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THE RULE OF LAW IN BOSNIA AND
HERZEGOVINA AND ITS INTEGRATION IN THE
EU

MASTER'S THESIS

Zagreb, 2023

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MASTER'S THESIS

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Student: Lara Kapović

Zagreb, 2023

I declare that I have written my graduate thesis/final specialist thesis “The rule of law in Bosnia and Herzegovina and its integration in the EU” that I submitted to my mentor dr. sc. Davor Petrić for evaluation, independently and that it is entirely in my authorship. I also declare that the paper in question has not been published or used to fulfill teaching obligations at this or any other institution of higher learning, and that I did not obtain ECTS credits based on it.

Furthermore, I declare that I have respected the ethical rules of scientific and academic work, particularly Articles 16-19 of the Code of Ethics of the University of Zagreb.

Lara Kapović

Table of Contents

1.	Introduction.....	1
2.	BiH-EU relationship over the years.....	3
3.	Literature review.....	6
3.1.	Importance of the rule of law for the EU and related rule of law reforms for Bosnia more generally.....	6
3.2.	The role of the EU in promoting rule of law reforms and the shortcomings of those policy measures.....	6
3.3.	Internal obstacles for the rule of law: nationalist political parties, corruption, ineffective government , ineffective judiciary, undemocratic regime, complex political and institutional system.....	8
4.	Thesis confirmation.....	11
4.1.	Complex political and institutional systems.....	11
4.2.	Ineffective government and judiciary.....	13
4.3.	Corruption.....	18
4.4.	Undemocratic regime.....	20
4.5.	Shortcomings of EU policy measures.....	21
5.	Conclusion.....	26
6.	List of references.....	30
7.	Summary.....	33

1. INTRODUCTION

Bosnia and Herzegovina's (hereinafter "BiH") story of its European Union (hereinafter "EU") accession dates back to 2003, when it became a potential candidate during the Thessaloniki European Council summit. This was the turning point for the region, since the "Thessaloniki Agenda for the Western Balkans" was set (Commission, 2019a: 1). Throughout the years BiH has cooperated with the EU which resulted in a number of agreements being formed between them. After applying for membership in 2016 and waiting three years for the Commission's opinion, in 2019 the 14 key priorities in order for EU accession negotiations were set. Rule of law was mentioned to be one of the key areas on which the country needed to deeply reform (Commission, 2019b). This comes as no shock though, since the discussions about the issues with the rule of law in the country have been going on since 2011 as "structured dialogue on justice" (Commission, 2019a). What is interesting is that although rule of law has been an issue in BiH for decades yet without much progress, the country has still managed to come as far as receiving the candidacy status. Rule of law is a continuous obstacle in the BiH which needs reform, but even without much progress related to the rule of law the country keeps building a stronger relationship with the EU.

When taking a look at the feedback the EU had for BiH in order to apply for candidacy, we can notice many improvements needed in areas connected to the guaranteeing of efficient rule of law. The most recurring factors in literature which seem to make BiH's accessions to the EU troubled in the rule of law aspect are the complex political and institutional system, ineffective government and judiciary, corruption, and an undemocratic regime. Starting off by talking about the complexities of the political and institutional system, which some authors consider the key obstacle to the functioning of the country. While the benefactors, those working in either of the two systems, use these complexities to their advantage for personal gains, the losers, the citizens, are not guaranteed proper rule of law in the country. The inefficiency of the government and judiciary comes along with the complexities of these institutions since it allows for responsibilities to be avoided and transferred onto the EU. Corruption has been an ongoing struggle for the country for decades affecting the legislative, executive and judiciary. BiH is

ranked as one of the worst countries in Europe regarding corruption, receiving a 34/100 on the Corruption Perception Index (International, 2022). With the absence of rule of law due to these factors, an undemocratic regime prevailed. In most instances, BiH's case is analyzed and a specific factor is pointed out. All mentioned factors in fact hinder proper rule of law in the country, but they seem to stem from the same bad seed.

The aim of this paper is to gather the most recurring factors mentioned and show that there is a factor which ties these issues together. What seems to tie all these factors together is that they are all a consequence of the country's constitutional framework. Through the analysis of secondary sources covering the topic of rule of law issues in BiH a few recurring factors were extracted and highlighted. A qualitative method of gathering and interpreting information was conducted and the results were then thematically analyzed. This method allowed an adequate amount of information collected for the duration of writing this master's thesis.

The paper will start off by presenting the literature review for the current available research done. After the literature review, a brief overview of the relationship between BiH and the EU will allow us to remind ourselves of the accession process's most important moments. Being familiar with the relationship between the two will allow us to better understand the factors which have led to the thesis in this paper. The complexity of the political and institutional system, the inefficiency of the government and judiciary, corruption, and the country's regime being undemocratic will then be discussed. The paper will be concluded by summarizing and reflecting on the answer to the research question of "What is making the accession process in BiH so troubled, specifically in relation to the rule of law?" while seeing if my thesis, "rule of law issues in BiH's accession process occur due to the consequences of the country's constitutional framework" is confirmed.

2. BiH - EU RELATIONSHIP OVER THE YEARS

BiH's story of its EU accession dates back to 2003, when it became a potential candidate during the Thessaloniki European Council summit. This was a turning point for the region, since the 'Thessaloniki Agenda for the Western Balkans' was set (Commission, 2019a: 1). This agenda set the road to reform in order to "consolidate democracy, stability and to promote economic development" (Commission, 2003); working towards their membership. Throughout the years Bosnia and Herzegovina has cooperated with the EU which resulted in the Stabilization and Association committee (hereinafter: "SAA") which was agreed on in 2008. This committee's goal was to promote political and economic stability within the country while laying down a foundation for further integration.

A few years later, in 2016 BiH after "successful" SAA implementation the country applied for EU membership. After reviewing the country's application, the European Commission (hereinafter 'EC' or 'Commission') gave its opinion on the matter at the end of May in 2019. In this opinion, there are three categories by which the Commission groups their priorities. In the spirit of this paper focusing primarily on political topics, I will focus on the political criteria set out in their opinion paper. This criteria is set in the Copenhagen accession criteria which along with the political criteria includes economic and legal/administrative criteria (Council, 1993). Amongst the 14 key priorities, the Commission focuses on the need for BiH to: ensure institutional functionality including judiciary, improve the electoral framework, strengthen its fights against corruption, reform the public administration as a whole, and the implementation of obligations needs to truly instead of superficially happen (Commission, 2019b).

