



# JUDICIAL REFORM IN SERBIA AND BOSNIA-HERZEGOVINA

## IS EU SUPPORT AND ASSISTANCE AUGMENTING INDEPENDENCE?

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Adam Fagan

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# JUDICIAL REFORM IN SERBIA AND BOSNIA-HERZEGOVINA: IS EU SUPPORT AND ASSISTANCE AUGMENTING INDEPENDENCE?

Adam Fagan

## Abstract

What is the impact of EU support delivered as part of the ‘new approach’ for judicial independence in Serbia and Bosnia-Herzegovina? The paper focuses on two new institutions - the Judicial Academy in Serbia and the High Judicial and Prosecutorial Council in BiH. Drawing on the comparative and theoretical literature on judicial independence, particular consideration is given to the balance between independence and accountability and whether an appropriate balance has been struck. Under the spotlight is the Commission’s new approach as a framework for maximizing the integration capacity of the EU from the perspective of a candidate and a potential candidate country. The conclusion reached is that EU intervention is predominantly geared towards strengthening independence, but this needs to be pursued extremely carefully by the Commission to ensure that new forms of political interference do not occur and that the newfound authority of these judicial institutions is exercised appropriately. Although the new approach requires demonstrable progress towards judicial reform as a prerequisite for opening additional chapters of the *acquis*, evidence presented here suggests that securing judicial independence is highly complex and will remain a ‘live’ issue throughout the accession negotiations.

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## 1. Introduction

The so-called ‘new approach’ of the European Union (EU) for the Western Balkans, introduced in October 2011, rests on the notion that issues relating to the judiciary and fundamental rights (Chapter 23 of the *acquis*) and justice, freedom, and security (Chapter 24) are prioritized at the start of accession negotiations (European Commission 2011). Fundamental reforms in these areas, plus a demonstrable track record of implementation, must be in place prior to the opening of other chapters (European Commission 2011: 5). The new approach is the most significant recent initiative introduced by the Commission to strengthen and develop the integration capacity of candidate countries in the region. It is also the clearest indication yet that the Commission has both ‘learned lessons’ and recognizes the profound challenge of integrating these economically weak polities in which democratic institutions remain fledgling and insecure despite extensive assistance. Against these expectations, enlargement has not led to a deterioration of compliance with EU law in the larger EU. This paper shows that in three of the EU’s four enlargement rounds, the new member states comply better with EU law than the old member states. The Southern enlargement round in the first half of the 1980s is the only one that led to a substantial increase in non-compliance.

This paper assesses the impact of EU assistance and intervention designed to support judicial independence in Serbia and Bosnia-Herzegovina (BiH). Following Smithey and Ishiyama (2002: 165), judicial independence is understood here to mean that “judges do not have any relation to the parties involved in a case and no vested interest in its outcome; and decisions by judges are not influenced by actors outside the judiciary”.

The empirical focus is the creation of two new institutions – the Judicial Academy in Serbia, and the High Judicial and Prosecutorial Council (HJPC) in BiH – both of which have received strong support from the Commission. Serbia is chosen as a country case study because the initial stages of its accession negotiations coincided with the introduction of the new approach and the prioritization of Chapters 23 and 24 of the *acquis*.<sup>1</sup> BiH is not yet a candidate country and has not therefore started accession negotiations. However, the new approach as well as the focus on judicial reform and the rule of law are prevalent in the Commission’s negotiations with the country, and are the focus of recent assistance and interventions. Moreover, the new approach is an over-arching framework for EU relations with the Western Balkan countries and progress in judicial reform will be the critical determinant of the country’s progress towards accession.

What this analysis seeks to ascertain is whether the EU’s new approach is exerting a positive impact on judicial independence in Serbia and BiH. If so, then we may assume that this will augment the EU’s external integration capacity<sup>2</sup>, understood here as the capacity to assume the responsibilities of member-

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1 In the case of Serbia, candidacy was not formally granted until March 2013, but the Commission’s recommendation that the country was ready for candidate status in October 2011 was a significant moment and came after the arrests of Goran Hadžić and Ratko Mladić. It is therefore fair to say that the accession negotiations with Serbia coincided with the launch of the new approach in October 2011.

