



# UNINTENDED CONSEQUENCES OF EU CONDITIONALITY ON (POTENTIAL) CANDIDATES

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## Abstract

In its efforts to strengthen the rule of law and generate judicial reform in the candidate and potential candidate states of the Western Balkans, the EU places emphasis on the ‘**quality, independence and efficiency**’ of the judiciary (European Commission 2015a). It also makes a clear link between robust judicial systems and **sustainable economic growth** and **political and social stability**. **The success of judicial reforms could not, therefore, be more central to the EU enlargement strategy for the region.** In practice, the EU’s approach is based on ensuring the robustness of formal institutions and processes, particularly with regard to bolstering bodies responsible for the training and recruitment of judges. Based on empirical and comparative analysis of countries in the region, it is argued here that although there is evidence of success, the EU’s approach generates sub-optimal outputs; a combination of unintended consequences and unrealized effects. This is due largely to the fact that the EU adopts a somewhat ‘Archimedean’ approach, namely the creation of new separate judicial bodies that stand above politics and are separate to existing judicial institutions and processes as a means of breaking political interference. This approach triggers an inevitable tension between democratic checks and balances, and independence.

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## Acronyms

BiH	Bosnia and Herzegovina
BIRODI	Biro za društvena istraživanja (Bureau for Social Research), Serbia
CVM	Co-operation and Verification Mechanism
EC	European Commission
EU	European Union
EUSR	European Union Special Representative (Bosnia and Herzegovina)
FBIH	Federation of Bosnia and Herzegovina
GERB	Graždani za evropejsko razvitie na Bălgarija (Citizens for European Development of Bulgaria)
HJC	High Judicial Council (Serbia)
HJPC	High Judicial and Prosecutorial Council (Bosnia and Herzegovina)
IPA	Instrument for Pre-Accession Assistance
JAS	Judges' Association of Serbia
JPTC	Judicial and Prosecutorial Training Centres (Bosnia and Herzegovina)
NGO	Non-governmental organization
OHR	Office of the High Representative (Bosnia and Herzegovina)
RS	Republika Srpska (Bosnia and Herzegovina)
SAA	Stabilization and Association Agreement
SDP	Social Democratic Party (Bosnia and Herzegovina)
SEIO	Serbian European Integration Office
SJC	Supreme Judicial Council (Bulgaria)
SNSD	Savez nezavisnih socijaldemokrata (Alliance of Independent Social Democrats) (Bosnia and Herzegovina)
TAIEX	Technical Assistance and Information Exchange instrument

## 1. Introduction

This working paper seeks to explain ways in which EU strategies, particularly conditionality, lead to sub-optimal outcomes in transforming political practices in the candidate and potential candidate countries of the Western Balkans, as well as looking at the legacy of recent Eastern enlargement by examining Bulgaria. We opt to refer to *sub-optimal outcomes* to underline that there are not definitive binary successes or failures in political transformation under EU conditionality. We seek to examine the following: (i) **the EU's external integration capacity and what it 'locks-in' as a consequence of its conditionality, strategies and assistance**; (ii) **how domestic conditions mitigate the impact of EU tools and mechanisms**; and (iii) **whether the failure / limits of transformation can be attributed to the occurrence of (negative) unintended consequences or unrealized effects** (Hirschman 1977). In other words, whether lack of progress in certain policy areas is because the intended effects are unrealized and have 'fail(ed) to materialise' (Hirschman 1977: 131), or that their introduction has prompted additional outcomes that then constrain or impede progress.

These questions are explored using Hirschman's notion of unintended consequences versus unrealized effects. Distinguishing between the two enables us to explore whether, in the context of EU enlargement, lack of progress is due to initial objectives not having been realized (that is, an implementation deficit or the existence of domestic obstacles and constraints inhibiting progress), or that the objective has been implemented but that this has generated adverse impacts that negate progress in certain policy or issue domains.

It is fully acknowledged that unintended consequences and unrealized effects are endemic within all policy making in every domain and location. Indeed, Rhodes and Bevir (2003: 76) go as far as to claim that the unintended effects of policies typically outweigh intended ones, or that the principal outcomes will be unintended. Whether such effects are always negative is, however, contested and a distinction made between 'welcome surprises, cases of futility (null effect), perversity (undermining the goal policymakers intend to achieve), and jeopardy (undermining other fundamental objectives)' (6 2014: 674).

Although this conceptual framework has not been applied to the study of Europeanization and enlargement, various empirically grounded studies have identified outcomes of compliance and conditionality that are negative and certainly unintended. For example, in the realm of environmental governance and policy, although compliance strengthened hierarchical steering, it nevertheless engendered an unintended narrowing of participation within decision-making that excluded non-state actors (Börzel and Buzogány 2010). Similarly, EU assistance through IPA designed to strengthen networks of state and civil society actors actually weakened links with indigenous civil society (Fagan 2010). On the Europeanization of judicial reform, the existing literature identifies the (negative) impact on checks and balances of measures taken, under EU pressure, to strengthen the capacities and authority of the judiciary (Kmezić 2014). In the realm of economic and market reform, recent analysis of BiH highlights the disconnect between European rules and local practices and how EU benchmarks actually inhibit liberalization and consolidate the power of wartime networks (Bojicic-Dzelilovic and Kostovicova 2013). In the area of EU state-building, recent research reveals a not dissimilar outcome: on the one hand EU aid and conditionality have strengthened

state-level institutions, but this has unintentionally weakened local ownership, which ultimately threatens state capacity (Juncos 2012).

Such outcomes are usually attributed to imperfect implementation arising from high compliance costs, low levels of institutional capacities, or a weak commitment to EU reforms amongst domestic political elites (Noutcheva 2012). However, such unpredicted outcomes may well be inevitable and unavoidable, or reflect unrealizable and poorly framed objectives; they may also reflect a technocratic, piecemeal and incremental dimension to EU conditionality that is particularly manifest in cases where domestic constraints are particularly acute.

In sum, we will not be focusing on EU interventions that have led to unexpected positive outcomes, i.e., ‘welcome surprises’. Rather, we will closely examine EU-led reforms related to the judiciary and highlight unintended consequences and / or unrealized effects in the quality of the rule of law. *Unrealized effects* occur when EU intervention, compared with non-intervention, either produces no change (‘futility’) or a positive change that is nonetheless short of the intended result due to impediments by key stakeholders (‘perversity’). *Unintended consequences* occur when EU intervention, compared with non-intervention, worsens the overall situation (‘jeopardy’).

From the perspective of existing research on particular policy areas, one of the primary constraints on the impact of EU conditionality appears to be the narrow sectorization of compliant institutions, and the technocratic interpretation of reforms. In other words, reforms are undertaken within narrowly defined policy domains, with emphasis placed on *capacity building* rather than on the wider political implications of reforms (Fagan 2008). This leads to reform silos, and makes it harder to track and anticipate unintended consequences and identify and tackle cross cutting issues. For example, tackling different forms of marginalization (e.g. gender, ethnicity, sexual orientation, etc.) that fall under different policy sectors as determined by EU conditionality makes it difficult for an applicant state to address what Yuval-Davis (2012) terms the ‘intersectionality’ of different ‘minority identities’, which create new forms of inclusion and exclusion.

The challenges summarized above occur before accession, but as a means of comparison, we should also examine unintended consequences and unrealized outcomes in the rule of law *after* previous Eastern European enlargement, with a particular focus on Bulgaria, which entered the EU in 2007, as an illustrative case. We will also draw on the post-accession experience of the CEE countries that entered in 2004.

In this study, we will focus on EU efforts to bolster judicial independence as a crucial component in establishing the rule of law. The strengthening of judicial independence in post-socialist and post-authoritarian European countries is identified as a key objective of the overall democratization process (OSCE-ODIHR and Max Planck Institute 2010; Seibert-Fohr 2012). However, despite the EU focus on developing judicial independence in accession and pre-accession territories, the development of judicial institutions free from political institutions remains an unfulfilled objective, according to the most recent EC monitoring reports. The post-accession CVM reports for both Romania and Bulgaria mention serious problems related to judicial independence (European Commission 2015b: 10; 2015c: 3-5). In the two Western Balkan countries examined



below: Bosnia and Herzegovina suffers from political interference in war crimes cases and via budgetary fragmentation (European Commission 2014b: 12); and Serbia does not have clear criteria in Court President appointments or in merit-based recruitment of practitioners (European Commission 2014g: 11). The EC reports also highlighted problems related to judicial independence in Macedonia (European Commission 2014c: 1), Montenegro (European Commission 2014e: 36-37), Albania (European Commission 2014a: 40), and Kosovo (European Commission 2014d: 13).

