

Bosnia and Herzegovina on the European Path: The Dynamics of State Functionality and the Rule of Law Reform

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Abstract

Bosnia and Herzegovina has travelled along a turbulent path, overcoming the burdens of the past such as the war in the early 1990s and the lack of any historical democratic experience. But there are also burdens in the present that include internal political disagreements over crucial issues such as the nature of the state, as well as the geopolitical complexities of the Western Balkans Region, to arrive to the point of obtaining the EU membership candidacy in the late 2022. While the local political elites often played the part of veto players, impeding state functionality in this process, most recently in a period prior to obtaining the candidacy, the international community has played the opposite role, actively engaging in the peacebuilding and state-building processes, and positively influencing the country's progress on the European path. The paper explores this dynamic and looks at recent reforms in the rule of law area, in particularly the judiciary, in an attempt to provide a comprehensive picture of the forces at work that shape the country's progress on the European path, and their respective rationales.

Keywords

Bosnia and Herzegovina, European Union, International Community, Judicial Reforms

Introduction

To claim that Bosnia and Herzegovina (“BiH”) is on the European path is undisputed. Still, its progress on this path, as well as its own nature as a state, is the subject of dispute, filled with numerous challenges and obstacles, and based on the complex external/internal dynamics that is sometimes hard to understand and even harder to navigate.

Out of many complexities that come to define BiH since its independence in 1992, owing to wider and regional geopolitical, internal political and constitutional arrangements, peace- and state-building endeavours, as well as multicultural societal composition that translates into delicate power-sharing system permeated by dissensus, the European path understood as European Union (“EU”) accession – stands out “as the only cohesive objective and strategic issue for which there is a broad political and social arrangement in the country” (Turčalo, Sadiković and Fejzić 2022: 246). Even if the process started formally in 2008 by signing of the Stabilisation and Association Agreement (“SAA”), BiH was on this trajectory ever since the war between 1992-95 ended by signing of the General Framework Agreement for Peace, or as is commonly known, Dayton Peace Agreement (“DAP” or “Dayton”) in 1995. Peacebuilding and state-building endeavours were carried out in the DAP framework, most notably through Annex IV that is the Constitution of BiH. Initially designed as a temporary and transitional solution with prospects of constitutional transformation that would see BiH develop into modern constitutional state and the future member of the EU, and transit from so-called ‘Washington’ to ‘Brussels’ phase (Hitchner 2006), the constitutional system would in fact make limited progress from the ceasefire logic under which it was developed, showcasing the challenges that arise from bringing ‘conflicting groups together through federalism’, involving continuous and strenuous attempts from the external actors for the constitutional system to be functional and achieve discernible results on the way forward (Woelk 2022: 252).

The actions of the external and internal actors are the nexus of the external/internal dynamics that shape both the country, and its European path. The actions were supposed to be coherent and convergent but proved to be incoherent and divergent, leading to distortion and asymmetry of the relation between forces in play. Still, this dissonance is not simply an outcome of such dynamics but rather seems to be its inherent trait. For instance, it can be traced to the text of the Constitution. While Article II introduced elements of the Western constitutional values (practically acting as Bill of Rights) with declaration of 13 international and European human rights catalogues having priority over all other law, Article IV retained constitutional principles of collective representation from the former Yugoslavia and asserted that constituent peoples

(Bosniacs, Croats and Serbs) are the only subjects endowed with rights of representation in the three-member Presidency and the House of Peoples of the Parliamentary Assembly BiH (Woelk 2022: 258). This contradiction was identified as discriminatory and in violation of the European Convention of Human Rights (“ECHR”), by the European Court of Human Rights (“ECtHR”) in the ruling of *Sejdić and Finci vs. Bosnia and Herzegovina* case in 2009 (see Marko 2010). The contradiction remains unresolved to this day, presenting a clear obstacle on the BiH’s European path. As Jens Woelk (2022: 259) notes, the elements belonging to two different constitutional traditions and presenting themselves as non-discrimination, constitutional inclusion, and democratic state that prioritizes individual over collective rights – on one side, and ethnic federalism, power-sharing arrangement, and primacy of collective over individual rights – on the other “do not harmonize, but rather create tension as their objectives contradict each other”.

The logical contradiction is not merely a legal antinomy, but an allegory of divergence that marks the very nature of the state – hence the contestation – and that significantly adds to the dissonant character of external/internal dynamics. It revolves around external and internal actors, where the former are actively engaging in processes that aid or push BiH on its turbulent European path, and the latter are purportedly doing the opposite. The picture painted by this description is a simplistic one and portrays local political power elites as gatekeepers and veto players whose basic political consensus seems to be retaining of the *status quo*. Its origins can be traced to the initial ceasefire logic where peace and stability appeared as primal imperatives, resulting in the freezing of facts on the ground and formalizing the existing power relations into the new constitutional structures. The initial stabilisation process was an opportune moment for establishing a pervasive patronage and entrenched system made possible through the “combination of rigid ethno-national power-sharing structures and authoritarian patterns” (Bieber 2020: 67). On the other hand, international actors are portrayed as playing an opposite role and actively engaging in driving the country on the European path. Even if simplistic, the picture is not that much divorced from truth. The truth is that both local and international actors are aggregates that include variety of actors with different agendas, adding the layer of complexity to the external/internal dynamics.