Finally, in 2022 after almost two decades of working towards becoming a member of the EU, BiH was just granted candidate status. Although candidate status was granted, there still remained issues which urgently needed to be improved. The General Secretariat of the Council concluded that there should be a focus on strengthening rule of law in the country, fighting corruption, and resolving the issues of ethnic division which drag along other complications.

To many, the granting of the candidate status to BiH seemed like it was in the distant future. The country had barely met the minimal requirements, yet alone implemented them. Many may wonder why the sudden acceptance regardless of the flaws and lack of met requirements. What we have to keep in mind is the current situation between Russia and Ukraine since this decision carries geopolitical importance and power while sending a strong message. Not only does this send a strong message to the outsiders but it also is a tool of the EU to show its commitment towards Western Balkan (hereinafter: “WB”) countries’ accession.

What stands out throughout the years of the ongoing relationship between the EU and BiH is the country’s struggle with rule of law. From the very beginning of the partnership between the two the issue of lacking rule of law in the country was pointed out. Therefore, the roots of this specific issue and how it has been an obstacle for BiH’s in its EU accession road will be the focus of this paper.

Before diving into the theories and explanations, I would like to address the idea of rule of law itself. Since there is no strict definition given by the EU in regards to what rule of law is or entails, the elements which make up rule of law will be used. The rule of law is a founding value of the EU, as stated in Article 2 of the Treaty on the EU, and

“Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law (Commission, 2019c).”

Since there are many elements which fall under these categories and some are interlinked this paper will focus on the following: (1) democratic and pluralistic process for enacting laws, 2) prohibition of arbitrary exercise of executive power which would also include separation of powers, and (3) effective judicial protection which include equality before the law, respect for fundamental human rights, and effective judicial review. Although this may confuse anyone

trying to understand the EU's concept of rule of law, by limiting itself to one conception of the term their maneuvering space would become limited as well, as Nikolaidis suggests (Nikolaidis, 2020 cit. in Hogić, 2020).

3. LITERATURE REVIEW

3.1 Importance of the rule of law for the EU and related RoL reforms for Bosnia more generally

Every time Bosnia and Herzegovina wishes to step closer towards the EU, their behavior in regards to the protection of rule of law in the country is criticized. While there might be cooperation in some areas of rule of law, the overall general theme suggests that the implementation is not adequate and that in more recent times rule of law has been backsliding. This can clearly be seen in a recent Expert Report on Rule of Law issues in Bosnia and Herzegovina given by the Commission, when several aspects about the presence and implementation of rule of law were criticized. The importance of rule of law for the EU, another important aspect, is depicted well in this report while at the same time trying to define what it actually is. The report describes the importance of rule of law by emphasizing that it is “at the core value of EU integration,” “one of the basic values on which the European Union is founded,” while also pointing out that it is one of the basic principles of Bosnia and Herzegovina’s constitution as well. Although this may be the case, even with more than 154 recommendations from the joint Sub-Committee on Justice, Freedom and Security there has been only some progress; but not enough to make a significant change (Pirebe, 2019). This is why it is important to address the issue of rule of law in the country and how it adds to the slow integrational process of Bosnia and Herzegovina into the European Union.

3.2 The role of the EU in promoting rule of law reforms and the shortcomings of those policy measures

One argument put forward by Hogić suggests that political will is of key importance when trying to promote, enforce and accept rule of law. While this is of high importance regardless, the focus is put on how the rule of law can be differently promoted during the enlargement process; although the lack of commitment towards the rule of law in Bosnia and Herzegovina and EU’s superficial power which are causing it to stagnate. Once again, pointing out several situations where the efforts of the EU to promote rule of law and to “punish” those

who did not comply were not successful, the idea of needing reform from within is presented. The author compares rule of law to one of Humphreys morality plays staged in a theater. The idea of judicial bodies, societies and reforms coming from within and fighting on the same side. The international institutions are depicted as a sort of support group which help them create a better environment and fight off the “authoritarian politicians, corrupt actors, and inefficient governance agents.” Tying it back to the idea of needing political will which will create the demand for the rule of law, while the international institutions, or in this case the EU, will supply it. Before trying to promote the rule of law idea, needing to assess the threats to the promotion of rule of law is crucial as well. This included the illiberal projects run by political parties in the country. These projects, such as the SNSD (Alliance of Independent Social Democrats) in Bosnia and Herzegovina, are causing rule of law backsliding in the country (Hogić, 2020). Although the EU has been successful in preventing candidate countries from going back to elements of non-democratic governance, the EU still struggles in implementing better democratic standards overall (Džihic, 2011). This gives us an interesting perspective of reform from within in order to properly promote the rule of law while tackling the obstacles of state capture and illiberal projects. Addressing the internal obstacles in the country would allow for rule of law to be able to flourish.

Since Bosnia and Herzegovina is not taking the voluntary route towards the implementation of EU values, conditionality was put into place in order to steer towards proper implementation of the rule of law. Although there have been readjustments to EU conditionality by learning from previous enlargements, Fagan argues that despite these efforts it is still ineffective. Essentially what conditionality does and how it works is by simply allowing the states “to import regulations and processes without necessarily investing in the requisite capacities to enable effective implementation.” The author once again argues that in order for the implementation to actually occur there is a need for internal actors supportive of the change while being supported by the EU when needed. With the current state BiH is in, all that occurs is having “a variety of actors with different agendas, adding the layer of complexity to the external/internal dynamics” (Forić, 2023).

