

2024

THE INVISIBLE OBVIOUS

Tensions between formalities and informalities in Western Balkan systems of public administration

CIDS Report No. 1/2024

By Svein Eriksen and Damir Ahmetović



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The Centre for Integrity in the Defence Sector (CIDS) promotes integrity, anti-corruption measures and good governance in the defence and related security sector. Working with Norwegian and international partners, the Centre seeks to build competence, raise awareness and provide practical means to reduce the risks of corruption by seeking to strengthen institutions through advice and training. CIDS was established in 2012 by the Norwegian Ministry of Defence and was officially appointed as s Department Head for NATO's discipline Building Integrity in 2013. The Centre is now an integral part of the Norwegian Ministry of Defence.

The views expressed in this report are those of the author and do not necessarily represent the views of, and should not be attributed to, the Norwegian MOD.

CONTENTS

| | |
|--|----|
| Abstract | 2 |
| 1. Introduction | 2 |
| 2. Discrepancy between institutional form and institutional behaviour | 3 |
| 3. Institutional theory | 4 |
| 4. Form and mentalities: a brief historical outlook | 5 |
| 5. Weak vs. strong institutions | 7 |
| 6. Research questions and approaches | 8 |
| 7. The alignment of the formal pillar – research methods and findings | 10 |
| 8. The alignment of the informal pillar – research method and data | 13 |
| 9. Degree of conformity between informalities and meritocratic professionalism | 15 |
| 10. Excessive legal formalism | 21 |
| 11. Informalities and meritocracy – the overall picture | 23 |
| 12. Effects of the mismatch between formal and informal norms | 26 |
| 13. Conclusions | 30 |

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FOREWORD

– Culture eats strategy for breakfast, it says. This report, written by Mr. Svein Eriksen and Mr. Damir Ahmetović¹, underlines that only working on formal structures and institutions are not sufficient in order to obtain government reform through changed behavior of individuals and organizations. If the cultural, informal values tell you to do something which is benefitting you, your family or your limited community, you will not follow the formal values.

The examples in this report are from the Western Balkans may paint a grim picture of reality. I will, however, state that there is no reason to believe that any country faces aspect of this that informal norms or values come into effect and govern human behavior in the wrong direction. You will find this everywhere, not only in the Western Balkans, but in varying magnitude.

Assistance to governments, like in the Western Balkans has been focused on the easy part, legislation, institutions, but not on “soft interoperability”² where a set of internationally supported values are implemented through the institutions, but they are also implemented in people's hearts and minds and govern their daily behavior. Writing laws can be quite easy. But bringing the laws into a change human behavior is the challenging and dangerous part because it confronts the informal norms that are governing this behavior.

You might ask when reading this report if foreign assistance in this field has been in vain? As previously stated, strong, formal intuitions are a necessity, but they are not enough. So, from this perspective it has absolutely not been in vain. The international community needs, however, to consider how it can assist cooperating partners to stimulate a change in behavior inside the institutions.

This report is a contribution to raise awareness on the “informality's” importance. CIDS has also published a method for awareness or dilemma training where individuals, especially those working in the public sector can discuss dilemmas they are facing on daily basis. This is an effective way of getting under the skin of people in the public sector and maybe change their behavior to the better.

I would like to thank Mr. Eriksen and Mr. Ahmetović for writing this report and contributing to enlighten us on an essential topic.

Oslo 25 October 2024



Per Christensen
Director CIDS

¹ International Senior Experts working for CIDS. The report is funded by CIDS with funds from the MOD NO

² Agnietė Zotkevičiūtė-Banevičienė: The Cultural Element in NATO Military Doctrines: Important, but a Declarative Issue? “While interoperability is universally agreed to be required across Western military services, many academics and practitioners are now recognizing the significance of the soft dimensions of interoperability, the most essential aspect of which is the cultural element.”
<https://www.redalyc.org/journal/6948/694874473003/html/> [redalyc.org].

ABSTRACT

The focus of this paper is the relationship between formal and informal aspects of public bodies in Bosnia and Herzegovina, Kosovo, and Montenegro. We find a significant discrepancy between these two sets of factors. While formal aspects – measured by characteristics of the legislation – largely support professionalism, impartiality and ethics in the public administration, informal factors – measured by unwritten norms and practices; “societal common knowledge” – seem to go against such standards. In the Western Balkans the law is applied, but poorly implemented. There is furthermore still a popular conception that holding public office is a means to enhance personal wealth. Rather than focusing on the common good, public officials tend to prioritize private interests.

Most of them seem to have obtained their positions through contacts, rather than through merit and they regularly appear to mix their personal and professional lives. Furthermore, corruption is seemingly both acknowledged and tolerated. In addition, there is a discrepancy between people’s professed and actual proficiency based on the widespread use of bought academic titles and fake diplomas. In the Western Balkans politics is currently centred around individuals rather than ideologies and policies. Our findings raise questions about the current reform approach in Balkan countries which mainly focuses on formal institutional features. The paper highlights the importance of giving more attention to informal factors in administrative reform efforts in the region.

1. INTRODUCTION

When the Iron Curtain fell around 35 years ago, there was a euphoric expectation that the former communist countries would – in the words of Claus Offe – become ‘normal societies’ following Western norms and thus becoming integral parts of the Western cultural sphere.³ These high hopes soon gave way to a more sober assessment. It became increasingly clear that a country in transition is not a blank page that can be inscribed with Western ideas. Such ideas will be ignored, interpreted, or rejected based on local conditions.

One aspect that has received little attention related to the research on how South-Eastern European countries have adapted to Western formal frameworks is the importance of informal factors, i.e. how unwritten norms, expectations

and practices align with imported formal arrangements, such as written regulations and organizational patterns.⁴ This is the topic we will investigate in this paper, utilizing data from three Western Balkan states, namely Bosnia and Herzegovina, Kosovo, and Montenegro. As far as we are aware, our small study is one of the first attempts to systematically, and empirically address this topic. Our aim is to understand how informal factors impact the behaviour of public officials and more widely the progress of state and public administration reform in Western Balkan countries. We cannot claim to hold the final answer to these issues. Our goal is more modest: to suggest whether informal norms and practices deserve more attention, in academic, administrative, and political contexts.

³ Claus Offe, “Cultural Aspects of Consolidation: A Note on the Peculiarities of Postcommunist Transformations”, 6(4) *The East European Constitutional Review* (1997), available at <http://www.law.nyu.edu/eecr/vol6no4/culturalaspects.html>.

⁴ For more elaborate definitions see pp. 10 and 11 below.

2. DISCREPANCY BETWEEN INSTITUTIONAL FORM AND INSTITUTIONAL BEHAVIOUR

Post-communist transformations in the Western Balkans, like those in Eastern Europe, have centred on legal and other formal instruments.⁵ Over the past two to three decades, there has been a tremendous growth in legislation, the number of public organizations, and official posts. Social, economic, and public life is intricately intertwined with legal regulations, as the law is invoked to resolve entrenched social problems, to bolster democracy, promote market economy, and guarantee efficient functioning of the government machinery. In short, the countries in question have experienced a remarkable legal revolution.

The transformations are seen to be driven by one conviction; the notion of legal centralism, which in its strongest version seems to assert that formal law determines society's goals and have ultimate authority over social norms.⁶ At the heart of this theory lies the assumption that the government possesses a substantial ability to create and uphold laws, which can be a daunting task in countries with weak administrations. It seems safe to

say that governments across the Western Balkans have not adapted to the significant changes in formal frameworks.

The focus of judicial reform across the region is mainly on meeting EU standards, with the EU committing 700 million euros in financial assistance for these efforts from 2014 to 2020.⁷ While the EU has been instrumental in improving technical aspects like legislation, its influence on the practical application of the rule of law in the region remains limited.⁸ A study comparing legislation and its implementation in nine South Eastern European countries, found that in 61 per cent of the administrative areas covered, the legislation was largely in accordance with international standards; the corresponding share for government practice was 24 per cent.⁹ The discrepancy between legislation and practice has been highlighted in civil service arrangements where adequate legal frameworks to a notable extent are ineffective.¹⁰ Overall, across the Balkans, government actions are seen to undermine the legitimacy of legislation, turning it into a mere "empty shell".¹¹

5 Denis J. Galligan, "Legal Failure: Law and Social Norms in Post-Communist Europe", in Denis J. Galligan and Marina Kurkchyan, *Law and Informal Practices. The Post-Communist Experience*, (1-24), Oxford University Press, Oxford, 2003, p. 6.

6 Galligan op.cit.5. 3, p. 12.

7 "EU support for the rule of law in the Western Balkans: despite efforts, fundamental problems persist", Special Report, European Court of Auditors, 2022, p. 4.

8 Ibid., p. 4.

9 "Defence against corruption", Memo 2015:1, The agency for public management and eGovernment, Oslo 2015.

10 "The Principles of Public Administration, Public Service and human Resource Management", Summaries of Monitoring Reports Western Balkans, Sigma, 2022, p. 8.

11 Eric Gordy and Adnan Efendić, "Engaging Policy to Address Gaps Between Formality and Informality in the Western Balkans" in Eric Gordy and Adnan Efendić, eds., *Meaningful reform in the Western Balkans between formal institutions and informal practices*, Peter Lang, Bern, 2019, pp. 7-19, p. 9.

3. INSTITUTIONAL THEORY

Institutional theory can help us to understand the gap between formal norms and institutional behaviour. Since the 1970s, institutional scholars have been working to understand why organizational members often do not follow formal rules, why formal changes under certain circumstances do not lead to corresponding changes in behaviour, and why resources and energy are invested into preserving structures that go against formal rules.¹² According to W. Richard Scott, institutions consist of three main pillars, the regulative, the normative, and the cultural-cognitive. These three elements can be seen to constitute a continuum ranging from the formal to the informal. When aligned, they can create a strong social system with a shared purpose. However, they can also support and energize different choices and behaviours.¹³ Legal provisions (the regulative pillar) may not always align with professional norms (the normative pillar), and culturally ingrained thought patterns (the cultural-cognitive pillar) may clash with both professional norms and legal regulations.

Despite the significant progress made in the study of institutions, informal rules have been largely neglected.¹⁴ There is, however, an important exception to which we will return below. For now, let us just say that a common belief in the literature, in line with a fundamental idea of legal centralism, is that formal rules are the primary or even sole influencers of actors' motivations and expectations.¹⁵ This pertains to studies conducted in developed Western nations with solid institutions, which is the primary focus of institutional research¹⁶, as well as to explanations of State administrative performance in post-communist nations.¹⁷

Balkan countries are an excellent example for the study of informality. Yet, the topic is seen to have received little attention in academic literature.¹⁸ EU reports are

also mostly silent when it comes to the informal sector's importance for the implementation of legal regulations.¹⁹ Sigma uses a comprehensive evidence-based approach to analyse the administrative capacity of potential EU member states to meet the obligations of membership. However, informal factors are not included in the analysis method.

The EU-funded INFORM project²⁰ has provided significant insight into the importance of the informal sector for the implementation of legal rules in countries in the Western Balkans. However, the topic that is our main interest; how informal practices influence the outlook and behaviour of public officials,²¹ was only peripherally touched upon.

Despite the scarcity of research on the impact of informal elements on current administrative reform, anthropological²², sociological²³ and historical²⁴ studies frequently explore how society influences the state, leading to social beliefs and practices displacing the state's rational-legal principles. Much of this literature is authored by academics affiliated with German research institutions, some of which have been concentrating on South-Eastern Europe for close to a century. This has been a source of inspiration for the present study. Findings and observations from this research tradition are briefly outlined in section four below.