For instance, local institutional actor of the Constitutional Court of BiH (“CC BiH”) played an instrumental role in the process of constitutional evolution by asserting the major constitutional principles of: multiculturalism, constituency of constitutional peoples across the whole territory, and principle of non-discrimination in its seminal Partial Decision III on the Constituency of Peoples from 2000 (see Begić and Delić 2013). Actions by the CC BiH cannot be isolated from the events of the first decade of

post-Dayton stabilisation that saw numerous reforms take place, most notably in the rule of law area that will be discussed in the third part of the paper. The reform agenda was driven by the international community, including efforts for innovated constitutional structure better known as the “April package”, but also including “Butmir” and “Prud” agreements between 2006 and 2009. While some reforms, i.e., security sector (see Juncos 2018), were successful, attempts for broader and structural changes were met with the resistance of the local actors (see Balić and Izmirlija 2013: 125-129). Also, some international actors such as the Russia often “broke ranks” from its Peace Implementation Council (“PIC”) Steering Board partners by dissenting on the texts of press releases, abstaining from meetings, and even suspending participation in the financing of the United Nation’s Office of the High Representative (“OHR”) in 2021 and 2022 respectively. These actions from Russia cannot be isolated from its own agenda to “empower and invigorate a Eurasian political perspective that situates Russia as a valuable political and cultural alternative to the West”, where BiH’s neighbour Serbia and BiH’s Entity Republika Srpska (“RS”) serve as a conveyor belt for that influence (Turčalo, Sadiković and Fejzić 2022: 255).

The EU, in the last decade, showed limited interest into playing an engaged role of aiding BiH on its European path, opting for so called ‘sit and wait’ policy, until the changes of the geopolitical landscape in Eastern Europe resulted in shift of their own strategic interest and newly found enlargement optimism. As Bieber and Tzifakis (2019: 20) note, the approach of the EU in the Western Balkans was focused on the norms driven policy (external rule of law promotion, prioritization of economic and social reforms) that not only yielded limited results due to gatekeeping of the local elites, but also facilitated rise of the external actors (Russia, China, Turkey, and the Gulf States) that sought to exploit the situation and exert their own influence in the region, influence perceived as negative and in requirement of containment. The dynamics between EU enlargement and the external actors’ containment adds another layer to already complex of external/internal dynamics shaping BiH’s European path and will be discussed more in the next part of the paper.

Despite the ambiguities surrounding the concept of external/internal dynamics, it is heuristically valuable and analytically viable for understanding of BiH’s progress on the European path since it helps in pinpointing the key forces that shape it. In the following parts we will present the most recent developments in which these forces have manifested, starting with the strategic shifts in the EU’s enlargement policy, and functionality crisis in BiH that ended with obtaining of the candidacy status. From there we will move to present the progress in the rule of law arena, namely in the judiciary, based on various reports in which progress in the area is evaluated. While discussion of the key points is limited, some of them are additionally illustrated with references

on quantitative indicators that display some general trends in the 2011-2021 decade, and some specific data related to judicial effectiveness in BiH. Finally, we reflect on the BiH's European path as a necessity. Both for the country's own sake and for the sake of the regional stability that represents the EU's strategic interest.

Dynamic of State Functionality and EU Accession: The Crisis and the Opportunity

The SAA that BiH signed in 2008 entered into force in 2015, and the following year saw BiH submitting its application for EU membership followed by the Opinion of the European Council ("EC 2019"), endorsed by the Council of the EU ("EU Council") in 2019. In late 2022 the EU Council granted candidacy status to BiH, the event that saw BiH European path moving into the next phase. The Opinion holds 14 key priorities that BiH will need to fulfil to proceed further in the EU accession negotiation phase. Out of the Western Balkan ("WB") countries, only BiH and Kosovo did not start negotiations, and BiH was the latest in the region to be granted the candidacy status, following the same status being granted to Ukraine and Moldova in mid-2022.

There is a strong belief that all three countries were granted the candidacy status due to the geopolitical reasons marked by the Russia's aggression on Ukraine in February 2022. At the same time, Ukraine applied for membership and was granted candidacy status in the course of four months. Moldova, like BiH, applied in 2016 and was granted candidacy in 2022. The dynamic was pushed by geopolitics, not merit, it is understood. But the geopolitics played a role in shifting the EU enlargement even before the events of February 2022, namely in the Western Balkans Region ("WBR"). As noted earlier, this was a shift in the rationale of EU enlargement that recognized the influence of external actors and sought to effectively contain it. The rationale shifted from consolidation of stability, and full implementation of liberal political and economic reforms toward containment of negative influences of external actors (Bieber and Tzifakis 2019: 5).