2 As Schimmelfennig (2014: 8) notes, there does not exist “a strong theory of integration capacity (...) but rather a tentative list of factors that we assume to influence the EU’s integration capacity”. These factors include, “favorable public opinion, converging government preferences, strong competences of the Commission, and democratic consolidation in the candidate countries” (Schimmelfennig 2014: 8). This

ship (Schimmelfennig and Börzel 2016). Conversely, if the EU's interventions and assistance are shown to be negatively altering the balance between accountability and independence, this will potentially have a weakening effect on integration. Whereas existing studies of the new approach have focused on the degree to which there has been civil society involvement, and the implementation of the various rule of law and anti-corruption initiatives (Kmezić 2015; Nozar 2012), this study<sup>3</sup> focuses specifically on how EU-supported institutions function in practice. In Serbia, the focus is on the creation of the Judicial Academy, introduced in an attempt to strengthen the professionalism of the judiciary and bolster judicial independence. In the case of BiH, the focus is on the High Judicial and Prosecutorial Council (HJPC) and the EU's intervention in its workings and code of practice.

The article concludes that whilst the EU's focus on supporting new judicial institutions to deliver greater independence is correct in principle, it is not a panacea. New, relatively autonomous bodies tasked with training and regulating the activities of judges may unintentionally enable new forms of political manipulation to occur and reinforce conservative practices that serve to undermine the reputation of the judiciary. Taken overall, what the case studies seem to suggest is that EU intervention and support can lead to the worst of both worlds: deficient independence and the emergence of new channels of political interference. The Commission clearly has considerable capacity to intervene and shape institutional development, as well as an ability to respond quickly when the independence or autonomy of the new institutions is threatened. However, the appropriate balance between independence and accountability is extremely difficult to strike, not least because it involves a perpetual negotiation between judicial institutions and political elites and, critically, close scrutiny of these institutions over time.

## 2. The EU, judicial reform and the new approach

The starting premise of the research is that the EU's new approach and the prioritization of judicial independence for (potential) candidate countries is a reasoned and appropriate response on behalf of the Commission to the slow pace of progress in the Western Balkans, and the legacies of previous enlargements. Securing judicial independence and rule of law reforms is foundational for ensuring integration and post-accession compliance (Mendelski 2013). It is also of critical importance in post-conflict countries, such as Serbia and BiH, with legacies of transitional justice and judicial systems compromised by allegations of war crimes and the internationalization of judicial processes (Ostojić 2014).

Two points ought to be noted from the outset. First, the EU's endeavor to target its assistance and use its enlargement instruments to engender judicial reform is an ambitious objective. International agencies trying to engineer an appropriate balance between independence and accountability in third countries is widely recognized in the comparative literature as being extremely difficult and invariably unsuccessful (Garoupa

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research is, therefore, based on the assumption that if the new approach is exerting a positive impact on judicial practice, this will potentially exert a positive effect on various 'integration-capacity factors', including public attitudes towards the EU, economic growth, and the strengthening of democratic governance.

3 The research was carried out and funded as part of the EU FP7 "MAXCAP" project, available at [www.maxcap-project.eu](http://www.maxcap-project.eu), accessed 6 May 2016.

and Ginsburg 2008; Canivet et al. 2006; Seibert-Fohr 2012: 4; Guarnieri 2013; Parau 2012). Moreover, as discussed below, the relationship between formal institutional change and improvements in judicial practice, on which most of such interventions are based, is highly contentious (Melton and Ginsburg 2014).