See *Studies*, 4(19) 2019, pp. 585-604, p. 585, and Eric Gordy, "Introduction", *Region 2(7) Special Issue: Gaps between Formal and Informal Practices in Southeast European States*, 2018, pp. 3-8, p. 5.

- 19 Mirza Mujarić and Ismet Kumalić, "Formal and Informal Institutions – Evidence from Southeast Europe", in Eric Gordy and Adnan Efendić (eds) *Meaningful Reform in the Western Balkans. Between Formal Institutions and Informal Practices*, Peter Lang AG, International Academic Publishers, Bern 2019, pp. 115-127, p. 120. One of the very few papers that the topic is a report by Transparency International in Bosnia 2014, *Human Resources Management in Public Administration Structures in BiH-Challenges in Monitoring Reform*, see chapter on "Lack of professionalism and integrity", pp. 10-12, available at: <https://ti-bih.org/wp-content/uploads/2014/09/Human-Resources-Management-in-Public-Administration-Structures-in-BiH-.pdf>.
- 20 The INFORM project, was funded by the EU, and implemented in the 2016-2020 period. It aimed to study interactions between formal and informal institutions in the Western Balkan societies in the fields of politics, economics and everyday life, as well as to track the influence of these institutions on the implementation of EU rules and regulations.
- 21 The term 'public officials' denotes employees of public institutions regardless of their type or category.
- 22 See for instance, Klaus Roth, op.cit. fn. 25 and fn. 29 below.
- 23 Consider for example, Anton Sterbling, a) *Strukturfragen und Modernisierungsprobleme südosteuropäischer Gesellschaften*, Verlag Dr. R. Krämer Hamburg 1993, and b) *Wege der Modernisierung und Konturen der Moderne im westlichen und östlichen Europa*, Springer Fachmedien, Wiesbaden 2015.
- 24 See i.a. H.-Michael Miedlig, "Patriarchalische Mentalitäten als Hindernis für die staatliche und gesellschaftliche Modernisierung in Serbien im 19. Jahrhundert", in Edgar Hösch and Karl Nehrig (eds.) *Südost-Forschungen*, Band L 1991, R. Oldenbourg, München 1991, pp.163-190, Hans-Michael Boestfleisch, *Modernisierungsprobleme und Entwicklungskrisen: Die Auseinandersetzung um die Bürokratie in Serbien 1839-1858*, Verlag Peter Lang, Frankfurt am Main, 1987, and Wolfgang Höpken, "Beamte in Bulgarien (1879-1912) in Edgar Hösch and Karl Nehrig (eds.) *Südost-Forschungen*, Band 54, 1995, R. Oldenbourg, München 1995, pp. 219-250, Georg Stadtmüller, "Westliches Verfassungsmodell und politische Wirklichkeit in den balkanischen Staaten", *Saeculum* 3/4 (IX) 1958, pp. 405-424.

12 W. Richard Scott, *Institutions and organizations. Ideas, Interests and identities*, SAGE publications Ltd., London 2014, pp. xi and xxii.

13 Scott op.cit. fn. 14, p. 71.

14 Gretchen Helmke and Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda* *Perspectives on Politics*, 4(2), 2004, pp. 725-740, p. 734 and Michael Brie, and Erhard Stölting, "Formal institutions and informal institutional arrangements", in Thomas Christiansen and Christine Neuhold (eds.) *International handbook on informal governance*, Cheltenham: Edward Edgar, 2012, pp 19-39, p. 19.

15 Helmke and Levitsky, op.cit. fn. 14, p. 725.

16 Steven Levitsky and Maria Victoria Murillo, "Variations in Institutional Strength", *Annual Review of Political Science* 2009, 12, pp. 115-133, p. 116.

17 Anna Grzymala-Busse, "The Best Laid Plans: The Impact of Informal Rules on Formal Institutions in Transitional Regimes", *Studies in Comparative International Development*, 45, pp. 311-333, 2010, p. 316.

18 See Predrag Cvetičanin, Misha Popović, and Miloš Jovanović, "Informality in the Western Balkans: a culture, a contextual rational choice, or both?", *Southeast European and Black*

4. FORM AND MENTALITIES: A BRIEF HISTORICAL OUTLOOK

For centuries, people in south-eastern Europe have lived in an almost permanent state of crisis.²⁵ Over the past 100 years or so, every generation living in the territory of former Yugoslavia, has witnessed a state collapse followed by the emergence of a new state. The latter has typically embodied principles and beliefs that stand in stark contrast to those of its predecessor. The shift from one state to another has been marked by violent conflicts. Instead of supporting the welfare of the entire population, the state has been used to advance the interests of groups and individuals. Most people do not see the state as a resource in navigating life's challenges, or even just surviving. On the contrary, they perceive it as unreliable and hostile.

The negative perception of the state and the public domain can be seen in contrast to a positive view of the private sphere, which is considered the primary source of security and reliability for individuals. Maintaining strong social networks, described by Klaus Roth as a 'weapon of the weak,' has been crucial for people in coping with the ongoing crises of their societies. This weapon, which initially emerged from scarcity and crises has been embraced by the ruling elites to manipulate and undermine formal state systems, integrating it into the existing governing culture.²⁶ Instead of setting positive role models that promote the common good they rely on networks of private trust, nepotism, and the ruthless pursuit of private interests at the expense of the general good.²⁷

Across the Balkans, foreign – mostly Western and central European ideals played a crucial role in shaping formal governance systems, while constantly being at odds with dominant mental patterns and social practices. The historical experiences of institutional change in Balkan countries are succinctly summarized by Holm Sundhaussen,

“The change in mentalities (understood as collective, historically developed, mostly unconscious ways of thinking and behaving) did not come close to keeping pace with the pace of institutional change. The consequence was an increasing dysfunctionality of the institutions. The traditional structures lived on behind the façade of external modernity. The result was the institutional state as a fusion of Balkan – Western European patterns.”²⁸

In the same vein, Klaus Kaser, argues that throughout its modern history, the region appears to be stuck in an inescapable pattern; due to the fragility of formal institutions, informal networks are formed ultimately leading to further weakening of the formal institutions. According to Klaus Roth, ever since the formation of the modern nation-States, South-Eastern Europe belongs to the parts of Europe, that exhibit the greatest gap between written laws and their implementation.²⁹

Regarding communist Eastern Europe, Steven Sampson asserts that the widespread and long-lasting nature of informal practices amidst massive bureaucratization can be attributed to their institutionalization as a “second polity.”³⁰ Similarly, according to Klaus Roth, feigning compliance with state regulations for personal gain was most likely one of the most prevalent and successful behaviours in the era of communism. It was used not only by ordinary people towards local elites and authorities, but also by the latter towards higher tiers of government.³¹ Considering the history of Balkan states Wolfgang Höpken observes, that, beneath the exterior of official state institutions, there appears to be a hidden reality of how they truly operate.³²

25 Klaus Roth, „Krisenmanagement – Strategien des Umgangs mit ökonomischen Krisen in der bulgarischen Bevölkerung“, *Südosteuropa Mitteilungen*, 1/51 2011, pp. 27-35, p. 27.

26 Roth, op.cit. fn. 25, p. 35.

27 *Ibid.*

28 Holm Sundhaussen, „Institutionen und institutioneller Wandel in den Balkanländern aus historischer Perspektive“ in Johannes Chr. Papalekas (ed.), *Institutionen und institutioneller Wandel in Südosteuropa*, pp. 35-55, Südosteuropa-Gesellschaft, Munich 1994, p. 54. My own informal translation of the German original text.

29 Klaus Roth, „Institutionelles Vertrauen. Südost Europa auf dem schwierigen Weg in die Europäische Union“, in Michael Daxner et al. Bilanz Balkan, Verlag für Geschichte und Politik Wien, 2005, (pp. 47-53), p. 54.

30 Steven Sampson, “The informal sector in Eastern Europe”, *Telos*, December 1985, pp. 44-66, p. 46.

31 Klaus Roth, „Krisenmanagement – Strategien des Umgangs mit ökonomischen Krisen in der bulgarischen Bevölkerung“, *Südosteuropa Mitteilungen*, 1/51 2011, pp. 27-35, p. 32.

32 Wolfgang Höpken, “Politische Institutionen in Bulgarien” in Johannes Chr. Papalekas (ed) *Institutionen und institutioneller Wandel in Südosteuropa*, Südosteuropa-Gesellschaft, Munich, 1994, pp. 157-163, p. 159.

Can history hold importance for the present? Does it signify influences that persist through extended periods, even amidst major political transformations? Although research into this issue is still in its infancy, historians tend to argue that "history matters".³³ The research of Klaus Buchenau and others has revealed that enduring aspects of Yugoslav political history centre on the significance of relationships (veze) for acquiring limited social resources, and the belief that holding public office is a means to enhance personal wealth. These elements were evident prior to the

formation of the first Yugoslavia in 1918, they were present during the interwar era, and in communist Yugoslavia.³⁴ Numerous well-founded studies, indicate their relevance today.³⁵ Historical turning points of the 20th century, such as 1918, 1945, and 1989, may lead to new ideals and new state forms, but at the same time they also seem to create new bases for the continuation – albeit in new forms – of traditional social practices such as clientelism and corruption.³⁶

³³ Holm Sundhaussen, *Jugoslawien und seine Nachfolgestaaten 1943-2011*, Böhlau Verlag, Wien, 2012, pp. 523, 524.

³⁴ See i.a., Klaus Buchenau, a) „Korruption im ersten Jugoslawien (1918-1941) Eine Skizze zur Diskurs und Praxis“, *Südost-Forschungen* 72 (98-132), b) „Der dritte Weg ins Zwielicht? Korruption in Titos Jugoslawien“, *Südosteuropäische Hefte* 4(1), 23-45, and c) „Historicizing Corruption. An Outline on Serbia (19th-21st Century)“, in Klaus Roth and Ioannis Zelepos (eds.) *Klientelismus in Südosteuropa*, Peter Lang GmbH, Berlin 2018 (109-132).

³⁵ See for instance, Petr Kopetcký, „Political Parties and the State in Post-Communist Europe: The Nature of Symbiosis“, in Petr Kopetcký, *Political Parties and the State in Post-Communist Europe*, (1-23) Routledge, Oxon, 2008, p. 18, and Thomas Brey, „Parteien in Ex-Jugoslawien als Reform- und Modernisierungshindernisse“, *Südosteuropa Mitteilungen*, 05/2015, 16-27, p. 25.

³⁶ Buchenau op.cit. a) fn. 34, p. 132.

5. WEAK VS. STRONG INSTITUTIONS

As already indicated, most studies of institutions have been conducted in countries with strong institutions. But knowledge about and approaches used to study strong institutions may not be easily applicable in research on weak institutions, such as the ones found in Balkan countries. Weak institutions may exist everywhere, but they seem to be particularly widespread in developing and transitional countries.³⁷ One possible explanation is that public bodies in these countries frequently rely on adopting foreign models, which may result in superficial imitations lacking substance.³⁸ There are distinctions between strong and weak institutions that are crucial for the theme of this paper. In strong institutions, individuals expect that others will follow the formal rules and ensure their implementation. Consequently, individuals' choices of behaviour are limited to what is specified or permitted by the official rules.³⁹ Weak institutions exhibit different dynamics.⁴⁰ Employees in the latter do not assume that formal regulations will be respected, resulting in a culture

where breaking official rules is normalized.⁴¹ Other factors, such as the governance customs outlined above, will override official regulations and professional norms. This means that informal expectations and practices rooted in kinship relations, networks of trust, and other traditional forms of social dependency will be influential. We may therefore reasonably assume that understanding the behaviour of weak institutions in countries in transition is impossible without examining which informal norms compete with the formal ones and what effect they have.