The new rationale is expressed in terms such as 'geostrategic investment' and 'geostrategic priority', and is noted in the strategic communication by the bodies of the EU. Following the European Commission ("EC") communications in 2020, the European Economic and Social Committee ("EESC") in its Opinion from 2021 (EESC 2021), stated that the integration of the WBR "represents a geostrategic investment in the peace, stability, security and economic growth of the entire continent. The Western Balkans are an integral part of Europe and a geostrategic priority for the EU". The EC Communication on EU Enlargement Policy from 2022 (EC 2022: 33) repeated that the

“enlargement policy is more than ever a geostrategic investment in long term peace, stability, and security of the whole of our continent and is consequently featuring high on the EU’s political agenda”, that the EU is “fully committed to the EU integration of the Western Balkans”, and that this is “a shared strategic objective that unites the whole region and the EU”. Josep Borell, High Representative of the European Union for Foreign Affairs and Security Policy (“EEAS”) asserted that accession negotiations “can only happen if there is more progress on reforms and on their implementation” but that the EU needs to increase its own “efforts to bring the region closer to the European Union”.

Clearly, the external part of the dynamics of the BiH’s European path was revitalized after the relatively longer period of hibernation. But when one looks at what was happening in the internal part of the dynamics, one can hardly escape the simplified picture of divergence between the local and international actors in BiH. The international community was heavily involved in ending of the war in BiH and remained involved in the subsequent peacebuilding and state-building processes. PIC is the formal representation of the international community comprising of 55 states and its most important body is the Steering Committee whose members are Canada, France, Germany, Italy, Japan, Russia, United Kingdom, United States, the Presidency of the European Union, the EC, and the Organisation of the Islamic Conference (“OIC”), which is represented by Turkey. Another representative of the international community is the OHR, envisaged as a moderator of the peace implementation process but, since 1997, endowed with extraordinary or ‘Bonn powers’ (see Banning 2014) to make direct interventions into the constitutional system by extensive legislative, judicative and executive decisions aimed to secure stability and functionality of the said system. These powers were used extensively in the first decade after the war, strengthening the state functionality and driving reform agendas, but the intensity of their use gradually ceased – since they aggravated local political elites and created impression that the style of government resembled that of colonial rulers (see Woelk 2022: 261). For the period between 2015 and 2020 no decision was made. Only in the autumn of 2021 OHR issued the Decision on Enacting the Law on Amendment to the Criminal Code of BiH, criminalizing genocide denial and glorification of convicted war criminals. The decision was an impetus for crisis of state functionality and the year was “one of the most turbulent years since the end of war in 1995, with severe political crises challenging the very existence of the state”, even if it “was widely seen as an opportunity for comprehensive reform” (Woelk 2022: 267-268).

What happened in the aftermath of this decision was detrimental to state functionality. The RS blocked central-level institutions from August 2021 until spring 2022 “leading to an almost complete standstill in reforms during that period” (EC 2022: 61).

During this period, RS pursued to “unilaterally take over state competences (including on taxation, the judiciary, defence and security) and dismantle state institutions, endangering the country’s EU accession perspective as set out in the Commission Opinion” (EC 2022: 61). The process also involved taking legislative action to withdraw RS from the key state bodies and establish parallel bodies on the entity levels, and unilaterally pass legislation that regulates immovable property used for functioning of public authority. Also, the Entity’s Government was instructed by the RS National Assembly to draft the new constitution that would withdraw powers from the central level in the judicial sphere. Practically, this meant that the High Judicial and Prosecutorial Council of BiH (“HJPC”), the institutional apex of post-war judicial reforms, would be dismantled and the new one on the Entity level would be established instead, leading to disintegration of the judicial apparatus as a whole and significantly hampering the progress of the country on the European path. These actions, accompanied by harsh and secessionist rhetoric by Milorad Dodik, then member of the three-member Presidency and now a President of the RS Entity, “were widely interpreted as preparations for RS secession” (Woelk 2022: 269). Said laws and declarations were eventually annulled by the CC BiH in 2022, and the OHR continued to issue decisions – 14 in total between April 2022 and April 2023, out of which three curtailed the attempts of the RS Government to legally regulate matters of the immovable property used for functioning of public authority. Both the OHR and the CC BiH affirmed that the regulation of this property should be done on the central, and not on the Entity level.

The other BiH Entity – Federation of BiH (“FBiH”) – experienced major functionality problems since the Government spent the whole 2018-2022 period in the technical term, due to inability of political elites in power, namely two major political parties whose electorate include two major constituent peoples in the Entity: Croats (HDZ) and Bosniacs (SDA), to reach the governmental coalition agreement. This was caused by the dissensus on the state electoral law that would introduce more adequate mechanisms of political representation of constituent peoples, namely Croats, in the form of guarantee of so called ‘legitimate representation’ (see Pepić and Kasapović 2022). Dissensus over electoral reform reflects the wider dissensus on three crucial issues in BiH: a) the nature of the state, b) the nature of political representation and c) assuming stance over the Ukraine-Russian conflict. While the first issue is one of the most contested that stifles BiH’s progress on the European path – manifested in unilateral and obstructionists action taken by the RS Entity, as mentioned above, the second issue was prominent for the dysfunctionality of the FBiH Entity. Dysfunctionality was again addressed by through international intervention, manifesting in the series of decisions of the OHR between autumn 2022 and spring 2023. Six of those decisions constituted so called ‘transparency package’ (allocating funds that enabled the general elections

of October 2022 to be conducted, amending the law on financing of state institutions, amending the electoral law, and amending the Constitution of the FBiH Entity) which made organization and conduct of elections possible. Once the elections were completed the additional obstacle appeared that put the process of implementation of electoral results and forming of the new FBiH Government in the standstill. Hence, the OHR intervened once again in spring 2023 with the so called 'functionality package', a set of temporary solutions and mechanisms designed to unblock the appointment of the FBiH Government. Nevertheless, the requirement for electoral reform remains one of the top priorities for the new Government on the central level and is expected to finalise by the end of 2023.

