



# **Rule of Law through judicial Reform: A Key to the EU Accession of the Western Balkans**

Research Article

Ardit Memeti

Assistant Professor, Faculty of Law, South East European University, Tetova  
[a.memeti@seeu.edu.mk](mailto:a.memeti@seeu.edu.mk)

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# Rule of Law Through Judicial Reform: A Key to the EU Accession of the Western Balkans

Ardit Memeti\*

This paper focuses on the importance of judiciary reform as a key segment of rule of law enforcement for the EU accession of Western Balkan countries as a process mainly driven by EU assistance. The Western Balkan (WB) countries, namely Albania, Bosnia, Kosovo, Macedonia, Montenegro and Serbia are considered 'potential candidates' for European Union (EU) membership. In the EU accession process of these countries, strengthening the rule of law is considered to be of vital importance. Although the concept of the rule of law is much broader, when it comes to the rule of law requirement, judiciary reform represents the most significant component for reform in the EU accession of Western Balkan countries. Judiciary reform is so crucial to the rule of law reform that it is at times interchangeably used as having the same meaning. This is not a result of the lack of knowledge and ability to make the distinction between the two, but due to the practical importance that the judiciary plays in the rule of law. Due to the limited resources of the Western Balkan countries as well as due to the significance of the assistance, judiciary reform has primarily been driven by EU Assistance.

**Keywords:** rule of law, judicial reform, EU accession, progress report, EU assistance

## Introduction

All potential candidates for EU membership have to fulfill the so-called “Copenhagen criteria” before membership negotiations can begin. One of the main criteria’s for EU accession<sup>1</sup> is the stability of institutions guaranteeing

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\* Ardit Memeti is an Assistant Professor at the Faculty of Law of South East European University in Tetova and a Lecturer at Maastricht University. He holds a PhD from the Faculty of Law, Maastricht University (2013). He obtained an LL.M in International and Comparative Law from the University of Pittsburgh (2005) and a degree in Law from the University of St. Cyril & Methodius, Skopje (2003).

<sup>1</sup> The European Union speaks of “admission” in Article 49, paragraph 2 of the Treaty of Lisbon. This means that the act of accession represents the will of a state to be bound by that treaty. This consent is expressed by accession if the treaty provides such an opportunity for accession, if the negotiating states agreed that such consent may be expressed or if all the parties have subsequently agreed on this. According to the Vienna Convention on the Law of Treaties the term “accession” mentioned next to the terms “ratification”, “acceptance”, and “approval” refers to the consent by a state to be bound by a treaty. See United Nations. 1969. *Vienna Convention on the Law of Treaties of 1969*, Article 2. (accessed: 14 March 2014). According to Article 5, the Vienna Convention “applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization.”

democracy, the rule of law, human rights and respect for and protection of minorities.<sup>2</sup>

In the accession process of the Western Balkan countries strengthening the rule of law has proved to be an uneasy task and “identified as continuing major challenge and a crucial condition.”<sup>3</sup> According to the communication from the Commission to the European Parliament and the Council “strengthening the rule of law and democratic governance is central to the enlargement process.”<sup>4</sup> The Commission notes in the EU’s Enlargement Strategy that the accession process depends on demonstrating results in the application of the rule of law. In the 2012 annual Enlargement Package, Commissioner Stefan Füle said:

*“Our recommendations place the rule of law firmly at the centre of the accession process. To create a more stable and prosperous Europe, momentum needs to be maintained both for merit-based enlargement process on the EU side and for reforms on the ground in the enlargement countries.”<sup>5</sup>*

Judiciary reform aiming to provide an independent, impartial and efficient judiciary is considered to be the main component of the rule of law. In fact, as will be discussed in this paper, in the context of promoting rule of law, the concepts of “rule of law” and “judiciary reform” have been interchangeably used as to have the same meaning.