Informal norms and practices are in themselves neither good nor bad. They are present in all societies, yet their impact seems to vary significantly across different contexts. Scholars assert that in weak democracies, informal practices tend to undermine formal institutions, whereas in liberal democracies based on the rule of law, they actually reinforce them,⁴² i.e. by filling legal voids and making formal systems work more efficiently.⁴³

37 Levitsky and Murillo, op.cit. fn. 16, p. 124.

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

41 Bo Rothstein, „Anti-corruption: The indirect “big bang” approach”, *Review of International Political Economy*, 18(2) 2011, pp. 228-259, pre-print version available at https://www.researchgate.net/profile/Bo-Rothstein/publication/233058668_Anticorruption_The_indirect_%27big_bang%27_approach/links/541ffc1f0cf203f155c292b1/Anti-corruption-The-indirect-big-bang, p. 11.

42 Wolfgang Merkel and Aurel Croissant, „Formale und informale Institutionen in defekten Demokratien”, *Politische Vierteljahresschrift*, 1(41), 2000, pp. 3-30, p. 19.

43 For case studies, see Thomas Christiansen and Christine Neuhold (eds.) *International handbook on informal governance*, Cheltenham: Edward Edgar, 2012.

6. RESEARCH QUESTIONS AND APPROACHES

Institutional theorists distinguish between institutions and organisations. An organization relates to the formal aspects of an institution. To become an institution, the formal elements must be accompanied and brought to life by mental logics of action. The main focus of our study is to examine the extent to which public *organizations* in the Western Balkans have transformed into public *institutions*, with the informal institutional pillar complementing and reinforcing the formal one.

To understand the institutionalization of the modern State in Western Balkan nations, we will apply a paired down version of W. Richard Scott's model and focus on two pillars the regulative and the cognitive-cultural pillar.⁴⁴ Essentially, the pair embodies the formal versus informal divide, or to use Claus Offe's words, the contrast between hardware and software in an institutional setting.⁴⁵

The regulative or formal pillar, denotes organizational, and legal aspects of a state body, i.e. the formal constraints on the behaviour of both citizens and public officials.

The cognitive-cultural or informal pillar refers to people's inner orientations, to expectations and beliefs. The informal aspects are closely related to behaviour, habits, and social practices. Although known and recognizable, the institutional software – unlike the hardware – is not formally described. It may be considered “societal common knowledge” and be rooted in social norms and conventions.

What about Scott's normative pillar, which involves professional norms? At first glance this pillar may not seem to have a significant impact in South-Eastern European countries, where the political and social discourse is dominated by elites representing socio-cultural beliefs

(nationalist, ethnic, religious etc.) rather than by people distinguished by a specific professional expertise.⁴⁶ However, this does not imply that professional norms do not play a significant role in shaping decisions within the state apparatus. The legal culture of the countries holds particular significance. Like all other ex-Yugoslav states, Bosnia and Herzegovina, Montenegro, and Kosovo are heavily governed by law. Legislation is clearly the dominant instrument of governance – including for the executive power. Administrative measures that are not explicitly and formally permitted or mandated do not exist as opportunities for action. In short, public administration is a law-bound, quasi-judicial activity.⁴⁷

This paper will explore how the domestic legal culture can shed light on the argument that in the Western Balkans the law is applied, but poorly implemented⁴⁸ and how this culture relates to the formal and informal pillars. Questions about the legal culture and its importance were not asked during the interviews, but several of the interviewees nevertheless touched on this topic. Our understanding of the legal culture and its manifestations is based on already existing literature.

Our assessment benchmark is the extent to which the formal and informal pillar as well as the legal culture support international standards regarding impartiality, integrity, and merit-based professionalism in the public service. The standards are codified in a series of international instruments, legal acts, recommendations, and guidelines. The countries included in the study have in various ways committed themselves to using the standards as guiding ideals for their public services.

44 Levitsky and Murillo op.cit. fn. 16, argue that not all aspects of institutional theory as developed in countries with strong institutions are directly applicable in countries with weak institutions.

45 Claus Offe, “East European exceptionalism as a challenge to democratization. Cultural Aspects of Consolidation: A Note on the Peculiarities of Postcommunist Transformations”, in Claus Offe, *Übergänge. Vom Staatssozialismus zum demokratischen Kapitalismus. Ausgewählte Schriften von Claus Offe*. Springer VS, Wiesbaden, (pp. 99-109), p. 105.

46 Anton Sterbling, “Elitenwandel in Südosteuropa: Einige Bemerkungen aus elitentheoretischer Sicht”, in Wolfgang Höpken and Holm Sundhausen (eds.), *Eliten in Südosteuropa. Rolle, Kontinuitäten, Brüche in Geschichte und Gegenwart*, Südosteuropa-Gesellschaft, Munich 1998, pp. 31-47, pp. 43-44.

47 F. F. Ridley, “The New Public Management in Europe: Comparative Perspectives”, 11(1) *Public Policy and Administration* (1996), 16-29.

48 Jan-Hinrik Meyer-Sahling, “Glass half full? Or half empty? Civil service professionalization in the Western Balkans between successful rule adaptation and ineffective implementation”, NICEP Working Paper: 2016:12, The University of Nottingham 2016, p. 17.

The rest of the paper is organized in the following way:

- **Section 7** discusses research methods and findings as regard the alignment of the formal institutional pillar with international standards.
- **Section 8** outlines research methods and data used to describe the informal institutional pillar.
- **Section 9** maps informal norms and practices of public officials and assess the extent to which they meet meritocratic criteria.
- **Section 10** outlines a predominant aspect of the legal culture, excessive legal formalism.
- **Section 11** discusses the extent of match or mismatch between the formal and informal pillars.
- **Section 12** outlines how the observations in section 11 impact the implementation of the five legal frameworks included in the formal pillar and other basic principles of good governance.
- **Section 13** suggests steps to be taken by national and international actors in view of our findings.

7. THE ALIGNMENT OF THE FORMAL PILLAR – RESEARCH METHODS AND FINDINGS

We will assess the extent to which legislation in five areas meets international standards, conflicts of interest, freedom of access to information, whistleblowing, personnel policies for civil servants, and public procurement. As mentioned above, the formal pillar also includes clearer organizational elements besides legislation. Unlike legislation, there are no globally recognized standards for these other formal elements. We will still present data from other studies that can offer insight into how much these are deviated from in practice. But our main focus is legal frameworks. The five legal areas chosen are all crucial for achieving impartiality, integrity and merit-based professionalism in the public service:

- Arrangements for handling **conflicts of interest** are essential to ensure that public officials make decisions and take actions that benefit the public, without being influenced by their personal interests.
- **Freedom of access to information** promotes integrity by allowing the public to keep itself informed of and form a well-founded opinion on the authorities that govern them and strengthening citizens' control over government.
- Reporting wrongdoing through **whistleblowing** allows the public service to become aware of issues that may have remained hidden and have a public interest element.
- **Personnel policies for civil servants** show how much emphasis is placed on merit-based professionalism, and officials' duty to uphold constitutional values, and protect the general interests.
- Stringent arrangements for **public procurement** are vital to building integrity for several reasons, the most important being that government purchase is the public activity most vulnerable to corruption – given the significant volume of transactions and money involved.

Very simply put, the international standards in these five areas require that

- arrangements must be in place that ensure that public officials act and make decisions, with consideration to public, not private interests,
- all citizens have access to public information,
- there are effective mechanisms to disclose wrongdoing in the public sector without fear of reprisals,
- all aspects of the personnel policies promote professionalism and integrity,
- procurement arrangements are accessible and transparent safeguarding integrity and accountability, with contracts awarded after a competitive process.

The standards in question originated in the West and reflect values and in some cases centuries- old practices in Western countries.⁴⁹ Their international formalization is largely a recent phenomenon,⁵⁰ primarily explained by the conclusion of the Cold War and the disintegration of the communist world. These two events meant that what has been called “the normative project of the West”, with emphasis on representative democracy, and the rule of law, emerged undefeated and without any attractive or well-conceived alternatives.⁵¹

49 A few examples: In Austria qualification-based recruitment to the public administration has been a legal requirement, at least since 1798. In Denmark and Norway, the merit principle has been in effect from roughly the same time, in the UK since the mid-19th century. Sweden's freedom of access to information legislation dates to 1766, and the Dutch Constitution of 1798 contained articles about “open government”. The UK Bill of Rights of 1688 confirmed the then already existing common law doctrine that superior orders do not excuse a public servant from his/her wrongdoing, (see Michael Carpenter, “Administrative Decision-Making-Balancing the Public Interest and the Rights of Citizens. Efficiency and Legality in Public Administration: What is the Priority?”, Sigma (undated), p. 5). In Austria, the 1811 Civil Code represented an important step to ensure the equality of all citizens before the law.

50 A few examples, the Council of Europe's Criminal Law Convention on Corruption (1999), the United Nations Convention against Corruption (2005), the Council of Europe Recommendation No. R (2000) 6 (2000). The European Union explicitly defined its membership criteria for the first time at the 1993 Copenhagen European Council and subsequently at the Madrid European Council in December 1995. The main Copenhagen criteria were the existence of rule-of-law democratic systems of governance, functioning market economies and proven capacities to absorb and apply the *acquis communautaire*. To work out more precisely the content of ‘an adequate system of HRM’ and several other administrative functions, the European Commission requested the SIGMA programme to define a series of “baseline” criteria. Sigma developed such baselines on the basis of EU legislation and on administrative law principles of existing member states. Sigma regularly revises the baselines to bring them in conformity with new EU legislation and other developments. Since 1999, the European Commission has based its regular Progress Reports on the Sigma baselines and in this way created a well-defined tool for administrative capacity assessment.

51 Heinrich August Winkler, *Geschichte des Westens. Vom Kalten Krieg zum Mauerfall*, C.H. Beck, München, 2014, p. 1119.

Countries across the world could now free themselves from the roles they had assumed during the confrontation between the superpowers of the USA and Soviet Union and fully concentrate on their political and social development.⁵² They found guidance in the formulation of laws and institutions in what would increasingly become the comprehensive international norms for good governance, which is the focus of our discussion. This process was most pronounced in Eastern and South-Eastern Europe.⁵³ For former communist states to achieve EU membership, they had to document that they had left their past behind them and become democracies founded on the rule of law. The EU process includes all the legal areas discussed in this paragraph. Particularly strong attention is focussed on the areas covered by separate negotiation chapters: for example, public procurement. Of our three countries, Bosnia and Herzegovina, and Montenegro are candidate countries to join the EU. Kosovo submitted its application for EU membership in 2022 and is considered a potential candidate country.

The Institute for Comparative Law in Belgrade conducted an analysis of the extent to which domestic legal frameworks align with international standards at the request of the Centre for Integrity in the Defence sector (CIDS). The overview depicts the legal situation in 2021. The countries are given a score from 0 to 10, where 0 indicates no compliance and 10 represents full compliance with international standards. The more closely the national legislation mirrors the international standards, the better the legal protection of impartiality, integrity, and professionalism in the public sector. Table 1 below summarizes the findings.