Final interventions by the OHR were made in late April 2023. The decisions were issued to amend the criminal codes on the central and Entity levels, introducing new criminal offences of bribery in elections and duty financed by public funds, some of which are punishable by imprisonment for a term between one and 10 years, aimed to curtail and prevent widespread corruption, as well as to enhance the integrity of the electoral process and the functioning of the public administration. The recent intensification of interventions, including those in the first phase of peacebuilding and state-building, demonstrate that post-Dayton achievements, both in terms of state functionality and progress on the European path, are proportional to the intervention of the international community, mostly via the decisions by the OHR (Turčalo, Sadiković and Fejzić 2022: 246).

Even if this type of intervention, direct and coercive, did manage to pass the obstructions laid by the political elites in power, an additional, this time indirect and diplomatic, intervention was needed so that the cycle of dysfunctionality and effective state paralysis could be broken. This happened couple of months after the work of the BiH Parliamentary Assembly was unblocked and representatives from the RS Entity returned to their posts. On June 12, 2023, leaders of the of political parties represented in the Parliament and the Presidency of BiH held a meeting in Brussels, hosted by the President of the EU Council Charles Michel and the High Representative of EEAS Josep Borell, where they adopted a Political Agreement on principles for ensuring functional Bosnia and Herzegovina that advances on the European path (EU Council 2022). What followed was the period of relative functionality where, aided by the mentioned OHR decisions, the general elections were held on October 2022, the BiH Government was formed in the record time in late January 2023 (Balkan Insight 2023), marking the sign of new times to come.

Signs positive for the BiH's European path were generated primarily externally by granting the candidacy status to BiH by the EU Council one month earlier. Internally generated signs cannot be reduced only to internal actors' newly found optimism for

cooperation but also in BiH's alignment with the Common Foreign and Security Policy ("CFSP") that was reportedly at 81% during the reporting 2022 period (EC 2022: 36). With the FBiH Entity Government forming in spring 2023, the overall institutional puzzle was (almost) complete and the functionality of state, in almost all of its administrative levels (except two Cantons in FBiH by the time of the writing), was formally secured. However, the main challenges of functionality are yet to appear, most notably in form of dealing with the eight urgent steps outlined by the EC Communication on EU Enlargement Policy from 2022 (EC 2022: 38-39), and 14 key priorities outlined in the EC Opinion on BiH's application for the EU membership from 2019 (EC 2019: 14-16), not to mention the contested issues relating to electoral law reform.

Eight urgent steps substantially correspond to eight of the 14 key priorities that BiH will have to deal with during the post-candidacy and pre-accession negotiation phase. Out of these eight, first five correspond to the rule of law priorities (6, 7 and 8). Improvement of the functionality of judiciary by adopting new legislation on the HJPC, with introduction of integrity amendments, and of the legislation on Courts of BiH in line with European standards pertains to priority number 6. Strengthening the prevention and fight against corruption by adopting the legislation on prevention of conflicts of interests and taking decisive steps to prevent and fight against corruption and organised crime by demonstrating progress towards establishing a track record of proactive investigations, confirmed indictments, prosecutions and final convictions against organised crime and corruption, including at high-level, pertains to priority number 7. Finally, ensuring effective coordination, at all levels, of border management and migration management capacity, as well as ensuring the functioning of the asylum system, pertains to priority number 8. In its BiH Report for 2022, the EC (EC BiH 2022) noted minimum to no progress in all of the 14 key priorities stating that BiH is overall in the early stage regarding its level of preparedness. Dysfunctionality of the state in the period between 2021 and 2022 does account for the lack of progress in the reporting period, but it is indicative that BiH made virtually no progress between 2019 and 2022 but was still granted with the candidacy status.

What was a major crisis not even two years ago turned into a tremendous opportunity for BiH's advancement on the European path. But why did this happen? Was it simply because the EU shifted the rationale behind its enlargement policy to address new geopolitical challenges and contain the negative influences of the external actors? Was this influence a factor in actions by the local political actors to obstruct and undermine the state functionality? While the first OHR decision in summer 2021 was an impetus for the secessionist politics exerted by RS that politics did not cease despite progress made and state functionality restored. The summer of 2021 saw High Representative ("HR") Valentin Inzko replaced by Christian Schmidt, former minister,

and parliamentary member in Germany. The appointment of new HR was contested by Russia and China at the UN's Security Council and is for that very reason highly contested by the RS representatives and officials in BiH (Sito-Sucic 2021). The contestation of the new HR is closely linked with contestation of the BiH's statehood by the RS political actors and, despite the progress on the European path, remains a significant source of challenges for future EU accession progress and state functionality. The intensification of external/internal dynamics in BiH could, in this case, be seen as result of BiH becoming a site of geopolitical conflict. In that sense, the EU's more engaged approach manifested in granting of the candidacy status could be seen not merely as a good will gesture but as geostrategic investment. It is important for that investment to come in a form of credible and realistic membership and utilize EU conditionality in a manner that maximizes its transformative potential for BiH, namely in the rule of law area. That it the real opportunity for BiH.

