REFORM OF THE JUDICIARY IN ORDER TO STRENGTHEN THE RULE OF LAW

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Abstract: *Regarding the segment of the judiciary, whose independence, impartiality, professionalism and unharmed integrity represents the sine qua non of the rule of law and legal and general security, at all levels, it is necessary to point out that Bosnia and Herzegovina already since the nineties and in accordance with its constitutional guarantees, is oriented towards the systematic judiciary reform, on its determined path towards EU memberschip. Besides the fact that a very important, if not the decisive role in the BiH negotiations for EU accession, plays chapter 23 "Judiciary and human rights" and chapter 24 "Justice, freedom and security", steps which already have been taken for a more complete implementation of the principle where all citizens have equal access to justice and equal status before the law, is of crucial importance for the overall democratic progress and status of Bosnia and Herzegovina.*
Key words: *judiciary, reform, rule of law, European integration, prosperity*

JUSTICE REFORM TO STRENGTHEN THE RULE OF LAW

In all transition countries, the judiciary and its reform deserves special attention, especially in Bosnia and Herzegovina, a sui generis state with a dysfunctional political system, a coherent legal system, and the same fragmented judiciary, politically infected. Due to the lack of the Supreme Court of B&H, there is no single judicial system hierarchically established to the level of the state, in which, therefore, there is no uniform case law, so participants in court proceedings (individuals and institutions) for the same legal matters often have different legal consequences (better or worse), depending on which part of the country is being prosecuted. Judicial decisions are often widely commented, not rarely enforced, not even by constitutional courts, which are final and enforceable, as well as by the European Court of Human Rights.

According to the members of the Governing Board of the Peace Implementation Council (PIK) in B&H (June 5-6, 2018), "Progress on political and economic reforms has slowed to near a deadlock with few exceptions." All this puts citizens in an unequal legal position before the law and in legal and general uncertainty. Because of all this, the country is in a permanent crisis, which is not an ordinary transient political crisis, which lasts only in the period from the termination of one to the establishment of a new government, but in the socio-political sense a deeper, real crisis of the ruling relations in society - a social crisis, with its own specifics, which they are looking for and a special way of solving it.

We live in a B&H society where personal, narrow group-related, ethno-national, political, economic, social, cultural and other interests are deeply divergent and opposed to the common common interests and in a reduced, unfinished, dysfunctional state, unable to articulate a common denominator in pluralism of split interests. for the good of all. Therefore, it can be said that there is no defined common interest in the country, or it is difficult and often only partially arisen. The state functions more through its separate and significantly autonomous parts, and less with its whole.

We are ranked third in the world in terms of unemployment and last in Europe in terms of purchasing power; 1% of the population in banks has KM 5 billion, at the same time we are a country with a growing number of national cuisines and consumers with one meal a day, a country of closed ethnonational identities; a country where ethnic, political, and religious affiliation is a measure of all other human values, and often a condition for the subsistence and subsistence of individuals and their families, a country where there is no social sensibility, which has led to enormous social inequalities. In this darkness of retrograde tendencies, man, citizen as an individual, his knowledge and ability, unable to apply them in his own and in the interests of the state and society, were lost.

This situation in society and the state is causally linked to the unsatisfactory situation in the judiciary. Namely, the judiciary has its own weaknesses: insufficient independence, insufficient impartiality, susceptibility to politicization, weaknesses in personnel policy, ie insufficient professional competence of certain judicial officials (judges and prosecutors) and their rapid advancement in the judicial hierarchy with little experience and legal) knowledge for election to higher judicial positions, including for the members of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC), has greatly contributed to the collapse of the rule of law, the failure of the rule of law, and the devaluation of its dignity. The judiciary, in order to fulfill its expected mission in the given circumstances, in overcoming the

current all-out crisis into the country, must first overcome itself, that is, eliminate the said weaknesses in its activities and with the strength of its more consistent professionalism, independence, impartiality and, on that basis, with its restored traditional authority. , more responsible to secure the rule of law. The accomplishment of this task of the judiciary must be greater and a general broader interest in the country and the willingness of the competent institutions, above all the legislative ones, to give it all the assistance it needs.

At the same time, the country has become in this condition a suitable socially and globally strategically important space for tutoring individual foreign entities in synergy with domestic like-minded people. The "wolves" smelled possible prey without being aware of how difficult it was to take it, if at all possible.

Whether and how much this critical timing for B&H, in its current strategy and tactics towards B&H, will be calculated by NATO and the EU, for B&H is a question of all questions of its survival, within the present internationally recognized borders of a sovereign state. In anticipation of the answer to this question, let us recall one TV statement by Prof. Zdravka Grebe: "Difficult for us with them, and even harder without them". A precondition and one of the conditions for the EU and NATO to fulfill our expectations in their engagement, among other things, is reforming our judiciary and empowering it to more consistently create the rule of law and the functioning of the rule of law, which will be able to prevent and counteract any anti-constitutional and illegal activities that calls into question the territorial integrity and sovereignty of the country and its stable democratic development.

