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Policy Brief
MODERNO I NEOVISNO BiH PRAVOSUĐE

Policy Brief
MODERN AND INDEPENDENT B&H JUDICIARY

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BOSNIA AND HERZEGOVINA

Izvod iz recenzija
Izvod iz recenzije akademika Borislava Petrovića

Iz samog naslova ”*Pozadina problema*” autori nagovještavaju da će se baviti uzrocima tematike koju istražuju. U početku su istaknuti afirmativni segmenti koji se odnose na formiranje najviših pravosudnih instanci u Bosni i Hercegovini, kao što su Sud, Tužiteljstvo, te uspostava VSTV i Ureda disciplinskog tužitelja. To je nagovještavalo da će pravosudni sistem u BiH biti na potrebnom nivou, što se, ipak, nije desilo. Naprotiv, danas imamo pravosuđe bremenito mnogobrojnim problemima, od čega je najupitnija njegova neovisnost. U elaboraciji ovog podnaslova vidljivo je da su autori odabrali ispravan metodološki pristup, koji im je omogućio svestrano sagledavanje istraživane problematike. Na to ukazuju uporedna razmatranja različitih uzroka koji dovode do neefikasnog pravosuđa, a odnose se na njegovo rukovođenje, konfliktnu i destruktivnu politiku, kao i negativnu percepciju javnosti. Toliko negativne sinergije naprosto ne ostavlja dovoljno prostora da pravosuđe u BiH bude u svojoj pravoj funkciji. Iz ovog kritičkog osvrta, po mom mišljenju, proizilazi posebno neefikasan rad VSTV.

*”Ključna pitanja reforme dana*s” predstavlja ustvari centralni dio ovog teksta. Odmah na početku autori su ispravno ukazali da način finansiranja pravosuđa u našoj zemlji nije dobar i da u izvjesnoj mjeri doprinosi ovisnosti od rascjepkanih budžetskih područja, pogotovo u Federaciji BiH, gdje se na nivou kantona kreira veliki dio budžetske politike. Stoga mi se preporuka autora ovog teksta ”da se pravosuđe finansira jedinstvenim budžetom, sa odlučujućom ulogom VSTV…” čini jako dobrom, jer bi finansijska neovisnost uveliko doprinijela funkcionalnoj neovisnosti pravosuđa. No, mislim da bi to morao biti neki drugačiji VSTV, što se može zaključiti i iz ovog teksta. Nadalje, kao jedan od faktora ovakvog stanja jeste i pozicija UDT, čija je neovisnost upitna, a prijeko je potrebna. Kada to stavimo u kontekst prethodnih konstatacija mogla bi se postaviti teza da nije ispunjen niti jedan faktor neovisnosti našeg pravosuđa.

Analizirajući i procjenjujući ovaj tekst grupe istraživača mišljenja sam da se radi o iznimno kvalitetnom, odgovornom i sveobuhvatnom pristupu. Smatram da nije potrebno pisati obiman tekst recenzije, jer bi to preraslo u novu elaboraciju što bi nadilazilo uobičajene okvire jedne recenzije.

Excerpt from reviews
Excerpt from Academician Borislav Petrović’s Review

By choosing the title "*Background of the Problem*", the authors suggested that they would deal with the causes of the topic/issue they researched. Initially, they put the focus on affirmative segments related to the formation of the highest judicial instances in Bosnia and Herzegovina, such as the Court, the Prosecutor's Office, and the establishment of the HJPC and the Office of the Disciplinary Prosecutor. This indicated that the judicial system in BIH would attain the required level, however, that has not happened. On the contrary, today we have a judiciary burdened with numerous problems, the most questionable of which is its independence. In the elaboration of this subheading, it is evident that the authors chose the correct methodological approach which enabled them to get a comprehensive insight in the issues under research. This is indicated by comparative considerations of various causes that have led to ineffective judiciary. The authors also discuss its management, conflict and damaging policies, as well as negative public perception. This amount of negative synergy simply does not leave enough space for the judiciary in BIH to function properly. This critical review, in my opinion, suggests that the HJPC is particularly inefficient.

“*Key Reform Issues Today*” is, in fact, a central part of this text. Right at the beginning, the authors rightly pointed out that the way of financing of the judiciary in our country is not good and that it contributes, to a certain extent, to its dependence on fragmented budget areas, particularly in the Federation BIH, where a significant part of budget policy is created at the cantonal level. Therefore, the recommendation of the authors for “the judiciary to be financed by a single budget, with a decisive role of the HJPC", seems very good to me, for its financial independence of the judiciary would greatly contribute to its functional independence. However, I think it would have to be a different HJPC, as can also be inferred from this text. Furthermore, one of the factors contributing to this situation is the position of the Office of Disciplinary Prosecutor, whose independence is questionable, while being of utmost importance. In the context of the previous statements, one may conclude that none of the independence standards have been met when it comes to our judiciary.

Having analyzed and evaluated this text of a group of researchers, in my opinion they took an exceptionally high-quality, responsible and comprehensive approach. I believe this requires no extensive review, because any further elaboration would go beyond the framework of a regular review.

Izvod iz recenzije akademika Mirka Pejanovića

Reforma pravosuđa u Bosni i Hercegovini je sastavni dio cjeline reformi koje se izvode u procesu integracije Bosne i Hercegovine u Evropsku Uniju. U tom kontekstu istraživački tim polazi od stajališta da je pravosuđe Bosne i Hercegovine daleko od Evropskih standarda. Ima se u vidu opšta tendencija da bosanskohercegovačko društvo u toku svoje postsocijalističke tranzicije ima visok stupanj korupcije u državnim i javnim institucijama. Pravosuđe kao treća grana vlasti ima najveću ulogu i odgovornost u zakonskom sankcionisanju kriminala i korupcije i stvaranju pravne sigurnosti u društvu.

Istraživački tim je oblikovao više preporuka za reformu pravosuđa u Bosni i Hercegovini. Pri tome je težište dato na pravosudne institucije na nivou države Bosne i Hercegovine, te uspostavu novih kao što je Vrhovni sud BiH.

Uzete u cjelini uvidi istraživačkog tima u moderno i neovisno pravosuđe i preporuke koje su izvedene za reformu mogu korisno poslužiti svim djelatnicima u institucijama pravosudnog sistema Bosne i Hercegovine.

Excerpt from Academician Mirko Pejanović's Review

Judicial reform in Bosnia and Herzegovina is an integral part of the comprehensive reform that is ongoing in Bosnia and Herzegovina on its path to the European Union integration. In this context, the research team started from the position that the judiciary in Bosnia and Herzegovina is far from the European standards. There is a widespread perception of a high level of corruption throughout the government and public institutions in Bosnia and Herzegovina in the course of its post-socialist transition. Judiciary, as the third branch of government, has the greatest role and responsibility in sanctioning crime and corruption and creating legal security in the society.

The research team formulated several recommendations for judicial reform in Bosnia and Herzegovina. The focus is placed on the judicial institutions at the level of the State of Bosnia and Herzegovina, and the establishment of new ones such as the Supreme Court of BIH.