Dynamic of Rule of Law Reform: The Uncredited Progress

In this part, our attention turns to the rule of law reform in BiH, primarily to key priorities number 7 and 8 that were reassigned as urgent steps 1 to 4 in the latest EC Report on BiH and pertain primarily to reforms of the judiciary.

Key judicial reforms took place in the early 2000s, with international community playing an instrumental role in the process. The Court of BiH was formed in 2002, with jurisdiction on labour disputes of civil servants in BiH institutions, adjudication of war crimes, determination the responsibility of the BiH state for damage, etc. Prosecutor's Office of BiH ("PO BiH") was established in the same year. This implied a different organization of the judiciary, as well as the organizational, material, and procedural regulations that would be applied in the process of the judicial system reconstruction on all levels of government. The next year saw the formation of Independent Judicial Council, the central and Entity level HJPC bodies, along with the Entity level centres for judicial and prosecutorial training. The new, central level HJPC was formed in 2004, while the previous three bodies ceased to exist. The HJPC is an independent and autonomous state institution tasked with securing independent, impartial, and professional judiciary in BiH. It is based on the judicial council model introduced by the constitutional reform phase to new post-socialist countries of the former Eastern bloc during the 1990s tasked to depoliticize judiciaries and implement the constitutional principle of judicial independence (Coman 2014: 893). Law on HJPC was adopted in 2004 and amended on two occasions in 2005 and 2007 respectively. There were two attempts to change and amend the law in 2012 and 2014 but failed to materialize because of

the pressure from both the international community and judicial community in BiH, since they proposed changes that would reduce HJPC's autonomy in appointment of prosecutors (Sali-Terzić 2013: 20). The law is expected to be amended with provisions on integrity plans, but also new law is expected to be adopted in the line of EC Opinion 2019 key priority 7. The Opinion was accompanied by the Expert Report on Rule of Law issues in BiH from 2019, also known as the 'Priebe Report' (ERRL BiH 2019).

The report was prepared by a team of several experts, headed by Reinhard Priebe, a German lawyer and associate of the EU Commission. The report focuses on the rule of law, the judiciary, and related institutions. It links the constitutional structure of the state as a prerequisite for the rule of law, but also the lack of political will for reforms. The problem of lack of responsibility and transparency of judicial institutions was also emphasized (i.e., insufficiently explained decisions, procedures and decision-making closed to the public). It was pointed out that the laws are not a problem, especially since most of them are already harmonized with European standards, but a gap between the legal norms and factual reality, in terms of non-application and erroneous application, but also due to dogmatic and formalistic interpretation of regulations by officials of all branches and levels of government. Termination of the previous convocation of the HJPC was recommended, along with the change of the appointment process (changing ethnic to merit criteria). Evaluation should be carried out more on the grounds of qualitative criteria rather than quantitative. The system of statements by judges and prosecutors, without control, about assets has been criticized, and rigid external supervision was recommended. Improvements in criminal and civil proceedings are recommended, for the sake of their efficiency, as well as appropriate implementation and sufficient legal remedies against human rights violations, and it was specifically pointed out that non-implementation of judgments of the ECtHR is unacceptable for an aspiring EU candidate country.

What follows next in this paper is presentation of some key points from four distinct reports, two made by HJPC detailing their accomplishments for the reporting period for 2019 and 2020 respectively; one made by the BiH's Parliament from 2022 and the last one from the EC Report on BiH for 2022. It is our intention to, by outlining reported points, present a more comprehensive picture of the work done in the BiH's judicial sector, reflected on from two different perspectives belonging to three actors: one of which is internal and two that are external to judiciary. We will first present major points from HJPC annual reports, and then proceed to present the relevant ones from the second two.

The annual report of the HJPC from 2020 (HJPC 2020) for the 2020 period contains an overview of the implemented activities which resulted from the previously mentioned reports, and the content of which was largely formed by Peer review missions