Second, the notion of the EU prioritizing the rule of law and judicial reform in its dealings with candidate countries is not entirely new. For instance, in its negotiations with Bulgaria and Romania prior to their accession in 2007 the Commission stated that it would “pay particular attention to the establishment of the structures needed to ensure the rule of law. This includes administrative and judicial capacity and the fight against fraud and corruption. These issues should be tackled at an early stage of the pre-accession process” (European Commission 2006: 22). Supporting judicial reform and rule of law activities has been a cornerstone of EU assistance in the region since 2000. The 2001 CARDS (Community Assistance for Reconstruction, Development and Stabilisation) programme devoted €37.5 million to supporting justice and home affairs issues, local community development and institution building across the Western Balkans, a significant proportion of which targeted rule of law and judicial reform directly and helped towards the (re-)building of public institutions, preparing new framework laws and constitutional reform.<sup>4</sup>

However, the new approach was introduced specifically to prevent the need to initiate the Cooperation and Verification Mechanism (CVM) after accession. Drawing on the experience of previous accession processes, particularly with regard to Croatia recently, the Commission now prioritizes issues relating to judiciary and fundamental rights (Chapter 23 of the *acquis*) as well as justice, freedom, and security (Chapter 24). The underlying aim is that these fundamental issues “should be tackled early in the accession process and the corresponding chapters opened accordingly on the basis of action plans...” (European Commission 2011: 5). The new approach stipulates that candidate countries will be judged on the basis of demonstrable track records of reform implementation, but will also not be able to set closing objectives, or indeed open other chapters unless such progress can be demonstrated. For its part, the Commission will “report regularly, at all stages of the process, on progress achieved in these areas along milestones defined in the action plans with, where appropriate, the necessary corrective measures. IPA funds will be targeted to support this process” (European Commission 2011: 5). The difference lies therefore in prioritizing judicial reform as a focus of assistance, but also in seeking to directly gather data on the implementation of reforms on the ground and making such progress a condition for opening other chapters of the *acquis*. The new approach thus inserts additional conditionality into the accession process.

The section below sets out the theoretical framework of the paper, namely the comparative literature on judicial reform in democratic and transitional contexts. The complexity of balancing independence and accountability is highlighted as it has particular resonance for post-authoritarian states. This is then followed by an exposition of the data on Serbia and BiH, which was gathered on the basis of semi-structured interviews with NGOs, judicial officials and practitioners, as well as EU delegation staff in both countries between August 2014 and March 2015.

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4 For more information, see the *CARDS brochure*, available at [http://ec.europa.eu/enlargement/pdf/financial\\_assistance/cards/publications/brochure\\_en.pdf](http://ec.europa.eu/enlargement/pdf/financial_assistance/cards/publications/brochure_en.pdf), accessed 6 May 2016.



### 3. Judicial reform: balancing independence and accountability

Underpinning the EU's new approach for the Western Balkans there are two implicit assertions: first, that judicial independence is a priority, and second, that new judicial institutions (councils and academies) will improve practice.

However, the theoretical and comparative literature on judicial reform does not equivocally endorse either assumption. The first issue is that whilst the emphasis placed by the Commission on independence is typical of judicial reform strategies introduced across the world over the past 25 years, it is extremely difficult to measure or, indeed, illustrate the independence of judges (Ginsburg 2010; Melton and Ginsburg 2014). Most reform initiatives that seek to strengthen independence focus on "insulating the tenures and salaries of judges, and limitations on the roles of the executive and legislative branches in the selection and removal of judges" (Melton and Ginsburg 2014: 188). In other words, independence is typically assessed in terms of the existence of *de jure* provisions to prevent interference rather than a direct measurement of *de facto* practice.