Taken as a whole, the insight of the research team into a modern and independent judiciary and their recommendations for the reform can be useful to all employees in the institutions of the judicial system of Bosnia and Herzegovina.

1. Izvršni sažetak

Bosanskohercegovačko pravosuđe se, unatoč gotovo tri decenije različitih reformi koje su se dešavale pod uticajem domaćih i međunarodnih aktera, još uvijek nalazi u reformskom procesu koji za cilj ima da osigura njegovu nezavisnost, nepristrasnost, profesionalnost i kvalitet. U ovom Policy briefu zastupamo tezu da je ovo rezultat međudjelovanja tri osnovna faktora; konstantno rastućih standarda normativnog ideala pravosuđa koje nameću vanjski promotori reformi, u prvom redu Sjedinjene Američke Države i Evropska Unija, nespremnosti domaćih političkih aktera da prihvate nezavisnost pravosuđa, kao i odsustva kompetencija i nespremnosti određenog broja pravosudnih aktera da izvršavaju zadatke koji pripadaju sudskoj grani vlasti u jednoj zemlji. Međudjelovanje ova tri faktora dovodi do percepcije pravosuđa kao neodgovorne grane vlasti na koju se ne može računati ni kao na branu neodgovornom ponašanju drugih dvaju grana vlasti, a ni kao na nepristrasnog društvenog arbitra. Mišljenja smo da je pravosuđe bolji, ili manje loš dio bosanskohercegovačkog institucionalnog okvira te da uz manje preinake i veće zalaganje za nezavisnost, može ostvariti ciljeve zbog kojih postoji.

2. Pozadina problema

U mnogim aspektima izgradnje savremenih pravosudnih sistema, Bosna i Hercegovina je bila pionir i predvodnik reformi. Uspostava Visokog sudskog i tužilačkog vijeća u BiH najprije kao dva entitetska organa (2003), a onda i kao jedinstvene institucije na nivou BiH bila je na nivou, a ako ne i ispred, sličnih projekata koji su ostvarivani u zemljama koje su pristupile EU još u fazi proširenja iz 2004. godine. Organizacija Suda i Tužilaštva BiH kao specijalizovanih institucija zaduženih za procesuiranje ratnih zločina, korupcije i organizovanog kriminala usporediva je sa organizacijom sličnih institucija specijalizovanih za borbu protiv korupcije i organizovanog kriminala u nekim članicama EU. Proces imenovanja i potvrđivanja sudija i tužilaca u BiH u 2003. godini bio je prvi proces takve vrste koji je obavljen u zemljama Zapadnog Balkana. Sličan proces u susjednoj Srbiji 2009. godine završen je kolektivnom tužbom razriješenih nosilaca sudskih funkcija protiv države, a istovjetan proces u Albaniji nije okončan ni danas. Uvođenje elemenata akuzatornog postupka u krivično procesno zakonodavstvo, odnosno smanjenje formalizacije u parničnom zakonodavstvu, procesi su koji su u BiH okončani između pet ili deset godina ranije, nego u svim drugim regionalnim jurisdikcijama. Ipak, BiH ni do današnjeg dana nije uspostavila ono što se u većini zemalja smatra najvišom instancom redovnog sudstva, naime

1. *Executive summary*

Despite nearly three decades of various reforms implemented under the influence of domestic and international actors, the justice sector in Bosnia and Herzegovina is still undergoing a reform process with the main goal of ensuring its independence, impartiality, professionalism and overall quality. In this Policy Brief we argue that the main problem stems from the interaction of three basic factors: more demanding standards of the normative judiciary ideal imposed by external reform promoters, namely the United States of America and the European Union; inability of local political actors to honor the justice sector independence, and the lack of competencies and unwillingness of some judiciary actors to perform the duties incumbent on them as members of the judicial branch of government. The interaction of these three factors leads to a perception of the judiciary as unreliable branch of the government which cannot serve either as a barrier to irresponsible behaviors of the two remaining governmental branches, or as an impartial social arbiter. However, we are of the opinion that the justice sector is a better part of the institutional framework of Bosnia and Herzegovina, or, at a minimum, not as bad as the rest of it, and, as such, it is capable of achieving all proclaimed objectives, with a few modifications and a greater resolve in safeguarding its independence.

2. Background

In the process of creating a modern justice sector, Bosnia and Herzegovina was, in many aspects, a pioneer and a front runner of reforms. High Judicial and Prosecutorial Council of Bosnia and Herzegovina (the HJPC BIH) was first established as two Entity authorities (2003), and then as a single, state-level institution.

As such, it leveled up, or, perhaps, was at one point a step ahead of similar projects implemented in the countries that joined the EU during the 2004 EU enlargement. The establishment of the Court of BIH and the Prosecutor's Office of BIH as the institutions responsible for prosecuting war crimes, corruption and organized crime can be compared to similar institutions specializing in anti-corruption and fighting organized crime in certain EU member states. The process of nomination and appointment of judges and prosecutors in BIH in 2003 was the first one of this kind in the Western Balkan countries. In 2009, a similar process in the neighboring Serbia ended up in a collective complaint against the state, filed by the judges removed from office, while in Albania, the same process has still not been finalized to date. Introduction of the elements of adversarial proceedings in the criminal procedure law, and

Vrhovni sud. Ustavni sud Bosne i Hercegovine koji nije dio redovnog sudstva u mnogim odlukama djelovalo kao *de facto* Vrhovni sud BiH ukazujući na propuste i ujednačavajući sudsku praksu pravnih tijela u BiH, osobito u pogledu primjene Evropske konvencije o ljudskim pravima a shodno nadležnostima iz Ustava BiH.

Zajedničke sjednice vrhovnih sudova entiteta te neformalna praksa citiranja sudskih odluka jednog entiteta u drugom, dala je djelimičan doprinos u ujednačenosti sudskog postupanja. Uspostavljanjem Panela za ujednačavanje sudske prakse koji predstavlja kontinuirani dijalog između najviših entitetskih sudskih instanci u 2014. godini, stvorena je platforma za ujednačavanje sudske prakse, kao i za diskusiju o drugim zajedničkim pitanjima. Također, kvalitetna sudska praksa Ustavnog suda BIH dovela je do kvalitetnije i ujednačene sudske prakse od strane drugih redovnih sudova. Osnivanje i djelovanje Ureda disciplinskog tužioca VSTV-a čija je funkcija da postupa u slučajevima kršenja discipline nosilaca pravosudnih funkcija, predstavljali su u vrijeme nastanka, najbolji primjer takve prakse u regionu. Zašto, imamo li u vidu sve navedeno, danas pravosudna zajednica u BiH ne uživa povjerenje u domaćoj javnosti ali i međunarodnim stručnim krugovima i zašto je još uvijek daleko od evropskih standarda? I još važnije; koji su koraci koji se mogu preduzeti da bi pravosuđe obnovilo svoju reputaciju?