With an overall average score of 7.6 out of 10 possible, the regulations show a relatively high degree of commitment to upholding international standards and ensuring impartiality, integrity, and professionalism in the public service. But there are significant differences across countries and legal frameworks. The average score of 8.7 places Kosovo at the top among the three countries, while Bosnia and Herzegovina ranks the lowest with 6.4. The legislation for public procurement is mostly in line with international standards at 9.7. An average score of 8.7 for personnel policies expresses support for meritocratic professionalism. At the other end of the scale there is a significant gap when it comes to whistleblowing legislation, which is rated at 4.5.

Table 1 Legal frameworks – extent of alignment with international standards

| Legal framework | Bosnia and Herzegovina | Kosovo | Montenegro | Average score |
|-----------------------------------|------------------------|--------|------------|---------------|
| Conflict of interest | 5.5 | 8.0 | 9.5 | 7.7 |
| Freedom of access to information | 7.0 | 8.0 | 7.0 | 7.3 |
| Whistleblowing | 1.5 | 8.0 | 4.0 | 4.5 |
| Personnel policies civil servants | 9.0 | 9.5 | 7.6 | 8.7 |
| Public procurement | 9.6 | 10.0 | 9.6 | 9.7 |
| Average score | 6.4 | 8.7 | 7.5 | 7.6 |

⁵² *Ibid.*

⁵³ See, among others, Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism. Hybrid Regimes After the Cold War*, Cambridge University Press, Cambridge, 2010.

The legal norms required by international standards, which are now widely adopted in our three countries, sharply differ from the norms that were in place in Yugoslavia and its successor states up to 20-25 years ago.⁵⁴

- As individuals, Yugoslav citizens did not have any right to official information. It is true that the Yugoslav constitution of 1963 introduced the principle of transparency in the public administration. However, this principle was restrictively practised and counteracted by a reverse consideration that was certainly much more strongly emphasised, i.e. the need to protect state secrets. There were hundreds of provisions regarding secrecy. The many definitions of “secret” were contradictory, often outdated, and were arbitrarily applied. It was not difficult for state bodies to find a reason or a pretext to classify information as secret if they wanted to do so.
- According to the Yugoslav legal system, socialist societies did, in principle, not know conflicts between the public and private spheres of society. There were therefore no rules regarding conflicts of interest.
- The procedure for public procurement was regulated by internal rules for the individual state bodies. These bodies made most of their procurements after negotiations. There were no rules at the level of primary legislation.
- The personnel system in the Socialist Federative Republic of Yugoslavia (SFRY) must be viewed based on the one-party nature of the country. It was difficult to reach high-level or sensitive positions without having close contacts to the political leadership. Scholars claim that the communist party developed from being a revolutionary into a clientelist organisation.⁵⁵ In 1957, the regime, as probably the only European communist

regime, passed a law on public officials (*Zakon o javnim službenicima*) which included provisions that vacancies in federal institutions should be posted publicly. However, the provision remained a formality without practical effect. The Communist Party's cadre committee admitted as much in 1959, but nevertheless declared itself satisfied with the implementation of the law.⁵⁶ This rudimentary meritocratic system was abolished in 1978. Employment in the public administration were placed on an equal footing to employment in companies and other financial undertakings. Decisions regarding, i.a. promotions and employment were completely left to the discretion of the public sector leaders.

What is striking in view of this, is the almost complete lack of political interest, and public discussions in Balkan countries regarding issues, which involve the introduction – broadly speaking – of legal norms and institutions that may be fundamentally at odds with widespread local practices and traditions.⁵⁷ At the same time, domestic authorities have – without reservations – entered into a large number of far-reaching international, and in some cases legally binding agreements on good governance. However, the administrative, financial and social consequences of these obligations have hardly ever been analyzed and assessed and far less made the subject of critical debate.

Considering this, two questions arise: Why would anyone bother about enforcing laws that nobody truly pays attention to? How can such legislation alter long-standing societal customs that contradict the principles the laws are designed to uphold? The subsequent sections of the paper will delve into these questions, by evaluating the informal pillar's support for international standards of professional merit, impartiality, and ethics.

54 The information in the bulleted list below is mainly based on Aleksandra Rabrenovic et al., “Historical development of corruption prevention measures in South East European countries”, in Aleksandra Rabrenovic (ed.), *Legal mechanisms for prevention of corruption in South East Europe. With special focus on the defence sector*, Institute of Comparative Law, (pp. 13-37), Belgrade 2013.

55 Marija Obradović, »From Revolutionary to Clientelistic Party: The Communist party of Yugoslavia, 1945-1952“, *East European Politics and Societies and culture*, 27(3) 2013, pp. 376-399.

56 Buchenau, op.cit. b) fn. 34, p. 39.

57 This observation is in line with that of Gordy and Efendić, who wrote that “the accelerated pace of EU accession has contributed to a rush in adoption of legislative reforms proposed solely for the purpose of compliance with the *acquis communautaire*, and frequently passed through the parliament without debate or substantive consideration.” Eric Gordy and Adnan Efendić, “Engaging Policy to Address Gaps Between Formality and Informality in the Western Balkans” in Eric Gordy and Adnan Efendić, eds, *Meaningful reform in the Western Balkans between formal institutions and informal practices*, Bern: Peter Lang, 2019, 7-19. The quote is from p. 10.

8. THE ALIGNMENT OF THE INFORMAL PILLAR – RESEARCH METHOD AND DATA

We will argue that a meritocratic system of public service is *the* key to achieving the two other values, impartiality and ethics. To put it differently, a system based on merit and professionalism increases the likelihood of maintaining impartiality and ethics, and of upholding legal standards that support these values, assuming all other factors are the same.

There are several reasons for this argument. In meritocratic systems of public administration, internal processes of socialization (development of a shared identity) and discipline (following from i.a. the prospects of a life-long career) inculcate into civil servants “codes of exemplary behaviour, right and wrong, true and false, legal and illegal [...]”.⁵⁸ Particularly, professional standards related to specialized expertise, e.g. those based on the Hippocratic oath, may help professionals resist corruption and pursue integrity. The implanted norms of appropriate behaviour act as an ‘inner check’⁵⁹ on civil servants, engendering antipathy towards corruption and other forms of abuse, and “ensuring responsible action even where no one is watching”⁶⁰.

Meritocracy will – assuming all other elements are equal – support reliability, predictability, and fairness, or, in other words, promote impartiality and integrity in the exercise of public authority.⁶¹ Students of public administration history argue that the low levels of corruption in countries of Western Europe are not due to recent measures to promote integrity in public life, but to steps taken 150 years ago or more to create a modern state, primarily by introducing the merit principle in their systems of public administration.⁶² Swedish researchers have documented

a strong positive correlation between meritocratic recruitment to the civil service and low levels of corruption. The causal direction is from merit reform to reduced corruption, not the other way around.⁶³ Corruption, which involves using public office or public resources for personal gain, is the opposite of impartiality and ethical conduct in public administration.

While meritocracy may produce good governance based on impartiality, and ethics, the reverse also appears to be true; absence of merit-based professionalism prevents good governance from developing. Patronage and cronyism, which are the opposite of meritocracy, mean that contacts to powerful people and not expertise determine employment and careers in the public sector. Civil servants are dependent on those who have employed them. Ultimately, loyalty not professional independence is what is expected of them. Their behaviour is guided by how they perceive their superiors’ interests and preferences, not by abstract principles such as impartiality, ethics or the common good.

A work environment with the following features is what we anticipate in a merit-based professional system,

- Officials are oriented towards serving the public good over anybody’s private interest.
- Officials maintain a reasonable balance between professional independence and political loyalty, and loyalty to other superiors.
- Officials provide advice based on merit.
- Transparent communication is encouraged, allowing for genuine feedback, addressing issues, including inconvenient ones, and exchanging ideas.
- Both routine and innovative issues receive fair attention.

58 Johan P. Olsen, “Maybe It is Time to Rediscover Bureaucracy”, 16(1) *Journal of Public Administration and Theory*, 2006, pp. 1-24, p. 11.

59 Carl Dahlström and Victor Lapuente, *Organizing Leviathan. Politicians, Bureaucrats, and the making of Good Government*, Cambridge University Press, Cambridge 2017, p. 57.

60 Olsen op.cit, fn. 58, p. 11.

61 Sigma establishes a direct link between reliability and predictability on the one hand and on the other hand professionalism and the professional integrity of civil servants: “Professionalism and professional integrity in the civil service clearly buttress the notions of reliability and predictability of public administration. Professional integrity of civil service relies upon the notions of impartiality and professional independence. [...] A civil service whose recruitment and promotion system is chiefly based on political patronage or cronyism is more likely to hamper professional integrity than a system based on merit.” OECD (1999), “European Principles for Public Administration”, *Sigma Papers*, No. 27, OECD Publishing, <http://dx.doi.org/10.1787/5kml60zwd7h-en>, p. 9.

62 See Mette Frisk Jensen, “The question of how Denmark got to be Denmark – establishing rule of law and fighting corruption in the state of Denmark 1660-1900”, working paper

series 2014:06, the Quality of Government Institute, University of Gothenburg, and Jan Teorell and Bo Rothstein, “Getting to Sweden: Malfeasance and Bureaucratic reforms, 1720-1850”, working paper series 2012:18, the Quality of Government Institute, University of Gothenburg.

63 Dahlström and Lapuente, op.cit. fn. 59 Kindle version, locs 3613-3616.

To map the presence or absence of these characteristics, we interviewed around 25 officials, both current and former, with about an equal third in each of our three countries. Most of the interviewees hold, or have held, leading positions in government bodies, mostly in ministries.

We have not aimed to obtain a representative selection of public officials, but have concentrated on one particular group. Our interviewees are all individuals who have been engaged in efforts to align their country's public administration systems with the above-mentioned standards. These individuals possess a deep understanding of the reforms' content and objectives, as well as first-hand experience with the factors affecting the reforms' execution and progress. To address the research questions of this

paper, it is essential to draw on the unique experiences of this group of public officials.

The interviews were partly conducted as focus group meetings with three to five participants and partly as individual interviews. We presented the questions as behavioural dimensions with two extreme values, one promoting and the other discouraging meritocratic professionalism. The interviewees were asked to rate the behaviour/attitudes they described on a scale from 0 to 10. A score of 10 may indicate strong adherence to meritocratic professionalism while 0 reflects behaviour/attitudes that seem to contradict it.

9. DEGREE OF CONFORMITY BETWEEN INFORMALITIES AND MERITOCRATIC PROFESSIONALISM

We will now examine the extent to which informal norms and expectations reflect each of the five characteristics of meritocratic professionalism we just described (see bulleted list above, p. 13).

Officials are oriented towards serving the public good over anybody's private interest.

The prevailing belief is that private interests have the greatest impact by a substantial margin.

Table 2 Public versus private interests

(10=complete focus on public interests, 0=complete focus on private interests)

| Bosnia and Herzegovina | Kosovo | Montenegro |
|------------------------|--------|------------|
| 2,8 | 2,8 | 3,3 |

Interviewees consistently report that the public service is affected by considerations that are in opposition to the normative standards central to the country's reform endeavour. As stated by a previous senior minister,

"[...] we are loyal to the wrong God. We are loyal to personal connections. In our country, there's a saying: "The good son is one who takes from the state and gives to his family." Stealing is not condemned; it is a favour to a friend. Being honest is viewed as a threat, I will not appoint you if you are honest, because everyone is corrupt."

A senior civil servant observes,

"Integrity is not a value [...] Politicians and leaders of state institutions emphasize private interests over public ones. [...] Recently, I had a conversation with a colleague. I asked him, 'How can we explain to the new director some of our decisions that do not comply with

the law'? He said, 'Do you mean that we need to work in accordance with the law? Don't be silly.'"