(judges and prosecutors from EU countries that had visited BiH and made an overview of the situation in key areas, which all enabled the EC to assess the situation in BiH and to help the institutions of BiH in implementing further reforms). Although a number of priorities presented to the HJPC by the EC required changes to the Law on the HJPC, certain recommendations could be implemented by amending the Rules of Procedure of the HJPC (rights and obligations of HJPC members, the role of the HJPC Presidency, exemptions of members the HJPC, and improving the transparency of the work of the HJPC). A large number of recommendations also referred to: disciplinary procedures in the judiciary of BiH (adopted amendments to the Code of Judicial Ethics and the Code of Prosecutorial Ethics in order to harmonize them with the Guidelines for Suppressing Conflicts of Interest in the Judiciary as well as the Manual for the Application of this Code), evaluation procedures and criteria of judges and prosecutors (amended acts concerning qualification and written tests, interviews; introduction of the difference between the first appointment and promotion), personal financial reports of judges and prosecutors (created an electronic system for submitting and processing financial reports of judges and prosecutors, on the website the HJPC published the financial reports of judges and prosecutors who gave consent for publication), evaluation of the work of judges and prosecutors (provided support to courts and prosecutors to conduct performance evaluations for 2019), initial training for newly appointed judges and prosecutors (training sessions for consultative prosecutors were held, and in two first-instance courts it is tentative implemented mentoring program) and the fight against corruption, organized crime, including money laundering (amendment of the Rulebook on orientation standards for the work of prosecutors in BiH prosecutor's offices, in which for the first time the work on high-level corruption cases according to the definition of the HJPC was evaluated, a two-year specialist program was developed and implemented training for prosecutors, etc.).

The annual report from 2021 (HJPC 2021) highlighted the efficiency, quality, and transparency of court work as significant achievements during 2021. Strategic planning system was introduced in all courts in BiH, more efficient processing of cases of corruption and organized crime, improvement of enforcement procedures in BiH, application of SOKOP - Small system for more efficient processing of communal cases, improving the efficiency of bankruptcy proceedings, creating a draft Strategy for Alternative Dispute Resolution, improving the efficiency and quality of litigation proceedings, implementing the Strategy for Improving Gender Equality in the Judiciary of BiH, improving the position of vulnerable groups in contact before the court, improving quality verdicts in civil proceedings, initiating the reform of civil legislation, an analysis of independence, responsibility and quality in the judiciary was carried out, according to ENCJ standards (application of all European standards), construc-

tion and renewal of judicial institutions, greater transparency (new documents, such as Communication Strategy of the HJPC). Furthermore, efficiency, quality and transparency of the work of the prosecution offices was noted (prosecution of criminal offenses of corruption, prosecution of criminal offenses of organized crime, support to the prosecution offices in their work on cases of economic crime, organized crime and corruption, analysis of the situation and measures for solving old cases in the prosecution offices, activities of the Permanent Commission for the Efficiency and Quality of Prosecutor's Offices, improvement of cooperation between prosecutors' offices and law enforcement agencies, improvement of specialization of prosecutor's offices and expanded categories of participants, providing support to the Coordinating Body of Chief Prosecutors of PO BiH, Entity prosecutor's offices and the PO of Brčko District BiH, strategic planning in prosecutor's offices, support in prosecutors' offices in the implementation of archive digitization activities, transparency, public relations in prosecutor's offices and cooperation with the non-governmental sector). Additionally, reports were made on evaluation of the work of the judicial function holders, their training (coordination of the process of equalization with judicial practices, increased transparency of the judicial system), implementation of the Revised State Strategy for work on war crimes cases and monitoring of the work of courts and prosecutor's offices on war crimes cases.

Even if many of the reported achievements made during the 2020 and 2021 period, made in the aftermath of the 'Priebe Report' may be attributed as technical and pertaining to issues of judicial capacity, they are nonetheless significant for the overall functioning of the judiciary. As some quantitative indicators presented in the end of this part show, the achievements of incremental judicial reform made by the HJPC, and that mostly followed EC recommendations, have resulted in higher effectiveness as measured by the Judicial Effectiveness Index. However, some wider and more structural shortcomings identified by the 'Priebe Report' would be reiterated by the first report that resulted from the parliamentary oversight in the post-Dayton BiH's history, albeit much more detailed.

In June 2022, the long-awaited report on the state of the judiciary, saw the light of day. The report (HRPA BiH 2022) was prepared by the Investigative Commission established in May 2020, based on the conclusion of the House of Representatives of the Parliamentary Assembly of BiH from 2019. The Commission's work was supported by numerous international organizations such as the OSCE and the Council of Europe. The Commission detected that the problems that exist are the result of the actions of a corrupt minority in leadership positions in the judiciary.

The Commission emphasized that it is important to expand the conflict of interest mechanism because the current bans on employment of close relatives of judges and

prosecutors in the same courts and prosecutor's offices in which they perform their duties are not sufficient. They stressed that it is necessary to expand the ban in such a way that it includes the ban on political appointments of close relatives of judges and prosecutors. It is stated that the OSCE, in its own report, raised concerns about the "impunity syndrome", indicating that the key positions in the judiciary are very often allocated according to the reward system, rather than merit and professional qualifications. When it comes to the Office of the Disciplinary Counsel of the HJPC ("ODC"), the Commission found that the number of procedures initiated in relation to complaints is satisfactory and that it exceeds European and global averages. The Commission concluded that in 2019 and 2020, the majority of complaints referred to acts of negligence or inattention, i.e. delays in making decisions or other actions, while less than one third referred to particularly worrisome acts, such as behaviour that harms the reputation of the judiciary or prosecutorial functions, intentionally providing false or misleading information, failing to seek exemptions in the event of a conflict of interest, making decisions that clearly violate the law, and the like. However, the Commission did contend with the idea that the root of this problem is to be found in the management or staff of the ODC, but rather caused by the extremely unequal and unfavourable position of the ODC in relation to the judiciary as a whole, including both institutional and professional inequality.