As we showed in Working Paper 11 (Judicial Independence in the Western Balkans), there are two main challenges in EU strategies to improve judicial independence in candidates and potential candidates of EU accession. First, as evidenced by intra-EU variation in measures used to ensure judicial independence (European Commission 2015a), there are no explicit institutional *acquis* for judicial matters but rather adherence to certain principles (Nozar 2012). Secondly, however, prevailing Western European understandings of judicial independence rest on the robustness of institutions. This has led to the EU approach of reforming judicial independence by strengthening judicial councils, though this strategy has been questioned by some commentators (Garoupa and Ginsburg 2008). In particular, creating independence in this way does not ensure judicial accountability and balance of power across the three branches of authority (Canivet et al. 2006; Seibert-Fohr 2012: 4). Such a technocratic approach changes institutions, yet behaviors ‘on the bench’ are unaffected (Guarnieri 2013). This has led to the situation whereby practitioners in the judiciary have exploited the unchecked power of judicial councils (Parau 2012). Despite the differences in the contexts examined in this paper, all of the cases will highlight a common problem of EU-led reforms of engendering judicial independence in judicial councils without concomitant development of judicial accountability, which we have explored in greater detail in Working Paper in the context of the six Western Balkan territories.

Although not an exhaustive set, the paper will investigate a number of possible explanatory factors for sub-optimal outcomes: EU member state and domestic spoilers; EU lessons not learnt; EU depoliticization of political reforms; and intransigence by EU and domestic decision-makers. However, it is also crucial to ask more fundamental questions about EU conditionality as a policy instrument:

- For recent Eastern European entrants and candidates for EU accession, are the sub-optimal outcomes *unintended consequences* or *unrealized effects*?
- Has EU conditionality delivered long-term positive *realized effects* in certain policy areas in certain countries? If so, what factors explain this?
- What lessons can be learnt for candidate and potential candidate countries as they progress towards eventual accession?

In the following sections, we will focus first on EU-led reform of judicial independence in a recent entrant to the EU (Bulgaria). This will be followed by examples from potential candidate and candidate countries (Bosnia and Herzegovina and Serbia), as illustrative cases of how EU instruments engender negative unintended consequences, deliver unrealized effects, and may in fact be unintentionally harmful to long-term reform processes.

## 2. Unintended Consequences of European Union Conditionality in Bulgaria

The considerable literature on the effects of EU conditionality so far has established that there have been some long-term positive effects in a number of sectors in the member states which participated in the 2004-2007 enlargement (Dimitrova 2002, 2005; Schimmelfennig and Sedelmeier 2005; Vachudova 2005). Examples of sectors or policy areas where EU conditionality has contributed to reform and / or adaptation to EU requirements are non-discrimination (Schwellnus 2005), banking regulations (Epstein 2005), public administration (Dimitrova 2002, 2005), and environmental regulations. This does not mean that reform in these areas has been complete and irreversible, or that proper institutionalization has followed the adoption of formal rules in all cases (Dimitrova 2010). In terms of the effects of conditionality, Schimmelfennig and Sedelmeier (2005: 8) distinguish between formal and behavioral adoption of rules, while Dimitrova (2010) and Dimitrova and Steunenbergh (2013) specify a whole range of different outcomes on rule implementation, from 'empty shells' to 'incidental compliance'. A number of more critical studies challenge the idea that the use of the policy tool by the EU has achieved these effects of reform and stress the central role of domestic actors for undertaking (or not) the reforms required by the EU (Brusis 2005; Hughes et al. 2004; Mungiu-Pippidi 2014; Sasse 2008). This debate focused mostly on mechanisms and actors involved in observed effects of conditionality. Much less attention has been paid to the possibility that conditionality, like any policy, would indeed have not only unrealized effects or fail in moving domestic actors to accept EU requirements, but also unintended consequences. In other words, the possibility that EU conditions and recommendations might achieve the opposite of what their declared objectives were, has not been that thoroughly explored.

Given its central role in the 2004-2007 enlargement negotiations, conditionality could have been expected to generate unintended (negative) effects. Arguably, the ability of the EU to adjust its requirements from year to year in its regular reports and even during the negotiations of specific chapters of the *acquis*, created the possibility to adjust demands based on the discussions with negotiating teams. On several issues, there was a clear domestic backlash against certain EU demands, such as the discussions with Hungary (later also with Bulgaria) about removing the prohibitions on selling land and secondary residences to foreigners (Gottfried and Györkös 2007: 194-195) or the closure of reactors of nuclear power plants in Bulgaria or Lithuania. The conditions and requirements on selling land to foreigners, or inspections and eventual closures of nuclear power plants, irrespective of the domestic difficulties they presented to incumbent governments that accepted them, however, were clearly intended to achieve what they eventually achieved.

Cases and areas where we can observe effects that are clearly different from what the Union's declared objectives have been, can be identified by comparing the EU's recommendations in the Regular Reports to recommendations made several years later in the same documents or to empirical developments that have gone in a different direction. In the case of Bulgaria, this is arguably the case with conditions and recommendations on rule of law and independence of the judiciary.

Recommendations, conditions and criticism targeting reform of the judiciary in Bulgaria have been part of the EC's Regular Reports in their general section of rule of law and political criteria. The substance of

measures and conditions has been difficult to define, as the EU itself has had no *acquis* or specific institutional formula for strengthening judicial independence (Smilov 2006). Furthermore, as Parau (forthcoming) has argued, the EU's recommendations and conditions related to rule of law have focused heavily on strengthening the independence of the judiciary.

To illustrate this, the 1998 Progress Report for Bulgaria explicitly criticizes the delay in the adoption of a law on the judicial system 'to reinforce judicial independence' (European Commission 1998: 8). The required law was adopted in October of the same year, as the next regular report noted (European Commission 1999), changing the composition of the Supreme Judicial Council (SJC). According to the amendments of the law in 1998, and the reform efforts since then, the SJC is composed of 25 members: 11 members are selected by the National Assembly, to fill the parliamentary quota; and 11 members are selected for the judicial quota by judges, prosecutors, and investigators. The judicial quota consists of six judges, four prosecutors, and one member from the investigation bodies. The chairpersons of the Supreme Administrative Court and the Supreme Court of Cassation, as well as the Prosecutor General are members of the SJC by law. The three ex officio members are appointed by an Act of the President, after endorsement of a candidate by the SJC. The SJC has been established as a permanent administrative body with wide-ranging responsibilities to manage the judicial system in Bulgaria. It operates with its own budget and 'represents the judicial power and secures its independence, determines its personnel and the work organization of the judicial system, and manages its activities without interfering with the independence of its bodies'.<sup>1</sup>

According to Parau (forthcoming), the EU's emphasis on strengthening the role of Supreme Judicial Councils and augmenting the independence of the judiciary has not necessarily strengthened rule of law. In fact, it has arguably eroded the ability of legislatures to hold the judiciary to account. This argument is well illustrated by the discussion on judicial system reform in the Commission's regular report on Bulgaria of 2001 (European Commission 2001). The report criticizes the Bulgarian executive and parliament for not complying with the Supreme Judicial Council's requested budget, but adopting a smaller budget instead. The report clearly advocates a strong, almost exclusive role for the legal profession in the composition and functioning of the SJC. The report criticizes the 'unclear split of roles and responsibilities between the SJC and the Ministry of Justice' (European Commission 2001: 18). The general assessment that follows calls for further action to be taken so as to make the judicial system 'strong, independent, effective and professional' (European Commission 2001: 24). In other words, the EU is overtly critical of any perceived intervention from parliament or the executive that may weaken or impede the power and autonomy of the judiciary. It is hard to contest the assertion that the EU's recommendations and requirements contributed to making the Bulgarian judicial system, and especially the Supreme Judicial Council, strong and independent. But instead of becoming professional and upholding the rule of law, the powerful and unchallengeable SJC actually became a target for those who sought to subvert due process and exert their influence covertly. This is evident from the criticism levelled at the SJC in the EC Progress Reports in the following years (European Commission 2002, 2003, 2004).

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1 Supreme Judicial Council (SJC) official website (English) available at <http://www.justice.bg/en/start.htm>, accessed 9 June 2015.