The ongoing reforms of the Western Balkan countries in the area of rule of law and judiciary reform have been primarily driven by EU assistance. For a decade now, the EU through the assistance provided by the Community Assistance for Reconstruction, Development and Stability programme-CARDS and as of 2007 through the Instrument for Pre-Accession Assistance (IPA) supports the rule of law and judiciary reform. In particular, as mentioned by the Commission, the current IPA regulation has proved to be efficient and effective and the proposal for the new financial instrument will draw from this experience.<sup>6</sup> As a result of EU assistance and as noted through the Country Progress Reports, there is a general perception that (with noted exceptions) the legal and institutional framework in the judiciary is mainly in place. Therefore, EU assistance should now look into achieving better impact results by enhancing efficient and effective implementation of the already reformed legal and institutional framework.

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<sup>2</sup> It should be noted that the requirements for the respect of human rights, rule of law, democracy and the guarantees of rights of different ethnic, national and minority groups extend the minimum of standards required by international law. See Hillgruber, Christian. 1998. The admission of new states to the international community. *European Journal of International Law* 9(3), 500.

<sup>3</sup> European Commission. 2011. *Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2011-2012*. Brussels: European Commission, 4 and 23. (accessed: 14 March 2014).

<sup>4</sup> European Commission. 2012a. *Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2012-2013*. Brussels: European Commission, 4 and 23. (accessed: 14 March 2014).

<sup>5</sup> European Commission. 2012b. *Commission outlines next steps for EU enlargement*, 10 October. (accessed: 14 March 2014).

<sup>6</sup> European Commission, *Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2011-2012*, 20-21.

## 1. Rule Of Law and Judicial Reform

International organizations that are promoting rule of law reform primarily seem to focus on judicial reform as the primary component of rule of law reform. These seem to be the case not only with the European Union but also with other international organizations including the World Bank and the United Nations.

In the European Union, the principle of rule of law is considered to be one of the main values of the EU. This is also strongly entrenched in the founding documents of the organization.<sup>7</sup>

Moreover, the external action of the EU should be focused in further strengthening the rule of law. This is regulated with the Treaty of Lisbon. In more specific terms, the Union's action in the international scene is guided according to Article 21 (Under Title V, Chapter 1 on the Union's External Action) by the principles inspiring its creation and which the union seeks to advance in the world including *inter alia* the rule of law. Furthermore, under Article 21, 2 (b) the Union shall work in order to "consolidates and support democracy, the rule of law, human rights and the principles of international law." On a global scale the EU has supported the justice sector and justice sector reform as one of the main avenues to promote democratic governance, the rule of law, citizen security, human rights and consequently socio-economic development.<sup>8</sup>

Similarly, other international organizations including the World Bank (WB) and the United Nations (UN) also support the rule of law and at times stress the importance it has as a prerequisite for supporting development.

According to the World Bank, without rule of law, economic growth or poverty reduction cannot be sustainable or equitable. Empirical studies show that there is a strong correlation between rule of law and development indicators such as gross national income and infant mortality.<sup>9</sup> Accordingly, in order for the law to promote economic growth and poverty reduction, first and foremost there should be an independent, impartial and effective judiciary.<sup>10</sup> Here, the judiciary is considered to be of central importance to the rule of law. In fact, according to the publication of the World Bank on Justice Initiatives, the justice sector assistance and assistance portfolio of the World Bank consists of almost 2500 justice reform activities throughout developing and transition countries

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<sup>7</sup> Most recently this has been noted in the Treaty of Lisbon both in its preamble as well as in the articles of the Treaty. In this regard, the preamble of the Treaty of Lisbon enumerates the rule of law as one of the universal values and confirms the attachment of the EU towards the principle. Furthermore, Article 2 of the Lisbon Treaty considers the rule of law as one of the values upon which the Union is founded together with the values of respect for human dignity, freedom, democracy, equality etc., as common values to Member States. See [Treaty of Lisbon](#), preamble, Article 2. (accessed: 14 March 2014).

<sup>8</sup> European Commission. 2012c. *Support to Justice and the Rule of Law, Review of past experience and guidance for future EU development cooperation programmes, Tools and Methods Series Reference Document, No 10*. Brussels-Luxemburg: European Commission, 4.