Much then rests on an assumed positive correlation between *de jure* and *de facto* judicial independence. Whilst the literature does not entirely dispute such a correlation (Hayo and Voigt 2007), it is certainly not strong and the most optimistic conclusion reached is that *de jure* guarantees are the *most significant determinants of independence* on the benches. Although cross-national comparative studies illustrate that countries observing human rights protection are invariably those with *de jure* independence built into constitutions and legal frameworks (Camp Keith 2002; Hayo and Voigt 2007), studies of post-socialist countries have found no direct relationship between *de jure* and *de facto* independence (Smithey and Ishiyama 2002; Herron and Randazzo 2003). Even in countries where rules and practice appear to coalesce the critical issue is the sequencing: *de jure* independence is shown to lag behind *de facto* independence (Melton and Ginsburg 2014: 188-9).

Thus, based on experiences with other countries we cannot assume that measures to strengthen *de jure* independence will necessarily result in *de facto* change; experience suggests that practice alters first and that constitutional amendments follow. Whilst this is not to suggest that EU measures to support *de jure* change in Serbia and BiH will fail to deliver *de facto* independence or at least better practice, a tight correlation cannot be assumed.

The comparative and theoretical literature raises far greater concerns about the EU's over-arching focus on independence. Numerous studies highlight the tension between bolstering the independence of judges whilst at the same time ensuring accountability. Garoupa and Ginsburg (2008: 18) portray this as a "dialectic tension between the need to de-politicize the judiciary and the trend toward judicializing politics". This is in large part about the balance of power between the three branches of government, but it is also about ensuring that measures are in place to ensure that "the collective vanity of the judiciary" is checked, and that "laws (are in place) to govern judges' conduct and to provide occasion for judging them" (Carrington and Cramton, 2009: 1107-1108). In a nutshell, the concern is that judges with bolstered independence will stray too far into politics and policy making or will, indeed, court particular interests with impunity.

This is a particular anxiety in post-socialist states where there existed a fusion between the three branches of power. On the one hand, there is an urgent need to curtail political interference and to strengthen the competency and independence of judges (most of who will have been appointed and trained under the socialist regime). Independent judges, not directly controlled or appointed by any party politicians, are seen as allies of progressive change and a bulwark against corruption. In this sense, the imperative can be expressed as an attempt to limit the accountability of the judiciary to political elites. Yet, on the other hand, if judges become too independent from the legislature and the executive – i.e., there is too little accountability – their ability to determine through their rulings the direction of social and public policy may become too great and their new-found power an impediment to progressive reform. What is perhaps over-looked, at least in the early years of a new democracy, is that the independence of a conservative or reactionary judiciary is as much of a threat as political interference. Whilst new training and appointment mechanisms can be put in place, it is invariably a slow process to eliminate from the benches judges from the socialist period (Mendelski 2013). Whilst in the immediate post-authoritarian period the fear of political interference is real and understandable, this must not allow the pendulum to swing too far towards independence in the belief that this will result in impartial and better justice. Garoupa and Ginsburg (2008: 18) capture the essence of the challenge and how it unfolds over time:

“Independence is needed to provide the benefits of judicial decision making; once given independence, judges are useful for resolving a wider range of more important disputes; but as more and more tasks are given to the judiciary, there is pressure for greater accountability because the judiciary takes over more functions from democratic processes.”

What is over-looked by those who prioritize independence is that limiting political interference in the selection and promotion of judges does not guarantee a progressive or less-conservative judiciary. Indeed, rigid hierarchies amongst judges and closed selection processes can, in fact, prove as much of an obstacle to progressive reforms as political interference. Closed practices can inhibit change and disconnect judges from society. This can be partially addressed by mechanisms in place to ‘judge the judges’, which can be a process undertaken entirely by judicial bodies or the legislature (Carrington and Cramton 2009).

Most scholars agree that achieving the ‘correct’ balance between independence and accountability is extremely difficult and there will often be considerable variation over time. On the basis of their cross-country study, Garoupa and Ginsburg (2008: 21) conclude that there is no universally optimal balance, rather “a limit to how far one can move in either direction within democracies”.