B&H society and the state can successfully develop and function if they are organized on the basis of all equal rights of citizens throughout the country, whose freedoms and rights will be limited only by the equal rights and freedoms of others and the general common interests of society and the state and which will have an effective judicial protection guaranteed by constitutions and laws, which can only be guaranteed by an independent, impartial and depoliticized judiciary, which is a prerequisite for establishing democratic relations in society and the rule of law, which can only ensure its stable and long-lasting prosperity.

The results achieved so far in the B&H judiciary through structural dialogue, which are almost never mentioned, are modest, or less than expected. The reform of the judiciary in its present state and in the exposed social and state circumstances is being made more difficult and slower, which complicates and slows down other reforms in the country.

In the interdependence of the inevitable reforms of the B&H society and the state, the issue of independence and impartiality of the judiciary is especially actualized in the conditions of separation of powers into legislative, executive and judicial, where each of them should exercise its function, independently of the others, why B&H decided. In the real relations of the three authorities, however, there are evident differences between the normative and the real state, that is, the holders of legislative and executive power, sometimes, act by inertia and practice appropriate to the earlier organization of the state on the principle of unity of power, in which, between the three authorities, it stands out. one (legislative or executive) that is higher than the others and which interferes with the affairs of other subordinate bodies. In order to change the situation in favor of an independent judiciary, but also to ensure the unavoidable, legal, legitimate and transparent institutional participation of the social community embodied in its representative (legislative) bodies, except through their legislative activity in the field of justice, it is necessary for the holders of

all three branches authorities, to foster a culture of consistent application of the tripartite authority and to prevent abuse of the powers of each of them, and to avoid that the holders of the judiciary also narrow and misunderstand their independence.

The principle of independence of the judiciary implies that in determining political and legal requirements, the primacy should have legal standards, a positive right, and that the judiciary must accept and consistently implement only those political standards, goals and specific requirements only when they receive their normative expression in the constitution, law and other legal acts, because the judge is obliged to apply the law and not to create it at one's request. However, in order not to take this view too rigidly and incorrectly, it should be recalled that the court applies the general rules of law to specific cases. The court is free to come up with the rules that seem best and most appropriate to it, in accordance with certain rules of interpretation, from the point of view of the norm to be applied and the values protected by law, which it must protect in this case. Therefore, the job of judicial enforcement is not mechanical, but creative, all the more so if the general norm is at a higher level of attraction, or less clear and precise. In this sense, a judge's successful work entails his or her required (appropriate) legal experience and knowledge.

Otherwise, the actions of the political and judicial authorities are leading to the politicization of the judiciary and the negation of the principles of its independence.

But in order to avoid the danger of falling into the formalism and technocratism that always lurks legal thinking, I will use sociological knowledge and say: there can be no absolute, unquestionable independence in the functioning of the judiciary, in its pragmatics, which must, within the limits of positive law, adapt to the needs and the interests of the state and society and the current phenomena in them, without prejudice to the principle of the independence of the judiciary, as its constant, limited by law. That is why, in a normative view, and even more so in real relations, it is most difficult to find a satisfactory answer to the question of how to achieve the independence of the judiciary, while at the same time avoiding its isolation and self-sufficiency and acting "under the glass bell", independent of real social needs.

Certainly, the reform of the judiciary and its more efficient functioning is more than limited by the current deepest and ever deepening social and political crisis in the country, at the same time it would defend the territorial integrity of the country and the sovereignty of the state of B&H, and thus the realization of human rights and legality throughout its entirety. the territory should have a judiciary. Recall, for example, in this regard, Article 1 (1) of the Law on the Prosecutor's Office of B&H[52] states: "In order to ensure the effective exercise of the jurisdiction of the State of B&H and respect for human rights and legality in its territory, this Law establishes the Prosecutor's Office of B&H. " The judiciary can only play its indispensable role in overcoming the current crisis in the country if its institutions consistently implement their formal legal powers into their "living life" if they go from offensive to offensive. Is there enough professional dignity, courage, determination, social responsibility and patriotism in them ?! None of this should be lacking for judges and prosecutors, because, among other things, they have well and long-term resolved their personal, basic, status and existential issues: they are elected under the law for an unlimited term, have solid

[52]Law on the Prosecutor's Office of Bosnia and Herzegovina (Official Gazette of B&H, Nos. 24/02, 42 / 03,03,03, 37/03, 42 / 03,09 / 04,35 / 04,61 / 04 and 97 / 09)

salaries (though they have not yet reached salaries, that is, the total earnings of politicians), retired in large numbers with the maximum amount, traditionally enjoying an enviable social reputation, which, in truth, due to justified negative criticism of the state of the judiciary, is diminished in some or at the limit of its unquestionability.