<sup>9</sup> Dakolias, Maria / Freestone, David and Peter Kyle. (eds.). 2002. *Legal and judicial reform: observations, experiences, and approach of the Legal Vice Presidency*. Washington DC: World Bank, 1-27.

<sup>10</sup> Dakolias, *Legal and judicial reform*, 1-27.

showing clearly the link between rule of law and development.<sup>11</sup> A number of World Bank supported projects related to justice were implemented in Western Balkan Countries as well.<sup>12</sup>

In the UN system, the Secretary General has stated that the ‘rule of law at the international level is the very foundation of the Charter of the United Nations’ and much of the efforts are directed to UN activities related to technical assistance and capacity building on the national level.<sup>13</sup>

Although a crucial concept for a number of international organizations, the rule of law is difficult to define as there is no unified adopted definition on the concept. According to the UN,

*“the rule of law is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>14</sup>*

On the other hand according to the World Bank,

*“while defined in various ways, the rule of law prevails where (i) the government itself is bound by the law, (ii) every person in society is treated equally under the law, (iii) the human dignity of each individual is recognized and protected by law, and (iv) justice is accessible to all.”<sup>15</sup>*

It is noted that the EU does not have a definition and a specific policy for support to the justice sector and its reform, though the justice sector is considered to be primarily the judiciary (court system) and at the same time it is acknowledged that it is much broader.<sup>16</sup> While the support to the justice sector has provided significant contribution to progress in many countries, at the same time the results were mixed as the “process is complicated, politicized, context-specific, and not fully suited to reaping the full benefits from technical assis-

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<sup>11</sup> World Bank. 2009. *Initiatives in justice reform 2009*. Washington DC: World Bank. (accessed: 14 March 2014).

<sup>12</sup> For example in Albania the project of Legal and Judicial Reform from 2000-2005; in Croatia the project on Institutional Capacity Building for Judicial Efficiency from 2002-2006 and a proposed project on the Judicial Reform Project on backlog of cases; in Kosovo on Judicial Statistics; in Macedonia on Legal and Judicial Implementation and Institutional Support Project from 2006 until 2011, and in Serbia on Strengthening the Court Administration System from 2002-2006. See World Bank, *Initiatives in justice reform*, 52-63.

<sup>13</sup> Dunoff, Jeffrey L. 2012. Is sovereign equality obsolete? Understanding twenty-first century international organizations. *Netherlands Yearbook of International Law* 43, 121.

<sup>14</sup> UN Security Council. 2004. *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General, S/2004/616*, 4. (accessed: 14 March 2014). See also: United Nations. 2011. *The United Nations Rule of Law Indicators: Implementation Guide and Project Tools*. New York: United Nations Publication. (accessed: 14 March 2014).

<sup>15</sup> Dakolias, *Legal and judicial reform*, 1.

<sup>16</sup> European Commission, *Support to Justice and the Rule of Law*, 8-18.

tance provided by outside parties".<sup>17</sup> The difficulty with this task in general and in specific in the Western Balkans is that there is no generally accepted definition on the rule of law and there is no blue print or a model what the assistance should achieve in individual countries.

In addition, the meaning of the concept of rule of law has also been the focus of academics and practitioners. In this regard, there seem to be a two layer type of definitions applicable to scholars and to rule of law development practitioners.

According to legal scholars and philosophers the definition on rule of law should emphasize the end result by considering that the rule of law should serve the society (upholding law and order, predictable and efficient judgments).<sup>18</sup> And for the rule of law development practitioners, the highlight is at the institutional attributes believed necessary (comprehensive laws, well-functioning courts, trained law enforcement agencies) for the existence of rule of law in a society.<sup>19</sup> The latter seem to be the case in practice also when it comes to the assistance provided by the EU and other donors as well. The focus is more in the required framework as a tangible result from the assistance with the idea that it will also serve the society.