Mišljenja smo da pad povjerenja javnosti u pravosudne institucije u cjelini ima dva osnovna uzroka. Prvi uzrok, su izuzetno visoka očekivanja od pravosuđa BiH, kao i izazovi koji su pred njim stajali i još uvijek stoje. Pod visokim očekivanjima mislimo na uvjerenje da su rad ili nerad pravosuđa rješenje i uzrok različitih društvenih problema, kao što su politička korupcija, nepovjerenje stranih investitora u BiH, odsustvo napretka u evropskim integracijama, i opći nedostatak odgovornosti druge dvije grane vlasti, zakonodavne i izvršne. Svakako, pravosuđe ima direktne veze sa svim od navedenih pitanja, ali nije nadležno, niti za kreiranje političkog i pravnog sistema koji stvara prilike za koruptivno djelovanje, niti za uređenje društvenih odnosa kojim bi se naplata potraživanja i izvršenje ugovornih odnosa poboljšala, niti za planiranje budžeta neophodnog za izvršavanje svih ovih poslova. Naravno, budući da pravosuđe nema ni monopol fizičke prisile, ni mogućnost da raspolaže i kreira budžet, upravo to čini njegovu reputaciju nezavidnom. Ipak, ovdje valja naglasiti da ono što najviše doprinosi lošoj reputaciji bosanskohercegovačkog pravosuđa, proističe iz različitih procesa koji su, u dobrom dijelu, izvan njegovih nadležnosti.

Drugi uzrok je taj što se sam model sudske samouprave (kod nas proveden kroz uspostavljanje VSTV-a) i u BiH, ali i u mnogim drugim zemljama gdje je uveden od 1990. godine naovamo - pokazao

reducing formalities in civil legislation were processes that had been finalized some five to ten years before their completion in any other regional jurisdiction. However, to date, Bosnia and Herzegovina has still not established, what in most countries is the highest instance of ordinary courts, i.e. the Supreme Court. The Constitutional Court of Bosnia and Herzegovina, which is not part of the ordinary judiciary, has in many decisions acted as the *de facto* Supreme Court of BIH, pointing to omissions of various judicial bodies in BIH and harmonizing jurisprudence, particularly with regard to the application of the European Convention on Human Rights, in accordance with its responsibilities under the Constitution of BIH. Joint sessions of the Supreme Courts of the Entities and the informal practice of mutual citing of their decisions, have contributed to the harmonization of judicial proceedings. The establishment of the Panel for the harmonization of jurisprudence in BIH in 2014 enabled a continuous dialogue between the highest judicial instances of both entities and created a platform for the harmonization of court practices, as well as for a discussion on other issues of common concern. In addition, high quality case-law of the Constitutional Court of BIH led to an improved and harmonized case-law of ordinary courts. The establishment and work of the Office of the Disciplinary Counsel within the HJPC BIH, with the main task to investigate allegations of disciplinary misconduct among judges and prosecutors, was the best practice example in the region at the time of its formation. In view of all of the foregoing, why is it that the BIH judicial community does not enjoy the confidence of either the domestic public or international professional circles, and why is it still falling short of the EU standards? And more importantly: what steps should be taken in order for the justice sector to rebuild its reputation?

In our opinion, there are two main reasons for the decline of public confidence in the judiciary. The first reason lies in extremely high expectations from the BIH judiciary, as well as all the challenges it has been facing. What we mean by 'high expectations' is a widespread belief that almost all social problems, such as political corruption, mistrust of foreign investors, lack of progress in the EU integration process and general lack of responsibility of the other two branches of government, legislative and executive - all have their origin in a dysfunctional judiciary. Certainly, the functioning of the judiciary is directly linked to all of the above issues, but the judiciary cannot be deemed responsible for the creation of a political and legal system conducive to corruption, or for the regulation of social relations so as to improve claims collection, or ensure enforcement of contractual arrangements, nor is it involved, for that matter, in budgeting these activities. As it has no state monopoly on physical

kao nedovoljan da zaštiti sudije i tužioce od političkog uticaja. U periodu njihovog uvođenja, smatralo se da su sudska i tužilačka vijeća samom činjenicom da ih kontrolišu sudije i tužioci, garant neovisnosti ove grane vlasti. No, dešavanja u Poljskoj i Mađarskoj pokazala su da sama po sebi sudska i tužilačka vijeća ne mogu u cijelosti zaštititi ni nezavisnost sudstva, ni spriječiti nepoželjne pojave, kakve su nepotizam i korupcija. U ovim sistemima, moć koja je ranije pripadala izvršnoj i zakonodavnoj vlasti, prenesena je na predsjednike sudova i glavne tužioce koji su, imajući mogućnost da ocjenjuju i vrednuju rad drugih sudija, došli u poziciju moći i kontrole. Ova nesavršenost modela sudske samouprave, usljed faktora visokih očekivanja, često rezultira razočarenjima u situacijama kada se otkrije da VSTV odstupa od normativnog ideala, od kojeg se očekuje bezgrešno funkcionisanje.

Može se konstatovati da VSTV nije u cijelosti odgovorilo izazovima koje sa sobom nosi sudska samouprava. Sudska samouprava pretpostavlja potrebu za institucijom koja se bori za jaču ulogu pravosuđa kao predlagača zakonskih rješenja i rješenja javnih politika, istovremeno štiteći pravosuđe od vanjskog uticaja. Postojanje institucije sudske samouprave počiva na pretpostavci povjerenja sudija i tužilaca u njegove članove, budući da iste biraju same sudije i tužioci, i na povjerenju javnosti u nepristrasnost VSTV-a kao instutucije sudske samouprave. S druge strane, zakonodavne inicijative VSTV-a, u pravilu, ne nailaze na pravovremen odziv izvršnih i zakonodavnih tijela, što upućuje na odsustvo partnerskih odnosa između grana vlasti u BiH. Tome doprinosi i odsustvo adekvatnog funkcionisanja Sekretarijata VSTV-a koji nije adekvatan servis članovima VSTV-a prilikom analize složenih zakonodavnih i budžetskih rješenja.

S obzirom da gore navedene pretpostavke nisu u cijelosti ispunjene, VSTV je u situaciji da je, kao rijetko koji drugi državni regulatorni organ, u fokusu javnosti i da predstavlja predmet kontinuirane kritike, kako domaćih tako i stranih aktera. Otvaranje rada VSTV-a prema javnosti, putem izravnog audio i video praćenja sjednica od strane medija, doprinjelo je transparentnosti, ali je i u značajnoj mjeri otvorilo prostor za dodatne javne kritike.

3. Ključna pitanja reforme danas

Bosanskohercegovačko pravosuđe mora vratiti reputaciju pred domaćom javnošću i relevantnim međunarodnim akterima. Relevantni međunarodni akteri svoje stavove formiraju na bazi mišljenja i preporuka međunarodnih organizacija i ekspertskih izvještaja (Izvještaj stručnjaka o pitanjima vladavine prava u Bosni i Hercegovini iz decembra 2019. godine, poznatiji kao „Priebeov izvještaj“, OSCE-ovi

force or any budget planning authority, the justice sector is in an unenviable position which creates its bad reputation. Nevertheless, it should be noted that the overall bad reputation of the BIH justice sector is rooted in various processes that are largely beyond the control of this particular sector.