What then does the comparative and theoretical literature say about the EU’s specific strategy of supporting new institutions, such as judicial councils and academies, in order to deliver greater independence? Garoupa and Ginsberg contend that “there is little relationship between council adoption and quality” (2008: 17, 34). Yet, focusing on judicial councils and academies to bolster independence and regulate practice is entirely understandable given that these countries are still wrestling with authoritarian legacies and political interference. The Commission’s objective to achieve a meritocratic selection process as well as to improve the quality of training is also worthy given that most judges will have been trained and appointed

during the socialist era. The EU's strategy, namely to improve the quality of judges in the belief that better training before they are selected will make their judgements fairer and more consistent once selected, is a universally adopted approach.

However, comparative research into the impact of judicial councils on the quality of judicial decisions suggests that much depends on how councils operate, and their prescribed remit (Garoupa and Ginsburg 2008). For instance, whilst the United States (US) favors merit selection, other countries place emphasis on training and measures to ensure that poorly performing judges are sanctioned. In other words, they control exit as well as entry points; competences as well as competition. The composition of the council (the balance between judges and non-judges) is also deemed critical, as is the council's ability to gain public support and to balance and institutionalize various interests. What is deemed to make a difference is whether the constitution allows for procedures to select and remove judges. Less than ten percent of constitutions in the world do so, but a positive correlation is shown between insulating the appointment and sacking of judges from political interference and *de facto* independence (Garoupa and Ginsburg 2008). In the Western Balkans the EU continues to place independence and the creation of new institutions at the fulcrum of its reform efforts, pushes for "special measures to guarantee that the judiciary consolidates its independence and authority" and warns that "any reform that would introduce an overexposure of the judiciary to the other powers of the state would not be advisable at this stage" (European Commission Services 2015: 8). The EU has thus continued to prescribe the establishment of highly independent judicial councils (and anti-corruption agencies), despite the fact that these bodies are "seldom impartial" and that the same EU strategies are deemed by some to have failed in Bulgaria and Romania (Mungiu-Pippidi 2014: 29).

Perhaps the most significant warning from the comparative literature is that securing the appropriate balance between independence and accountability, or ensuring that new judicial institutions will deliver professionalism, independence and accountability, is a continuous and ever-changing process. The balance of power between judges and political interests has to be continually checked and mediated, as do the institutions set up to do so. In other words, the existence of councils and academies alone is not a guarantee for independence. Having reviewed the theoretical and comparative literature on judicial independence, a more nuanced set of research questions can be framed:

1. To what extent is EU support for new and reformed judicial institutions in Serbia and BiH bolstering the independence of the judiciaries?
2. How do these institutions (academies and councils) impact on the balance between accountability and independence?
3. What do the case studies suggest about the EU's new approach and prioritization of judicial reform *in practice*?

## 4. Serbia, the EU and judicial reform

Serbia has undertaken a remarkable Europeanization journey over the last decade, from a post-authoritarian country blamed for the Yugoslav conflicts in the 1990s that was intransigent in apprehending and extraditing high-profile war-crimes suspects, to the most recent country to commence EU accession negotiations (in January 2014). Using a variety of instruments and strategies (Instrument for Pre-Accession Assistance (IPA), Technical Assistance and Information Exchange (TAIEX), Twinning), the EU has invested heavily in reforming the Serbian judiciary and building new institutions in an attempt to change practice on the benches. Thus, the Commission's focus on judicial reform in Serbia pre-dates the new approach. However, candidacy and the emphasis on Chapters 23 and 24 of the *acquis* have intensified the impetus since 2011. The following section will examine the creation and evolution of the Judicial Academy, an initiative strongly supported by the EU, but an institution that has proved to be extremely controversial.

