

## EXECUTIVE SUMMARY OF THE JUDICIAL REFORM STUDY AND TI BiH RECOMMENDATIONS<sup>1</sup>

### ***Structure of the Regulatory Body – Single Regulator or Separate Bodies?***

**FINDINGS:** The High Judicial and Prosecutorial Council (HJPC) is the single regulator of the judicial and prosecutorial system. This model has proved to be fundamentally flawed as it compromises the independence of the regulatory body by allowing prosecutors to prevail over judges. HJPC consists of 15 members, of whom 11 are elected from among judges and prosecutor, two are lawyers elected by the entity-level Bar Associations, one member is elected by the BiH Parliamentary Assembly's House of Representatives and one is elected by the BiH Council of Ministers.

Five members of HJPC are elected from among judges and prosecutors each. The exception is the Brčko District Judicial Commission, which can elect either a judge or prosecutor. Such an arrangement may result in HJPC having more prosecutors (6) than judges (5), as indeed happened with the first composition of HJPC (2004-2008). A decision of HJPC requires a majority vote of the members present who constitute a quorum (11). There may be situations where a decision on status-related issues concerning judges is rendered by a majority consisting of prosecutors, or prosecutors and external HJPC members. For example, the President of the Court of BiH was elected by a majority of six members, of whom two were judges.

**RECOMMENDATION:** Provision should be made for separate regulatory bodies for judicial and prosecutorial systems, or separate panels for these two systems within the same body. The recommendation is consonant with the opinion of the Venice Commission.\*

### ***Composition of the Regulatory Body, Election of Members and Members' Term of Office***

**FINDINGS:** According to the existing legislation, members of the judicial regulatory body are judges, prosecutors, representatives of the lawyers community, representatives of Parliament and representatives of the executive (who do not perform a judicial function and are not members of the Parliament or the Council of Ministers). The professional community, as well as the general public, have raised a question of whether lawyers should participate in the composition of an independent judicial body. The prevailing opinion is that neither prosecutors nor lawyers should be able to decide on status-related rights of judges given their procedural roles in court proceedings. Being a member of the regulatory body allows a lawyer to exert pressure on judges whose status-related issues are being decided. Furthermore, this creates certain professional advantages and opens the door to abuse in the relationship with parties. This can be considered a potential source of judicial corruption.

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<sup>1</sup> This summary is largely based on the study *Pravosuđe u BiH: stanje i perspektive* [Justice in BiH: Current State of Play and Prospects] by judge Branko Perić, commissioned by TI BiH.

\*<https://rm.coe.int/1680700a60>

**RECOMMENDATION:** All members from the judicial ranks should be elected at the general meeting of all judges (prosecutors).

The criteria for election should be laid down by law and consistent with the criteria applied for the election of judges of constitutional courts and international courts.

Nominators should be professional associations of judges and prosecutors, the Collegium of the Supreme Court, the Collegium of the Court of BiH, the Collegium of the Appellate Court of Brčko District and the collegiums of district and cantonal courts, as well as collegiums of entity-level prosecutors' offices.

Nominations with biographies must be published on the official website of the regulator and/or the court/prosecutor's office which has made the nomination.

**RECOMMENDATION:** Lawyers should not be members of a regulatory body for judges and prosecutors. Members of the regulatory body elected by the legislature and the executive participate in the work of regulatory bodies, but without the right to decide the status-related issues concerning judges and prosecutors.

**RECOMMENDATION:** Academia and civil society must have their representatives in the regulatory body, too. Precise criteria for the election of these members should be laid down, to include professional reputation, work experience, public stature, scientific papers, membership in professional organizations, professional and social recognition, etc.

Provisions should be made to ensure participation in the nomination process of all authorized academic institutions and registered NGOs working in the field of rule of law and justice. Right to elect these members should be given to the national parliament, and in the event that it fails to elect a member on second attempt, the right to elect should be given to the Constitutional Court..

**FINDINGS:** HJPC members currently serve for a period of four years and are eligible to a maximum of two consecutive terms. Someone who has served two consecutive terms as an HJPC member can be re-elected after the expiration of four years from the end of last term. In the last composition of the HJPC all prosecutors and judges renewed their terms.