3.3 Internal obstacles for the rule of law: nationalist political parties, corruption, ineffective government, ineffective judiciary, undemocratic regime, complex political and institutional system

Kmezić seems to share a similar opinion to that of Hogić when claiming that, “the absence of democratic rule of law acts as a break to democratic impulses which creates a regime-centered regime allowing for the ruling elite to be arbitrary and use violence.” The author similarly argues that the weakness in the structure of the democratic institutions allows the ruling elite to use it to their advantage. As Lemstra suggests, state capture is widespread and it manifests itself along ethnic lines (Lemstra, 2020). While there may be ethnic division in for the Croats, Serbs and Bosniacs, the constitutional framework which was agreed upon at the time did not guarantee equality to the rest of its constituent people who do not identify as one of the three (Vanjek, 2021). Both Hogić and Kmezić view the institutions as weak and insufficiently effective, while needing to fight off the bad guys in power who misuse these institutions. In order for rule of law to function properly, there needs to be readjustment in the country’s institutions. Without doing so there is a lack of substance to form a formal democracy which is needed as a foundation to promote the ideas of rule of law.

This argumentation can be even seen in articles from almost twenty years ago, where Knaus also identifies the issue with rule of law and claims that, “what BiH (Bosna i Hercegovina) urgently needs is responsible political leadership and effective institutions.” This is due to the complexity of the institutional system itself in which “across the state, two entities, ten cantons and one district, administrative organs are preoccupied by their own internal affairs,” rather than focusing on issues such as their path towards the EU, especially issues such as inadequate implementation of the rule of law. The complexity of this system drags along the issue of unresolved distribution of responsibilities which make it hard to gain a clear image of the situation in the country. Even though this may be the case, an important point was made which also needs to be taken into consideration. Robert Putnam’s famous study on the introduction of regional government in Italy showed how even in a “a prosperous society with no recent history of war and ethnic division” proper institutional function was achieved after decades rather than years (Knaus, 2004). Once again it is important in this case to work from the

inside out rather than waiting on some international institution to fix the issues. From this article we can see that rule of law has been an issue since the beginning and that similar suggestions have been set in order to try and improve the situation, but as we see from the most recent reports this does not seem to help BiH's case. Although Brussels thought their policies would overcome ethnic nationalism and help make the compromises needed, this was not the case (Internal Crisis Group, 2007).

Similarly to Knaus's perspective, Aybet seems to share the thought of the complexity of politics in the country being "the key obstacle to the functionality of the country." This is evident through the fact that ever since the Dayton constitutional framework was introduced the country has failed to move beyond its content; showing us that there actually is no consensus on the state or its structure to begin with. This goes hand in hand with the lack of taking responsibility since it is unclear whose it is and therefore institutions are not able to perform their duties properly. Even when the big guys, international institutions or in our case the EU, set conditions and parties were uncooperative all that was done was the renegotiation of conditions.

The author points out another point which is important for the EU's approach towards Bosnia and Herzegovina today. The idea of conditionality by which the EU tries to steer Bosnia and Herzegovina towards the right path is ineffective since it requires the pre-existence of domestic structures with domestic norms and a rational local elite. This would allow for Vachudova's "electoral game" to take place when the political actors' policies align with the EU's. Since these aspects are missing, the EU's approach does not seem fit. What is really needed in BiH's case are more precise checks and balances, and for the constitutional order to safeguard these rights (Mansfield, 2003). With the current constitutional framework the country of BiH has it is challenging to achieve progress in these areas.

Schwartz brings an interesting point to the table. The importance of the courts is brought up in order to make sure constitutional commitments are held and to resolve issues on the basis of rule of law when political agreement cannot be reached. This is why it is important that courts are impartial and independent. Judicial impartiality is the idea of prejudices or ideological biases not affecting one's decision, while judicial independence is when there are no threats or

incentives for judges to steer a specific direction. (Shwartz, 2016) Having these features is also of high importance when moving towards the EU and its principles since having proper rule of law includes having “independent and impartial courts.” Therefore, when looking at factors affecting the presence of rule of law the country’s courts should be examined closely since they have a greater role than some might think. Sadly, in BiH’s case, this only adds a bigger threat to the rule of law since “corruption manifested through the informal networks between political and the judicial actors” making the judicial authority the politicians puppets (Forić, 2023).

While there may be several factors which different authors suggest negatively affect rule of law implementation in BiH, they seem to pinpoint the cause on a specific point and stop there. When we take a closer look at the factors such as nationalist political parties, corruption, ineffective government, ineffective judiciary, undemocratic regime, and complex political and institutional system we have to note that they are all quite overlapping and causes and effects of one another. This paper intends to provide additional value to all these credible factors which hinder rule of law implementation in BiH by demonstrating that all those obstacles are ultimately a consequence of the constitutional framework of BiH.

4. THESIS CONFIRMATION

4.1 Complex political and institutional systems

What remained in BiH after the ending of the Yugoslav War is a set of extremely complex political and institutional systems. The rush to peace has resulted in many uncertainties being left across the political system and institutional functions and powers. Some authors argue that the complexities of these systems do not allow for proper rule of law practices and implementation. Experts which are familiar with the political system in BiH still manage to be perplexed by the degree of complexity, yet alone how complicated it may seem to some observers. Some consider it to even be the “key obstacle to the functionality of the country” (Bieber, 2006 cit. in Aybet, 2011).

The institutional system carries its complexities from the beginning when the Dayton agreement was signed. In the urgent rush to secure peace in the country, state level institutions were created but their functions and domestic constituency were not clearly defined (Knaus, 2004). The burden from the past is still being carried today with the institutional system functions not being clear and easily manageable for manipulation.

The complexities of the systems drag many issues along. The lack of common understanding of the nature of the state, with the Federation of BiH (hereinafter “FBiH”) seeing Republika Srpska (hereinafter “RS”) as transitional phenomenon and the opposing side not caring about the overall interest of the population but rather prioritizing their own interests, makes it extremely difficult to try and put agendas such as a better rule of law on the table. Due to the division into two separate entities, with a separate form of a small federation in FBiH with the Croats needing to be represented as well, it is almost impossible to get all three major ethnic groups to agree on a single set of terms. Not only is there a struggle to come to agreement on the terms, but the focus then shifts towards acts for personal gain rather than for the gain of the population as a whole. Recently the lack of cooperation between two entities has escalated to thoughts of RS waiting to secede (Forić, 2023). Without an agreement about the nature of state,

the country cannot move on further to improving conditions but is stuck trying to comprehend them.