The second reason is that the model based on judicial self-administration (introduced by the creation of the HJPC) in BIH and in several other countries where it was introduced since the 1990-ies, proved to be deficient in shielding judges and prosecutors from undue political influence. When the councils were first established, there was a wide-spread belief that the very fact they were staffed with judges and prosecutors, represented the bulwark of independence of this branch. However, the events in Poland and Hungary have clearly demonstrated that the judicial and prosecutorial councils cannot fully protect the justice sector's independence, nor can they prevent negative phenomena such as nepotism and corruption. In these systems, the power which earlier rested with the executive and legislative branches has now been transferred to presidents of courts and chief prosecutors, bestowing upon them the authority to assess and evaluate the work of other judges and prosecutors, thus being put in the position of power and control. Due to high expectations, these glitches in the system of judicial self-administration often result in disappointments whenever the HJPC BIH, which is expected to function perfectly, is seen to be deviating from the normative ideal.

It may be observed that the HJPC has not adequately responded to the challenges of the judicial self-administration. Judicial self-administration presumes the need for an institution which fights for a stronger role of the judiciary as a proponent of legislative and public policy solutions, while shielding the judiciary from external influence. The existence of judicial self-administration is based on a supposed trust of judges and prosecutors in members of the council, considering that they are selected by judges and prosecutors themselves, as well as on the public confidence in the impartiality of the HJPC as a judicial self-administration institution. On the other hand, legislative initiatives of the HJPC are generally not met with a timely response by the executive and legislative bodies. This indicates the lack of partnership relations between different branches of the BIH government. Inadequate functioning of the Secretariat of the HJPC, which does not provide effective services to the HJPC members in their analyses of complex legislative and budgetary issues, adds to the above.

Since the above stated prerequisites have not been fully met, the HJPC remains exposed to constant public scrutiny, unprecedented when compared with other state-level regulatory authorities, being continually lambasted by both domestic and foreign

izvještaji o procesuiranju predmeta korupcije i ratnih zločina, preporuke GRECO komiteta Vijeća Evrope, peer izvještaji i dr.), koji su javno dostupni i, zajedno sa našim stručnim mišljenjima predstavljaju osnov ponuđenih viđenja. Oštro polarizirana po političkim linijama, domaća javnost svoje stavove formira prvenstveno na osnovu medijske slike što je nešto nad čim pravosuđe ne može i ne treba da ima kontrolu. Ono, međutim, što može učiniti je da efikasnije komunicira potrebe, zahtjeve i uspjehe te da ponudi rješenja za pojave od javnog interesa.

Komunikacija s javnošću kao način otvaranja pitanja od šireg značaja i finansijska nezavisnost pravosudnih institucija

Otvaranje sudova prema društvu jedan je od načina da pravosuđe bolje komunicira i da se približi građanima, da bi se, s jedne strane, objasnila uloga koju sudovi igraju u demokratskom društvu, a s druge strane da bi se javnost mobilizirala za neka od rješenja na koja se već više od jedne decenije ukazuje, a koja ostaju zanemarena u našem društvenom i političkom životu. Dok je senzibiliziranje javnosti, u principu, moguće za širok niz pitanja funkconisanja sudske grane vlasti, pitanje koje se sistematski ignoriše i zapostavlja od strane donosilaca odluka, jeste pitanje finansiranja rada pravosudnih institucija. Naime, pravosudne se institucije prilikom formiranja budžeta tretiraju kao i drugi budžetski korisnici. Ovo se direktno odražava na broj zaposlenih u pravosuđu i njegove kapacitete, pa je i u VSTV-u, prema njegovom izvještaju od 2019. godine broj stalno zaposlenih lica ograničen, dok su sudovi u FBiH u dobroj mjeri prepušteni dobroj volji kantonalnih ministara finansija. Ovo ne samo što je u suprotnosti sa praksom da sudska i tužilačka vijeća budu predlagači budžeta pravosudnih institucija, već ima i štetne implikacije na rješavanje problema kakvi su sporost privrednih sudskih odjeljenja (na koje stalno ukazuju Svjetska banka i strani investitori u BiH, rangirajući po ovom kriteriju BiH kao posljednju državu u regionu), ili potkapacitiranost kantonalnih i okružnih tužilaštava (na koje ukazuje analiza OSCE-a o radu na predmetima korupcije u BiH prepoznavajući ovaj problem kao ključni u odnosu pravosuđa prema korupciji).

I dok su odluke domaćih vlasti o finasiranju pravosudnog sistema često neadekvatne, međunarodna zajednica nastavlja svoja ulaganja u modernizaciju pravosudnog sistema i njegove reforme, ali vodeći se više svojim, nego prioritetima domaćeg pravosuđa. Kako bi ulaganja međunarodne zajednice dovela do željenih rezultata, smatramo da je neophodno da VSTV kao regulator pravosuđa napravi sveobuhvatnu analizu finansijskih potreba neohodnih pravosudnih reformi, na osnovu koje bi se efikasno usmjeravala donatorska, ali i domaća

actors. The HJPC's opening to public through live streaming of its sessions for the media has undoubtedly contributed to the transparency, but has also left a door wide open for additional public criticism.

3. Essential questions about the reform today

Bosnia and Herzegovina's justice sector must restore its reputation in the public eye and among relevant international actors. Relevant international actors form their opinions on the basis of the opinions and recommendations formulated by international organizations' and experts' reports (Expert Report on Rule of Law issues in Bosnia and Herzegovina in December 2019, known as "The Priebe Report", OSCE's reports on the monitoring of corruption and war crimes cases before courts, recommendations made by the Council of Europe's Committee – GRECO, peer reports and others). Those reports are publicly accessible, and along with our expert opinions, constitute the basis for the proposed views. Sharply divided along political lines, the domestic public forms its opinion primarily based on media reports, which remains beyond the justice sector's control, as it should. However, what the justice sector can do is to communicate its needs, demands and successes, and offer solutions for issues of public concern.

Public Outreach as the way to open issues of general interest and financial independence of judicial institutions

The courts' public outreach is one of the ways to achieve better communication with the citizens in order to, on the one hand communicate the role of the courts in a democratic society, and on the other hand, to mobilize the public to engage in certain solutions that have been neglected in our social and political life for a decade now. While raising public awareness is possible in a wide range of issues related to the functioning of the judicial branch, the issue which has been systematically ignored and neglected by decision-makers is that of judicial institutions' financing. Specifically, budgetary planning treats judicial institutions the same as any other budget beneficiaries. This is directly reflected in the number of employees in the judiciary and its capacities. Thus, the number of full-time employees has also been limited in the HJPC according to the 2019 HJPC Annual Report, while the courts in the Federation of BIH have mostly been dependent on the benevolence of cantonal ministers of finance. Not only that this contradicts the practice according to which judicial and prosecutorial councils should propose budgets of the judicial institutions, but it also has an adverse impact on solving the problem related to poor efficiency of commercial courts (as

finansijska sredstva.