A recurring theme in the interviews is the observation that government employees tend to blur the lines between their personal and professional lives, often using work hours and public resources for their own benefit and for that of friends and relatives. Only a small fraction of all employees is seen to make any meaningful effort in their jobs. The interviewees provide slightly different estimates of the size of this share, but they all agree that it is quite limited, ranging from a couple of percent to one-third of the workforce, with an average of around fifteen percent. Simply put, it appears that most officials do not contribute much to the work of their organizations. According to a Bosnian civil servant, "people do little or nothing, they simulate work." In the same vein, a Kosovar civil servant with experience from several ministries reported that, "When working in the public administration, your job is not your focus. Rather, it is about building connections and exchanging favours with those in your social circle." According to interviewees, the primary factors motivating people to pursue public sector employment are a fixed salary, job stability, and low demands for performance and dedication.

Given our observation that meritocracy breeds impartiality and ethical conduct, we asked our interviewees: which holds more weight when seeking employment in government – qualifications, or personal connections? As shown in table 3, having connections is crucial for securing employment; qualifications alone play a minor role. This question was not asked in Kosovo, but still, it emerged from the interviews that there is every reason to assume that the situation is similar to that in Bosnia and Herzegovina and Montenegro.

Table 3 Qualifications versus personal connections
(10=full emphasis on qualifications, 0=full emphasis on connections)

| Bosnia and Herzegovina | Kosovo | Montenegro |
|------------------------|--------|------------|
| 1,2 | N.A. | 2,0 |

The Kosovar interviewees particularly highlighted the importance of family connections. According to one official, entire families are employed in some institutions. Interviewees with deep knowledge and experience in recruitment processes report that often 'preferred candidates' are favoured over those with the best qualifications,

Bosnia (3),⁶⁴ "I was a member of recruitment panels. It rarely happens that members justify the score they give to the candidates. Everything has been arranged before the competition takes place. Everybody knows in advance who will be appointed. Panels are always composed with a view to selecting the predetermined candidate. You do not stand a chance if you complain. The answer is always, 'We have followed all the rules.'"

Kosovo (7), "Recruitment for most positions, is carried out using the "preferred candidate" method. This means that a particular candidate is supported or assisted during some or all stages of the recruitment process. Only in rare cases the recruitment process goes without instructions or interference. [...] The general mindset in the recruitment process is that instructions for the preferred candidate are more important than the candidate's level of professionalism, education, and skills."

Interviewees from Montenegro and Bosnia and Herzegovina point out that the significance of connections has increased in recent years.

Montenegro (2), "Connections are very important. Under DPS⁶⁵ connections were required for employment in some 70 percent of all job openings. Now you need connections in all of them [...] Ministers just bring friends to the Ministry. They do not care about their qualifications."

Montenegro (3), "The situation has only worsened. During the past five years around 70-80 per cent of new recruits have been employed through personal connections."

Bosnia (1), "Nothing can be achieved without connections. During the period from 2005 to 2010 the situation was better."

Bosnia (2), "Previously you had to demonstrate your competence. This is no longer necessary."

We attempted to assess how important job-related status symbols are to people in their jobs. The feedback was clear that these symbols are seen as important, not least because they can be used as resources to obtain private, often unjustified advantages for public officials.

Table 4 Status flaunting

(10 = status flaunting does not occur and is not seen as important, 0 = status flaunting occurs widely and is seen as important)

| Bosnia and Herzegovina | Kosovo | Montenegro |
|------------------------|--------|------------|
| 4,8 | 2,6 | 1,8 |

A senior Bosnian civil servant mentioned the following example,

"Senior public officials use their government-provided black cars with flashing blue lights and government drivers, to pick up their children from school. This daily display sends a strong message to school staff that powerful people expect special treatment for their children."

During interviews, individuals express concern about the size of the government's vehicle fleet and the abundance of drivers and personal assistants, citing it as a wasteful expenditure of public funds. They believe this is linked to the desire of higher-ranking officials to showcase their power and status.

Officials maintain a reasonable balance between professional independence and political loyalty, and loyalty to other superiors.

⁶⁴ The interview subjects were consecutively numbered in each individual country. The figure in brackets refers to this number.

⁶⁵ The Democratic Party of Socialists of Montenegro.

In the interviews, the participants were prompted to discuss which trait was most closely associated with public servants: professional independence or an inclination to unquestioningly obey their superiors. According to respondents, there is a noticeable absence of emphasis on professional independence. In particular, there are two ways in which this is shown: an unwillingness to submit proposals without prompting and without specific instructions, as well as a tendency to blindly comply with directives from those in authority (see table 5).

Table 5 Balance between professional independence and submissiveness to superiors

(10=there is a reasonable balance between professional independence and loyalty to superiors, 0=blind loyalty to superiors)

| Bosnia and Herzegovina | Kosovo | Montenegro |
|------------------------|--------|------------|
| 2,6 | 2,8 | 3,0 |

Respondents say that, in practice, the duty to prepare proposals is delegated from the bottom to the top of state organizations, not the other way around. In the words of one interviewee, officials go to the minister to make up their own opinion. A senior official in a Ministry of Interior tells the following story,

“After a series of armed gang clashes, the Minister of the Interior summoned the Police Director for a discussion. The Police Director asked, “What course of action do you recommend?” Whereupon the minister responded, “I assumed you had a recommendation for me.”

Many respondents share the belief that inappropriate and possibly illegal orders are common and regularly put into action. For most employees speaking truth to power, or addressing problematic issues at all, is a far-fetched notion.

Kosovo (1), “Illegal orders are prevalent in the public administration. Public officials do not hesitate to carry them out for several reasons, fear of retaliation, lack of integrity and offers of compensations and rewards.”

Montenegro (4) “Operational independence of the police is an illusion. The police are under constant pressure when it comes to arrests and appointments. It happens frequently that politicians try to pressure the police director to do something improper and even illegal.”

Bosnia (5) “Officials will never be in short supply for those seeking individuals who are willing to carry out improper and illegal actions. We cannot trust that justice will be done. On the contrary, it is a witch hunt. Working in the public administration is to work with a rope around your neck. Whenever you notice something inappropriate, you feel powerless. If you try to do something, the rope is used to hang you.”

Kosovo (5) “No matter what the instruction may be, there will always be those who are ready to follow it.”

Montenegro (2) “Half of the workforce tends to follow the boss’s instructions without question.”

An interviewee submitted a written contribution in which it was said,

“In general, significant portion of the staff within the ministry is aware what other(s) are doing but there is reluctance to put forward such information to the relevant authorities, speak openly, and take measures. This situation is prevalent in all public administration institutions. This is because of hesitation to be involved in a case or against a colleague, lack of trust that the issue will be dealt properly (within and outside the ministry), fear of retaliation, fear of potential threats by the official in question or others, etc. In general, in public administration dominates the practice “don’t be involved in such issues and mind your own business.” Such “advice” is given very frequently when a public official discusses with a colleague, friend or family member to put forward the issue.”

The assumption that the issuance and follow-up of illegal orders can have a significant scope is consistent with other studies.⁶⁶

⁶⁶ Svein Eriksen, “Breach of Law as Government Policy. The use of illegal orders in Western Balkan State Institutions”, CIDS Report No., 2/2022. Centre for Integrity in the Defence Sector. Paper available at, <https://img5.custompublish.com/getfile.php/5123079.3005.ptbjubqsuuljpl/10694-CIDS-rapport-2-2022-skjerm-ny.pdf?return=www.cids.no>.

Officials provide advice based on merit.

The prevailing opinion as per table 6, is that advice from civil servants, if given, is often without merit. Interviewees often think that officials feign expertise by relying on fake knowledge to give advice. According to one interviewee, “In our state, fake competence is the highest form of competence”.

Table 6 Advice based on genuine, not fake competence

(10 = advice is based on genuine competence, 0 = advice is based on fake competence)

| Bosnia and Herzegovina | Kosovo | Montenegro |
|------------------------|--------|------------|
| 4,2 | N.A. | 2,8 |

The discrepancy between people’s professed and actual proficiency is notably shown through the widespread use of bought academic titles and fake diplomas. An interviewee reported that there are roughly 30,000 of these documents being used in Montenegro. The state’s most significant problem, in his opinion, is the acceptance of individuals relying on fake credentials to attain public positions and advance in their careers. Interviewees pointed out that senior members of the administrative hierarchy tend to lack competence more often than junior staff. The problem is considered to be especially common among individuals who reach their positions through political affiliations.

Transparent communication is encouraged, allowing for genuine feedback, addressing issues, including inconvenient ones, and exchanging ideas.

The decision-making process in public administration is marked by a lack of open, professional discussions. This limitation is manifested in various ways. Table 7 suggests a notable level of self-censorship among the employees.

Table 7 The extent of self-censorship

(10=professional topics are openly discussed, 0= self-censorship in professional discussions is widespread)

| Bosnia and Herzegovina | Kosovo | Montenegro |
|------------------------|--------|------------|
| 4,2 | N.A. | 2,8 |

Many believe that superiors do not value the opinions of employees, that shared information may be misused, and that expressing opinions voluntarily, particularly on contentious issues, is risky. In formal settings, officials typically choose not to speak up. In one interview, the situation was succinctly put this way,

“Those who want to take initiatives are punished and isolated. People are hesitant to share good proposals, because they fear they might get stolen. You will not disclose information to incompetent individuals in higher positions.”

Silence in formal environments does not translate into silence in informal settings. Corruption and potentially illegal activities are being whispered about within governing bodies. But there is a significant lack of official reporting to the relevant authorities. As already mentioned, the prevailing attitude is to “stay out of it and mind your own business,” a stance unanimously advised by colleagues, friends, and family.

New proposals and ideas are consistently met with dismissiveness, as indicated in table 8.

Table 8 Dismissiveness vs. inclusivity

(10 = new proposals and ideas are assessed based on their merits, 0 = proposals and new ideas are dismissed without any justification)

| Bosnia and Herzegovina | Kosovo | Montenegro |
|------------------------|--------|------------|
| 2,8 | 1,9 | 2,8 |

According to interviewees, decision-making processes tend to evaluate arguments based on the proponent’s identity including ethnicity, gender, or place of origin rather than on their merit. One senior civil servant observes,

“We face significant issues as proposals get automatically rejected due to biases related to individuals submitting them, such as age, religion, or sexual orientation. The man is still the chief. Arguments are not considered valid simply because they are made by a woman. People from certain nationalities, communities are not listened to. In the ministry’s collegium, where the minister and other senior people

meet, these attitudes are often prominent. It is a very big problem.”

Interviewees say that that coming up with new ideas can often lead to ridicule.

Ever since Max Weber, it has been considered a defining characteristic of the public bureaucracy, that official business relies on written documents. Nevertheless, within Balkan bureaucracies, we see a different scenario. In Kosovo, as indicated in table 9, civil servants tend to avoid communicating in writing. The interviewees suggest two potential reasons for this: either not wanting to admit to having poor writing skills or not wanting to align oneself with a viewpoint that could be used against them in the future.

Table 9 Willingness vs. unwillingness to communicate in writing
(10 = Writing is a common means of sharing ideas and proposals, 0 = there is a widespread reluctance to put things on paper)

| Bosnia and Herzegovina | Kosovo | Montenegro |
|------------------------|--------|------------|
| N.A. | 2,6 | N.A. |

The question about writing was not asked in the other two countries in the survey, but it became clear during the interviews that reluctance to write is not limited to Kosovo. As per table 10, it has been noted that officials from Bosnia and Herzegovina and Montenegro often resort to evasive and ambiguous communication, supposedly in an effort to sidestep requests for written contributions.