But what conclusions can be drawn post-accession? A decade after adopting the recommended changes to its composition and functioning, the SJC is still explicitly and repeatedly criticized by politicians, NGOs, and even judges, as well as legal professionals.<sup>2</sup> At the end of 2014 and the beginning of 2015, the lack of transparency and controversial appointments of Presidents of the Supreme administrative court and the Supreme Court of Cassation triggered a series of open letters by the Union of Judges and a group of major NGOs to the President, the SJC, and various Bulgarian authorities and institutions. These letters express strong criticism of what they refer to as the ‘administrative crises’ in the judicial system, and the SJC’s exposure to political influence. In addition, letters have been received from legal attorneys calling for the dismissal of the Sofia City Court leadership and the resignation of the SJC which is seen as being responsible for these appointments.<sup>3</sup>

Furthermore, developments in the period 2012-2015 have shown that the SJC has become a conduit for corrupt influences, and its institutionalized independence has made it very difficult to form a political coalition able to reform it.<sup>4</sup> The EU Compliance and Verification Mechanism (CVM) reports in 2012 to 2014 noted the improvements regarding the reform of the judiciary, while again levying criticisms towards SJC and the fulfilment of its responsibilities (European Commission 2014f). The report for 2014 indicated that the upcoming appointments of senior magistrates later the same year would be a major test for the independence of the SJC and the effects of the reform effort (European Commission 2014f: 3-4). The subsequent response from judges, lawyers and civil society suggest that the SJC failed to pass these tests, and the most recent Commission report under the CVM clearly acknowledges this failure (European Commission 2015b). It refers precisely to these appointments and to the previous report:

‘[...] the SJC was not widely regarded as “an autonomous and independent authority able to effectively defend the judiciary’s independence vis-à-vis the executive and parliamentary branches of government”. The work of the SJC in 2014 has continued to be subject to controversy, with several incidents in relation to appointments, dismissals or the control of the application by courts of the system of random allocation of cases’ (European Commission 2015b: 3)

The EU’s conditions and recommendations have achieved the intended institutional reforms and changes in the Bulgarian judicial system from 1998 to 2015, including rules to make the judiciary independent and

2 The text of the letter of the Union of Judges in Bulgaria regarding the SJC is available at <http://www.judgesbg.org/bg/component/k2/item/862-отворено-писмо-до-всс.html>, accessed 9 June 2015. The letter to the President is available at <http://www.judgesbg.org/bg/component/k2/item/898-писмо-до-президента-на-република-българия.html>, accessed 23 February 2015.

3 The letter from 33 attorneys at law in Bulgaria to the President of Bulgaria read: ‘[...] We state that SJC, which has become a passive observer of the obvious problems in the system of justice and the continuous spread of dependence on backstage groups of individual judges and high-ranked officials requires the resignation of the institution, while the national representatives are required to adopt the needed legislative changes to protect the judicial system from political influence’ (translated by the authors from the original letter), full text is available at <http://m.btvnovinite.bg/article/bulgaria/i-advokati-poiskaha-ostavka-na-rakovodstvoto-na-sofijskija-gradski-sad.html>, accessed 20 February 2015.

4 As evidenced, for example, by the joint position expressed in a letter by seven EU member states’ ambassadors to the second GERB government, stating that the structure and composition of the SJC needed to be addressed. Letter available at <https://www.gov.uk/government/world-location-news/ambassadors-with-joint-position-on-the-cvm-in-bulgaria>, accessed 18 February 2015.

strong. At the same time, the criticisms and the cases of obvious political influence on the judiciary have intensified in recent years, as evident above. Arguably, the effects on the independence of the judiciary currently taking place have increased the necessity for new reforms of the judicial system. The belief of politicians, members of the judiciary, practitioners, and observers is that such reforms should start with improving the SJC.<sup>5</sup>

Relating the Bulgarian case to our conceptual framework, it is possible to conclude that the EU's push for a highly independent Judicial Council has generated both unintended consequences and unrealized effects. On one hand, the SJC's relative autonomy has generated concerns about accountability and appropriate checks and balances (unintended consequence); on the other hand, that the SJC remains subject to political interference suggests the objective of distancing the judiciary from politics has not been fully accomplished.

### 3. Serbia: Unintended Consequences and Unrealized Effects

The principle of separation of powers has required reforms so that the Serbian judiciary would become a non-political power designed to work in tandem but independent from executive and legislative branches of authority. However, during the transition to plural democracy, the *de facto* understanding of 'independence' has largely referred to building the conditions for a judiciary with authority and control. In this context, EU-led efforts to support judicial independence have been at risk of creating unintended consequences, particularly problems with accountability and a renewed politicization of the judiciary. It is certainly the case that the judiciary in Serbia has gained more authority, and its role has become more clearly defined (*de jure*), but it nonetheless remains very much exposed to political influence (*de facto*).<sup>6</sup> In the context of Europeanization, this gap between *de jure* aims of creating an independent judiciary and the *de facto* implementation (actual understanding and use of measures and criteria for independence) remains a fundamental challenge (Mendelski 2013).

The following section will examine the two institutions that have been the focus of EU and other international support to bolster judicial independence: the Serbian Judicial Academy; and the Serbian High Judicial Council (HJC). The analysis will examine how EU-led changes in the Judicial Academy (including upgrading the Academy from a Training Centre) have allowed interference by the Ministry of Justice. The following section will examine the case of judicial re-appointment and expose how a reform instigated by the Serbian government to supposedly eradicate political interference actually completely back-fired. The powerful HJC, operating without transparency and in tandem with the Government, was able to undermine fundamental principles of jurisprudence, such as legal certainty and the irremovability of judges. What both sections highlight

5 Interview with the Minister of Justice for Bulgarian National Radio available at <http://bnr.bg/radiobulgaria/post/print/100522366/ministar-ivanov-istinskata-sadebna-reforma-e-vapros-na-politicheska-i-institucionalna-otgovornost>, accessed 9 June 2015, and news article in Capital newspaper on the positions of magistrates available at [http://www.capital.bg/politika\\_i\\_ekonomika/bulgaria/2013/02/28/2013139\\_magistrati\\_sudebna\\_reforma\\_e\\_vuzmojna\\_samo\\_ako/?sp=1#storystart](http://www.capital.bg/politika_i_ekonomika/bulgaria/2013/02/28/2013139_magistrati_sudebna_reforma_e_vuzmojna_samo_ako/?sp=1#storystart), accessed 9 June 2015

6 Interview with BIRODI, Belgrade, 27 February 2015.

is how reforms, designed to augment the independence of the judiciary and reduce political interference, actually result in greater political interference, arbitrary exercise of power, and a severing of accountability.

### 3.1 *The Judicial Academy: Political Interference by Other Means?*

A major issue in reforming judicial independence in Serbia has been the understanding and application of the concept of 'independence' amongst judicial practitioners. For instance, whilst the judicial profession used to be apolitical in the sense that political influence was meaningless in an already fully controlled one-party state, or under the authoritarian regime of Milošević, this also meant that the judiciary was not perceived as an active and indispensable part of the state machinery.<sup>7</sup> To transform understanding and behavior amongst current and new judicial practitioners, the EU and other international actors have focused their efforts on establishing, and then improving, the Judicial Academy. Between 2009 and 2011, the EU funded a project to create a 'Standardised System for Judiciary Education and Training' by upgrading the Judicial Training Centre into a national Judicial Academy to provide initial and continuing training for judicial practitioners. The IPA 2012 program had a fiche entitled 'Support to the Rule of Law System', which included activities related to building curricula at the Judicial Academy (European Commission 2015d).

The forerunner of the Judicial Academy, the Serbian Judicial Training Centre, was established in 2001 by the Judges' Association of Serbia (JAS), as a nationwide professional association.<sup>8</sup> The creation of the Training Centre was thus a 'bottom-up' initiative. In contrast, the process of upgrading the Training Centre into a national Academy has relied heavily on EU assistance.

The Judicial Academy has been depicted as a positive example of internationally assisted judicial reform in Serbia, since it has actively involved civil society in its trainings and can potentially become a forum where judges openly discuss how they are politically pressured at work.<sup>9</sup> Furthermore, despite the fact that it is not a component of the Community *acquis*, the EU has not only highly promoted the Academy as a tool for improving the quality of the judiciary, but it has also insisted in its annual Progress Reports that '[t]he means and expertise of the Judicial Academy should be increased and the legislative and institutional framework adapted to allow it to become the compulsory point of entry to the judicial profession' (European Commission 2013b: 9-10).

Nonetheless, the example of the Judicial Academy raises some questions regarding unintended consequences of EU-supported measures for securing judicial independence. The adoption of the Law on the Judicial Academy in 2009 established its responsibility for initial training of future judges and prosecutors as well as continuous training for sitting judges, prosecutors, and court assistants.<sup>10</sup> According to the law, graduates of initial training were guaranteed immediate employment and the support of the HJC

7 Interview with Judges' Association (JAS), Belgrade, 26 February 2015.

8 Interview with JAS, Belgrade, 26 February 2015.

9 Interview with Yucom, Skopje, 27 August 2014.

10 National Assembly of the Republic of Serbia, Law on the Judicial Academy, Official Gazette of the RS 104/2009 (Belgrade).

(responsible for nomination) to obtain permanent tenure in front of other candidates. However, the preferential selection of graduates of the Academy was contested, and the Constitutional Court declared the initial provisions of the Law on Judicial Academy to be unconstitutional. Therefore, graduates of the Academy could no longer be treated preferentially. These short-term changes regarding the appointment of judges and prosecutors have brought more confusion into the system and have somehow divided the judicial community between candidates with experience, and graduates of the Academy. In response to these developments, the EU's latest report reiterates that the Academy should become 'the compulsory point of entry to the judicial profession while ensuring compliance with the ruling' (European Commission 2014g: 41).