Preporučujemo da se **pravosuđe finansira jedinstvenim budžetom, sa odlučujućom ulogom VSTV-a u ostvarenju kvaliteta predloženih budžetskih rješenja**. No, mišljenja smo da predsjednici sudova kao i VSTV ovdje ne treba da se ograniče na komunikaciju sa donosiocima odluka, već da o ovim problemima otvoreno progovore u javnosti kako bi senzibilizirali i javnost i donosioce odluka, te kako bi ukazali na činjenicu da sudovi i tužilaštva koja se adekvatno ne finansiraju, ne mogu da odgovore na izazove koje se pred njih nameću. Na ovaj način pravosuđe će biti u mogućnosti da odgovori na jednu od primjedbi koje smo istakli u uvodu, a riječ je o percepciji njegove odgovornosti za neke od najvećih problema u Bosni i Hercegovini. Stoga, predlažemo da budžet za kompletno pravosuđe u Bosni i Hercegovini bude jedinstven, a da ga kreira i njime upravlja VSTV. Ovo, naravno, zbog toga što istinska nezavisnost pravosuđa podrazumjeva i finansijsku nezavisnost.

Disciplinski postupci i imenovanja sudija i tužilaca

Prema postojećim rješenjima Ured disciplinskog tužioca (UDT) u okviru VSTV-a, vrši dužnost tužioca u vezi sa navodima koji se tiču povreda dužnosti sudija ili tužilaca. U pogledu postupanja po pritužbama, istraživanja navoda protiv sudija ili tužilaca o povredi dužnosti, pokretanje disciplinskog postupka i zastupanja tužbi pred disciplinskim komisijama VSTV-a, UDT uživa samostalnost i nezavisnost.

Međutim, funkcionalna ovisnost Ureda disciplinskog tužioca od Sekretarijata VSTV, te način biranja i ocjenjivanja Glavnog disciplinskog tužioca, ukazuju da je njegova faktička nezavisnost od VSTV upitna. Iz tih razloga Preporuke Evropske komisije koje su uslijedile nakon stručne analize disciplinskih postupaka (Peer Review iz 2016. godine), bile su da UDT mora postati nezavisno tijelo sa vlastitim budžetom, posebnim sjedištem i vlastitom administrativnom podrškom.

Kod razmatranja pozicije i budućeg statusa UDT-a, uvijek treba imati na umu i preporuku Evropske mreže sudskih savjeta da „treba postojati posebno tijelo koje će primati i obrađivati pritužbe, a koje je nezavisno od Ministarstva pravde i koje za svoj rad odgovara isključivo pravosuđu“. Drugim riječima, izmještanje UDT-a iz VSTV ne smije dovesti do bilo kakve, makar i prividne, mogućnosti uticaja od strane druge dvije grane vlasti. Moguće rješenje ovog problema bilo bi i osnivanje posebne institucije, a kod izbora rukovodioca bi odlučujuću ulogu trebalo da ima nezavisni odbor, po uzoru na tijela koja biraju i ocjenjuju rukovodioce agencija za sprovođenje zakona. Odluke disciplinskih komisija moraju biti bolje obrazložene, da bi se praksa Ureda disciplinskog tužioca adekvatno razvila te da bi

repeatedly indicated by the World Bank and foreign investors, ranking BIH by this criterion as the lowest ranked in the region), and the issue of inadequate capacity of the Cantonal and District Prosecutors' Offices (as underlined in the OSCE analysis of corruption cases before courts in BIH, which identified this as a key problem in relation to the corruption).

While the local authorities' decisions on funding the justice sector are often inadequate, the international community continues to invest in modernization of the judicial system and its reform, however, mostly guided by its own priorities rather than the priorities of the domestic justice sector. In order to achieve desirable results from the investments made by the international community, the HJPC should make a detailed cost-benefit analysis of the necessary judicial reforms which would help direct both donors' funds and domestic allocations more efficiently.

We recommend that **the justice sector be funded from a single budget with the HJPC playing a decisive role in achieving the quality of the proposed financial solutions**. However, we are of the opinion that presidents of the courts and the HJPC should not limit their communication to that with decisions makers, but openly raise these issues in public in order to bring to the attention of both, the public and the decision makers, the fact that courts and prosecutor's offices cannot effectively confront the challenges they are facing without adequate funding. This will enable the justice sector to respond to one of the issues mentioned in or our introductory remarks - the perception that the justice sector is responsible for some of the biggest problems in Bosnia and Herzegovina. We therefore propose creating a single budget for the entire judicial system in Bosnia and Herzegovina with the HJPC being responsible for its creation and management. There can be no true independence of the judiciary without its financial independence.

Disciplinary proceedings and the appointment of judges and prosecutors

Under the current organization, the Office of the Disciplinary Counsel (the ODC) operating within the HJPC, performs prosecutorial functions concerning allegations of misconduct of the judges and prosecutors. The ODC is fully autonomous and independent with respect to investigating complaints and allegations against judges and prosecutors, instigation of disciplinary proceedings and arguing complaints before the HJPC disciplinary panels. However, functional dependency of the Office of the Disciplinary Counsel on the HJPC Secretariat, and the way the Chief Disciplinary Counsel is appointed, indicate that his/her actual independence from the HJPC is questionable. For those reasons the

standardi u ovoj oblasti postali jasniji.
Kako je vidljivo iz mišljenja koja tretiraju problematiku imenovanja sudija i tužilaca, sam postupak koji VSTV u ovom smislu provodi formalno zadovoljava sve standarde nezavisnosti, ali je suočen sa dva osnovna problema. Prvi je percepcija da članovi VSTV-a trguju uticajem prilikom imenovanja nosilaca pravosudnih funkcija, a drugi da je etnički kriterij od presudnog značaja za imenovanja kandidata. Trgovanje uticajem predstavlja krivično djelo iz kategorije koruptivnih krivičnih djela i prema njemu je neophodno zauzeti najstroži stav. Međutim, čini nam se da ovaj problem ovisi više od kvaliteta samih članova VSTV-a, nego od kvaliteta normi koje regulišu izbor nosilaca pravosudnih funkcija. Naime, ako većinu članova VSTV-a čine sudije i tužioci koji se, na osnovu slobodnog kandidovanja, biraju neposredno na izborima, onda je kvalitet odabira ljudi koji zastupaju sudije i tužioce u VSTV-u, ključan za fomiranje i poštovanje normi na kojima se zasniva njihov rad. Ako se ovaj postupak vodi tako da se sudije i tužioci ne oklijevaju kandidovati i voditi kampanju za članstvo u Vijeću, onda je to garant da će najbolji biti izabrani, pa shodno tome da će i trgovina uticajem biti obesmišljena, ili svedena na najmanju moguću mjeru. U pogledu poštivanja etničkog kriterija prilikom imenovanja, a što je ustavna obaveza, neophodno je voditi računa da ovaj kriterij nema prednost u odnosu na kriterij profesionalnih kompetencija.