**RECOMMENDATION:** In the context of frequent scandals and widespread suspicions of corruption, the tenures of members of the regulatory body should be limited to a single five-year term without possibility of re-election, as a form of guarantee of the integrity and independence of the regulatory body. The five-year term of office is recommended so as to ensure that it does not coincide with the tenures of other branches of government, as well as those of court presidents.

### ***Disciplinary Liability of Judges and Prosecutors***

**FINDINGS:** The legislator has entrusted disciplinary liability of judicial officeholders to the independent regulator. Investigation and prosecution of a disciplinary matter is the responsibility of the Office of the Disciplinary Counsel (ODC), which operates as part of the HJPC Secretariat and has a certain autonomy to act, and can also receive complaints from citizens. ODC is headed by the disciplinary prosecutor who is elected by the Civil Service Agency. Disciplinary prosecutor does not have to be a judicial officeholder.

Disciplinary liability is decided by the first-instance and second-instance disciplinary committees composed of judges and prosecutors who are members of HJPC. HJPC can choose a number of judges and prosecutors from the judicial system to serve as members of disciplinary committees. The composition of the disciplinary committee is elected by the president of HJPC.

**So, HJPC holds complete control of disciplinary liability of judicial officeholders.** The fact that the disciplinary prosecutor does not have to be a judge or prosecutor lessens the authority of this body and only goes to accentuate the power that the president and members of HJPC hold over ODC. In the majority of cases, the disciplinary commissions do not adopt uphold sanctions proposed by ODC, and on multiple occasions HJPC has, on appeal, changed the decision of the second-instance disciplinary commission. According to the 2018 HJPC Annual Report<sup>2</sup>, the most commonly imposed disciplinary measures were written reprimand, public reprimand and salary reduction, and disciplinary proceedings were most often conducted against judges. In the same year a total of 33 disciplinary proceedings were instituted – an all-time record high number of proceedings in any one year. Furthermore, the average time to resolve complaints was 367 days, and ODC received as many as 895 complaints whose merits were appreciated. Of those, the majority (about one third) referred to the duration of court proceedings, which is also the same grievance citizens most commonly report to TI BiH through its Advocacy and Legal Advice Centre (ALAC).<sup>3</sup>

**RECOMMENDATION:** Disciplinary proceedings should be radically simplified. The starting point should be the principle that the aim of disciplinary liability of judicial officeholders is not to punish judicial officeholders but to create the highest professional standards of accountability. Disciplinary liability of judges should be located in the court system and under the mandate of the supreme courts, and the disciplinary liability of prosecutors should be located in the prosecutorial system and under the mandate of the highest prosecutor's offices.

The Law on Judicial Council and the Law on Prosecutorial Council should create the basis for appraising professional skills of individual judicial and prosecutorial officeholders, including their procedural skills and the ability to correctly apply the law. Such appraisals should be entrusted by the regulator's decision to judges and prosecutors of higher judicial institutions. The appraisals would be carried out periodically on a random sample or based on the reasoned proposals of the

### **Election and Appointment, Career Advancement**

**FINDINGS:** The process of election and appointment to a judicial post is carried out in accordance with the principle that in essence follows the logic of vacant judicial and prosecutorial posts. The election process includes a mandatory written test for the first election to a judicial office, and following successful completion of the test also an interview before an *ad hoc* committee consisting of HJPC members. For career

<sup>2</sup> See more: [https://vstv.pravosudje.ba/vstv/faces/pdfservlet?p\\_id\\_doc=52789](https://vstv.pravosudje.ba/vstv/faces/pdfservlet?p_id_doc=52789)

<sup>3</sup> See more: <https://ti-bih.org/izvjestaji/>

advancement written test is not mandatory and includes only an interview before the members of the election committee. Experience has showed that the candidates who achieve the highest score on the test often do not get elected, and that interview plays the key role.

**RECOMMENDATION:** Election to a judiciary office must be made more objective by favouring written testing. It is only after the appraisal of performance over a given period of time (five years) that other abilities and skills should be checked and evaluated.