Table 10 Unclear, evasive communication vs. clear and direct communication

(10=the communication is clear and direct, 0=communication is unclear and evasive)

| Bosnia and Herzegovina | Kosovo | Montenegro |
|------------------------|--------|------------|
| 2,5 | N.A. | 3,8 |

Bosnia (1) “This is why officials avoid speaking. They do not want to be asked to put things in writing.”

Bosnia (4) “People who are full of ideas do not want to commit anything to paper or are unable to do it.”

Both routine and strategic issues receive fair attention.

As can be seen from table 11, public bodies are essentially concerned with routine matters. Little attention is paid to strategic questions. The question was not asked in Kosovo, but the interviews made it clear that the situation there is like the one we observed in Bosnia and Herzegovina and Montenegro.

Table 11 Routine vs. strategic issues

(10=Both routine and strategic issues receive fair attention, 0= predominantly, only routine matters are taken care of)

| Bosnia and Herzegovina | Kosovo | Montenegro |
|------------------------|--------|------------|
| 2,5 | N.A. | 2,8 |

As we shall see below, the lack of attention to future-oriented questions may stand in clear contrast to the formal expectations directed at public institutions. The interviews suggest that the neglect of strategic issues is associated with prevailing mindsets.

Kosovo (1), “People lack motivation to analyze how policies and processes should be enhanced. It would mean a lot of work, therefore people are not interested, and they are not encouraged by their superiors. The leadership may be interested in pursuing new projects solely because they involve funding from donors. The purpose of the project is of little interest. It is the same with laws. Adopting new laws has only symbolic value. We can say that we meet requirements set by the EU. The idea is not to improve the legislation to enhance the lives of people in Kosovo.”

Montenegro (2). “People do not want to do analytical work. They do not see any interest from the top of the Ministry, and therefore believe that any such efforts would not be appreciated.”

Montenegro (3). “People who come to work in the Ministry may expect to engage in analytical tasks. But upon arrival, they discover that the focus is solely on trivialities. Few civil servants would take the initiative to document their own thoughts on how to address an issue. First, they would go to someone higher up to pick up their opinion.”

In relation to this, CIDS conducted an in-depth analysis, including examining policy making at a Kosovo ministry. We mention this investigation because it helps to shed light on the core theme of this paper: how well an organization's formal and informal aspects align.

At the formal level, strategic policymaking is well reflected at the Kosovar Ministry in question. It is the key component of the Ministry's official mission. 102 of 199 reviewed job descriptions include policy/analytical tasks. In 83 of the 102 cases, these tasks are primary and in the remaining 19 cases secondary assignments. Despite this, in practical work the Ministry pays hardly any attention to policymaking/analysis at all. This applies to all major ministerial functions. The Ministry has a separate department for HRM policies, but its focus seems to be formal, sometimes excessively formalistic aspects of HRM. In procurement, the absence of analyses and precise data makes it challenging to conduct effective acquisition processes. The Government's Rules of Procedure stipulate that policy analysis should be conducted before legal drafting takes place. But this provision was bypassed – with the consent of the Prime Minister's Office – in the law preparation processes CIDS studied. The attitude in the Ministry seems to be that policy analysis is not important, but rather a burdensome and not even necessary formality. In a survey CIDS conducted, a significant share of ministerial managers reported that innovative proposals are not welcomed. Policy development, when it occurs, is typically supported and overseen by foreign experts.

The neglect of strategic matters appears to be associated with two prevailing mindsets found in this research: risk aversion and a general tendency towards passivity. Both

are evident to a significant, some might even say to an excessive extent, see table 12 below.

Table 12 Uncertainty avoidance vs. uncertainty tolerance – passivity vs. pro-activity

(10 = uncertainty is expected and tolerated, 0 = any uncertainty is to be avoided)

(10 = proactivity at work is seen as desirable, 0 = officials are widely passive, waiting for instructions about what to do)

| | Bosnia and Herzegovina | Kosovo | Montenegro |
|------------------------------|------------------------|--------|------------|
| Uncertainty avoidance | 2,6 | 2,1 | 2,5 |
| Passivity | 2,4 | 2,6 | 2,5 |

Regarding uncertainty avoidance, we have already noted that public officials hesitate to express independent opinions without specific direction, and they consistently try to avoid scenarios where they may be required to provide professional, especially written input. According to one interviewee, "To be on the safe side, you do nothing".

Both uncertainty avoidance and passivity stem from a belief that voicing an opinion and being proactive are risks, not virtues. One senior civil servant observed,

“Officials are cautious when interacting with individuals who have connections to influential people. They go to great lengths to avoid saying anything that could be seen as criticism. In these relationships there is no trust. Only a very few would discourage let alone warn their boss from making a decision, even if they think that it will harm the public interest.”

10. EXCESSIVE LEGAL FORMALISM

In the Western Balkans, deficits in the rule of law are often understood through the lens of state capture, where politicians are seen to abuse the legal system for their own purposes.⁶⁷ While this viewpoint holds value, it is incomplete. An important supplementary perspective is that norms and practices that could undermine the rule of law have become institutionalized among the state's law enforcement officials. These norms and practices are supported by and support several of the informal attitudes we have described above, not least subservience to the state's leadership and avoidance of uncertainty.

As we have noted above and discussed elsewhere, improper, even illegal instructions are widespread across Western Balkan systems of public administration. Public officials will probably in most cases comply with – and not infrequently anticipate such instructions or signals. In the German Democratic Republic (GDR), “*vorauseilender Gehorsam*” – “anticipatory obedience” was a common occurrence among judges.⁶⁸ Apparently, a similar practice also characterized Tito's Yugoslavia, and seems to be “alive and well” among current law enforcement officials across the Western Balkans.⁶⁹

In the Balkans (as in other European post-communist countries), a legal culture, has developed, which views the judicial process as an instrument of avoiding conflicts with the political elite, rather than prioritizing the rule of law.⁷⁰ A core element of this culture is excessive legal formalism, where a case is treated based on a purely linguistic analysis of the legal text and not a discussion of the merits of the case or abstract legal principles.⁷¹ The education system, by discouraging critical thinking, further solidified this method for future lawyers. According to Siniša Rodin,

“legal scholarship was not expected to be critical but descriptive and apologetic, while the function of education was understood as transmission of the ultimate truth from teachers to disciples: *magister dixit, discipulus scripsit.*”⁷²

Legal practitioners in ex-Yugoslav countries are described as “skilful technicians” who are expected to find an adequate legal form and justification for almost any desired outcome.⁷³ The emergence of excessive formalism was not merely motivated by considerations about the proper role of law in society. Probably more important was the desire of the legal profession to protect themselves against punishment from the political leadership whenever they could be suspected of deviating from the party line.⁷⁴ By sticking strictly to written texts that had been adopted by the party, this risk was greatly reduced.

Under communism, it was difficult, if not impossible, to distinguish between the interests of the state, of the ruling class, and of the political leadership. One can reasonably conclude that there is a legal continuity in this regard, where even today, the interest of the political leadership is conflated with the interest of the state, which in turn is equal to the public interest.⁷⁵

The emergence of excessive formalism was triggered by the realisation that communism was far less monolithic than initially perceived, leading to unpredictability regarding the party's authoritative stance on various issues.⁷⁶ The same logic still applies. In the Western Balkans politics is currently centred around individuals rather than ideologies and policies. This means that there can still be great lack of clarity regarding the interests involved in a certain case and the priorities of various leaders. Thus, excessive formalism even today gives legal practitioners a way to navigate unpredictability and the insecurity that accompanies it.

67 See i.a. Danijela Dolenc, *Democratic institutions and authoritarian rule in southeast Europe*, ECPR Press, Colchester, 2013, p. 192.

68 Inga Markovits, “Children of a Lesser God: GDR Lawyers in Post-Socialist Germany”, *Michigan Law Review*, 7(94) 1996, pp. 2270-2308, p. 2304.

69 Alan Uzelac, “Survival of the Third Legal Tradition”, *Supreme Court Law Review*, 49 S.L.C.R. (2d), pp. 377-396, 382.

70 Fikret Karčić, “A Study on Legal Formalism in the Former Yugoslavia and its Successor States”, CIDS Report No. 1 2019, Centre for Integrity in the Defence Sector, Oslo, 2021. For Central Eastern Europe, see Zdeněk Kühn, *The Judiciary in Central and Eastern Europe. Mechanical Jurisprudence in Transformation*, Martinus Nijhoff Publishers, Leiden 2011, pp. 158 and 159.

71 See Karčić, op.cit. fn. 70.

72 Siniša Rodin, *Discourse and Authority in European and Post-Communist Legal Culture*, in *Croatian Yearbook of European Law and Policy*, Vol 1 (2005), pp. 1-22. Available at <http://www.cyel.com/index.php/cyel/article/view/1>, p. 6.

73 Uzelac op.cit. fn. 69, p. 382.

74 Kühn, op.cit. fn. 70, p. 158.

75 Edwin Rekosh: *Who Defines the Public Interest?* in *SUR: International Journal of Human Rights*, 2005

Year 2, Number 2, pages 166-179. At <https://sur.conectas.org/wp-content/uploads/2017/11/sur2-eng-rekosh.pdf>.

76 Kühn, op.cit. fn. 70, p. 155.

Textual formalism has long historical traditions in the former Yugoslavia and seems well institutionalized, including in the systems of higher education in Yugoslav successor states.⁷⁷ As a result, this conception of law is transmitted to each succeeding generation of law enforcement officials and civil servants.⁷⁸

Excessive textual formalism and the stronger versions of legal centralism stem from a common belief that legal form prevails over other social norms, and that law equates social reality.⁷⁹ When formalism is overly emphasized, the execution of laws, their social effects become secondary concerns along with any gap between laws on paper and laws in practice.

⁷⁷ See Karčić op.cit. fn. 70, especially paragraph 1.4. „Survival of the socialist Legal Culture“, pp. 8-10.

⁷⁸ *Ibid.*, and Katarína Staronova and György Gajdusček, «Book review: Guy Peters – Institutional Theory in Political Science: The New Institutionalism, Perspectives from Central and Eastern Europe», *The NISPAcee Journal of Public Administration and Policy*, X11(2), Winter 2019/2020 (281-285), p. 282.

⁷⁹ Staronova and Gajdusček op.cit. fn. 78.

11. INFORMALITIES AND MERITOCRACY – THE OVERALL PICTURE

In section eight above, five characteristics of a meritocratic public administration have been identified. The interview data indicate that these are to only a small extent reflected by mindsets and informal action practices in the three countries covered by the survey. Table 13 summarizes the observations in section nine.

Table 13 Overall fit between prevailing mindsets and the ideal type of a meritocratic system of public administration⁸⁰

| Features of a merit-based system of public administration | Bosnia and Herzegovina | Kosovo | Montenegro | Average |
|---|------------------------|--------|------------|---------|
| Officials are oriented towards serving the public good over anybody's private interest, | 2,9 | 2,7 | 2,4 | 2,7 |
| Officials maintain a reasonable balance between professional independence and political loyalty, and loyalty to other superiors | 2,6 | 2,8 | 3,0 | 2,8 |
| Officials provide advice based on merit | 3,4 | 2,6 | 2,8 | 2,9 |
| Transparent communication is encouraged, allowing for genuine feedback, addressing issues, including inconvenient ones, and exchanging ideas. | 2,6 | 2,5 | 3,4 | 2,9 |
| Both routine and innovative issues receive fair attention. | 2,5 | 2,4 | 2,6 | 2,5 |
| Overall scores | 2,8 | 2,6 | 2,8 | 2,8 |

⁸⁰ The scores are calculated by averaging the ratings assigned by the respondents to the questions measuring each of the five features of a merit-based system of public administration.