If the Judicial Academy is to drive up standards and increase the efficiency and professionalism of the judiciary, further reforms are needed to bolster its power vis-à-vis the executive, to increase its capacity as a training and professional standards body, and also to better integrate it within the judicial system (in particular, to foster closer link with the Judicial Council).<sup>11</sup> Of particular concern is the fact that the Ministry of Justice currently wields considerable influence over the Academy: three out of nine members of the Managing Board of the Academy are appointed directly by the government, including one official from the Ministry of Justice; and the Ministry is responsible for monitoring the performance of the Academy. Thus, representatives of the executive are deeply involved in the management of the Judicial Academy, with negative consequences for the independence of individuals entering the profession. The Serbian Anti-Corruption-Council, a governmental advisory body established in 2001, thus concluded: 'this way of selecting new attendees of the Judicial Academy is a model by which the executive power acquires the possibility to participate in the selection of new judges and prosecutors through the Judicial Academy' (Anti-Corruption Council 2014: 10).

These shortcomings of an EU-promoted institution are very important in a context where there is a widely-held consensus amongst key stakeholders in Serbia that the principle of independence of the judiciary is meaningless without accountability and professional competence.<sup>12</sup> The limited and contested efficacy of the Academy compounds a judicial system that is slated for the persistence of politically appointed judges, for poor quality prosecutors in basic courts, and for the lack of expertise on issues relating to EU and other international legislation.<sup>13</sup>

Thus, EU assistance transformed the existing Training Centre, which had been established by domestic practitioners and operated independently of political interference from the executive and legislature, into an Academy that allows significant involvement of the Ministry of Justice in the training of judges and prosecutors, and enables three out of nine members of the Managing Board of the Academy to be appointed

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11 Interview with Association of Prosecutors, Belgrade, 23 February 2015.

12 Interviews with Centre for Human Rights, Belgrade, 24 February 2015; Judicial Academy, Belgrade, 23 February 2015; JAS, Belgrade, 26 February 2015; SEIO, Belgrade, 24 February 2015; Association of Prosecutors, Belgrade, 23 February 2015; Ministry of Justice, Belgrade, 26 February 2015; and the EU delegation office, Belgrade, 27 February 2015.

13 Interviews with the Judicial Academy, Belgrade, 23 February 2015; JAS, Belgrade, 26 February 2015; SEIO, Belgrade, 24 February 2015; Association of Prosecutors, Belgrade, 23 February 2015; BIRODI, Belgrade, 27 February 2015; and the Centre for Human Rights, 24 February 2015.



directly by the government.<sup>14</sup> The result is arguably the worst of both worlds: a more powerful body, but one that is at the behest of governmental interference.

Considering the Judicial Academy was established with the aim of building independence, its lack of efficiency and capacity, and its immediate subordination to the executive have created a perennial risk of political influence. To its critics, the Academy represents an institutional opportunity for politicians to participate in the selection of judges and prosecutors.

### 3.2 *Judicial Reappointment*

As in other post-socialist contexts, the EU has promoted reform of the recruitment and training of judges in Serbia as a mechanism for ensuring independence and breaking the political hold over the judiciary. The IPA 2012 program had a fiche entitled 'Support to the Rule of Law System', which included activities related to assisting the Ministry of Justice and HJC in developing competences for appointments (European Commission 2015d). The IPA 2013 program includes a twinning program to further develop the capacities of the Judicial and Prosecutorial Councils (European Commission 2015d). Of all the reforms undertaken in response to EU pressure for strengthening independence, judicial reappointment has proved to be the most controversial and contradictory.

The Serbian Government undertook an ambitious reappointment process for all sitting judges after the ratification of the 2006 Serbian constitution. This was purportedly to ensure that all of those on the bench fulfilled certain standards of independence, professionalism and impartiality, and to remove judges from the socialist and Milošević eras (Mendelski 2013). What this ambitious and large-scale process did not seem to take into consideration was that several hundred judges had left the judiciary between 1992 and 1994 because of the poor salaries and conditions. Most of the judges – approximately two-thirds – in place prior to the reappointment process began had actually been recruited after October 2000. For instance, the composition of the Supreme Court changed by 80% between 2000 and 2006.<sup>15</sup> There was, therefore, arguably insufficient evidence to support such a drastic change.

The Government made the decision to undertake the reappointment procedure despite the fact that both the Venice Commission and the EU<sup>16</sup> had expressed strong reservations about a process without clear criteria, and one that would essentially result in a Judicial Council appointed directly or indirectly by political parties (in the Assembly). Nonetheless, the Government persisted and when the procedure finally ended in January 2010, 800 of the 3000 sitting judges had lost their jobs, with all of the decision-making by the HJC done behind closed doors (Andric 2012a). The 2010 EC Progress Report raised 'serious concerns' about the process, including inadequate justification for decisions (not to reappoint), a lack of transparency, and

14 Available at <http://www.seio.gov.rs/upload/documents/ekspertske%20misije/Judicial%20Reform/judicial%20academy/Law%20on%20Judicial%20Academ%2009.pdf>, accessed 9 June 2015.

15 Interview with JAS, Belgrade, 26 February 2015.

16 The EC voiced its concern in its 2009 Progress Report that the procedure would leave room for political influence, and potentially lead to the long-term politicisation of the judiciary (European Commission 2009: 12).



first-time applicants who were hired with no merit-based assessment (European Commission 2010: 10). In fact, none of the decisions for termination made by the Judicial or Prosecutorial Councils were explained (Transparency International 2011). Realizing the extent of the controversy, the Serbian Government changed the law in December 2010 in order that the HJC, which had made the initial dismissals, was permitted to reconsider. Unsurprisingly, the HJC upheld most of its initial dismissals, and, no less surprisingly, a number of judges promptly appealed to the Constitutional Court, who decided in favor of 126 judges, recommending that they be immediately reappointed (Andric 2012b). For critics in Serbia and beyond, the process (which was entirely led by the Ministry of Justice) highlighted the extent of political interference (Kmezić 2014: 197).

Thus, a reform instigated to cast aside judges deemed to be tarnished by their political links with the Milošević regime, and to generally improve the reputation of the judiciary as an independent and professional body, whole-heartedly failed. Largely because the reform was based on an inaccurate assessment of the status quo, it failed to deliver new judges, inflicted damage on the reputation of the HJC (which was seen to be at the mercy of the Government), and evoked the wrath of both Brussels and the Venice Commission in the process.

### 3.3 Conclusion

The above cases highlight the profound complexities in establishing a *de facto* independent judiciary in Serbia. There is a clear tension on one hand between developing the autonomy of new, supposedly independent judicial bodies, and limiting the influence and power of the government (Ministry of Justice). In the case of judicial reappointment the pendulum clearly swung too far towards the latter. On the other hand, there is a need to ensure that checks and balances are such to prevent the Judicial Council and Academy from becoming so powerful that they become a target for undue political influence, or take decisions and operate inefficiently so that the judiciary is further discredited in the eyes of the public.

Developing a sustainable balance between accountability, efficiency, and independence is immensely complex, and even somewhat chimeric. The case of Serbia perfectly illustrates how guaranteeing *de jure* independence to judicial institutions and bodies cannot support the overall reform of the judiciary and its progress to reach EU standards if, in practice, greater autonomy results in control without responsibility and accountability. Such a scenario leads to the worst of all worlds: it undermines the independence of the judiciary by permitting (and even encouraging) political interference, as well as negatively affecting the efficiency of the system. In this context, it is even more difficult to deal with issues that require immediate attention such as the backlog of unresolved cases, the poor management of the judicial budget (significant unspent funds), the poor infrastructure and the questionable integrity of judges.<sup>17</sup>

As these two examples suggest, the EU efforts to promote ‘independence’ of the judiciary have not necessarily engendered impartiality and greater efficiency. Some of the norms that have been formally adopted to develop judicial independence have been undermined by the same bodies designed to protect them.<sup>18</sup>

17 Interview with BIRODI, Belgrade, 27 February 2015.

18 Interviews with JAS, Belgrade, 26 February 2015; SEIO, Belgrade, 24 February 2015; and BIRODI, Belgrade, 27 February 2015.

Moreover, the gap between legislation and implementation partially results from the unrealistic expectations to produce such complex and fundamental reforms in a transitional country and in a short period of time.<sup>19</sup> The unintended consequences also reveal the risks that come with accepting radical changes of the system without taking into consideration all particularities of the judicial community, and without measuring the capacity to undertake such changes and without doubting the practicability and necessity of each reform. The development of judicial independence thus requires much more than undergoing a fast legislative and institutional harmonization process.