The internal struggles with the political system negatively affect the ability of international institutions to act (Aybet, 2011). Even though there have been various efforts from the EU in order to achieve change, there has been limited progress. The dysfunctionality of the state was accounted for as the reason behind the lack of progress in 2021 and 2022, and according to the European Commission's BiH report for 2022 it has been intensely causing stagnation of progress since 2019 (EC, 2022 cit. in Forić, 2023). With the current situation in the country what is left is the international institutions pushing for change while the political and governmental systems' focus is on their issues.

Not only is the political structure complex, but there are also uncertainties with the distribution of responsibilities in government since there are various layers (Knaus, 2004). To outsiders such as citizens and international institutions this might seem as a problem, but for the government it works in their favor as responsibilities can be avoided. While it makes it easier for those in government to avoid responsibilities, it makes it extremely difficult for institutions and citizens to find who to blame for their dissatisfaction with decisions. Not only have there been left uncertainties with the distribution of power, but there has also been asymmetric distribution amongst the constituents (Vanjek, 2021). The current distribution of powers has left the inequality and asymmetric distribution of representation in the institutional system. While Vanjek suggests that there is constitutional equality but a lack of institutional equality, we have to keep in mind that the "others" which are part of the population are not equally treated. This brings us back to the main idea of the constitutional framework hindering progress in relation to rule of law due to a lack of clarity on the specifics of powers, responsibilities and goals each system holds.

As Knaus mentions, the complexity of the state and its public institutions across "the state, two entities, ten cantons and one district" (Knaus, 2004) administrative organs' focus is primarily on their own internal affairs rather than working with external international institutions. One cannot blame the government and its institutions focusing on internal issues if their powers

and competences were not clearly stated and fully thought through at the start. Before trying to implement external ideas the internal matters should be addressed. The political system seems to be so complex that there is no consensus on the state and its structure which is evident from the failure to move beyond the Dayton agreement.

When conducting research, it is important to try to get to the roots of the cause rather than blaming one bad branch. While to some researchers the reason why the accession process seemed so troubled was due to the complexities of the political and institutional system, and it is in fact a factor which complicates rule of law implementation, the source of the form and function should be considered. The constitutional framework in which the constitutional arrangement of political and institutional systems lies does not seem to clearly state these specifics. The Venice Commission in their opinion on the constitutional framework in BiH stated that, “Power is dispersed between too many levels and usually exercised by a unit too small to fulfill its functions effectively. There are too many bureaucracies and too many posts for politicians...” and “Power-sharing arrangements were introduced, making it impossible to reach decisions against the will of the representatives of any constituent people” (Venice Commission, 2005). Here we can see that these issues of complex political and institutional systems stem from the constitutional framework itself.

The complexity of the political and institutional system is a clear factor which hinders rule of law implementation in the country, but the root of these complexities lies in the constitutional framework. The fact that this factor has been recognized to obstruct rule of law implementation should prompt the question of why they are this complex. The complexities occurred since there was a need for a quick fix for the war while trying to satisfy all three sides of the peace accord. Thus we can see that the BiH constitution is not fit for that purpose since the constitutional framework and the rule of law requirements are not a match.

4.2 Ineffective government and judiciary

While some authors focused more on the institutions and structures themselves, others focused on the work being done inside those institutions. Some authors argue that the setup of

the institutions is why proper rule of law cannot be implemented, others argue those who run the same institutions are not fulfilling their duties. The ineffectiveness of the government and judiciary should be closely inspected since they should be the main protectors and implementers of the rule of law.

They say “where there’s a will there’s a way”, which is what is missing amongst BiH’s political elite. Hogić even considers it to be of key importance if trying to promote, accept, and implement rule of law. Not only is the political will important, but the country also urgently needs a responsible political leadership. The ineffectiveness of the government can be seen when taking a look at the need for change of the constitution. While there seems to be a common agreement within experts and political elite on the need for constitutional change, all the government does is pass the job to international institutions to do it. What the government does not realize is that in order for change to be implemented there is a need for debate and compromise (Knaus, 2004).

Although some authors might argue that the government is not aware of this, I would argue that they are very aware that for change to occur debate and compromise is needed which is exactly why they simply decide to pass the job to someone else. This can also be seen in the Package 2012 and Key findings of the 2012 Progress Report which emphasized low political will and agreement which completely slowed down any process (Commission, 2012 cit. in Hasić, 2023).

A study has shown that the inefficiency of the government and their lack of political will to try and do something have been high since 2006. Since then, local elites have been unwilling to implement important changes which are needed. Not only does this lack of political will and consensus halt the country’s progress, but it also makes it extremely difficult for international actors such as the EU to intervene when there is disagreement between the major players (Keil, 2015 cit. in Karabegović, 2019).

Once again, the EU carries the weight of seeming to be able to implement change and force the political elite to cooperate and achieve change. Although this may be the case, the RS

side of the country has made it clear that their priorities are to “protect the Serbs in Bosnia” (Keil, 2013 cit. in Karabegovic, 2019) rather than to work on their path towards the EU and towards integration. Thus, we can see how there is a general trend of passing the job onto international institutions once the local elite decides that they are not willing to cooperate.

The inefficiency of the government has been dragging down many other parts of the country along with it. The government shares a feeling of there being a lack of proper agencies and their growing response is to leave it in the hands of the EU. The government being ineffective has also let down citizens since they feel as if any action they take is not going to blossom. This can be seen from the Country Report for Bosnia and Herzegovina in 2022 which states that the parliament has become a “mere rubber stamp for ruling party leaders” (BTI, 2022). The only progress there seems to be is that of trying to find who to blame for one institution’s own inaction.

Even when there seems to be support for change and working towards EU integration, the process still remains extremely slow. In many instances BiH has supported the integration process into the EU and has set agendas which work towards its integration. While the EU official document contained the idea that all political parties supported reform and the path towards accession (Reports, 2003 cit. in Hadjiisky, 2017), there was minimal sacrifice made and efforts for this to happen (Toal, 2011 cit. in Hadjiisky, 2017). Not only was the government ineffective in working towards their EU path, but they even seemed to work in the other way when they shifted their focus to building relations with Turkey, and Russia (Hadjiisky, 2017). Thus we can see how BiH’s government is both ineffective and dragging down the functions of other institutions along with them. The lack of will for working towards EU integration has also been noted in the Commission’s BiH Report for 2022 when it had been noted that due to the dysfunctionality of the state from 2019 to 2022 no progress has been made; while also having to take into account that at the time the FBiH was internally struggling since it was unable to form a government coalition agreement (Forić, 2023).