### 4.1. *The Judicial Academy: political interference by other means?*

As is the case in other post-socialist states, the core issue in reforming judicial independence in Serbia has been the understanding and application of the concept of 'independence' amongst judicial practitioners. During the Yugoslav period, the judicial profession was perceived 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>5</sup> To transform the understanding and behaviour 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 'standardized System for Judiciary Education and Training' by upgrading the Judicial Training Centre - established in 2001 by the Judges' Association of Serbia (JAS) as a nationwide, independent professional association<sup>6</sup> - into a national Judicial Academy to provide initial and continuing training for judicial practitioners.<sup>7</sup> The process of upgrading the Training Centre into a national Academy has relied heavily on EU assistance and support. Amongst judges and lawyers in the country, the Judicial Academy has been depicted as a positive example of internationally assisted judicial reform insofar as it has actively involved civil society in its trainings, and is seen to have the potential to become a forum where judges can openly discuss political interference and threats to their independence.<sup>8</sup> Despite the fact that it is not a requirement of the Community *acquis*, the EU has heavily promoted the Academy as a tool for improving the quality of the judiciary. 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).

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

6 Interview with JAS, Belgrade, 26 February 2015.

7 The IPA 2012 programme had a fiche entitled 'Support to the Rule of Law System', which included activities related to building curricula at the Judicial Academy.

8 Interview with Yucom, Skopje, 27 August 2014.

Nonetheless, the Judicial Academy is not without its critics. 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>9</sup> According to the new law, graduates of initial training were guaranteed immediate employment and the support of the High Judicial Council (responsible for nomination) to obtain permanent tenure, coming before other candidates. This would have quickly and decisively established the new Academy as gate-keeper to the profession. However, the preferential selection of graduates of the Academy was contested and referred to the Constitutional Court, which declared the initial provisions of the Law on the Judicial Academy to be unconstitutional. Therefore, graduates of the Academy could no longer be treated preferentially. This was a major setback for the Academy as a fully-fledged national training authority.

The meteoric rise of the Academy and the changes regarding the appointment of judges and prosecutors has served to divide the judicial community (between candidates with experience, and graduates of the Academy) and brought additional confusion into a judicial system that lacks public credibility. Despite the Constitutional Court ruling and the controversy, the EU has remained steadfast in its support for the Academy. Indeed, the latest progress report reiterates that the Academy should become “the compulsory point of entry to the judicial profession while ensuring compliance with the ruling” (European Commission 2014a: 41).

However, not all criticism of the Academy revolves around it having acquired too much influence. Indeed, the Association of Prosecutors argues that, in fact, it actually lacks sufficient independence and is subject to undue political interference.<sup>10</sup> It is argued by those supporting voices in the profession that if the Academy is to drive up standards and increase the efficiency and the 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 a closer link with the High Judicial Council).<sup>11</sup> Of particular concern is the fact that the Ministry of Justice currently wields considerable influence over the composition of 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 potentially 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).

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

10 Interview with Association of Prosecutors, Belgrade, 24 February 2015.

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

These shortcomings of an EU-promoted institution are problematic in a context where there is a widely-held consensus amongst key stakeholders that an acceptable balance between independence, accountability and professional competence has yet to be struck.<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 from political interference of 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 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 that 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.

## 5. Building judicial independence in Bosnia-Herzegovina

The dual projects of peace-building and state-building in the ethno-territorially fragmented BiH represents the most ambitious initiative by the EU in the Stabilization 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 within 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, judicial 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 Stabilization and Association process from 2000 – i.e., from ‘Dayton’ to ‘Brussels’ as the driver of change (Aybet and

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.

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.

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 across the country.

BiH has long been viewed as a laggard in terms of EU accession, and has experienced huge difficulties and lengthy delays in negotiating an SAA (Stabilization and Association Agreement). 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.

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>15</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>16</sup> Much, therefore, hinges on the success of the momentum to strengthen judicial independence.

The following section will focus on a particular aspect of judicial reform that has been the focus of EU assistance and intervention: namely, the creation of the High Judicial and Prosecutorial Council (HJPC).