#### **4. Building Judicial Independence in Bosnia and Herzegovina**

The dual projects of peace-building and state-building in ethno-territorially fragmented BiH represents the most ambitious initiative by the EU in the Stabilisation and Association process spanning the Western Balkans. As a result of the post-conflict settlements after the wars in the 1990s, central state functions are generally weak, and most substantive political power rests with the two sub-state entities: the Federation of BiH (FBiH) with a Bosniak majority and Croat minority; and the Serb-dominated Republika Srpska (RS). In FBiH, there are also ten cantons (most with recognized ethnic majorities), which compounds the problems of fragmentation. Brčko District is disputed by RS and FBiH, and is governed as a condominium between the two entities with international administration.

This complex constitutional configuration has allowed local ethnic elites to exert unchecked authority in all aspects of political, economic, and social life. In order to combat the situation on the ground, the international community has provided substantial financial and technical assistance for nearly two decades, first under the auspices of the Dayton-Paris Agreement at the end of the wars, and then the Stabilisation and Association process from 2000 – i.e., from ‘Dayton’ to ‘Brussels’ as the driver of change (Aybet and Bieber 2011). Notwithstanding the claims that these interventions are tantamount to a ‘European Raj’ (Knaus and Martin 2003), international assistance, particularly from the EU, has been pivotal in reforming judicial institutions in BiH.

BiH has long been viewed as a laggard in terms of EU accession, and has experienced huge difficulties and lengthy delays in negotiating an Stabilization and Association Agreement (SAA). Issues relating to the rule of law and judicial reform are particularly problematic due to the peculiar constitutional configuration of the country, which institutionalizes fragmentation of the judiciary and prevents the pursuit of common standards and practices (Kadribašić 2014). The challenge for judicial reformers is thus to ensure that the country’s citizens are treated equally regardless of the entity or canton in which they reside, but also to prevent a multitude of political actors from interfering within a constitutional architecture that potentially provides a plethora of opportunities to do so. The success of the Commission’s ‘new approach’, which prioritizes judicial reform and makes progress in this realm paramount for any advance towards accession, is therefore critical for BiH.

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<sup>19</sup> Interviews with JAS, Belgrade, 26 February 2015; Association of the Prosecutors, Belgrade, 23 February 2015; and BIRODI, Belgrade, 27 February 2015.

Prior to embarking upon the analysis, it is worth emphasizing that EU officials acknowledge that the issue of judicial independence in BiH not only hinders progress towards accession, but also impacts on economic recovery.<sup>20</sup> There is a widely held view within the Commission that, notwithstanding some early successes, EU assistance and conditionality have thus far failed to propel BiH further ahead in terms of judicial and other reforms.<sup>21</sup> Much therefore hinges on the success of the momentum to strengthen judicial independence.

The following sections will focus on three aspects of judicial reform: (i) the creation of the High Judicial and Prosecutorial Council (HJPC); (ii) attempts to reform of judicial budgets; and (iii) the EU-BiH structured dialogue introduced to resolve mounting tensions regarding judicial powers at entity and state levels. The final section will consider why internationally-supported institutional innovation – (new Judicial and Prosecutorial Training Centres - JPTCs) – fail to actually trigger progressive change and realize intended objectives.

#### *4.1 Independence without Accountability: the High Judicial and Prosecutorial Council of BiH*

The state-level HJPC of BiH was established through a voluntary Transfer Agreement between the entities in 2004. Thus, the HJPC is not identified within the constitution, but justifies its existence through constitutional principles (Venice Commission 2014: 3). Despite teething problems in its first year, the EU commended the establishment of the HJPC (European Commission 2005: 17). The HJPC is an independent state-level body<sup>22</sup> with wide-ranging competences across courts and prosecutors' offices across all levels of governance in BiH, including: appointment and promotion of all judges and prosecutors in BiH; receiving complaints and conducting disciplinary proceedings; determining training; and proposing judicial budgets.<sup>23</sup> The current composition of 15 members of the HJPC are selected: from judges and prosecutors from the state, entity, and district levels by members of the respective courts and prosecutor's offices; a judge or prosecutor from Brčko District by the Judicial Commission; and attorneys by the entity-level Bar Associations. The only indirect influence exerted by the other branches of authority is through the selection of the two non-judicial / non-political members of the HJPC by the Parliamentary Assembly of BiH and Council of Ministers of BiH, respectively.<sup>24</sup>

In its 2012 assessment of judicial independence in BiH, the Venice Commission concluded: 'the establishment of the HJPC and its performance over the eight years of its existence have been assessed positively by the representatives of the judiciary in BiH. Several interlocutors in Sarajevo and Banja Luka expressed the view that the HJPC had helped increase the institutional and individual independence of the judiciary' (Venice Commission 2012). A recent TAIEX seminar concluded that the HJPC has been given greater competences than similar bodies in EU member states and other parts of the Western Balkans, and is seen to be completely independent of executive and legislative control (European Commission Services 2015: 8).

20 Interview with an official at DG Enlargement, Unit C1 (Bosnia-Herzegovina), 4 September 2014.

21 Interview with an international official working in Sarajevo, 20 February 2015.

22 Law on HJPC, Consolidated text, art. 1. The HJPC provided a copy of this document.

23 Law on HJPC, art. 17.

24 Law on HJPC, art. 4.

Perhaps due to its perceived independence, the HJPC has been frequently targeted publicly by political leaders, mainly but not exclusively from RS. In late 2012, leaders from both the SNSD (the Alliance of Independent Social Democrats – RS) and the SDP (Social Democratic Party – FBiH) signed an agreement that proposed to make the appointment of chief prosecutors a decision of the legislature. This would have entirely undermined the HJPC and opened the door to political influence and interference. The agreement was immediately criticized by the President of the HJPC, the Venice Commission (in its 2012 Opinion), and EU officials (Tausan and Dzidic 2012).

Despite the positive assessments of the HJPC and its apparent ability to forestall overt attempts to diminish its powers and authority by political elites, it has been suggested that a process of ethnification has taken place. The insinuation being that ethnic interests or factions within the HJPC have begun to impede its work, though this is difficult to corroborate due to the fact that the Council works entirely behind closed doors. International officials working in BiH felt that some members of the HJPC seem to be bringing ‘political lines’ from their respective entities into the work of the body, which was not the case previously. For example, the former President of HJPC Milorad Novković, was seen to work in the interests of the HJPC and not the RS, though he is also President of the District Court of Banja Luka.<sup>25</sup>

This would suggest that whilst the HJPC has been good at guarding its authority, it has been less prudent in limiting contact with political actors or bodies, and is less hermetically sealed from political influence as perhaps intended. Indeed, politicians from across the political divide have suggested an increase in the executive and legislative influence in appointing HJPC members (European Commission 2013a: 12).

On the one hand, this suggests problems with too *little* independence in the HJPC (*vis-à-vis* political and societal interests), but a more pressing problem is that the Council arguably has too *much* independence, at the expense of democratic accountability. Following discussions in the Structured Dialogue on Justice between EU and BiH, the HJPC adopted a rulebook on conflict of interest in May 2014, seen as a first step towards an ethical code for the whole Bosnian judiciary. However, soon after its adoption some members of the HJPC suggested amending the rulebook to water down the provisions, which the EC felt would result in ‘a vacuum on questionable practices of conflict between private and public interest of its members’. Furthermore, in November 2014, the HJPC discussed amending or even revoking the rulebook altogether (European Commission Services 2015: 2). The provision in the rulebook that caused particular consternation was the stipulation that members of the HJPC would have to resign if her / his parents, children, adoptive parents, adopted children, spouse, or common law partner applied for any post in the judiciary.<sup>26</sup> In response to the HJPC attempts to dilute the rulebook, the EU organized a TAIEX seminar on ‘Conflict of Interest in the Judiciary’ at the EU Delegation in Sarajevo in February 2015. The EU and member state (Germany, Belgium, Italy, and Croatia) representatives underlined that in return for the ‘unprecedented’ level of HJPC independence, necessary in the highly politicized Bosnian context, it was vital to create ‘clear and stringent’ measures related to conflict of interest by not altering the rulebook. Thus, the EU’s warning to the HJPC that ‘any reform that would introduce an overexposure of the judiciary to the other powers of the state would

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25 Interview with an international official working in Sarajevo, 20 February 2015.

26 Book of Rules on Conflicts of Interest for Members of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, adopted 29 May 2014, art. 2-4. Copy provided by the HJPC.

not be advisable at this stage' (European Commission Services 2015: 8) reflects a concern to ensure that the HJPC remains independent and not exposed to interference, but equally that it exercises its autonomy with caution.