Unlike the findings related to judges and prosecutors, including members of the HJPC, where corruption, manifested through the informal networks between political and the judicial actors, and conformity are the key to the problem, the inadequate activity of the ODC to prosecute disciplinary offences results from a combination of justified fear, lack of institutional and professional independence, inadequate resources, the unequal position of the ODC staff in relation to judicial functions holders, and to some extent the inadequate legal regulation of their professional status. The Commission accepted the point of view of certain judges who testified before it, that the chief disciplinary prosecutor should have stronger references and that the criteria for appointment to this position should be equal to the criteria for appointment to the highest positions in the judiciary in BiH. In the report, it was pointed out that the Case Management System ("CMS") system is also connected to the ODC, where it is indicated that certain chief prosecutors were subject to disciplinary action and dismissed from their positions due to the non-implementation of that system, and the lack of transparency in the use of CMS in determining disciplinary commissions, which are not a legal category. The final report presented in this part (EC BiH 2022) touched upon this issue but omitted to note the structural reason behind the problem highlighted in the HRPB BiH report.

The next problem that the Commission identified related the unlimited duration of the mandate in managerial positions in the judiciary, because it is stated that the presidents of courts and chief prosecutors can renew their mandate, but not how many times. Important findings referred to attacks on journalists, the number of which has increased in recent years, and to unauthorized filming, where it was proposed to change the relevant legal provisions, but also that they should not be applied without the simultaneous application of the practice of the ECtHR, i.e., detailed consideration of public interest, as well as the location where the video was taken, in each individual situation. Part of the report also referred to the public procurement system, where it was concluded that the problem is not only in the illegal behaviour of public authorities during the public procurement procedure, but also within the judiciary.

When compared to the 'Priebe Report', the HRPB BiH 2022 report appears to be more concrete both in terms of identifying roots of the problem and mechanisms of its maintenance, as well as solutions for dealing with them. Unlike the HJPC reports, the HRPB report is more critical yet affirms some accomplishments, namely those related to judicial accountability and disciplinary procedures. When compared to the latest EC Report on BiH (EC BiH 2022) in which it is noted that independence and impartiality has not improved since 2019, causing the public trust in judicial institutions to remain low, and that CMS is vulnerable to abuses which negatively impacts impartiality, the HRPB BiH report appears much more comprehensive and nuanced. EC BiH report, on the other hand, appears to be more straightforward. It notes that the level of external, namely political, pressure on judicial office holders has increased; that there is no progress on establishing a robust system to verify asset declarations of judges, prosecutors and HJPC members; that integrity plans, even if in place, yield limited results; and that disciplinary procedures continue to have little dissuasive effect. The most troubling finding pertains to the position of the chief prosecutors of the PO BiH and PO RS respectively. Both were demoted from their positions for disciplinary offences of manipulation of case assignment.

The presented reports are taking the 'Priebe's Report' as a reference point and are oddly affirmative and critical, depending on the authorship coming from inside or outside of the judicial system. Aside from the HJPC reports, others paint a bleak picture of judicial system in BiH and presents its accomplishments as very limited. Therefore, it should not come as a surprise that the BiH's progress on the European path is conditioned by the substantive judicial reform that will address the structural issues to be resolved by the HJPC, and the wider issues relating to corruption. Prior to conclusion of this part, we want to present some quantitative indicators that provide more comprehensive picture BiH's shortcomings in terms of general governance trends, but also

some that demonstrate limited progress in the work of judiciary, even if not accompanied by public recognition.

First of those are the World Bank's Worldwide Governance indicators (The World Bank 2023) for BiH for the 2011-2021 decade. The curvature based on the specific set of indicators (regulatory quality, rule of law, control of corruption, governance effectiveness, and political stability) is on the rise between 2011 and 2014, after that it gradually drops down and remains dropping since 2017. For example, rule of law indicator was highest in 2014 (51.92%) and is on a steady decline ever since (42.79 in 2020 and 2021). Control of corruption indicator was highest in 2013 (50.71) and is also on the steady decline (28.85 in 2021). Governance effectiveness indicator was highest in 2013 (41.23) and is also declining steadily (12.98 in 2020, 13.46 in 2021). Political stability indicator was highest in 2014 (44.76) and dropped to 33.79 in 2021. These trends correspond to the period where the international intervention, or external part of the external/internal dynamics, was decreasing and is best showcased by the lack of any decisions by the OHR until Summer of 2021. This trend alone may serve as basis for argumentation that the progress on the European path is proportional to the level of international intervention, as stated earlier (Turčalo, Sadiković and Fejzić 2022: 246)