A reliable confirmation of the unsatisfactory situation in the judiciary and difficulties in exercising human rights in the ordinary court proceedings is certainly an enormously large increase in cases (appeals) filed with the Constitutional Court of Bosnia and Herzegovina. The Constitutional Court receives from 5,500 to 6,000 annually, or an average of 20 cases per day, and the average time for resolving cases is three years, with the Court's orientation to shorten this period to two years. By these parameters, the Constitutional Court of Bosnia and Herzegovina is increasingly approaching a regular court, which diminishes its productivity in work, that is, the ability to make its decisions within a reasonable time and to avoid delayed justice for the appellants. The failure of the Constitutional Court to enforce the constitutionality of the law (there are currently nine such non-enforced decisions) deserves special attention, as it leads, by far more than in the case of non-enforcement of the Court's decisions on appeal by citizens, to the dangerous collapse of the constitutional order. countries, and thus to widespread legal, social and general insecurity in it.

The delay in judicial reform leaves the possibility, most often, for a slightly transparent, and more elegant, subtle politicization, which is contributed not only by political entities individuals and institutions outside the judiciary, but also within the judiciary itself. A number of examples confirm this. One recent hijacking initiative in the HJPC (thankfully unfulfilled) condemned the domestic public and international institutions to prosecute the work of military court judges after twenty-two years, circumventing the HJPC's established practice of determining the disciplinary responsibility of judicial office holders. which was eventually abandoned by the HJPC itself.

The politicization of the judiciary is also when changes to the entity laws, due to the populist unrealistic personal ambitions of individuals and their indulgence in local environments, contrary to the HJPC opinion, establish courts in those environments where there is objectively no need for it and in which judges will not have enough work (cases). Of the four courts established in B&H last year, the HJPC gave a positive opinion only to form one.

Or, an example of the politicization of the judiciary is that of the executive in the Federation

B&H does not, at the end of its four-year term, have yet to provide all the necessary conditions for the establishment of the Special Department of the Federal Prosecutor's Office for Combating Corruption and Organized Crime, and the Special Department of the Supreme Court of the Federation of B&H with the same task, envisaged by the 2014 Law, whose establishment is should be completed in 2015. What are the real reasons for this: difficulties in finding offices for new judges and prosecutors? - what the money was provided for; politicization of the judiciary and obstruction of its future more efficient work; perhaps someone's disguised fear that, tomorrow, a better and more efficient judiciary might expose B&H Senadera? We leave the answer to the readers. Obviously, at least in this case, it is not about the inability of those responsible. On the contrary.

Need a more convincing example of the politicization of the judiciary than almost a year of political competition in the B&H Parliamentary Assembly to enforce the Constitutional Court's decision binding on amendments to the B&H Criminal

Procedure Code (CPC) pertaining to the investigative part of criminal proceedings. Although the international community announced the possibility of imposing sanctions on Bosnia and Herzegovina, such as the abolition of the visa-free regime, it was not enough for Parliament to implement the Constitutional Court's decision without delay. Personal and group interests, above all the interests of individuals and groups, have proven to be above all national and international legal standards that bind the state and are a prerequisite for its inclusion in Euro-Atlantic integrations. This ipso facto means official, institutional, tacit, support for the perpetrators of corruption and organized crime and other crimes and still creeping, soft adaptation to life with crime in the country.

An undoubted and dangerous example of the politicization of the judiciary is the decision of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina to amend Article 382 of the Criminal Code of the Federation of Bosnia and Herzegovina relating to the offense of "Receiving a reward or other form of benefit for trade in influence" as one of the offenses of corruption. direct influence on the outcome of certain court proceedings.

Recently, the EU and OSCE in B&H, recognizing the gravely devastating consequences of our inefficient judiciary (the rise in corruption and organized crime, which are increasingly becoming a "normal" condition and a prerequisite for "business success" in all areas of work and life, especially in the economy that citizens lose legal, material and social security and trust in the political system and the current government) and offer concrete forms of assistance to enable the judiciary to work more effectively. This helping hand, of course, should be embraced. However, according to public perception, it is less about the incompetence of judicial office holders, but more that some of them lack professional courage, determination, social responsibility and that this needs to be addressed within the judicial community, more specifically in the HJPC.

