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Country Report

Rule of Law Programme South East Europe (Bucharest)

Bosnia and Herzegovina: Publication of the "Priebe" Report

A critical review of the report on the situation regarding rule of law in the judiciary of Bosnia and Herzegovina

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The so-called "Priebe" Report, which had been eagerly expected by both the public at large and the judiciary of Bosnia and Herzegovina, was published on December 05, 2019 in Brussels. The report was compiled by several EU experts under the leadership of Reinhard Priebe (a German lawyer and a long-time employee of the EU Commission) "in relation to rule of law issues in Bosnia and Herzegovina".¹ As expected, the report is critical, but it lacks concrete recommendations for action or reform steps.

Before analysing the content of the report, the background, motives and the structure of the report will be examined.

Context

In March 2019, following an increasing number of judicial scandals in Bosnia and Herzegovina, the EU Commission launched the "EU Initiative for Improving the Monitoring of Rule of Law in Bosnia and Herzegovina". This initiative focuses on the causes of rule of law deficits in Bosnia and Herzegovina. It aims to improve the monitoring of rule of law reforms and their implementation and to increase the accountability of the legal system in Bosnia and Herzegovina, while fully respecting the independence of the judiciary. The initiative encompasses the whole legal system, including courts at all levels, prosecutor's offices and law enforcement agencies.

¹ <http://europa.ba/wp-content/uploads/2019/12/ExpertReportonRuleofLawissuesinBosniaandHrzegovina.pdf>

The 25-page "Priebe Report", which was presented after several months of analysis, must be viewed in the context of Bosnia and Herzegovina's ambition to become an EU Member State. Bosnia and Herzegovina formally initiated the accession process in 2005. The results, however, have been rather poor so far. Unlike Serbia and Montenegro, the country has still not obtained a candidate status and is once again well behind North Macedonia and Albania regarding its reform efforts. In its opinion on Bosnia and Herzegovina's application for EU membership of May 29, 2019², the EU Commission highlights numerous remaining shortcomings in the field of rule of law in the country and concludes that accession negotiations may be opened with Bosnia and Herzegovina "once the necessary level of compliance with the accession criteria has been achieved, in particular the Copenhagen political criteria, which require the stability of institutions that guarantee democracy and rule of law in particular". The country must "fundamentally improve its legal and institutional framework in order to ensure that a number of key priorities defined in the opinion are met", a significant number of which aims to improve the rule of law in the country in general.

Key points

The report presented now focuses on a limited number of rule of law issues, mainly on the judiciary and related institutions. It does not cover any of the other areas that are obviously essential for the functioning of the rule of law. The report also addresses a number of fundamental points that give a relatively authentic impression of the rule of law situation in Bosnia and Herzegovina.

The report also clearly states at the outset that, although Bosnia and Herzegovina has a complex constitutional framework and is facing a difficult political situation, these circumstances are not the only reasons for the weakness of the rule of law in Bosnia and Herzegovina. It is generally acknowledged that *public institutions are dysfunctional*. One of the reasons for this is no will whatsoever on the part of key stakeholders to reform the judiciary. Bosnian and Herzegovinian institutions lack a culture of accountability and transparency. It is pointed out that the problem is not the laws (most of them have already been adapted to EU standards), but the gulf between laws and the everyday practice of their (non-)application. The positivist and formalist interpretation of laws by officials of all levels and the resulting behaviour (regulations are frequently deliberately misinterpreted), makes it difficult to implement laws correctly and meaningfully.

In this sense, the Bosnian and Herzegovinian *judiciary must also be reformed systematically*. A key point in the report is the problem of the public's loss of confidence in the Bosnian and Herzegovinian judiciary. The report points out that the public has been given the impression that the decisions of the judiciary have been politicised. It is also noted that the High Judicial and Prosecutorial Council of Bosnia and Herzegovina must be reformed. It is widely perceived as an irresponsible power in the hands of few individuals who serve the interests of a network of political patronage and influence. A key means for ensuring the independence and functioning of the judiciary in Bosnia and Herzegovina is a significant improvement of the legal framework and functioning of the High Judicial and Prosecutorial Council in order to better serve the interests of the judiciary and citizens.

² https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-opinion_en.pdf

However, in addition to the legal framework, a radical break with the previous behaviour of members of the Council is also necessary. Members of the Council must be persons who also distinguish themselves by their ethical and moral conduct, so that the public no longer has the impression that these persons are above the law. A closely related issue is the issue of integrity of judges and prosecutors. The appointment and promotion of judges and prosecutors must be primarily based on merit and knowledge, not on ethnic principles. The assessment of the performance of the judiciary must to a larger extent take into account qualitative characteristics instead of the mostly quantitative-based approach it used to have up to now. The current system of recording asset declarations only on paper, without any controls, is pointless and must be strengthened. It must be subject to careful external monitoring. The report also notes that *vetting*, as a last resort, could well be considered. It also generally criticises the education and professional training system for judges and prosecutors. In addition to this, there is *no transparency* in the judiciary (decisions are not sufficiently justified and proceedings and decisions are not always accessible to the public).