Stated verbally, the findings can be outlined as follows,

- Officials regularly mix their personal and professional lives. Rather than focusing on the common good, they tend to prioritize private interests. Connections as opposed to merit are vital to secure employment in the public service.
- Instead of maintaining a reasonable balance between professional independence and loyalty to superiors, officials are overly submissive, even uncritical to leaders, There is little hesitation in issuing and carrying out improper, potentially illicit orders.
- Instead of providing advice based on merit, officials often rely on false competence in their advisory roles.
- There is a lack of transparent communication and genuine feedback; new ideas are met with skepticism; difficult and controversial topics are typically sidestepped, and officials are reluctant to articulate their stances in writing.
- Routine matters take precedence over strategic issues. There is a lack of interest from officials in analytical work, and the management is not prioritizing it.

Table 14 below displays the degree of agreement between the countries' scores on the formal and informal institutional pillars, respectively.

Let us take a moment to revisit the line of reasoning that underpins this paper before we move on. Our central focus is the relationship between formal and informal institutional pillars. The formal pillar, as defined in this paper, includes legislation in five areas that encourage professionalism, impartiality, and integrity in public administration. The degree to which the pillar, specifically the legislation, aligns with international standards is detailed in table 1 above.

The higher the level of alignment, here measured on a scale from 1 to 10, the more the countries' laws support professionalism, impartiality, and integrity. The overall score for each of the three countries in the study is compiled in row 1 of table 14 below.

The informal pillar consists of the mindsets of public officials and their informal action practices. Section nine above discusses how well these align with five criteria for merit-based administrative behaviour. The findings are summarized in table 13 above. The informal pillar's compliance with the chosen criteria for meritocracy is also measured on a scale from 1-10. The overall score for each individual country is displayed in row 2 of table 14 below.

Our main argument is that when informal aspects like mentalities and action practices, are guided by meritocracy, they tend to promote professionalism, impartiality, and integrity in the public administration. This, in turn, supports the enforcement of laws that uphold these standards. Conversely, without meritocracy in play, informal aspects fail to promote professionalism, impartiality, and integrity.

If our assumption is correct, there is a noticeable discrepancy between the formal and informal pillars in the three countries we are studying. Table 14 shows the extent of the mismatch. Largely, the formal pillar upholds professionalism, impartiality, and integrity, while the informal one goes against these standards.

Kosovo showcases a stark contrast between formal and informal elements, primarily due to the relatively high quality of legislation, which is undoubtedly shaped by the extensive contribution of international experts to Kosovar legal frameworks.

Table 14 Extent of alignment between the formal and the informal institutional pillars

| | Bosnia and Herzegovina | Kosovo | Montenegro | Overall score |
|---|------------------------|--------|------------|---------------|
| Formal institutional pillar, fit with international standards | 6,4 | 8,7 | 7,5 | 7,6 |
| Informal institutional pillar, fit with meritocratic standards | 2,8 | 2,6 | 2,8 | 2,8 |

Our data suggests that many public servants do not see it as beneficial to adhere to norms that promote merit-based professionalism and formal frameworks set for government operations. Alternate, often conflicting norms and expectations hold more significance, even if they may not reflect the officials' own attitudes. We must make a distinction between social expectations, people's personal attitudes and their actions. The interviews suggest that there are several civil servants whose attitudes run counter to practices and expectations they observe at their workplace. Nevertheless, it has been consistently seen that people's attitudes and practices do not correlate.⁸¹ People may have a positive opinion of behaviour they are not involved in and may take a negative personal stance against social conventions and expectations, but still adapt to, or at least refrain from challenging them. Our interviews indicate that regardless of their personal attitudes, public officials' actions are often influenced by expectations from their superiors, "patrons", colleagues, community, and family, and the potential consequences they may face if they fail to meet these expectations.

Monitoring, control, and reward mechanisms deserve special mention. For a formal norm to remain valid, an organization must address any behaviour that violates it. Trust in a formal norm is not diminished by inappropriate behaviour in itself, but by normalizing misconduct, by ignoring it and lacking the dedication to uncover and rectify it. Those who follow the formal expectations must be rewarded in order for the ideas to have a long-term effect on people's behaviour.

The interview data strongly suggest that employees have little confidence in the fairness of the formal control and reward systems. Employees' performance scores are not seen to reflect their actual work efforts. They describe it as a formalistic exercise, without much assessment of performance, or honest feedback on the need for improvement. Interviewees suggest that managers are reluctant to critically assess the efforts of subordinates who may have powerful patrons. It creates uncertainty and cynicism that people who have been given strict disciplinary injunctions have had these revoked and been reinstated in their positions. Several interviewees have expressed concerns that audit reports may be more likely to mask issues rather than disclose them, contributing to an

overall level of distrust in their reliability. One interviewee commented upon the generally positive state audit opinions at his ministry and suggests that senior ministerial officials have offered state auditors irregular compensation, e.g. offers of employment for relatives in return for positive or acceptable audit reports. Interviewees raise suspicion that people who have refused to carry out what they perceive to be illegal orders have been sanctioned, i.a. by having their performance score lowered. Allegations of misconduct have been reported to the police and public prosecutors, but apparently with no results or even official feedback. A yet unpublished report CIDS has made of the state prosecution authority, in one of the countries included in this study, argues that informal networks and practices have continuously hindered the proper implementation of formal regulations and the establishment of a genuine rule of law.

All of this stirs up a mistrust that justice is hard to come by, that well-connected people committing inappropriate, perhaps illegal acts will ultimately be protected and prevail, not those who want to inform about misdeeds and to bring them to an end. We are tempted to conclude that monitoring and control mechanisms do not effectively deter misconduct; rather, they seem to institutionalize and normalize it.

The significance of personal connections suggests a substantial informal system of rewards and sanctions that runs along with and is intertwined with formal arrangements. The relationships that civil servants have to colleagues and to people in positions of power can have far-reaching consequences; not only for their future job prospects, but also their social circumstances, regarding i.a. admittance to kindergarten and education for their children, and their own and family members' access to medical and various other types of private and public services. Interviewees mention a number of examples that personal job-related contacts can influence the availability of, among other things, the types of benefits mentioned here. The more job-related personal connections influence other aspects of life, the more firmly informal, person-centred practices become ingrained in state institutions.

In sum, public officials across the Western Balkans work in an environment, which they expect may ignore, sometimes intentionally violate, and often only pay lip service to legal

81 Allan W. Wicker, "Attitudes Versus Actions: The Relationship Of Verbal And Overt Behavioural Responses To Attitude Objects", *Journal Of Social Issues* 4/XXV, 1969.

frameworks that are essential to upholding impartiality, professionalism, and integrity in the public service. Our task is not to ascertain the truthfulness of such claims. Acknowledging their prevalence is what is central to our purpose. Perceptions matter in their own right. They will shape officials' views of how others will respond to their decisions and the risks and benefits that come with them. These expectations will in turn serve as compass for employees' conduct and perhaps more importantly shape peoples' understanding of their roles as public servants.

Is it possible that the attitudes and behaviours we have described above do not express informal norms, but rather indicate a lack of knowledge and/or inappropriate

organization of administrative bodies? Such factors undoubtedly play a role, but our findings suggest they are not the cause, but rather a consequence of the attitudes and practices outlined in this paper. Expert opinion is seldom voiced because it is not requested. Public bodies and formal regulations do not function as intended because they are not meant to do so. The main allegiance of public officials lies with individuals and social groups rather than formal systems. According to Michael Brie and Erhard Stöltring, "If formal institutions are no longer able to rely on informal personal loyalty, they are doomed."⁸²

⁸² Michael Brie and Erhard Stöltring, «Formal institutions and informal institutional arrangements» in Christiansen and Neuhold fn. 14, p. 32.

12. EFFECTS OF THE MISMATCH BETWEEN FORMAL AND INFORMAL NORMS

We will now briefly summarize what our findings imply for the implementation of each of the five sets of regulations that are the core of our definition of the formal pillar.

12.1. CONFLICTS OF INTEREST

The informal practices outlined above, clearly violate the idea that public decisions should be based on the common good rather than individual interests. Private concerns take precedence by a considerable degree, as we observed. The emphasis on connections and loyalty in public employment – to the exclusion of competence – makes it difficult to imagine public servants as staunch advocates of the common good over the interests of their benefactors. The conflict-of-interest regulation’s view that connections are potentially problematic directly contradicts the deep-seated societal belief that relationships are essential for navigating life’s challenges. Often, the responsibility to safeguard the common good may appear abstract and remote when juxtaposed with the immediate obligations public servants are seen to have not only to their benefactors, but towards their families and friends. This was clearly expressed in a study of one of the largest ministries in Kosovo that CIDS recently carried out,

“People think they do something good when they help family members to get a job with free canteen and free transport. There is huge pressure from the family. If you have a job in the Ministry, you are expected to find jobs for relatives. If you just say, they should apply for vacancies you are seen to violate the duty to help your family. You risk strong reactions from your family. If on the contrary, you can show that you have helped many people to find a job, you will be a local hero”.

12.2. FREEDOM OF ACCESS TO INFORMATION

As we noted, there is a common perception among public officials that information should be withheld; information can be misused; one must be cautious when sharing it

with others. The internal communication style of state bodies may impact their external communication. The belief that public decisions and assessments should be shielded from critical scrutiny is probably stronger than the notion that citizens’ knowledge and awareness are crucial for overseeing the public administration. A recurring criticism from journalists is that Western Balkan authorities have an overly limited perception of what constitutes a public interest, not least in matters concerning corruption and abuse of authority by public servants.⁸³ As we observed, there may be a widespread perception that political interests are equivalent to the common good. Studies carried out by CIDS indicate that domestic authorities are reluctant to disclose vital information to citizens, thus preventing them from protecting their interests vis-à-vis public authorities. Two pertinent examples: Many administrative decisions are made without providing reasons or informing individuals about the opportunity to appeal.⁸⁴ Public procurements are frequently kept confidential without adequate basis.

Media regularly encounters a wall of silence when seeking access to public records.⁸⁵ Government bodies typically respond to information requests in ways that align with the legal environment they operate in (see paragraph 10 above), e.g. by requiring the fulfillment of formalities beyond what is stated by the law⁸⁶ or “hiding behind legal justifications without providing meaningful information or reasoning.”⁸⁷

12.3. WHISTLEBLOWING

The probability of the whistleblower mechanism being employed to a significant degree seems minimal given the reluctance to report misconduct outlined earlier. This impression is confirmed by two surveys carried out by

83 Kristina Obrenovic and Ana Toskic Cvetinovic, “Freedom of information. 2023 annual report”, available at <https://balkaninsight.com/wp-content/uploads/2024/06/Freedom-of-Information-2023-Annual-Report.pdf>, pp. 21 and 22.

84 Katarina Jovicic, “Overview of the situation in the field of administrative procedures in view of the obligation to provide reasoning for administrative acts in Serbia, Bosnia and Herzegovina and Montenegro”, unpublished paper, Belgrade 2018.