This is so for a logical reason as countries differ in many ways and the assistance is conditioned by many constraints. According to one perspective, rule of law practitioners know what the rule of law should look like in practice, but are less certain in knowing what its essence is.<sup>20</sup>

Rule of law promoters tend to see rule of law as an institutional checklist focusing primarily in the judiciary and this focus is widespread in rule of law field by even using interchangeably the terms rule of law and judicial reform.<sup>21</sup> For example, an efficient and effective judicial system is the corner stone upon which rule of law is built and the World Bank has seen fit to promote: capacity building for judges as the key component to an efficient legal system, case management; transparency of court proceedings, Judicial Councils, alternative dispute resolution; assistance to the Ministry of Justice and the Prosecutors Office.<sup>22</sup>

When it comes to the judiciary, according to the UN Rule book in there are 51 indicators measuring performance in the judiciary. They are categorized among others in the following sets: performance, integrity, transparency and accountability, treatment of members of vulnerable groups, capacity (material, human administrative and management capacity).<sup>23</sup> Performance is evaluated based on

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<sup>17</sup> European Commission, *Support to Justice and the Rule of Law*, 4.

<sup>18</sup> Kleinfeld, Rachel. 2005. *Competing Definitions of the Rule of Law: Implications for Practitioners*. Washington: Carnegie Endowment for International Peace, 3.

<sup>19</sup> Kleinfeld, *Competing Definitions*, 3.

<sup>20</sup> Carothers, Thomas. 2003. *Promoting the Rule of Law Abroad, The Problem of Knowledge*. Washington: Carnegie Endowment for International Peace, 8.

<sup>21</sup> Carothers, *Promoting the Rule of Law*, 8.

<sup>22</sup> Dakolias, *Legal and judicial reform*, 4-8.

<sup>23</sup> United Nations, *The United Nations Rule of Law*, 7-8 and 49-59.

the outcome having in mind whether the institutions provide efficient and effective services which are accessible and responsive to the needs of the people.<sup>24</sup> With regard to judiciary reform in the Western Balkan countries, the EU through its Progress Reports focuses on judicial independence, professionalism, efficiency, impartiality, material resources (infrastructure) etc.

## 2. Western Balkans, Rule of Law and Judicial Reform

According to the latest approach the negotiations on chapters 23 and 24 in the areas of judiciary and fundamental rights and on justice, freedom and security, it is clarified by the Commission and verified with the negotiating framework with Montenegro that these two chapters will be the first ones to be opened and the last ones to be closed in the negotiations.

The Commission on the conditions for membership regarding Chapter 23 on Judiciary and Fundamental rights provides the following explanation:

*“EU policies in the area of judiciary and fundamental rights aim to maintain and further develop the Union as an area of freedom, security and justice. The establishment of an independent and efficient judiciary is of paramount importance. Impartiality, integrity and a high standard of adjudication by the courts are essential for safeguarding the rule of law. This requires a firm commitment to eliminating external influences over the judiciary and to devoting adequate financial resources and training. Legal guarantees for fair trial procedures must be in place. Equally, Member States must fight corruption effectively, as it represents a threat to the stability of democratic institutions and the rule of law. A solid legal framework and reliable institutions are required to underpin a coherent policy of prevention and deterrence of corruption. Member States must ensure respect for fundamental rights and EU citizens’ rights, as guaranteed by the *acquis* and by the Fundamental Rights Charter.”<sup>25</sup>*

In order to achieve these standards the EU has provided significant assistance. For example, in the case of Macedonia, justice and home affairs and fundamental rights is one of the six sector priorities selected by the Commission for programming financial assistance for the period 2011-2013.<sup>26</sup> From 2000-2006 technical assistance and support was provided through the CARDS programme assistance and as of 2007 it is provided under the auspices of the Instrument for Pre-Accession Assistance (IPA). Until 2008 the European Agency for Reconstruction was responsible for the management of assistance. The IPA now represents the essential instrument for providing financial assistance to the Western Balkan countries and a significant number of projects provide assistance to the judiciary.