Interestingly, despite the position of the EU and member state experts, some officials within the HJPC Secretariat still felt that the current conflict of interest rules perhaps went too far.<sup>27</sup> The episode underlines the unintended consequence of building unprecedented independence without concomitant measures for accountability. An official at EUSR said that there was a sense that with the high levels of independence, members of the HJPC were 'out of control' and felt 'untouchable', and there was the danger that the HJPC would slide towards 'judicial oligarchy' as in Croatia.<sup>28</sup> A former official in the State Prosecutor's Office added that this attitude might be a legacy of the previous socialist regime, when the judge was to be feared and not questioned, so there is little motivation to act as an accountable public servant.<sup>29</sup>

Broader concerns about judicial accountability also stem from the apparent ineffectiveness of the disciplinary mechanism. The EC noted that 'there is a lack of adequate disciplinary sanctions against wrongdoing judicial office holders' (European Commission 2014b: 13). The responsible institution, the Disciplinary Prosecutor, has received extensive support from the EU, but its location within the HJPC has undermined its effectiveness and conjured a sense that it is not properly independent. EU and other international officials recognize that the Disciplinary Prosecutor 'should not have to report to the members of the HJPC on his / her colleagues (i.e. other members of the HJPC)'.<sup>30</sup> For example, an EUSR official cited the case of a judge who had not cast a verdict in a number of years, leading to the statute of limitation expiring in a number of cases. The Disciplinary Prosecutor recommended removal, but the HJPC, which has the final say, overturned the recommendation.<sup>31</sup> The problem is that: 'Everybody knows everyone here. So they tend to be protective... there are no sanctions... They never fully dismiss you, you are guaranteed of your pension, so nobody is afraid of doing anything that is unethical or unprofessional, because there are no repercussions'.<sup>32</sup> Thus, the HJPC is able to continue in this way because of the lack of transparency in its daily operations and 'very high level of independence'.<sup>33</sup>

#### 4.2 *Budgetary Fragmentation and Legacies of Dayton*

The establishment and development of the HJPC have occurred during the Stabilisation and Association process, but the roots of budgetary fragmentation in BiH can be traced to the establishment of the country under the Dayton-Paris Agreement. The necessary ethno-territorial autonomy to end the wars in the 1990s has had implications for judicial independence, and thus equal access to justice for Bosnian citizens. The political decentralization at the end of the war also necessitated 14 different budgets for judicial

27 Interview with a Legal Adviser at the HJPC, 4 March 2015.

28 Interview with an EUSR official, 9 February 2015.

29 Interview with a former official at the State Prosecutor's Office, 23 February 2015.

30 Interview with an international official working in Sarajevo, 20 February 2015.

31 Interview with an EUSR official, 9 February 2015.

32 Interview with an international official working in Sarajevo, 20 February 2015.

33 Interview with an EUSR official, 9 February 2015.

functions (one state, two entities, ten cantons, and Brčko). The most recent EC Progress Report concluded that streamlining judicial budgeting is a 'key structural objective' in order to improve judicial independence (European Commission 2014b: 13), and it has been recognized as a pressing problem since the first EU-BiH Structured Dialogue (European Commission 2011). In its first opinion on the independence of the BiH judiciary, the Venice Commission recognized that there were no uniform rules for judicial budgeting across different levels of government, and thus 'judicial bodies become easily vulnerable to pressure from the institution deciding on the budget' (Venice Commission 2012: 21). The HJPC can draft budget proposals for courts and prosecutors' offices, and provide comments on the allocations by the relevant finance ministries<sup>34</sup>, but 'the existing legal framework does not provide a sufficient level of independence of the judicial institutions in the budgetary process. The executive power tried to influence this'.<sup>35</sup> In other words, governments at canton or entity level can decide how much to allocate and in so doing are able to then shape the power and influence of judicial authority 'locally'.

For example, officials in RS allegedly threatened and carried out budget cuts in the judiciary when they did not agree with the trajectory of the reform process. According to a former official at the State Prosecutor's office, this perfectly illustrated the 'high risk of politics meddling with the judiciary'.<sup>36</sup> The predominance of the executive and legislature in budgeting is also evident if we compare the requested and final allocations for the HJPC: between 2008 and 2013 the HJPC received on average 10% less (from each entity and from the state budget) than was initially allocated and planned (Wittrup/USAID 2013: 19). In FBiH, the 2012 allocation for courts and prosecutors' offices was 24 million BAM less than the proposed allocation by the HJPC, which corresponds to a 17% gap (Šuškić-Bašić and USAID 2013: 32).

In order to try and identify why this was happening, as well as to locate the bottlenecks in ensuring judicial independence, the HJPC analyzed budgeting laws from different levels of authority in BiH. The following problems were identified:<sup>37</sup>

1. The law in FBiH stipulates that the HJPC should be consulted if the budgetary proposal is changed, but this is 'rarely implemented in practice'.<sup>38</sup>
2. Although it has the authority to do so, the HJPC rarely comments on a reduction of budgets, and the allocation by the executive is usually approved. This is partly due to legal fiscal constraints, where increases in expenditure necessitate decreases elsewhere or increases in revenue.
3. The budgets of the Court of BiH and Prosecutor's Office of BiH are determined by the Ministry of Finance and Treasury, and the BiH Presidency, Council of Ministers, and Parliament have the right to reduce the allocation without a response from the state-level judiciary.
4. The RS Law on Courts only allows HJPC comments after the budget is decided by the Ministry of Finance, i.e. the HJPC does not propose the budgetary needs.

34 Law on HJPC, art. 17.

35 Interview with an official in the HJPC Secretariat, 9 February 2015.

36 Interview with a former official at the State Prosecutor's Office, 23 February 2015.

37 Analysis of Existing Regulations which Regulate the Budgets of Courts and Prosecutors' Offices and Recommendations for Improving the System of Financing of Judicial Institutions. Copy provided by the HJPC.

38 Analysis of Existing Regulations which Regulate the Budgets of Courts and Prosecutors' Offices, op. cit.

It is widely acknowledged by domestic and international actors that the problems identified above are the consequence of the particular and extensive constitutional decentralization of BiH. Reform of the budgeting process, particularly at the RS entity and FBiH cantonal levels, is seriously hampered by the numerous veto points within the system. A recent USAID report concluded that ‘Federal [FBiH] and Cantonal Ministries of Justice and Finance fail, almost as a rule, to comply with the recommendations of the HJPC in terms of scope and amounts of budgets for the Courts and Prosecutors’ Offices’ (Šuškić-Bašić and USAID 2013: 16). Thus, whilst there is a recognition that something must be done at an earlier point to ensure that the required funding for the HJPC is made available, it is also acknowledged that the sensitivities involved in ceding authority to higher levels are particularly challenging.<sup>39</sup> The state-level Ministry of Justice has been given a greater co-ordination role by law, but the additional powers have not been used to sufficient effect. The fundamental problem is that final budgetary decisions still rest with the executive and legislative branches of authority in a highly fragmented system in which power is dispersed across multiple *locales of centralization*.<sup>40</sup>

Thus, in order to secure accountability whilst at the same time prevent interference and also ensure citizens are treated equally across the country, the conundrum is to somehow incrementally reform budgeting compatible with the political realities in the country. A better model for budgeting in the judiciary does already exist in BiH. In Brčko, the Judicial Commission prepares its budget and submits it to the Finance Office. Although the Mayor of Brčko can provide feedback, they cannot change the allocations.<sup>41</sup> The aforementioned HJPC survey of budgetary regulation in BiH cites the procedure in Brčko as one that should be replicated across the country in order to ensure judicial independence. The HJPC also recommended that it should have a stronger role as a formal proponent for court and prosecutor office budgets with the relevant legislatures.<sup>42</sup>

Another way to improve the budgetary procedures across the country without necessarily requiring centralization is by ratifying transparent, unified criteria for budgetary allocations, allowing for a more co-operative relationship between executives and the judiciary in the process (Wittrup and USAID 2013: 19). Another important aspect is to produce multi-year budgets with ‘long-term strategic thinking’ for courts and prosecutors’ offices, instead of the current short-term and unpredictable allocation system.<sup>43</sup> As an example of good practice, this principle of long-term budgeting and strategic planning was crucial in the consolidation of the Court of BiH during the internationally supported Registry project between 2004 and 2013.<sup>44</sup>

### 4.3 Whose Structured Dialogue?

In April 2011, the National Assembly (lower house) of RS ratified a proposal to hold a referendum with the following question: ‘Do you support laws imposed by the High Representative in Bosnia, in particular the

39 Interview with an official at DG Enlargement, Unit C1 (Bosnia-Herzegovina), 4 September 2014.

40 Interview with an EUSR official, 9 February 2015.

41 Law on Budgets, Brčko District, art. 16.

42 Analysis of Existing Regulations which Regulate the Budgets of Courts and Prosecutors’ Offices, op. cit.

43 Interview with a former official at the State Prosecutor’s Office, 23 February 2015.

44 Interview with a former official at the Court of BiH, 9 February 2015.



laws on Bosnia's state court and prosecution?' (Remikovic and Hadzovic 2011) The institutions in question would include both the state-level Court of BiH and Prosecutor's Office of BiH, since both were created by an imposed decision by the High Representative. Milorad Dodik, leader of SNSD and President of RS, justified the proposal as a poll on trust in the state-level judicial structures in BiH, particularly the war crimes chamber, which prosecuted more Serbs than either Croats or Bosniaks (Remikovic and Hadzovic 2011). However, the leader of the Bosniak caucus in the Council of Peoples (upper house) in RS blocked further consideration of the proposal, and appealed to the High Representative to intervene and annul the decision by the Lower House on the basis that RS did not have jurisdiction over state-level matters (Remikovic 2011).