### *5.1. 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>17</sup> with wide-ranging competences across courts and prosecutors’ offices across all levels of governance in BiH, including: the appointment and promotion of all judges and prosecutors in BiH; receiving complaints and conducting disciplinary proceedings; determining training; and proposing judicial budgets.<sup>18</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 prosecutors’ offices; a judge or prosecutor from Brčko District by the Judicial Commission; and attorneys by the entity-level Bar

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

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

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

18 Law on HJPC, art. 17.

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>19</sup>

In its 2012 assessment of judicial independence in BiH, the Venice Commission (2012: 4) 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: 19). 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). Perhaps due to its perceived independence, the HJPC has been frequently targeted publicly by political leaders, mainly but not exclusively from Republika Srpska. 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). No change was made to the process for appointing chief prosecutors.

Despite the positive assessments of the HJPC and its apparent ability to forestall overt attempts to diminish its powers and authority by political elites, concerns have nevertheless been raised about its independence. The main allegation is that ethnic interests or factions within the Council have begun to impede its work.<sup>20</sup> This is difficult to corroborate due to the fact that the HJPC works entirely behind closed doors, but concerns have been raised that members of the HJPC are bringing their ethno-political agenda into the proceedings.<sup>21</sup>

Such assertions would suggest that whilst the HJPC has been good at guarding its authority, it has been less prudent in regulating the behavior of its members and their contact with external political actors or bodies.<sup>22</sup> It also endorses the notion that the internal workings of the Council – i.e., how various factions are balanced and managed – is as critical to ensuring its independence as preventing interference from the executive, legislature or other political interests. Greater independence does not necessarily equal fairer and more equitable rulings. Independent bodies, as the comparative literature suggests, can be as conservative or subjective as judicial bodies that are heavily influenced by political elites (Garoupa and Ginsburg 2008).

Indeed, the controversy surrounding the HJPC’s new rulebook suggests that the problem is how the Council uses its independence and whether rules are in place that prevent political or ethnic interests from

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19 Law on HJPC, art. 4.

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

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

22 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).



impacting on rulings and procedures. Following discussions in the Structured Dialogue on Justice between EU and BiH<sup>23</sup>, the HJPC adopted a rulebook on conflict of interest in May 2014, which is 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 Commission felt would result in “a vacuum on questionable practices of conflict between private and public interest of its members” (European Commission Services 2015: 2).

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>24</sup> In response to the HJPC attempts to dilute the rulebook, the EU organised a TAIEX seminar on ‘Conflict of Interest in the Judiciary’ at the EU Delegation in Sarajevo in February 2015. The EU and representatives of different member states (Germany, Belgium, Italy, and Croatia) 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 (European Commission Services 2015: 8). This reflects a concern to ensure that the HJPC remains independent and not exposed to interference, but equally that it exercises its autonomy with caution. The HJPC conceded and withdrew the proposal to amend the code of practice.

This episode highlights a number of things: the EU is prepared to intervene quickly and decisively when it believes the independence of a judicial institution is threatened, even if this means challenging the autonomy of an institution it has supported. But it also reflects the hazards of the EU and other international organizations in terms of defending independence without continual consideration given to concerns either about accountability or arbitrary rule-making. An European Union Special Representative (EUSR) official said that there was a sense that with the high levels of independence enjoyed by the HJPC, its members were ‘out of control’ and felt ‘untouchable’, and there was the danger that the HJPC would slide towards ‘judicial oligarchy’ as in Croatia.<sup>25</sup> The same official also noted that the issue was not about ensuring greater control or accountability for the executive or legislature, but ‘ensuring mechanisms for regulating the HJPC’.