The major difficulty is that there is no comprehensive approach towards judiciary reforms and at times the political context within particular countries of the Western Balkan countries is very dynamic. The fact that there should be

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<sup>24</sup> United Nations, *The United Nations Rule of Law*, 7-8 and 49-59.

<sup>25</sup> European Commission. *Chapters of the Acquis*. (accessed: 14 March 2014).

<sup>26</sup> European Commission. 2010. *Annex: Instrument for Pre-Accession Assistance (IPA). Multi-annual Indicative Planning Document (MIPD) 2011-2013 the former Yugoslav Republic of Macedonia*. Brussels: European Commission, 3. (accessed: 14 March 2014).

recognition of the specific country based contexts in promoting rule of law and consequently judicial reform is at the same time a contradiction in itself when it comes to EU assistance to the Western Balkan countries. This is so due to the reason that unlike the EU assistance to countries that will never join the EU, in the case of the Western Balkan countries the effort is to establish an EU model of rule of law and judiciary compatible with EU Member States. In the Western Balkans States the goal is to achieve similar or same standards of rule of law for the countries preparing to join the EU and not adjust to their specifics.

As stated above, the evaluation of the performance of the judiciary in the individual WB countries is evaluated under Chapter 23 titled “Judiciary and fundamental rights” of EU Progress Reports.<sup>27</sup> As a result, progress has been made notably in the legal framework.

In the case of Albania, the last Progress Report notes that for the opening of the accession negotiations the country will need to focus on top 5 priorities including the judiciary as the second priority. It states that Albania will need to “take further action to reinforce the independence, efficiency and accountability of judicial institutions.”<sup>28</sup>

Also in the case of Bosnia and Herzegovina judiciary plays an important role in EU accession. Namely, while there is limited progress in the reform of the judiciary, the non-implementation of a judgment by the European Court of Human Rights (in the Sejdić-Finci case) is noted as (one of) the primary reasons why the country is at a standstill with regard to EU accession.<sup>29</sup>

In the case of Kosovo, the last Progress Report notes that it has met the “short term priorities on the rule of law” and that the Commission in its feasibility study has specified rule of law and the judiciary as the first and the second priority of Kosovo with regard to its obligations under the Stabilisation and Association Agreement.<sup>30</sup> According to the Report, the judicial system has undergone through important reforms by introducing a new legal framework that is “expected to contribute to the independence, effectiveness, accountability and impartiality of the judicial system.”<sup>31</sup>

With regard to Macedonia, it is noted that the bulk of the judiciary reform has been completed between 2004-2010 period and further progress has been noted in improving the efficiency of the judiciary.<sup>32</sup> The Progress Report notes that

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<sup>27</sup> Each year the EU Commission publishes the so-called “Progress Reports” providing for assessments on each (potential) candidate for EU accession.

<sup>28</sup> European Commission. 2013a. *Albania 2013 Progress Report*. Brussels: European Commission, 1. (accessed: 14 March 2014).

<sup>29</sup> In fact, without any progress in the country the Commission has decided to postpone discussions on IPA II and the country is facing a real risk to lose significant funds from the EU making its accession process significantly more difficult, see European Commission. 2013b. *Bosnia and Herzegovina 2013 Progress Report*. Brussels: European Commission, 1-2. (accessed: 14 March 2014).

<sup>30</sup> European Commission. 2013c. *Kosovo 2013 Progress Report*. Brussels: European Commission, 1-2 and 12. (accessed: 14 March 2014).

<sup>31</sup> European Commission, *Kosovo 2013 Progress Report*, 2.