Similarly, in the case of judiciary, there have been reforms but at an extremely slow pace (Report, 2018 cit. in Karabegovic, 2019). In the case of RS we see once again that there is a lack

of will to cooperate and implement change, especially after creating the opportunity to monopolize the whole process. The judiciary of the RS has decided to not take steps in situations when they could be harmed in some way; some examples would be implementing the Sejdić-Finci ruling, not adopting the coordination mechanism set by the EU, not adopting reform to the judiciary and leaving the death penalty in place. While some might view this as Euroscepticism, in BiH's case it is more a defense of sovereignty. A great example of the judiciary not fulfilling the EU's criteria of proper rule of law in the aspects of protecting fundamental human rights would be the Sejdić-Finic case. In this case, two applicants from Roma and Jewish origin complained that they are ineligible to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina. The Central Election Commission stated that they were ineligible due to their ethnicity. This is a violation of Article 14 ECHR (non-discrimination) taken together with Article 3 of Protocol No. 1 ECHR (right to free elections), as well as Article 1 of Protocol No. 12 ECHR (general prohibition of discrimination). Although this case has been going on since 2006, no constitutional change has been implemented to resolve this issue even though its findings suggest breaching Article 14 taken in conjunction with Article 3 of Protocol 1 and Article 1 of Protocol 12 (Open Society Justice Initiative, 2010).

As Nurkić would describe it, BiH's judiciary is best described as inert and corrupt. The judiciary system does not even work in the favor of its citizens as well, as we can see them violating the right of trial in reasonable time (Bieber, 2006 cit. in Nurkić, 2023). When taking a closer look at the courts' decisions, they are very ineffective when it comes to executive and labor disputes, but extremely quick and efficient when it comes to trialing journalists who "defamed" politicians (Pajić, 2002 cit. in Nurkić, 2023). This shows us that the judiciary is simply an instrument of authorities (Nurkić, 2023).

As Kochenov suggests, there is a need for an independent, well staffed, well paid, well trained, and accessible judiciary, without the interference of any other governmental institutions. Only this way is it possible to actually resolve issues of ineffective judiciary and achieve proper rule of law implementation (Kochenov, 2004 cit. in Hadjiisky, 2017). The importance of courts lies in the fact that where disagreements cannot be solved politically, the courts should form a position of neutrality instead of working in favor of certain parties. This would require courts'

impartiality to ethno-political influence, which is obviously not the case (Shwartz, 2016). These factors drag down the efficiency of the judiciary altogether.

Although when political issues come to a deadlock in the judiciary, there still seems to be hope with the court needing to work towards the “vital national interest” (Shwartz, 2016). This may seem as a light at the end of the long dark tunnel of unresolvable political dispute, but when taking a closer look at it, it does not seem to be the case. The truth is that there is still “ex post autonomy” which allows for courts to be controlled when taking certain decisions which fall under party interest rather than national interest (Ibid.).

The issue is that from the beginning of the appointment of judges the process is dominated by ethno-nationalist parties which therefore appoint judges which serve their interests. This can be seen in Shwartz’s analysis of decisions which shows that Bosniak judges almost never vote against a law or government actions while the Serb judges vote against 78% of the time (Ibid.). While the Dayton agreement tried to resolve the nationalist rhetoric, it continued in the judiciary by putting ethnic group interests over the interests of the state as a whole and the implementation of rule of law (Nurkic, 2023). Due to the lack of definition of what the “vital national interests” are, the judiciary is simply used as a tool for the political elite instead of serving the states and citizens’ interests. At the current state, “The constitutional framework is incomplete and does not sufficiently guarantee the independence, autonomy, accountability and efficiency of the judiciary” (Commission, 2019b).

We can see that the internal work of the political elite, institutions and judiciary are also halting the implementation of rule of law through their actions. The inert and corrupt judiciary, and the lack of political will in the government and among political elites are additional factors resulting in the country’s struggle towards fulfilling EU’s integration criteria.

While ineffective government and judiciary drag along improper rule of law implementation, the roots of this issue once again lie in the constitutional framework of the country. Firstly, by taking a look at the inefficiency of the government we strongly see their unwillingness to change the constitutional framework. If the constitutional framework were to be

changed then the benefits that the government faces now could potentially disappear. At the current stage, the constitutional framework allows for the entities to focus on themselves without tying them to work towards a greater good. A similar case can be seen in the judiciary when these interests are protected in the constitution in the idea of “protecting vital national interests” which were never clearly defined and are used broadly today. This allows for the government with their control of the judiciary to simply once again work in their own interests. In order to break this loophole, the setup of the judiciary should be changed in the constitution in order to exert proper control of the executive and legislative branches of government and in order for ruling to be properly implemented; by doing so the inefficiency of the government will be better controlled as well. The inefficiencies highlighted in the Country’s Report for 2022 by BTI have the potential of being overcome.

4.3 Corruption

It most probably will not come as a shock to many, but the levels of corruption in the country and its extent influence the functionality of many sectors such as the government and that of institutions. As Nurkić notes, corruption has been present in the country from the times of the Ottoman Empire, and being a communist state afterwards simply allows for corruption to be present for a long time in the country (Nurkić, 2023). Today, BiH is classified as one of the worst ranked in terms of corruption in all of Europe (Corruption Perceptions Index, 2021 cit. in Nurkić, 2023). We can see that years and years of corruption being present has resulted in roles and relationships prevailing over rules and regulations (Pajic, 2002 cit. in Nurkić, 2023).