The second set of indicators is more specifically related to judiciary, namely the Judicial Effectiveness Index BiH ("JEI BiH"), a monitoring and evaluation instrument annually conducted since 2015. The report from 2022 (JEI BiH 2022) for the previous year shows relative deterioration of -0.38 points relative to 2020 value; its overall value for 2021 being 56.10/100 – mostly caused by the indicators of public perception being worse for -0.88 relative to 2020 value. Out of five dimensions, two of them deteriorated (Efficiency and Quality) while three of them improved (Accountability and Transparency, Capacity and Resources, Independence and Impartiality). Negative public perception of BiH judiciary is mostly related to "judiciary's handling of corruption matters" that is "the poorest since the inception of the JEI, and that judicial professionals' own perceptions about judges and prosecutors' susceptibility to bribery keep worsening" (JEI BiH 2022: xiv). This perception remains negative despite the inflows of corruption cases increasing in 2021 relative to 2020 by 33% (1.053 to 833), "an increase not observed since the inception of the JEI-BiH" (JEI BiH 2022: 56). It is worth noting that prevention and fight against corruption stands out as one of the key priorities that BiH will have to address in the foreseeable future. In its latest report (EC BiH 2022: 23-25), EC noted that there is alarmingly low number of convictions in high-level corruption cases; that there is no effective track record for proactive investigations, prosecutions and final convictions for corruption; that plea-bargaining are frequent and sanctions are lenient; that there is no harmonisation of legislative and coordination between anti-corruption bodies across the country, and, finally, that the

rejection of central-level law on prevention of conflict of interests demonstrates the lack of genuine political commitment to rule of law on the European path.

Critical assessments of the rule of law progress are certainly substantiated. Negative perception on the judicial work and virtual omission of recognition of incremental reforms taken by the body that represents radical change to tradition of relations between law and politics in BiH is perhaps not substantiated. Certainly, shortcomings and aberrations of judicial apparatus identified by named reports cannot be ignored and are legitimately on top of the priority list for the new BiH Government. Still, some level of recognition for BiH judiciary is due given that it finds itself in unprecedented degree of autonomy and the need so manoeuvre between simultaneously appearing imperatives of maintaining the existing order while acting as agents of its change, and between autonomy and accountability. Portraying judiciary as yet another facet of BiH's state dysfunctionality should be accompanied by realization of its relative inexperience, general self-reliance and at least limited progress in delivering required reforms. Still, in order for the EU's new approach to BiH to work, the geostrategic investment should come in form of investing further in the rule of law area and strengthening of the BiH's judiciary. It is no surprise that these matters top the list of the post-candidacy EU accession path priorities, and one should not expect for the EU to be inconsistent with this policy, nor should it be expected that the international community, namely the OHR, to be passive observer in this process.

Conclusion

The aim of this paper was to provide accounts, based on the development of BiH post-Dayton statehood inextricable from its EU path trajectory, as well as on relevant reports evaluating the progress in the rule of law area, that display how dynamics that shape the BiH progress on the European path, most notably the external/internal dynamics, work. Complexities associated with these dynamics are indeed plentiful and to present them in a crude relationship and simplified picture where one part (external) is pushing the country ahead while the other (internal) is doing the opposite was by no means a grateful task. Still, however discursively framed, these accounts speak for themselves and pinpoint the roles that external and internal actors play in the process of moving BiH on its European path. They seem to affirm the premise that the progress on the European path is proportionally related to active engagement of the international community. Repercussions of the idea are then, *prima facie*, read in the negative key: if BiH cannot realize its EU membership aspiration alone, without active engagement of the international community, why should it be deserving of such status? Is

the aspiration even real? Or is it just a collectively projected ideal that would give the internally divided society some sense of purpose?

Perhaps the ordeal should be instead understood not as an aspiration, but as a mere necessity, just as the EU membership candidacy should be understood as an investment rather than just a gift. As Jens Woelk (2002: 256) notes, the integration to EU “is less matter of political and economic transition and more, if not *primarily*, an issue of stabilising the peace and creating fundamental preconditions for overall development”. Also, as Turčalo, Sadiković and Fežić (2022: 245) assert, integration to the EU is a necessity in order for BiH to “fully realize its potential as a stable, multi-ethnic and democratic state”. This necessity is born out the fact that the EU represents a normative-value framework that is the only capable of effectively dealing with the critical issues over which local political elites regularly dissent. In other words, it is a stabilisation mechanism that is always seemingly required due to its internal divergent forces that continue to undermine that stability. The more this issue is regionally relevant, namely in the optics of ‘geostrategic interest’ that is now the driving rationale behind the EU Enlargement policy, the more pressing it becomes, consequently increasing the external part of the external/internal dynamics that shapes the BiH’s European path. Such observation is explicated in the International Crisis Group Report from 2022 (ICG 2022: 6) where it is said that the situation, regarding the Western Balkans Region, “calls for the two-track approach that separates out urgent crisis and conflict management tasks from long-term planning for EU accession”, and that stabilising BiH “is the most pressing need”. However, stabilisation is only a minimal requirement and should not constitute the general expectation fostered for BiH by international community, namely the EU, and the country citizens. To fulfil the priorities set out in in EC Report, BiH will have to continue to make efforts in strengthening the rule of law. Only then will its aspiration to be part of the broader normative-value framework that the EU represents be externally and internally recognized and the geostrategic investment will be not an external placeholder but in internal capital that will provide the so much needed stability from within.

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