Seemingly in response to the impending crisis caused by the call for a plebiscite in RS on the legitimacy of state judicial institutions, Baroness Catherine Ashton (High Representative of the [European] Union for Foreign Affairs and Security Policy) travelled to Banja Luka to meet with Dodik. After concluding discussions, Ashton announced that the EU and BiH would open a 'structured dialogue on the functioning and work of the judiciary as a mechanism that the EU will activate as a response to these dilemmas. This is a defined institutional mechanism which tackles judicial issues in the enlargement countries'. She also added: 'We warmly welcome your leadership, Mr. President [Dodik], in accepting the dialogue... I expect you will stick to your commitments to remove the threat of the referendum and to review the conclusions' (EU 2011). Dodik gave assurances that the call for the referendum would be repealed in exchange for the opening of the Structured Dialogue, which would concentrate on the appellate (second instance) division in the Court of BiH, war crimes prosecution, and the retroactive application of the Criminal Code in war crimes trials (Hadzovic 2011). Instead of pushing reform via conditionality, the discussions would focus on technical reasoning and dialogue to achieve progress in judicial reform via local ownership instead of imposition.<sup>45</sup> In June 2014, the National Assembly of RS 'shelved' the plan for the referendum, stating: 'With the opening of dialogue about the situation in the judiciary, the Republika Srpska National Assembly regards that for the time being it is not necessary to organise a citizens' plebiscite' (Katana and Sito-Sucic 2011). Thus, it was clear that for Dodik and others within RS, the starting premise of the Structured Dialogue was to resolve a constitutional crisis: the intransigence of certain officials in ceding powers to state-level authorities.

However, it is instructive to return to Ashton's original statement after meeting with Dodik, particularly the words: 'This is a defined institutional mechanism which tackles judicial issues in the enlargement countries'. Indeed, the type of dialogue instrument used in BiH to address key sectors could be found elsewhere in the Western Balkans: Serbia (then Serbia and Montenegro) has had an Enhanced Permanent Dialogue since 2003; and the Ministerial Dialogue between Montenegro and the EU commenced in 2007. After the Structured Dialogue started between EU and BiH: the Structured Dialogue on the Rule of Law between the EU and Kosovo began in 2012; the EU and the former Yugoslav Republic (FYR) of Macedonia started the High Level Accession Dialogue in 2012; and the EU-Albania High Level Dialogue commenced in 2013. In fact, there is some insistence amongst international officials that: 'This methodology of the Structured Dialogue is not new to the EU... There are other similar mechanisms, so it was always in the plan, it was in the programme that this Structured Dialogue would take place... The way that it was presented in the media was that Dodik was the saviour of the day, because he was complaining about the court and the

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45 Interview with an official at Unit C1, DG Enlargement, Brussels, 4 September 2014.



prosecutor's office being biased and inefficient... That is the way it was presented, but we knew months in advance that she [Ashton] was coming anyway. Maybe the timing was not right. Maybe she should have come later'.<sup>46</sup>

Thus, there is an understanding amongst some officials that the Structured Dialogue on BiH would have been established irrespective of the crisis around the RS referendum, but that the timing of the visit and establishment of the Dialogue was seen as a response to RS demands. In other words, the timing of Ashton's visit and establishment of the instrument has had the unintended consequence of representing the Dialogue as a response to placate Dodik's attack on state-level institutions. The EU further exacerbated this misperception by holding the first Structured Dialogue in Banja Luka (the capital of RS) in June 2011.

The result of this is that the RS has been able to claim a degree of ownership over the Dialogue that is unfounded, according to the EU, yet is predominant amongst commentators and practitioners. For example, Florian Bieber (2011) concludes: 'The EU offered a "structured dialogue" in exchange for shelving, not dropping the referendum...The EU needs to have talks and take the lead in BiH, but not (only) with Banja Luka and certainly not on Dodik's terms on the judiciary... Dodik will continue to hold the threat of a referendum over such talks and with a largely hapless EU on the ground he is likely to gain from the talks'. This understanding of the provenance of the Structured Dialogue has allowed for the politicization of judicial reforms in the discussions: 'I think that the mistake was made when the Structured Dialogue was born as a diversion tactic from the threats of RS that they will secede from BiH. Within those first few months, they [politicians] had anchored their positions and used it as a political dialogue. Then it was really difficult to bring it back to what it was really meant to be'.<sup>47</sup>

One participant in Structured Dialogue meetings felt that the instrument was a 'replacement' for the referendum by RS, and that 'the EU, on the other hand, presented it as something different, meeting the EU standards towards an independent judiciary. But in fact, if you entered the room, if you see how discussions go, it was not dictated by any standards, at the beginning at least, by the EU. It was dictated by many representatives that came from the RS, many of whom supported this abolishment of the state court and prosecutor's office'.<sup>48</sup>

Thus, according to the EU, the Structured Dialogue is an established instrument used in enlargement countries to achieve European standards through locally agreed reforms, as evidenced by the dialogue mechanisms in all other Western Balkan territories. During the discussions, RS officials have referred to the mechanism as 'our dialogue', but were repeatedly corrected by EU officials.<sup>49</sup> Nonetheless, the timing of its establishment, holding the first meeting in Banja Luka, and perceptions (including those involved in the Dialogue) have resulted in the unintended consequence of the RS, as the perceived agenda-setter, using the instrument to attack the state-level judicial institutions. In other words, the EU instrument designed to improve Bosnian judicial independence has opened the state-level judiciary to political attacks.

46 Interview with an international official working in Sarajevo, 20 February 2015.

47 Interview with a former official at the State Prosecutor's Office, 23 February 2015.

48 Interview with a former official at the Court of BiH, 9 February 2015.

49 Interview with an international official working in Sarajevo, 20 February 2015.

#### 4.4 *Unrealized Effects: Buildings Institutions without Transforming Attitudes*

As mentioned in the introduction, for all of the EU efforts in creating strong institutions, a verifiable track record of judicial independence in practices remains unrealized.

It is for this reason that it is crucial to develop an independent judicial academy alongside the judicial council, as in Serbia. However, in BiH, there are only two entity-level training centers, which have not been integrated into a formalized assessment process for judicial appointment. There are proposals to improve the situation, particularly through the introduction of a standardized state-wide examination for individuals wishing to enter the profession, as well as clearer structured criteria to be incorporated into interviews (conducted by the HJPC) for initial appointment and promotion (European Commission 2014b: 14). At present, the criteria for appointment are quite vague, such as ‘Professional ability based on previous career results, including participation in organized forms of training’.<sup>50</sup> There is also a problem that the in-service training does not connect completion of relevant courses with a confirmation that this new knowledge has been applied in practice.<sup>51</sup> There is thus ‘no link’ between exam performance in judicial training centers and appointment in the judiciary. On one hand, this can be justified as providing more egalitarian access to the judicial profession without limiting the pool of candidates to those who have attended courses at a training center or academy.<sup>52</sup> On the other hand, however, without more explicit benchmarks in interviewing or standardized examinations for entry and promotion, there is room for political interference. The HJPC has suggested instituting a points-based system for appointments and promotions, but these provisions have not been ratified as yet.

Thus, as things stand, ‘although most judicial staff comply with the compulsory minimum days of training per year, institutional reforms of the training centers are necessary to improve both the delivery and substance of training’ (European Commission 2014b: 13-14). Part of the problem lies with the way international assistance has been deployed in supporting the Judicial and Prosecutorial Training Centres (JPTCs). Most initiatives have been one-off training sessions due to the project-driven nature of international assistance, with little co-ordination with other donors. Even now, when donors do meet, it is for ‘information sharing’ rather than co-ordination,<sup>53</sup> and ineffective co-ordination is an important factor in the shortcomings of the judicial reform process in BiH.<sup>54</sup>

Although the lack of co-ordination is an important factor, the stasis in improving the training regime has to do with the lack of change in mentalities on the ground, which were not transformed to a sufficient level even after the gradual process of international administration to domestic ownership.<sup>55</sup> The methodology of the training remains quite hierarchical, with the small pool of trainers usually delivering the information as a lecture with little or no interactive elements.<sup>56</sup> The EU has sought to work with the JPTCs in order to

50 Law on HJPC, art. 43.

51 Interview with an EUSR official, 9 February 2015.

52 Interview with an official from the HJPC Secretariat, 9 February 2015.

53 Interview with a former official at the State Prosecutor’s Office, 23 February 2015.

54 Interview with an official from the HJPC Secretariat, 9 February 2015.

55 Interview with an OHR official, 23 February 2015.

56 Interview with a former official at the State Prosecutor’s Office, 23 February 2015.

modernize them in order to communicate their activities better with their core constituents (i.e. judges and prosecutors), as well as with the general public, and to change the methodology of trainings to be more interactive and practical.