As Nurkić suggests, corruption makes up one of the two main characteristics of BiH institutions (Nurkić. 2023). The other is inertia, but our focus lies on the corruption aspect. The extent of corruption is so widespread that even when there seemed to be economic liberalization occurring it was basically undone since the ethnically defined political parties control the judiciary, the administration and other state authorities. Controlling these authorities allowed the political parties to use them to protect their “ethno-national reserved domains” and discrimination prevailed throughout all public life (Džihic, 2011). This is why establishing

proper rule of law is so essential to the country; doing so corruption can be fought off. The struggle lies in eradicating it in the current system.

Corruption is also present in the functions of many institutions and the government itself. The control of the elite over the judiciary also occurs due to corruption since money and power grant control. State capture in this sense can also be defined as “systemic political corruption” (Lemstra, 2020). The idea of corruption through state capture which allows for complete control of the state resources for one’s benefits is considered to be the most significant obstacle for EU accession of BiH (Ibid.). The Freedom House Report in 2016 stated that the patronage networks and clientelism in the country are in fact a detrimental obstacle to the rule of law in the country (Freedom House, 2016). The Office of the Disciplinary Counsel of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (hereinafter “ODC”) has also noted that corruption greatly manifests itself through informal networks of the elite and judicial actors which harms the aspects of rule of law since all expectations set by the EU are shattered.

Strong perceptions of corruption have even lowered citizens’ trust in the government and national institutions. This can be seen from surveys showing that 89.2% of BiH’s citizens believe corruption is widespread in the government (Gallup Balkan Monitor, 2010 cit. in Džihić, 2011). What is needed from the institutions is them indicting those who have taken part in corrupt activities in order to regain trust and start working towards the EU’s criteria (Müller, 2015 cit. in Hoxhaj, 2020). While there may not be much hard evidence of corruption since there are not many prosecutions, this is where the judicial institutions have to step up. While corruption stands as one of their key priorities according to the European Commission, there have been a low number of convictions although there is enough evidence and it is an ongoing pattern.

The lack of adequate human rights protection, the relations between the parties and judiciary, and inertia of judicial institutions to do anything are all factors which allow for corruption in the country to flourish. “If the EU is to be judged successful in Bosnia, it must put a halt to such activities such as corruption, as it is counterproductive to democracy” (Osland, 2004 cit. in Karabegović, 2019).

As noted by other authors, the issue of corruption has been present and flourishing in the country for decades of its history. It has also been shown that corruption extends to all three branches of government. The consequences of corruption at the level it is at in BiH leaves the country struggling to fulfill the EU's most basic requirements of rule of law. There is a lack of transparency and legality in the system, legal certainty is not provided, arbitrary exercise of power is evidently not prevented, effective judicial protection by impartial courts is not guaranteed, and there is a blur in the separation of powers. With the current constitutional framework eradicating corruption from the system will be challenging. "The complicated constitutional structure and an oversized and ethnically divided state framework is a key challenge to anti-corruption efforts" (Jones, 2018). Thus, addressing these obstacles in the constitutional framework will allow for anti-corruption efforts to flourish and for the fight against corruption to finally show progress.

4.4 Undemocratic regime

After the fall of the Berlin Wall there was a kind of expectation that Western ideals would simply spread, but due to the conflicts in the Western Balkans their systems rather resulted in "hybrid regimes" (Collier, 1997 cit. in. Kmezić, 2020). These regimes fell under the categories between consolidated democracies and autocracies though never reaching the liberal democracy classification. Levitsky describes the regime in power as a competitive authoritarian system which is a "civilian regime in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis-à-vis their opponents. Such regimes are competitive in that opposition parties use democratic institutions to contest seriously for power, but they are not democratic because the playing field is heavily skewed in favor of incumbents" (Levitsky, 2010 cit. in Kmezić, 2020). Although formally having democratic institutions, the abuse of the same by those in power brings us back to the starting point of not being a democratic regime at all.

As Magen puts it, rule of law is the "foundation upon which every other dimension of democratic quality ultimately rests" (Magen, 2008 cit. in Kmezić, 2020). This point sheds a light on the graveness of BiH's rule of law struggle since there is a lack of institutions which promote

and protect these values. The consequences of a lack of democratic quality and rule of law demonstrate how further breaks from democratic impulses are encouraged. Since BiH's legal setting does not bind the ruling elite by the rule of law, the institutions are misused to their advantage.

According to the Economist Intelligence, they test the levels of democracy through the criteria of: electoral process and pluralism, functioning of government, political participation, political culture, and civil liberties (Intelligence, 2023). "The importance of the rule of law for democracy building is the fact that the rule of law is a fundamental principle embraced in most modern democracies" (Tommasoli, 2012). Elements of rule of law pertain to elements making up elements of the definition of democracy. Thus, the democratic element is missing from the beginning since the division along three prevailing ethnicities vs. others does not protect the citizens as a whole but rather by the group which they pertain to. This results in the issue of rule of law not even being able to prevail when there are no institutions which are left to safeguard the ideas of democracy; leaving us with a democratic facade.

The Presidency of BiH as a common institution is a perfect example of how institutions are misused to one's advantage and how the lack of rule of law encourages further breaks from democratic impulses. When a particular decision is made, a dissenting member of the Presidency may declare it as "destructive of the vital interest of the Entity from the territory from which he was selected" (Bosn. & Herz. Const. art. V(2) cit. in Mansfield, 2003). The issue here is that the constitution provides no definition of what a vital interest is which allows it to be challenged for impasse if a particular group interest or gain is harmed (Mansfield, 2003). This shows us how the foundation for a proper democratic regime is missing which allows for the undemocratic form of regime to prevail; or as the Democracy Index classified it a hybrid democracy. This mode of decision making by the Presidency does not go in line with democratic practices.

The electoral process in BiH is another great example of a facade of democratic customs in an undemocratic regime. This issue in BiH prevails due to those in power controlling most resources which grant them power during the electoral process. The facade in this case is the fact that there are elections in the country with a catch of using patronage networks and public and

private resources which tilt the scale into their favor. The gravity of the situation can be seen when a study conducted by the Centar za Izborne Studije showed that the citizens trust was at the lowest in all Western Balkan countries, at a low of only 11% trusting the electoral process (Centar za Izborne Studije, 2017 cit. in Kmezić, 2020). This once again does not go in line with a fair electoral process and political participation. Without these elements proper democracy can not prevail.