85 Obrenovic and Cvetinovic op.cit. fn. 83.

86 Obrenovic and Cvetinovic op.cit. fn. 83, p. 21.

87 Obrenovic and Cvetinovic op.cit. fn. 83, p. 22.

CIDS in one of the three countries under study, where interviewees report that officials tend to shy away from reporting any suspicion of inappropriate behaviour. Few cases are ever reported. The individuals responsible for handling reports of misconduct in both state organizations studied had strong connections to key officials suspected of corrupt activities, one through family ties and the other through close professional relationships. This is an additional aspect that undermines officials' motivation to report. One could reasonably speculate that this effect may be intended.

12.4. PERSONNEL POLICIES FOR CIVIL SERVANTS

The informal elements we have described affect almost all significant aspects of personnel policies for civil servants. The importance of connections as opposed to merit is impossible to overlook, especially when it comes to employment and promotions. Interviewees pointed out that connections have become the primary means of recruitment, a shift that has grown more significant in recent years. This assessment is consistent with what appears from other surveys. In Bosnia and Herzegovina, it is estimated that 9 out of 10 employments take place through connections.⁸⁸ In a Kosovo poll, 86 per cent of the respondents say that access to employment in the public sector is based on nepotism/family/political ties or bribery/corruption. Only 11 per cent believed that merit and skills were decisive.⁸⁹

The fact that most public servants have obtained their positions through contacts also affects other aspects of personnel management. To steer clear of conflicts with employees' protectors, managers will probably give subordinates performance appraisals that are better than many of them truly deserve. The common knowledge or widespread suspicion that managers are not appointed for their qualifications may also deter them from addressing employees' inadequate performance. Consequently, it is not surprising that various sources indicate a disproportionate number of performance results falling into the higher rating

categories.⁹⁰ CIDS investigations also indicate that the distribution of allowances, for example after business trips – which can be considerable for extended stays abroad – may be skewed toward individuals with good connections.

The Western Balkans civil service systems show significant weaknesses both overall and within individual public organizations.⁹¹ For instance, state bodies have both an abundance and a deficiency of personnel. On the one hand, many officials contribute very little to the work of state agencies. On the other hand, key administrative functions are clearly understaffed. Nevertheless, CIDS studies consistently show a lack of personnel planning or related initiatives. There is little question that this is linked to the evident reluctance towards analytical and policy-oriented tasks outlined above. Additionally, planning may restrict decision-makers from utilizing the state's personnel policy as arbitrarily as they wish.

Overall, the informal norms and customs give the impression that the state administration is not viewed as a tool for enhancing the welfare of society and citizens' quality of life. Rather, it functions as mechanism to distribute positions and other benefits to individuals with close connections to the ruling elite.

12.5. PUBLIC PROCUREMENT

The focus on private interests often overshadows public concerns in the field of public procurement. In a study on the Ministry of Defence of Bosnia and Herzegovina officials reported that even prior to the initiation of procurement processes, they were instructed by the minister's cabinet on which firms were to be allocated which contracts.⁹² According to the report,

88 Post-conflict dystopia. Captive state and society – the case of Bosnia and Herzegovina, available at, POST-CONFLICT-DYSTOPIA-CAPTIVE-STATE-AND-SOCIETY.pdf., p. 18.

89 WBSB Survey in Kosovo. Country report, 2022. "Public perception on trust, corruption and the integrity of public institutions in Kosovo", available at WBSB_2022_Kosovo_Report_1_Dec_2022_ENG.pdf., p. 14.

90 SIGMA, Monitoring Report for Bosnia and Herzegovina, May 2022, p 69. Document available online at: <https://www.sigmaweb.org/publications/Monitoring-Report-Bosnia-and-Herzegovina-May-2022.pdf>.

91 Regarding Kosovo, see for instance World Bank (2020): Kosovo Policy Note on Public Administration Reform (February 2020). Note prepared by Shiho Nagaki, Anya Vodopyanov, and Zuhra Osmanovic-Pasic. Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/36291/Kosovo-Policy-Note-Public-Administration-Reform.pdf?sequence=1&isAllowed=y>.

92 "Functional Analysis of the procurement Sector of the Ministry of Defence of Bosnia and Herzegovina", Oslo 2017.

“[...] ethnic balance is simply used as an excuse for allocating contracts to businesspeople who are party loyalists. [...] Apparently, MoD employees see such practices as an almost unalterable reality of Bosnian society.”⁹³

According to CIDS reports, other countries like Kosovo exhibit a similar pattern. Staff members of government bodies, including those dealing with procurement, are aware of improper/illicit relationships between their colleagues and private business representatives. But no one is ready to interfere with these networks, which are widely seen as prevalent and deeply entrenched. Attempting to disrupt them is not only considered futile but also carries tangible risks for those who would make an effort.

In sum, corruption is acknowledged and tolerated. In Kosovo, practices with evident potential for corruption are carried out fairly openly. Little is done to hide them. Interviewees admit that possible future providers are asked to prepare technical specifications for goods to be purchased. They also report that framework contracts lasting up to three years are managed by just two people (which is a breach of the formal regulations that call for a contract management team in case of high value and complex contracts), one from the public, purchasing agency and one from the private vendor, both of whom have the authority to deal with questions concerning adjustments in the quality, quantity, and pricing of real deliveries.

Persons who participate in procurement processes must sign a declaration that the processes will not entail conflicts of interest for them. But considering the knowledge they have about the true course of these processes – which is nowhere disclosed – the declarations are of little value. One may be inclined to suggest that their main function is to paper over law infringements, half-truths and even outright lies.

Public procurement, much like personnel policies, is marked by a reluctance to analyse and plan. Systematic planning of needs hardly seems to occur, market research in the true sense of word is not carried out, and there is no adequate mapping of corruption risks. All of this leads to great difficulties in estimating procurement costs and the

true value of contracts as well as an inability to formulate contract provisions that safeguard public interests.

The inclination among public officials to steer clear of analytical work and their remarkably limited tolerance for uncertainty we discussed earlier seem to be reflected in the practice of public authorities granting contracts solely based on the cheapest offer, disregarding the more intricate criterion of the “most economically advantageous tender”.

Public procurement is not seen as an economic activity, with the core purpose of achieving value for money. Rather it is considered an administrative, formalistic exercise. It seems justified to ask whether public officials in a country like Kosovo even understand and accept the rationale behind modern procurement legislation. The emphasis on legal formalism is not least expressed in contract management, which is implemented as a purely desk-based exercise focussing on technical compliance with contract provisions, rather than substantial adherence. Government contract managers hardly ever proactively work to prevent contract violations or to ensure that the delivered items/ services comply with the agreed quality and deadlines.

12.6. WIDER IMPLICATIONS OF OUR FINDINGS

Our findings in this study have implications for impartiality, professionalism and ethics that go far beyond the enforcement of the five pieces of legislation discussed above. The situation described,

- impacts the effectiveness of *general management practices* in the public institutions. As previously noted, informal factors can complicate the decision-making process for managers, making it challenging to reach decisions that are in the public’s best interest. Rather they are instructed or encouraged to make decisions which are ‘useful’ to their superiors. Moreover, informal elements frequently obstruct the effective execution of key managerial functions (such as planning, organizing, leading, controlling) rendering them mere routine activities with little or no substance. In these situations, many managers can “succeed” without possessing actual skills or qualifications for their positions, as the crucial factor for obtaining and keeping a managerial

⁹³ CIDS op.cit. fn. 92, pp. 8 and 9.

role is connections and loyalty, rather than abilities and professional ethics. Eventually, upon realising who the managers are and what qualities they possess, public servants lose enthusiasm, get disillusioned, and settle for the 'mind my own business' attitude.

- has obvious negative effects on *the rule of law*. We mentioned at the beginning of this paper that the central feature of the countries' reform agenda is institutional, economic, and social change through legislation. Our findings raise considerable doubts about the realism of this approach. The fact that legislation is not consequently implemented, that violations are not rigorously sanctioned, contributes, as we have already mentioned, to misconduct by public authorities being seen as a normal state of affairs. Hence, the constant introduction of new and complex laws could lead to diminished respect for formal laws, a rise in lawlessness, and ultimately higher levels of citizen insecurity.
- has a negative impact on the *quality of democracy*. The allocation of goods and burdens by government agencies, is systematically unfair. While people belonging to or having close ties to the political leadership enjoy advantages, people without such contacts suffer drawbacks. The fact that the countries, despite these weaknesses, are electoral democracies, may contribute to weakening the reputation of democracy and citizens' confidence in democracy as a form of government.
- impairs the governments' ability to *improve the welfare of their citizens*. Studies show that the ability of democracies to perform, to develop high-quality policies depends on impartiality in the civil service, on 'free and fair' recruitment and promotion.⁹⁴ In countries where loyalty is valued more than competence and merit-based advice is not sought after, there is a possibility that evidence and knowledge may be distorted to benefit those in high-ranking government positions and their friends and families.⁹⁵

94 Bo Rothstein, "Epistemic democracy and the quality of government", *European Politics and Society*, 1 (20) 2019. (16-31).

95 Ibid.

13. CONCLUSIONS

If the description and analysis of this paper are sufficiently accurate, it is reasonable to infer the following:

The informal norms and behavioural traits that were outlined should not be seen as exceptions to an otherwise prevailing normal state, where professionalism and respecting the law is typical. Nor should they be understood as expressions of system failure in regimes, which are on the verge of downfall. We should rather see them as expressions of normalcy, albeit a different normalcy than that which follows the norms of impartiality, professionalism, and integrity.

The norms that govern public institutions have been likened to an iceberg, with the official rules representing the visible 10 percent above the water and the unofficial ones the hidden 90 percent below.⁹⁶ As we have mentioned multiple times, scholarly research and practical reform work mainly focus on the visible 10 percent. As a result, our understanding of how public institutions function is limited, particularly in countries such as those we study in this paper, where informal norms may conflict with formal ones. This suggests that the current reform approach in Balkan countries is built on a narrow view of public institution and may lack a fully adequate knowledge base. This situation should be addressed by systematically seeking to obtain knowledge about informal institutional elements and how they interact with formal factors. As previously noted, our

analysis is an initial attempt to describe and indicate the effects of a broad social phenomenon.

We recommend a review of the evaluation frameworks utilized by national and international organizations to analyse the status of the public administration in Balkan nations. It is crucial to develop and include techniques for mapping informal factors, e.g. of the type described in this paper. Furthermore, steps should be taken to increase awareness among everyone involved in the reform efforts about the significance of informal elements and how they support or counteract formal ones. At the same time, international organizations, foreign aid agencies, and local stakeholders should assess how acknowledging the significance of informal elements may necessitate modification to current reform strategies and the ways in which they are supported by external actors.

The lack of attention to institutional factors is seen as a reason why many experts were caught off-guard by the collapse of European state socialism.⁹⁷ This situation prompts the question of whether overlooking key institutional factors is also preventing us from fully grasping the challenges to reform and anti-corruption initiatives in post-communist states.

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⁹⁶ Brie and Stöltring, *op.cit* fn 14, p. 19.

⁹⁷ See M. Rainer Lepsius, "Interessen, Ideen und Institutionen", Westdeutscher Verlag 1990, p. 7, and Wolfgang Lipp, *Institutionen, Entinstitutionalisierung, Institutionengründung. Über die Bedeutung von Institutionen, zumal im gesellschaftlichen Transformationsprozess in* Johannes Chr. Papalekas, "Institutionen und institutioneller Wandel in Südosteuropa", Südosteuropa Gesellschaft, Munich 1994, pp. 19-35, pp. 19, and 20.



CENTRE FOR INTEGRITY
IN THE DEFENCE SECTOR

Norwegian Government Security and Service Organisation
11/2024
S-1042E. ISBN: 978-82-7924-116-4