However, in deploying this assistance, international actors have found that the directors of the two JPTCs block attempts to conduct ‘any analytical work on the reform of the institutions. They do not want people to be looking at how they work, or how little they work’.<sup>57</sup> The problem is clear: there is no accountability mechanism or procedure through which JPTC directors and staff can be made to engage in more ambitious reforms, including providing more progressive and comprehensive training.

#### 4.5 Conclusion

From the analysis above, it is clear that measures undertaken to reform and strengthen the judiciary, be it through dialogue, the creation of new institutions or mechanisms, have created conditions that actually threaten judicial independence in ways that were not presumably foreseen. With regard to strengthening the HJPC, reforming judicial budgeting, or using the EU’s structured dialogue to advance judicial reform, the success of any innovation in BiH seems highly contingent on the existing constitutional distribution of power.

There is also a sense that reforms, invariably initiated at the behest of, or in response to EU standards or pressure, rest on the notion that technical changes can be undertaken in order to immunize state structures from political interference. This rather Archimedean notion of new, supposedly neutral directors and secretariats as a bulwark against (ethicized) party political interference seems to ignore the extent to which party elites and state bodies in BiH are enmeshed at all levels. A recent roundtable organized by Oxford University and the London School of Economics proposed that international actors (including the EU) should engage directly with representatives of state bodies, not partisan elites (SEESOX et al. 2015: 14). However, those working ‘on the ground’ in BiH continually point to the fact that there is no separation between the two: ‘politics’ has infiltrated the HJPC and other bodies that are supposedly ‘above politics’.

Furthermore, the reforms that were achieved with strong, unilateral international imposition through the High Representative and the Transfer Agreement establishing the HJPC do not reflect the current political climate. In particular, since the victory of Dodik in RS in 2006, the entity’s leaders have become particularly intransigent. The situation is not much better in FBiH, due to increased tensions between Bosniak and Croat leaders. After months of bitter quarrelling, the FBiH Government was formed five months after the 2014 election, but with only four out of ten cantons establishing governing coalitions. Against this centrifugal backdrop, an effective consensual reform process is highly unlikely, particularly in relation to building and bolstering national judicial institutions, where reforming the ‘state’ is a ‘dirty word’<sup>58</sup> or ‘taboo’<sup>59</sup> amongst many of the stakeholders.

57 Interview with an international official working in Sarajevo, 20 February 2015.

58 Interview with an international official working in Sarajevo, 20 February 2015.

59 Interview with a former official at the State Prosecutor’s Office, 23 February 2015.

## 5. Conclusions

What each of the case-study empirical sections of this working paper has reinforced is the sheer complexity of any reform initiative designed to strengthen judicial independence. Whether the innovation is a direct result of EU conditionality or not, the potential for unintended consequences and unrealized effects is, as we have seen, significant. Given the complexities of the cases examined, we have summarized our findings in *Table 1*.

*Table 1: sub-optimal outcomes in judicial independence*

<p><b>Unintended consequences: EU intervention exacerbates the situation</b></p>	<p>EU-led reform of the Bulgarian SJC has led to problems of accountability and transparency in the appointment of judges, since the latter were not developed concomitantly with greater independence. There is some evidence that lessons were not learnt by the EU, since similar problems are also apparent in the Serbian HJC and the Bosnian HJPC.</p> <p>Creation of the Serbian Judicial Academy, encouraged by the EU, transformed the independent training centers into institutions with significant influence from the Ministry of Justice.</p> <p>Timing of the start of the EU-BiH Structured Dialogue on Justice has allowed politicians from Republika Srpska to claim ownership of the process and attack state-level judicial institutions.</p>
<p><b>Unrealized effects: EU intervention leads to improvement short of the level envisioned</b></p>	<p>EU efforts have not completely removed political interference from the Bulgarian SJC.</p> <p>The lack of a transparent Serbian HJC led to missed opportunity for transitional justice during the judicial reappointment process, and many judges who had been removed have returned to the bench.</p> <p>Lack of co-ordination between the EU and other international donors, coupled with impediments from entity-level Training Centre Directors, has slowed reform of judicial training in BiH.</p> <p>The post-war ethno-territorial divisions in BiH (resulting from the Dayton-Paris Agreement) allow for numerous opportunities for political interference in judicial budgeting, despite international capacity building efforts.</p>

At a very superficial level, the problem is politics: no matter how well conceived a reform may be, political will is the critical intervening variable in terms of implementation and effectiveness. Political elites intent

on limiting the power of judges and extending or securing their influence over 'independent' judicial bodies are perfectly able to do so, regardless of the ascribed powers of the new institutions or bodies.

The risk of political interference is augmented by the fact that the EU's approach and strategy for supporting judicial reform in candidate or potential candidate states is based on an Archimedean notion of lifting judicial processes out of the milieu of politics and party interference. In other words, supporting the creation of autonomous judicial councils or academies that are separate from governing institutions, and then attempting to firewall them from political interference. This immediately raises questions about accountability and control, but it also stirs up a political reaction and intensifies the quest, so it would seem, for politicians to ensure that they can exert influence. In cases where there is an existing *de facto* system of checks and balances and a separation of powers, however fragile and imperfect, the new institutions seem to inflict collateral damage on democratic accountability. What they also seem to fail to deliver, certainly in the short term, is a sense of greater efficiency and professionalism.

Thus, whilst the unintended consequences of, for example, the creation of a new judicial academy, or a process of reappointment for judges are clear, they also appear not to achieve their stated objectives: political interference is not entirely prevented or diminished, and, if anything, the augmented power of these new and potentially powerful judicial bodies make them an even greater target for corrupt officials and party elites. Thus, what we see is a toxic mix of both negative unintended consequences and unrealized effects. Part of the dilemma seems to be finding an appropriate balance between accountability across branches of government, and firewalling the judiciary from political interference. Independence and accountability are not incompatible, but it seems that in Serbia, BiH and Bulgaria, the consequence of EU pressure for reform has been to push too much towards independence, which has discredited the new bodies and therefore weakened the rule of law, rather than strengthen it. It is possible to see such problems as teething troubles, and argue that any new institution or initiative needs time to bed down. This may well be the case, but the risks of new Academies or Councils, endowed with extensive powers, either failing to gain credibility from the outset, or actually discrediting the judiciary even further is extremely worrying.

The research on BiH and Serbia also suggests that there are loopholes and evident shortcomings in the reforms that are quickly enacted. The clear preference for augmenting training bodies and giving judicial councils significant powers without paying heed to democratic accountability and the delicate interaction with the executive and legislature is a mistake, or an oversight. Notwithstanding the unusual case of BiH (in which the constitutional set-up stymies nearly any reform initiative), judicial reform is immensely sensitive in countries with no immediate tradition of a separation between party and state, between government and the judiciary, and where the realities of transition have fueled a public sense of widespread corruption and illegality.

We realize that it is impossible to eradicate political influence over the judiciary, but it is possible to strongly constrain the actions of political elites intending to interfere with the rule of law. We also agree with the conclusions of the aforementioned TAIEX seminar in BiH that the standards for insulating relevant institutions in the region need to be higher than in Western Europe to avoid the overexposure of the judiciary

to undue partisan influence. In the short-term, it is of paramount importance to build in mechanisms for transparency and accountability at the same time as institutional independence. In particular, strict laws on the conflict of interest covering all public officials (including the judiciary) need to be ratified against the backdrop of greater open access to trial and judicial council proceedings. This will allow for a greater potential oversight by domestic civil society organizations, media, and the EU, and reduce opportunities for political interference behind closed doors. In the longer term, it is necessary to gradually reform and standardize judicial training centers (or academies) as single entry points into the profession and for promotion. Moreover, given the particularities of Southeast Europe, the Western Balkans, the levels of independence in the management of these training institutions need to exceed the standards in Western Europe, and need to be more firmly under the control of professional associations with necessary accountability mechanisms to sanction malfeasance. Thus, technical fixes alone will not deliver democratic governance and the rule of law unless they are being introduced at the behest of practitioners intent on progressive democratic change.

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**“Maximizing the integration capacity of the European Union: Lessons of and prospects for enlargement and beyond”**

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