Broader concerns about judicial accountability also stem from the apparent ineffectiveness of the disciplinary mechanism. In its 2014 progress report, the Commission 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

23 “The Structured Dialogue on Justice is a mechanism of the European Commission. It aims to advance structured relations on the rule of law with potential candidate countries. The Structured Dialogue assists Bosnia-Herzegovina to consolidate an independent, effective, efficient and professional judicial system. At the same time, the Dialogue helps the country move further along its path towards the EU. The Structured Dialogue was launched by Commissioner Fuele; the first meeting of the EU-BiH Structured Dialogue on Justice was held on 6 and 7 June 2011.”, Delegation of the European Union to Bosnia and Herzegovina (2011) *Structured Dialogue*, available at [http://europa.ba/?page\\_id=553](http://europa.ba/?page_id=553), accessed 6 May 2016.

24 *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.

25 Interview with an EUSR official, 9 February 2015.

location within the HJPC has undermined its effectiveness and invoked the 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>26</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>27</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>28</sup> Thus, the HJPC is able to continue in this way because of the lack of transparency in its daily operations and a ‘very high level of independence’.<sup>29</sup>

## 6. Conclusion

What have the Judicial Academy in Serbia and the HJPC in BiH achieved in terms of moving the respective countries towards a judicial system in which “judges do not have any relation to the parties involved in a case and no vested interest in its outcome; and (ensuring that) decisions by judges are not influenced by actors outside the judiciary” (Smithey and Ishiyama 2002: 165)? Both institutions have received strong support from the EU and thus stand for a measure of the Commission’s new approach of prioritizing judicial reform.

The case of Serbia’s Judicial Academy revealed that by heavily supporting the creation of a new institution, the EU may have inadvertently weakened independence insofar as the existing Judicial Training Centre was set up and run by judges and therefore free from any political interference in its composition, whereas the new Academy’s membership is decided in large part by the government. Whilst the Academy is undoubtedly a powerful body, its insularity from other legal bodies in Serbia actually constrains its influence and ability to fully control the selection training and the conduct of judges. The overriding impression gained from the research is that the Academy’s status and the rules governing its composition and remit remain imperfect.

The EU’s support for the HJPC in BiH has created an institution that operates without direct political or outside interference, and with a code of practice that, due to the Commission’s intervention, regulates vested interests. However, in this case the EU has arguably supported an insular institution that is not sufficiently accountable and which does not seem to have effective mechanisms for regulating its own members’ behavior. In this case the pendulum seems to have swung too far towards independence.

Finally, what do these findings suggest about the impact of EU support for judicial independence on integration capacity? Under the new approach the EU wishes to lay a strong legal foundation so as to avoid a

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

27 Interview with an EUSR official, 9 February 2015.

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

29 Interview with an EUSR official, 9 February 2015.

post-accession CVM or the unravelling of judicial independence and to support adherence to the rule of law in the future. However, what this research suggests is that continual monitoring of and intervention in the new institutions is likely to be required. How judicial academies and councils evolve and operate will need to be continually monitored. The Commission will have to be perpetually cognisant of attempts by both political elites and by members of the judicial bodies to alter the rules governing appointments and remit. Thus, although under the new approach it will be necessary to close Chapters 23 and 24 of the *acquis* and demonstrate a successful track record of implementation before moving on to further negotiations, judicial independence and reform will remain 'live' issues throughout. The capacity of these new institutions to dispense judgements, which are deemed to be fair and not prejudiced by political interference, will influence public attitudes towards the EU, economic growth, and the strengthening of democratic governance – key factors of external integration (Schimmelfennig and Börzel 2016).

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

The ‘big bang enlargement’ of the European Union (EU) has nurtured vivid debates among both academics and practitioners about the consequences of ‘an ever larger Union’ for the EU’s integration capacity. The research project MAXCAP will start with a critical analysis of the effects of the 2004-2007 enlargement on stability, democracy and prosperity of candidate countries, on the one hand, and the EU’s institutions, on the other. We will then investigate how the EU can maximize its integration capacity for current and future enlargements. Featuring a nine-partner consortium of academic, policy, dissemination and management excellence, MAXCAP will create new and strengthen existing links within and between the academic and the policy world on matters relating to the current and future enlargement of the EU.