<sup>32</sup> European Commission. 2013f. *The former Yugoslav Republic of Macedonia 2013 Progress Report*. Brussels: European Commission, 1, 10-11 and 39-41. (accessed: 14 March 2014).

during 2004-2010 period an impressive set of judiciary reforms were introduced including:

*“significant changes to the Constitution, the Law on Courts and the Judicial Council, the establishment of the Academy for Judges and Prosecutors, the introduction of stricter professional requirements, the establishment of an Administrative Court and High Administrative Court, the shift towards enforcement of court judgments by professional bailiffs, the elimination of court backlogs, the introduction of legal aid and mediation, the establishment of an automated case management system and e-justice, as well as the complete overhaul of the criminal procedure legislation and reform of the police.”<sup>33</sup>*

However, in the case of Macedonia there are still concerns regarding the independence of the judiciary and the general quality of justice.<sup>34</sup>

With regard to the judiciary in Montenegro<sup>35</sup>, the latest Progress Report notes the adoption of constitutional amendments to strengthen the independence of the judiciary by reducing political influence in the appointment processes.<sup>36</sup> It also notes that Montenegro should focus its reforms in efforts to strengthen the independence of the judiciary as well as accountability and professionalism.<sup>37</sup> The reform process in the judiciary is primarily focused on the action plan on the judiciary which is based on the EU accession negotiations under the framework of Chapter 23 on Judiciary and fundamental rights.

Serbia on the other hand will have to sustain the momentum on judicial reform although major legislation improvements were already made.<sup>38</sup> The immediate plans on the judiciary are now focused on the recently adopted Strategy on Judicial Reform for the period 2013-2018 based on the requirements on the EU accession process. In general terms, it is considered that the implemented reforms are on the right track and their implementation will prove whether Serbia is prepared and willing to move forward in its EU accession process.<sup>39</sup>

Much of these reforms in the judiciary in the Western Balkans can be attributed to EU assistance through CARDS and then IPA programs of the European Union. The assistance in these countries among others addressed reforms that introduced the establishment of Judicial and Prosecutorial Councils, Academies for Judges and Prosecutors, vetting processes, infrastructure and equip-

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<sup>33</sup> European Commission, *The former Yugoslav Republic of Macedonia 2013 Progress Report*, 10.

<sup>34</sup> European Commission, *The former Yugoslav Republic of Macedonia 2013 Progress Report*, 10-11 and 39-41.

<sup>35</sup> Montenegro already opened accession negotiations with the EU in June 2012 and so far is the most advanced country in the EU accession process compared to the remaining Western Balkans countries.

<sup>36</sup> European Commission. 2013d. *Montenegro 2013 Progress Report*. Brussels: European Commission, 1 and 5. (accessed: 14 March 2014).

<sup>37</sup> European Commission, *Montenegro 2013 Progress Report*, 1 and 35-38.

<sup>38</sup> European Commission. 2013e. *Serbia 2013 Progress Report*. Brussels: European Commission, 3 and 9. (accessed: 14 March 2014).

<sup>39</sup> European Commission, *Serbia 2013 Progress Report*, 48.

ment modernization, case management systems, establishment of special Administrative Courts.<sup>40</sup>

### Conclusion

In the EU accession process of the remaining Western Balkan countries, namely Albania, Bosnia, Kosovo, Macedonia, Montenegro and Serbia strengthening the rule of law is considered to be of vital importance. Although the concept of the rule of law is much broader, judiciary reform represents the most significant component for reform.

Judiciary reform is so crucial to the rule of law reform that it is at times interchangeably used as having the same meaning. This is not a result of the lack of knowledge and ability to make the distinction between the two, but due to the practical importance that the judiciary plays in the rule of law.

Due to the economic constrains of these countries and on the other hand due to the size of the assistance by the EU, the process of reforming of the judiciary has been very much dependent and driven from the assistance received.

Therefore, it is not only up to the Western Balkan countries to continue in their efforts to strengthen the rule of law through judiciary reforms, but also to the European Union to continue and further strengthen the assistance in this sector as both sides play a vital role in this process.

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<sup>40</sup> For an evaluation on the assistance provided by the European Union in the field of rule of law through IPA see, Berenschot and Imagos. (eds.) 2012. *Thematic Evaluation of Rule of Law, Judicial Reform and Fight against Corruption and Organised Crime in the Western Balkans*. The European Union's IPA Program For Western Balkans. (accessed: 14 March 2014).

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