Ratni zločini

Strategiju za procesuiranje najsloženijih i najprioritetnijih predmeta ratnih zločina pred pravosudnim institucijama u BiH do 2023 je, nakon dugotrajnih napora na usaglašavanju, usvojena. Međutim, postoje ozbiljne sumnje u to da li će ovaj rok biti ispoštovan. Prije svega, provođenje ove Strategije zahtijeva značajan koordinisani institucionalni napor ne samo pravosuđa već i organa izvršne vlasti, naročito po pitanju osiguranja finansijskih sredstava. Zato je važno, kao što smo i ranije istakli, da VSTV kontinuirano zagovara provođenje ovih napora i otvoreno ukazuje na one koji im se suprostavljaju. Naredni problem je dužina trajanja sudskog postupka u složenim predmetima koja, u korelaciji sa normama koje tužioci imaju, dovodi do toga da tužioci vrše tzv. fragmentaciju predmeta, odnosno da iz mase dokaza koji se odnose na grupu krivičnih djela počinjenih na jednom prostoru, ne vode postupak ili istragu u odnosu na sve osumnjičene ili optužene, već „fragmentiraju“ dokazni materijal na osnovu kojeg sačinjavaju jednostavnije optužnice.
Potrebno je da sudije iskoriste svoje ovlasti za upravljanje predmetom, kako bi smanjili vrijeme trajanja postupka. Također, potrebno je da Tužilaštvo

European Commission, upon their expert analysis of the disciplinary proceedings, made recommendations (the 2016 Peer Review) suggesting that the ODC should become an independent body with its own budget, separate headquarters and administrative support.
In the process of discussion of the ODC's position and its future status, it is important to keep in mind the recommendation given by the European Network of Councils for Judiciary that "There should be a separate body responsible for receiving and administering complaints, independent of the Ministry of Justice and answerable only to the Justice sector". In other words, the separation of the ODC from the HJPC must not lead to any, even apparent possibility of influence by the other two branches of government. A possible solution to this problem might be the establishment of a separate institution, with the Head of the ODC appointed by an independent board, similar to the bodies that select and appoint heads of the law enforcement agencies. Decisions of the Disciplinary Panels must be better reasoned so as properly develop the ODC case-law and to ensure clearer standards in this field.
As indicated in the opinions on the issue of appointment of judges and prosecutors, the relevant HJPC procedure formally satisfies all standards of independency, but is faced with two main problems. The first one is related to the perception that the HJPC members are trading in influence in the appointment of the judiciary office holders, and the second one is that the criterion of ethnicity is of decisive significance for the appointment of candidates. Influence trading is a criminal offence falling under the category of corruption offenses and must be considered rigorously. However, it seems that this problem is more dependent on the quality of the HJPC members themselves, than on the quality of standards for the appointment of judiciary office holders. Specifically, if the HJPC mostly consists of judges and prosecutors who have been directly elected based on their individual candidacy, then a quality selection of individuals representing judges and prosecutors in the HJPC becomes the key element in the formation of and compliance with the standards on which their work is based. If this process is conducted in such a way as to encourage judges and prosecutors to declare their candidacies and campaign for membership in the Council, it will ensure that the best candidates are selected, thus making the trading in influence pointless or kept at a minimum. As for the criterion of ethnicity in appointments, it is a constitutional obligation, however, it should not take precedence over professional competences.

War crimes

The strategy for the prosecution of the most complex

BiH bolje planira utrošak sredstava, kako bi umanjilo teškoće koje se javljaju pri pristupanju svjedoka ukoliko se svjedočenje odloži ili produži za naredni dan. Zato je neophodno preispitati tužilačke norme i, na osnovu postojećih kriterija za ocjenjivanje, utvrdi postojanje ili nepostojanje razloga za fragmentacije optužnica i štetu koju ovo nanosi. Jednako tako, potrebno je preispitati i normu od pet predmeta koju imaju sudije Suda BiH koji postupaju u predmetima ratnih zločina, u odnosu na tužioce u Tužilaštvu BiH koji duže četiri predmeta.

Organizovani kriminal i korupcija

Iskustva zemalja koje su provele velike antikorupcione kampanje protiv političke korupcije (Brazil, Rumunija i Italija) pokazuju da je uloga specijalizovanih sudova, odnosno tužilačkih timova koji u sprezi sa specijalnim policijskim jedinicama istražuju korupciju, ključna za uspjeh. U tom smislu, BiH veoma zaostaje; specijalno tužilaštvo na nivou FBiH postalo je talac političkih i verbalnih sukoba između onih koji misle da ga ne treba osnivati, onih koji smatraju da treba te onih koji smatraju da je korisnije jačati specijalna odjeljenja za borbu protiv korupcije unutar kantonalnih tužilaštava. Struktuirani dijalog pod pokroviteljstvom Evropske Unije nije doveo do saglasnosti u vezi sa opsegom jurisdikcije Suda BiH i Tužilaštva BiH u ovom pogledu.

Smatramo, kako je istakao i Ustavni sud BiH u odluci U-16/08, da je izlišno pokušavati u jednoj složeno uređenoj državi kakva je BiH, u cijelosti precizirati nadležnosti i nastojati predvidjeti svaku mogućnost zasnivanja nadležnosti Suda BiH, a konsekventno tome i Tužilaštva BiH. Smatramo da je postojeća sudska praksa Suda BiH dovoljan vodič koji daje smjernice na osnovu kojih tužilaštva i policijske agencije mogu utvrditi nadležnosti suda.

Drugi problem koji se javlja u ovoj oblasti je *reaktivno, a ne proaktivno* djelovanje tužilaštva na krivične prijave, odnosno izvještaje o počinjenom krivičnom djelu koje dostavljaju građani, institucije ili policijske agencije. Jednostavno, opseg korupcije koji postoji u BiH, zahtijeva pristup u kom tužilaštva sama stvaraju saznanja o koruptivnim mrežama u različitim sektorima u BiH. Naš pravosudni sistem napustio je ideju tužioca kao zastupnika optužbe koji se primarno stara o kvaliteti dokaza i pravnih argumenata i njihovog izlaganja pred sudom. Umjesto toga, tužilac treba, ne samo da rukovodi istragom, već i da usmjerava istrage na one oblasti ljudskog djelovanja u kojima je zemlja zarobljena korupcijom. Ovo zahtijeva postojanje značajnih analitičkih kapaciteta unutar samog tužilaštva i kontinuirano educiranje tužilaca u cilju boljeg razumijevanja koruptivnih mreža koje postoje u našem društvu.

Pojavljivanje nosilaca visokih državnih funkcija u svojstvu osumnjičenih/optuženih pred pravosudnim

and high-priority war crimes cases before the BIH judicial institutions by 2023, has been adopted after a prolonged deliberation. However, serious doubts are expressed over the possibility of this deadline to be met. First of all, the implementation of this Strategy requires a coordinated institutional effort not only of the justice sector but also of the executive branch, especially with regard to the provision of funding. It is therefore important, as noted above, that the HJPC continually advocates for those efforts and openly confronts those who undermine them. Another problem is excessive length of judicial proceedings in complex cases which, in correlation with the prosecutors' quotas, leads to the so-called fragmentation of cases. This phenomenon refers to the situation where regardless of a body of evidence concerning a group of criminal offences committed in a certain area, the prosecutors do not conduct proceedings or investigations in respect of all of the suspects or the accused, but instead, they "fragment" evidence and accordingly create less complex indictments.