### Evaluation of Judges and Prosecutors

**FINDINGS:** Currently the performance of judges and prosecutors is evaluated on the basis of standardization, i.e. a statistical criterion that has drawn serious criticism (evaluation is not based on qualitative comparison, or does not use indicators that take account of individual specificities, etc.). The most serious objection to this type of evaluation is that, for example, prosecutors avoid complex cases and choose the easiest ones to meet the quota, which is why the effect of the current methods of evaluation are seen as negative. This problem is particularly acute in the area of criminal justice. Because of the focus on meeting quotas, criminal justice is predominantly engaged in prosecuting petty crimes in order to make statistics look good. The prosecuting policy is reduced to a semblance of results, and complex cases of war crimes, corruption and organized crime remain out of sight of the prosecuting authorities.

**RECOMMENDATION:** Rather than monitoring and evaluating the performance of judges (and prosecutors) as individuals, it would be more acceptable to monitor and evaluate the work of the courts and prosecutors' offices. In public perception, ultimate liability rests with the institution, rather than the individual. An institution is the sum of its human resources and their combined results. Responsibility for the judiciary's performance is equally borne by judges and prosecutors, administrative staff, court president and chief prosecutor, HJPC and ministries of justice. Placing focus solely on the performance of judges and prosecutors is wrong and counterproductive as it only obscures the far more important responsibility of other agents.

Devise new methods of evaluation of institutions and individuals, and test them on several institutions in a trial period. Special attention should be paid to the policy of criminal prosecution, the flow of cases, types of cases, efficiency, opening new cases...

**FINDINGS AND RECOMMENDATIONS:** Very important factor that can be subsumed under the policy of prosecution and criminal prosecution: prosecutors are currently under no obligation to represent their own indictment before the court, even though this would be the most logical thing in the organization of prosecutorial work. It has become customary for prosecutors to represent other prosecutors' indictments. With such an obligation imposed on them by work organization and the chief prosecutor, prosecutors go to court totally unprepared. Acting in another prosecutor's case, the prosecutor only meets the formal requirement of appearing in the courtroom. This has serious implications for the standard of proof and the outcome of the proceedings. Such an attitude towards justice and the procedural role explains why nowadays judicial practice "produces" sensationalist cases with spectacular arrests that often end in acquittals by the court.

## **INITIATIVE OF CIVIL SOCIETY ORGANIZATIONS**

### ***Vetting Procedures – Findings and Recommendations***

Taking into account all relevant reports and assessments of corruption in the judiciary, TI BiH proposes a comprehensive re-evaluation of all judges and prosecutors modelled on the method used in Albania.<sup>4</sup> Such a reform would imply introduction of interim and specialized regulatory evaluation bodies, composed of independent legal experts who are not part of the judiciary, with the participation of international experts. They would vet all judges and prosecutors using a multiple-instance mechanism, while ensuring that judges and prosecutors have the right of appeal, as follows: **1) verification of competences; 2) verification of personal background and links to organized crime, and 3) verification of assets.**

Re-evaluation or vetting procedures would mean that persons performing them should have guaranteed independence and integrity, and that their work is temporary, i.e. time-limited. Judicial officeholders unable to prove the origin of their assets, or whose assets declaration forms submitted in the vetting process are found to be inaccurate, as well as those who have not passed the verifications by the evaluation bodies in terms of knowledge and/or personal connections, will be removed from office. Vetting process or specialized re-evaluation would be mandatory for all judges and prosecutors. In its consideration of similar models<sup>5</sup>, the Venice Commission (VC) has justified such a radical intervention by the severity of the situation in these countries in terms of, primarily, the extent and forms of corruption. VC has not found vetting procedures to be incompatible with the European Convention and the constitutional guarantees of judicial independence, or undesirable in terms of good practice. On the contrary, such radical measures are considered to be purposeful, although one must always bear in mind that they are not desirable in normal circumstances, that they are of **interim** and **temporary** nature, that there must be procedural guarantees in place for their independence, and that they are justified by the severity of the situation.

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<sup>4</sup> See more: [https://ti-bih.org/wp-content/uploads/2018/12/Vetting-procedure-u-pravosudju\\_10.12.2018.pdf](https://ti-bih.org/wp-content/uploads/2018/12/Vetting-procedure-u-pravosudju_10.12.2018.pdf)

<sup>5</sup> See more: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)045-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)045-e)