There are also illiberal practices of ethnocracy that prevail in the country's political sphere. In BiH's "democratic" structure the formal and informal agreements seek to meet the interests of political and economic elites which are defined along ethnic lines. In a political context of this sort constitutional and institutional discrimination is present in all public spheres of life. This type of division creates the perfect grounds for utilizing ethnicity as a political purpose; it also allows for the political elite to use fear as a political principle to increase their power without taking into account the citizens' interests.

Although there have been efforts to implement democratic customs and institutions when the Dayton Peace Agreement was signed, what really happened was that a democratic facade was created. This democratic facade allowed for customs from previous regimes to continue flourishing and for proper rule of law implementation to merely be a topic of discussion.

The importance of having a democratic regime goes hand in hand with having rule of law in the country. As Tommasoli says, most democratic today require rule of law. This is crucial since if democratic elements are missing it makes it difficult for elements of rule of law to prevail. This is why it is important to have a strong foundation in order for democratic customs to flourish. With the current state of BiH's constitution it is challenging for democratic elements to prevail and help rule of law spread throughout the country.

4.5 Shortcomings of EU policy measures

With the EU's current approach to implementing rule of law in Bosnia and Herzegovina most efforts have vanished into fake compliances and just a topic to talk about (Hogic, 2020).

Many seem to blame the past, the complexity of the institutions, and corruption which are all ghosts of the past. Instead of learning from previous mistakes and trying to improve the conditions for the future by learning from the past, the EU's approach to implementing rule of law is still flawed and insufficient. While the EU has been successful in preventing countries from going back to or moving towards non-democratic governance, there is a lack in the implementation of democratic standards overall (Vachudova, 2005 cit. in Džihčić, 2011).

The EU approaches rule of law implementation in candidate countries through a process called conditionality. As Geoffrey Pridham findings suggest, for EU conditionality and implementation to be properly approached it has to be seen as an interactive process between the EU and governing elite (Geoffrey Pridham, 2005 cit. in Džihčić, 2011). The EU approaches change through the functions of democratic institutions and structures, but the proper implementation and execution depends on the elected representatives. The issue with this top-down approach is that citizens feel as if their participation in reforms is insignificant.

During previous enlargement rounds BiH's structure did not come up as an issue for its accession. Nevertheless, it has been successfully identified as a limitation to the functionality of the central government which hinders their progress towards further accession. This is why EU conditionality is focused more on state building in order to implement the preconditions rather than focusing only on monitoring and judging the reform. Although the focus has been put on building up the new institutions, there has been a lack of EU involvement in the implementation of these formal rules. "This has resulted in a situation where external actors have made the bulk of the decisions, passed laws, and put pressure on political elites to comply with rules and norms defined from outside, but due to ethnically motivated obstruction and the unwillingness of political elites to implement the reform, the intended effect has been limited" (Solioz, 2007 cit. in Džihčić, 2011).

The issue of BiH having undemocratic regime customs such as ethnocracy, which was previously discussed, impacts the effectiveness of conditionality as well (Gromes, 2009 cit. in Džihčić, 2011). Taking a look at the police reform process in 2005 we see how focusing on ethnic related issues was more important to the political elite since it secured them more power than the

commitment to the EU would be. Consensus was reached on the reform, but the reform was never passed. Even with the EU threatening there would be no signing of the Stabilization and Association Agreement the focus remained on ethno-national rhetoric. While there seemed to be efforts by the High Representative Miroslav Lajčák to implement changes, the SAA was still signed with minimal reforms made (Džihčić, 2011). In this situation we can see that once parties were unwilling to comply with or implement conditions, the EU seemed to be willing to renegotiate conditions (MacMahon, 2009 cit. in Aybet, 2011).

We can see that the EU's current approach to Europeanisation has done little to provide change in the country. Their institution-to-elite base approach in a country with a dysfunctional state and institutional structures and the non-existing consensus of national leaders' support towards accession has not done much to steer BiH in the right direction (Džihčić, 2011). "Conditionality is not able to produce social learning and modify behaviors, and state weakness leads the EU to behave inconsistently, reducing its own leverage and the effectiveness of conditionality" (Denti, 2014 cit. in Karabegović, 2019). When combining the unwillingness of BiH actors, the lack of power from the EU and institutional complexities we get "negotiable conditionality" (Parry, 2011 cit. in Karabegovic, 2019) which essentially lowers the bar of expectations and requirements by the EU.

When we take a look at the bigger picture and include all the factors mentioned by several authors across the years, we see that the focus is on the issues of the complexities of the political and institutional system, having an ineffective government and judiciary, struggles with corruption and establishing a democratic regime are mostly mentioned to hinder the rule of law implementation in the country. With the way the EU is approaching the situation in BiH the policy measures hardly prove successful. Without resolving the mentioned issues, rule of law cannot be properly implemented. Since these issues are hindering better rule of law application in the country the source of these issues should be modified. The structure of political and institutional systems, the duties of the government and judiciary, and efforts for fighting off corruption and undemocratic regimes all lie in the constitutional framework. With the current constitutional framework and structure, the EU's policies of trying to improve rule of law in the country will be in vain. The real efforts of the EU should be put towards pushing for

constitutional framework changes which would allow proper rule of law to be able to advance, eliminating elements of being non-democratic and making way for anti-corruption efforts to transpire.

5. CONCLUSION

Throughout BiH's accession process which has been in the works for over two decades there seems to be a constant concern which appears. The rule of law presence and implementation in the country has been an identified problem for the country since the 2003 Thessaloniki European Council summit when BiH was named a potential candidate. Although there had been concrete efforts to ameliorate the rule of law situation in the country through structured dialogue, not much progress had been made. Even after all those years and efforts, it was once again pointed out as part of the 14 key priorities for the country in order to be granted candidacy status. Even though this factor has been pointed out to be an issue for BiH's accession numerous times throughout the 20 years of working towards this goal, the progress on achieving any concrete change has been poor. Even after gaining candidacy status, due to more of a geopolitical reason, the key focus was set on addressing the rule of law in BiH.