Judges should use their authority in case management with a view to reducing the length of proceedings. In addition, the Prosecutor's Office of BIH should make better planning of expenditures in order to reduce difficulties associated with the attendance of witnesses in criminal proceedings if their testimony is postponed for the following day. It is therefore necessary to review the prosecutors' quotas and decide, in line with the existing evaluation criteria, if there are reasons for the fragmentation of indictments and assess the damage caused by this practice. Also, the current quota of 5 cases applicable to judges of the Court of BIH in war crimes cases needs to be reconsidered, in comparison to the prosecutors at the BIH Prosecutor's Office who are assigned 4 cases each.

Organized crime and corruption

Experience of the countries that have launched massive anti-corruption campaigns against political corruption (Brazil, Romania and Italy) has shown that the key role in fighting corruption belongs to specialized courts as well as to prosecutorial teams which investigate corruption cases in collaboration with specialized police units. BIH lags far behind in on this front; the idea of establishing a specialized prosecutor's office on the level of FBIH has become a hostage of political skirmishes between those who think it should not be established, those who believe that it should be, and those who consider that it is more important to strengthen specialized units within the cantonal prosecutors' offices to fight corruption. The Structured dialogue, held under the auspices of the European Union, failed in reaching an agreement on the scope of jurisdiction of the Court of BIH and of the Prosecutor's Office in this respect.

institucijama na nivou države, u konačnici bez adekvatnog sudskog epiloga, stvara dojam o instrumentalizaciji pravosuđa u svrhu političkih obračuna. Tužilaštva moraju biti svjesna ove percepcije te im se zato preporučuje da svoje akcije usmjeravaju tako da njima ne izoluju određene političke aktere. U procjeni okolnosti u kojima se vrši procesuiranje ovih lica, odlučujuću ulogu treba da imaju glavni tužioci i predsjednici sudova.

Obuka sudija i tužilaca

Priebeov izvještaj predlaže uspostavljanje pravosudne akademije kao tijela koje bi se bavilo obukom kandidata za sudačke i tužilačke pozicije. Ovim bi se riješio problem koji se percipira kao nedovoljna obučenost kandidata za rad u pravosuđu. Mišljenja smo da prije usvajanja ovog rješenja treba pojasniti šta je smisao postojanja pravosudne akademije, odnosno postojećih centara za obuku sudija i tužilaca. Pravosudna akademija kao institucija je tipična za zemlje kontinentalnog evropskog prava koja imaju tzv. karijerno pravosuđe u kom se kandidati za pravosudne pozicije u pravosuđe uključuju, u pravilu, na samom početku njihovih karijera. Suprotno tome, centri za obuku sudija i tužilaca karakteristični su za zemlje anglosaksonskog pravnog sistema ili hibridnih (mješovitih) pravnih sistema. U tim zemljama, u pravilu, imenovanja sudija se ne vrši u ranoj fazi njihove karijere, već u sredini karijere jer je sama sudačka pozicija više izraz ličnog prestiža, nego karijernog opredjeljenja. Zbog toga se imenovanje sudija u ovom sistemu ne vrši nužno iz reda najboljih studenata – polaznika pravosudne akademije - već na osnovu reputacije i iskustva koju određeni pravnik ima. Smatramo da postoje jaki argumenti da se zadrži postojeći model (tako se spriječava da sudije i tužioci postanu osobe koje nemaju dovoljno praktičnog iskustva, a istovremeno omogućava da imenovanja budu zasnovana na ličnim kvalitetama pojedinaca), kao i da dođe do uvođenja Pravosudne akademije, a u cilju usklađivanja sa evropskim praksama ujednačavanja kvaliteta sudija i tužilaca. U tom smislu, oba rješenja su pravilna, ali oba zahtijevaju da donosioci odluka budu svjesni njihovih prednosti i nedostataka. Takođe se predlaže, da se za sve nosioce pravosudnih funkcija koji trenutno uživaju veliku autonomiju prilikom odabira edukacija koje će pohađati, uvede obaveza edukacija iz oblasti etike, integriteta sudija i tužilaca i ljudskih prava. U tom smislu je i najavljeno uvođenje Odjeljenja za integritet unutar VSTV-a dobrodošla novost.

Najviša sudska tijela

Pravosudni sistem BiH razlikuje se od većine evropskih po tome što još nema Vrhovni sud, ili

We concur with the Constitutional Court of BIH Decision U-16/08 that it is utterly pointless to strive to precisely define and foresee the scope of jurisdiction and competency of the Court of BIH, and consequently, of the Prosecutor's Office, given the complex nature of the state of BIH. We believe that the current case-law of the Court of BIH provides adequate guidelines on which police agencies and prosecutors' offices may deduce specific competences of the court.

Another problem in this field is a *reactive*, - rather than *proactive* - action of the Prosecutor's Office in dealing with criminal charges, i.e. reports on committed criminal offences submitted by citizens, institutions or police agencies. Simply put, the corruption threat in BIH requires an approach where the Prosecutors' Offices lead investigative efforts against corruption networks in different sectors in BIH. Our judicial system has abandoned the idea of a prosecutor who argues charges primarily taking care of the quality of evidence and the presentation of legal arguments before the court. Instead, the prosecutor should not only lead investigations, but also direct them towards the areas in which the country is seized by corruption. This requires a great deal of analytical skills within the Prosecutor's Office and continuing education of prosecutors for the purpose of better understanding of the corruption networks in the society.

Corruption allegations against high ranking officials before the state level judicial institutions and their rare resolution at court, gives the impression of the judiciary being used in political showdowns. Prosecutors' offices should be aware of this perception and therefore, their actions should not be directed at singling out certain political actors. Chief Prosecutors and Court Presidents should have a decisive role in the assessment of the circumstances under which these persons are prosecuted.

Professional training of judges and prosecutors

The Priebe Report recommends the establishment of Judicial Academy, as an institute in charge of education of candidates for judicial and prosecutorial positions. In this way the problem perceived as inadequate training of candidates would be resolved. In our opinion, before this solution is adopted, it is necessary to clarify the purpose of the Judicial Academy, in view of the already existing Centers for education of judges and prosecutors. Judicial Academy is an institution typical for countries with the European continental law systems, with so-called career judiciary where candidates for judges and prosecutors join the justice sector at an early stage of their career. On the other hand, Centers for education of judges and prosecutors are specific for countries with Anglo-Saxon legal systems and hybrid (mixed) legal systems. In those countries, as a rule, judges are