Important improvements in *civil and criminal proceedings* are needed. These must deliver results. Civil proceedings are too cumbersome, complex, formalist and lengthy. The criminal justice system in Bosnia and Herzegovina is not capable of fighting serious crime and corruption.

The authors of the report also call for proper enforcement and sufficient legal remedies to ensure effective legal protection against human rights violations. In particular, they consider the failure to comply with the caselaw of the European Court of Human Rights to be unacceptable.³

The report also addresses *the constitutional framework issues* in Bosnia and Herzegovina. The current Constitution of Bosnia and Herzegovina and the constitutions of the entities require fundamental reforms, in particular to overcome the "institutional overkill". Such constitutions are not suitable in order for the country to advance on its path towards the EU, enable it to further progress towards a stable democracy based on the rule of law and achieve the highest human rights standards and a sound economic development. In parallel with the elaboration of constitutional reforms, all possible efforts should be undertaken to remedy the shortcomings within the current constitutional framework. The common interest should prevail rather than the ethnic approach.

At the end of report, it is clearly stated once again what is actually lacking in Bosnia and Herzegovina: politicians in the country must cooperate more constructively so that vital reforms can be initiated. However, this is exactly what has been lacking for years.

Reactions

The *reception of the expert report among experts* in Bosnia and Herzegovina was mixed. Most reactions fluctuate between the point of view: "We already knew all of this – but it's

³ No progress has been achieved in the implementation of rulings of the European Court of Human Rights in the *Sejdić-Finci*, *Pilav* and *Zornić* cases. There are 6 ongoing proceedings against Bosnia and Herzegovina in the framework of the extended supervisory procedure.

good that someone who is objective is addressing this issue" and the disappointment that the report does not identify more clearly who are the persons that pose a problem for the judiciary of Bosnia and Herzegovina as well as the regret that the report is not much more specific.⁴ Milan Tegeltija, who himself had recently come under heavy criticism in connection with the allegation of corruption against him and who is the President of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, which was also subject to criticism in the report, has already spoken out. He succinctly remarks that the report could have been even worse for the judiciary of Bosnia and Herzegovina, given (according to his words) "the inflated negative sentiment of the media, secret services and politics in Bosnia and Herzegovina towards the High Judicial and Prosecutorial Council".⁵ In the end, he concludes that the report is not too bad for the judiciary and that it addresses some points correctly. He also states that some things are not correct and that EU experts were served wrong information (this, by the way, is a popular accusation that has recently become more frequent in countries of Southeast Europe).

It can be noted that the report addresses some serious shortcomings of the rule of law in Bosnia and Herzegovina. However, these findings have been known to experts in Bosnia and Herzegovina for quite some time. It must also be said that the report is very general and abstract, containing numerous general statements, without a sufficient number of specific proposals on how to solve the issues. If we thus compare it to two EU expert reports on the situation in the Macedonian judiciary from 2015 and 2017 (that have also been led by Priebe and have been received mostly favourably),⁶ we can observe that these two reports contain a significantly higher number of more specific recommendations for action: alone the report published in the spring of 2015, which is similar in scope to the current one on Bosnia and Herzegovina, contained 55 recommendations. However, the "Priebe reports" on Macedonia were compiled for a different reason: a great number of interception protocols had surfaced and the EU provided concrete advice, including on media sector aspects.

In contrast, the (only) 14 "key priorities" in the annex to the report now presented on Bosnia and Herzegovina seem modest. On the one hand, this is probably a testimony to the even more fundamental problems faced by the judiciary in Bosnia and Herzegovina. On the other hand, international consultants seem helpless after decades of project work and financial support provided to the legal system in Bosnia and Herzegovina.

Nevertheless, it is important that the EU has now published this sober report. The highest authority has thus disclosed or confirmed the existence of grievances. It seems that the intention of EU experts was not to create too much of a stir, but to rather address only certain grievances, knowing fully well that the difficult constitutional and political situation in Bosnia and Herzegovina has been present since the formation of the state. However, it is

⁴ See <https://balkaninsight.com/2019/12/06/bosnian-judiciary-under-pressure-after-critical-european-report/>

⁵ <https://www.blic.rs/vesti/republika-srpska/nista-neocektivano-moglo-je-bit-i-gore-milan-tegeltija-o-izvestaju-pribea/hdlrjnf>

⁶ The Former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts' Group on Systemic Rule of Law Issues Relating to the Communications Interception Revealed in Spring 2015 (published on June 08, 2015) or 2017 (published on September 14, 2017).

worrisome that the EU insists on the concept of local ownership (which would be correct and logical in many cases), but in Bosnia and Herzegovina it does not seem to have functioned for more than ten years.

It is highly unlikely that the political decision makers in Bosnia and Herzegovina – but also the elites in the judiciary of Bosnia and Herzegovina – will now, in view of the recent report, become constructive and fervently push for the necessary systematic reforms identified in the report. The system needs new people for this, but they are currently unable to gain a foothold in the existing system. It is clear that a profound and sustainable reform can only come from "within". The task of the EU and the international community is to actively support new (younger) forces in Bosnia and Herzegovina, so that the existing system does not keep them out.

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