In: Nelken D (ed) Comparing legal cultures. Dartmouth, Aldershot
Gibson J, Caldeira G (1996) The legal cultures of Europe. Law Soc Rev 30
Gould J (2002) Bosnia and Herzegovina. In: Kritzer H (ed) Legal systems of the world: A political, social, and cultural encyclopedia. ABC-Clio, Santa Barbara
Hayden R (2002) Yugoslavia: kingdom of and socialist republic. In: Kritzer H (ed) Legal systems of the world: A political, social, and cultural encyclopedia. ABC-Clio, Santa Barbara
Hornuf L, Voigt S (2011) Preliminary references – analyzing the determinants that made the ECJ the powerful court it is. Berkeley program in law and economics working paper series
Howell K (2004) Developing conceptualisations of Europeanisation. Politics 24
Klemenčić G (2002) Slovenia. In: Kritzer H (ed) Legal systems of the world: A political, social, and cultural encyclopedia. ABC-Clio, Santa Barbara
Komàrek J (2014a) Waiting for the existential revolution in Europe. 12 International Journal of Constitutional Law 190
Komàrek J (2014b) The Struggle for legal reform after communism: A review of Zdenek Kuhn 'The judiciary in central and eastern Europe: mechanical jurisprudence in transformation?' LSE Law, Society and Economy Working Papers 10/2014
Krug P (2002) Macedonia. In: Kritzer H (ed) Legal systems of the world: A political, social, and cultural encyclopedia. ABC-Clio, Santa Barbara
Kühn Z (2004) Worlds apart: western and central European judicial culture at the onset of the European enlargement. Am J Comp Law 52
Kühn Z (2006) The authoritarian legal culture at work: the passivity of parties and the interpretational statements of supreme courts. Croatian Yearb Eur Law Policy 2
Kühn Z (2011) The judiciary in central and eastern Europe: mechanical jurisprudence in transformation. Martinus Nijhoff, Leiden
Legrand P (2001) What 'legal transplants'? In: Nelken D, Feest J (eds) Adapting legal cultures. Hart, Oxford
Malleson K (1997) Judicial training and performance appraisal: the problem of judicial independence. Mod Law Rev 60
Oakes R and Verrija A (2002) Albania. In: Kritzer H.M. (ed) Legal systems of the world: A political, social, and cultural encyclopedia. ABC Clio, Santa Barbara
Rodin S (2005) Discourse and authority in Europe and post-communist legal culture. Croatian Yearb Eur Law Policy 1
Rodin S (2009) Functions of judicial opinion - a view from a post-communist European state. In: Huls N, Adams M and Bomhoff J (eds) The legitimacy of highest courts' rulings: judicial deliberations and beyond. T.M.C Asser Press, The Hague, pp 369–388
Schaap M (2011) The strained relationship between international administrators and local institutions: judicial activism in BiH and the demand for access to justice. http://www.academia.edu/4076996/The_strained_relationship_between_international_administrators_and_local_institutions_Judicial_activism_in_BiH_and_the_demand_for_access_to_justice
Schütze R (2012) European constitutional law. Cambridge University Press, Cambridge
Snyder F (ed) (2000) The Europeanisation of law: the legal effects of European integration. Hart, Oxford

Tridimas T (2003) Knocking on heaven’s door: fragmentation, efficiency and defiance in the preliminary reference procedure. Common Mark Law Rev 40
Uzelac A (2002) Croatia. In: Kritzer H (ed) Legal systems of the world: A political, social, and cultural encyclopedia. ABC-Clio, Santa Barbara