slično najviše tijelo redovnog sudstva koje bi harmonizovalo sudsku praksu i bilo posljednja instanca sudovanja. Zbog toga je stav da je Vrhovni sud BiH tijelo neophodno za ujednačavanje sudske prakse često istican u mnogobrojnim mišljenjima domaćih i međunarodnih eksperata. No, mišljenja su neujednačena u pogledu toga da li je dovoljno uspostavljanje samo Vrhovnog suda BiH, ili i objedinjavanje entitetskih vrhovnih sudova u jedan. Prva opcija bi, u odnosu na postojeće stanje osigurala nezavisnost u procesu drugostepenog odlučivanja po odlukama Suda BiH, dok bi druga opcija, pored naprijed navedenog, uključivala i nadležnost suda posljednje instance po odlukama kantonalnih, odnosno okružnih sudova entiteta. Kao aktuelno rješenje, a u skladu sa preporukama Struktuiranog dijaloga o pravosuđu između Evropske unije i Bosne i Hercegovine i Mišljenjem o pravnoj sigurnosti i nezavisnosti pravosuđa u Bosni i Hercegovini iz juna 2012. godine, predstavnici Suda BiH, vrhovnih sudova entiteta i Apelacionog suda Brčko distrikta BiH, pod pokroviteljstvom VSTV BiH u aprilu 2014. godine donijeli su Pravila panela za ujednačavanje sudske prakse. Panel vrši usaglašavanje stavova i donosi pravna shvatanja kada postoji različito tumačenje usaglašenih zakonskih odredbi, po potrebi inicira zakonske izmjene u slučajevima kada ne postoji usaglašenost zakonskih rješenja koja stvara nejednakost građana pred zakonom. Na Panelu se razmjenjuju iskustva i mišljenja u tumačenju i primjeni zakona. S obzirom da je riječ o trenutno jedinoj platformi za ujednačavanje sudske prakse u BiH, smatramo da je potrebno unaprijediti i ojačati rad ovog Panela.

Ovdje se valja prisjetiti da ustroj sadašnjeg Suda BiH nije bio vođen logikom ustavne reforme, niti uporednih pravnih rješenja u složenim državama, već potrebom da se osigura forum pred kojim će se rješavati materija koja se odnosi na rad institucija BiH (pred upravnim odjeljenjem), kao i rješavanje predmeta koji se odnose na ratne zločine i najsloženije krivične predmete (pred krivičnim odjeljenjem). To je dovelo do specifične nadležnosti Suda BiH koja se ne naslanja na ustavnu strukturu države, već na izvore prava s jedne i specifična pitanja, s druge strane. Slabosti ovog pristupa danas su vidljive; ne postoji redovan sud koji vrši nadzor nad sudskom praksom Suda BiH, već to čini njegovo apelaciono odjeljenje. Reagujući na ove okolnosti, Ustavni sud BiH je, rješavajući po apelacijama građana po osnovu primjene Evropske konvencije o ljudskim pravima pred redovnim sudovima, razvio bogatu jurisprudenciju bivajući u nekim oblastima *de facto* Vrhovni sud BiH, iako po svojoj pravnoj prirodi i *de iure* to nije. No, Ustavni sud BiH je u posljednjoj dekadi značajno smanjio obim propitivanja sudskih odluka nastojeći da se ograniči ne na pitanja primjene prava, već na pitanja temeljnih ljudskih prava i sloboda i njihovih

not appointed at an early stage of their career but at mid stages, since the position of judge is perceived as a matter of personal prestige rather than career option. For this reason, judges in this system are not necessarily appointed from among the best students, those attending the Judicial Academy – but based on the experience and reputation they enjoy as lawyers. We consider that there are strong arguments in support of keeping the existing model (thus preventing the appointment of judges and prosecutors with little practical experience, and securing appointments based on personal quality of an individual), but also for the establishment of the Judicial Academy with a view to alignment with the EU practices of balancing the quality of judges and prosecutors.

Therefore, both solutions are acceptable but both require careful consideration by decision makers in order to be aware of their advantages and disadvantages. It is also recommended that all the judicial office holders, who currently enjoy large autonomy in choosing their training courses, should also attend mandatory trainings on ethics, human rights and the integrity of judges and prosecutors. In that respect, we welcome the news about the prospect of establishing the Integrity Department within the HJPC.

The highest judicial authorities

The BIH judicial system differs from most of the European judicial systems in that it still has no Supreme Court or a similar highest level judicial body which should harmonize the case-law and be the ultimate judicial instance. For this reason most domestic and international experts have shared the opinion that it is necessary to establish the Supreme Court of BIH with a view to harmonizing the case-law. However, opinions differ with respect to the dilemma whether it suffices to establish the Supreme Court of BIH anew, or should the Entities' Supreme Courts merge into one. The first option would ensure independence in the second instance proceedings on decisions delivered by the Court of BIH, while the second option would include not only the aforementioned but also the jurisdiction of the court of final instance for rulings rendered by Cantonal, and/or Entities' District courts.

In line with the recommendations of the Structured Dialogue on Justice between the European Union and Bosnia and Herzegovina and the Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina of June 2012, the representatives of the Court of BIH, the Supreme Courts of the Entities, and the Appellate Court of Brčko District of BIH, in April 2014, adopted the Rules of the Panel for the harmonization of jurisprudence in BIH. The Panel harmonizes positions and provides legal opinions where legal

ograničenja u procesnom zakonodavstvu BiH i entiteta. Na ovaj način, Bosna i Hercegovina je u situaciji da nema najviše redovno tijelo sudske vlasti. Ovi razlozi, zajedno sa potrebom da se odgovori na zahtjeve koji se pred nas postavljaju u procesu evropskih integracija, opredjeljuju nas za stav da je uspostavljanje Vrhovnog suda Bosne i Hercegovine *de lege ferenda* neophodan korak naprijed.

provisions are harmonized but their interpretation differs, it initiates legislative amendments if necessary where legislative provisions are not harmonized and thus result in inequality of citizens before the law. Experiences and opinions in the interpretation and application of legislation are exchanged at the Panel. Considering that this is the only currently active platform for the case-law harmonization in BIH, we think that its work should be further strengthened and expanded.

It should be noted here that the current structure of the Court of BIH was not the result of a constitutional reform, or of any comparable legal solutions in other complex states, but was established to meet the need of having a forum for the resolution of matters arising from the work of the BIH institutions (the Administrative Division), as well as for the prosecution of war crimes cases and the most complex criminal cases (the Criminal Division). This led to a specific jurisdiction of the Court of BIH which does not rely on the constitutional structure of the state, but on the sources of law on the one hand, and specific issues, on the other. Weaknesses of this approach are visible today; no ordinary court has supervision over the Court of BIH case-law, but rather, this is done by the Appellate Division of the Court. In its reaction to these circumstances, the Constitutional Court of BIH, acting upon citizens' appeals based on the application of the European Convention on Human Rights before ordinary courts, has developed a rich jurisprudence, acting as *de facto* Supreme Court of BIH in some areas, although *de iure* and by its nature, it is not a supreme court. However, as the Constitutional Court of BIH has significantly reduced the scope of consideration of court decisions over the past decade in an effort to, rather than examining the application of law, limit its review on issues related to fundamental human rights and freedoms and their restrictions in procedural legislation of BIH and the Entities. Thus, Bosnia and Herzegovina has basically been left without the highest ordinary court. For these reasons, and having in mind the necessity of meeting the requirements of the European integration processes, we argue that, *de lege ferenda,* the establishment of the Supreme Court of BIH is a necessary step forward.

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