When taking a closer look at the obstacles which hinder proper rule of law in the country, the issues of having a complex political and institutional system, having an ineffective government and judiciary, corruption, undemocratic regime elements and the shortcomings of the EU in its policy measures have been identified. All of these factors hinder rule of law in the country since they do not guarantee legality and legal certainty, arbitrary exercise of executive power is not avoided, there is no effective judicial protection since courts are not impartial and independent, human rights are not respected, powers are not separated and equality is not guaranteed. Inspecting the obstacles one by one allows us to see how each impacts the rule of law in the country, but gathering them all together allows us to identify a common underlying cause.

Complex political and institutional systems are what the BiH was set up with in order to put an end to the bloody Yugoslav War. With the rush to secure peace, not much focus was put on the structure of these systems. While trying to secure adequate representation for the three major ethnic groups at the time the nature of the state was left unclear. The separation into the FBiH and RS without a clear understanding of the state of nature has led each ethnic group to primarily focus on their interests instead of working towards the improvement of conditions for

all its citizens. This works in the favor for those using these complexities to their advantage, but poses an issue for institutions or citizens who are unsatisfied with specific decisions made. The separation of powers amongst the three dominant ethnic groups has also caused inequality. The ethnic groups focusing on their own gains and the “others” not being equally represented poses a threat to rule of law in the country. The current set up of the political and institutional systems in the constitutional framework does not allow for equal distribution of power which causes inequality, and the human rights of the “others” are not respected.

Having complex political and institutional systems tackles the outer layer of the problem, but taking a look at the work being done by the government and judiciary inspects the problem from the inside. While the systems themselves may be inadequate, the government and judiciary should work towards improvements of rule of law implementation; but this is not the case in BiH. The government and judiciary should be the promoters, acceptors and implementers of rule of law. In BiH’s case, the focus of the government and judiciary once again lies in working on protecting the interests of their ethnic group instead of trying to achieve compromise. While there seems to be much support for change in order to better apply the rule of law in the country, the effort and sacrifice have been minimal. The focus on personal interests is so strong that sometimes the country will rather focus on building relations with countries such as Turkey and Russia which harm their relationship with the EU. With the government struggling to form a coalition agreement, the work of other institutions, such as the EU which try to improve the rule of law situation in the country, suffers.

Similarly to the government, the work of the judiciary is ineffective as well. The judiciary faces issues such as RS not willing to implement change and cooperate in cases where they could be harmed. The previously mentioned inequality between the three main ethnic groups vs. others was brought to court in the Sejdić-Finic case, but no constitutional change has been achieved in the last 17 years in order to resolve this matter. This instance does not provide adequate protection of fundamental human rights and protection from inequality. The judiciary does not not guarantee effective judicial review and the respect for fundamental rights since the courts continuously violated the right of reasonable trial time. While inert in situations aiding their citizens, the judiciary is quick and effective in resolving issues which are linked with the political

elite. This does not respect rule of law principles of legal certainty, prohibition of arbitrary exercise of power, and effective judicial protection by independent and impartial courts, and separation of powers. Especially with the appointment of judges being dominated by ethno-nationalist parties, and when in power using the idea of “vital national interest” to protect the ethno-nationalist group from any suggestion they do not support.

With the inefficiency of the government and their unwillingness to change the constitutional framework we sense that the current advantages the ethno-nationalist groups benefit from and maintaining them is the goal of the government. With the current constitutional framework the entities can focus on their own interests and protect them when it comes to a dispute through using the “protection of vital interests” card. The current constitutional framework does not allow for proper control of all three branches of the government. Changes to the judiciary should be prioritized in order to adequately protect and implement rule of law. This would allow for the rule of law to be better accepted as well since acts which are not in accordance with EU’s rule of law standards will be punished.

When it comes to corruption we can see that this has been a problem way before the present constitutional framework was introduced. Despite the fact that it has been present throughout history, the current constitutional framework sets the terrain for this element to keep permeating. With the current set up of the constitutional framework corruption spreads through several institutions since state capture allowed for “systemic political corruption” to prevail. With this the state controls the state resources and uses it for their own personal advantage, and patronage networks and clientelism flourish. The judiciary in the country is also affected since there is party influence over them. The rule of law elements of having an independent and impartial judiciary, legal certainty, prohibiting arbitrary exercise of executive power, having effective judicial protection and respect for human rights, and there being a separation of power are not present with the current constitutional set up.

All these factors have resulted in the country having non-democratic elements. With the complexities of the institutions and the ineffectiveness of the judiciary and government there are no adequate institutions which protect the elements of democracy. Since the elements of

democracy cannot prevail in this situation, this means that there is no adequate rule of law in the country either. As authors previously mentioned, rule of law is necessary in order to have democracy; with the current set up of the constitutional framework which hinders adequate rule of law implementation, undemocratic regimes prevail.

Albeit having the best intentions to improve the rule of law situation in the country, the EU keeps pushing even though they are encountering a brick wall. The current approach the EU is taking through conditionality requires a back and forth relationship between the EU and the governing elite of BiH. Going back to the point of having an inefficient government sets a problem for this relationship to flourish. The structure of the state has also been identified as a limitation to the central government, which once again brings us back to our thesis of these factors being a consequence of the country's constitutional framework. Due to the complex set up of the country and the inefficiency of the government in the country, the EU's efforts have resulted in potential acceptance of certain changes but meeting no implementation.

Based on the elements hindering the rule of law in the country we can conclude that the common underlying factor is the constitutional framework. As Machiavelli said, "There is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things" (Machiavelli cit. in Kmezic, 2020). With the current circumstances and situation in BiH, the only realistic solution seems to be that which many fear, initiating a new way of order in the country.

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Summary

For the duration of BiH's accession towards the EU the country has continuously faced challenges in regards to the rule of law. The literature on the topic presented several predominant factors which were a shared cause amongst various authors. By identifying these factors of complex political and institutional systems, ineffective government and judiciary, corruption, undemocratic regime and the shortcomings of EU policies, we received the answer to our research question. Finding out what factors are making BiH's rule of law implementation troubled, through the analysis of research done on the topic, has led us to the conclusion that these factors have a factor in common which is that they are a consequence of the constitutional framework.