However, there is no doubt that without the reform of the judiciary, even with its limited initial results, the situation in the field of law and justice would now be even worse, and thus the overall situation in the country. Therefore, judicial reform should continue with more enthusiasm, creativity and responsibility and in the broadest social and professional dialogue articulate basic principles that would be politically verified in the B&H Parliament and serve as a basis and guide for the adoption of the Law on Amendments to the HJPC Law, which justifiably proposes Ministry of Justice of B&H, the official proponent of this law. A thorough approach to the amendments to this law is necessary, because the HJPC, as a regulatory body in the B&H judiciary, is responsible for all that has happened in it, but is also most responsible for its current unsatisfactory state. Therefore, the focus of judicial reform should be on the HJPC its organization, composition, ie election of its members, its management, decision-making in it, its institutional connection with the B&H Parliament and its personnel policy. The importance of passing this law is also confirmed by the fact that, except for the Ministry of Justice of B&H, only the HJPC, citizens' forums work on its preparation, and that the social and judicial communities and institutions of the EU and the OSCE in B&H are increasingly interested in this. At the same time, the preparation of this law is accompanied by obstructions and resistance motivated by the particular and personal interests of individuals.

It is important that certain proposals that smell of retaining the status quo in the judiciary and of its untouchability, or that may even bring it into its pre-reform state, such as proposals to abolish the HJPC and elect judicial office holders for a limited

time, request that they are approached cautiously and with convincing counterarguments. Namely, in social and professional discourse, the stated weaknesses in the state of the judiciary should not jeopardize the judicial system. It is necessary to upgrade and repair it with concrete constructive proposals in order to make it more efficient and to establish a unified hierarchically regulated sub-coordinated judicial system with the Supreme Court of B&H, which will create a uniform case law throughout the country in order to achieve equality of citizens before the law and their legal security. The judiciary organized in this way, but still until then and in the state of its present organization, should be given the now missing constitutional guarantee of its independence.

The politicization of the judiciary, as well as the misunderstanding and narrow understanding of its independence by its individual actors, led to serious weaknesses in its personnel policy. As in B&H society and the judiciary, in the practice of selecting judicial office holders in the order of priority of application, although listed first in the above criteria, the criterion of the candidate's competence, ability and competence to successfully perform the duties of judge and prosecutor was neglected. In practice, the criterion of the ethnic and regional affiliation of the candidates was of greater importance. However, these, in their order of application, unacceptable criteria are applied selectively, so that there are currently no Bosniaks, as the most numerous people, in the position of the President of the HJPC (where there have never been any Bosniaks), the President of the Court of B&H, the President of the Supreme Court of the Federation of B&H , the Prosecutor General of the Prosecutor's Office of B&H, or the Chief Prosecutor of the Federal Prosecutor's Office, which is a derogation from Article 43, item 2 of the Law on the HJPC B&H on Equal Rights of Representation of Constituent Peoples and Others in Appointments at All Levels in the Judiciary. It is necessary to overcome the practice that only members of particular nations are elected to leadership positions in certain top judicial institutions only continuously, since this is also the case with the HJPC, since it has already been well observed that the holders of some of these functions have greater executive power than individual members. B&H Presidency. In this context, the proposal of the Federation of Judges Association contained in its letter to the HJPC and representatives of the international community should be supported, that the HJPC President may not be elected twice consecutively from the same entity or District of Brcko B&H.

Weaknesses in personnel policy are also compounded by the HJPC Law, which establishes the requirement that judges of the Court of B&H, entity supreme courts and judges of the Brcko Appellate Court must have at least eight (8) years of experience as judges, prosecutors (does not state which court, ie prosecutors), which results in the selection of judges from these courts, coming directly from the municipal or primary courts, with little knowledge and no second-hand procedure required to work in the highest judicial institutions, which negatively affected the quality of work in the judiciary and the personal dignity of judicial office holders. Therefore, the Law on the HJPC and its Rules of Procedure[53] should adopt the principle and introduce the practice of progressively progressing in the judicial hierarchy and acquiring the necessary prior experience and knowledge for election to higher courts and prosecutor's offices (the higher the court and the prosecution, the more experience

[53]HJPC Rules of Procedure "Official Gazette of B&H", no. 55/13, 96/13, 46/14, 61/14, 78/14, 27/15, 46/15, 93/16, 48/17, 88/17 and 41/18

and knowledge). In this regard, and in order to raise the quality of the holders of judicial functions and to enhance the affirmation of their experience and knowledge, the HJPC Rules of Procedure have been amended (Article 59a). In addition to these, the changes in Art. 46. Rules of Procedure according to which the earlier criteria for the ranking of candidates for judicial positions have been extended to the new criteria (past work experience of candidates, education and training, publication of scientific papers and other professional activities, etc.), which apply not only to judges and judges; prosecutors, but also to holders of leadership positions in the judiciary, with the requirement of managerial skills and experience, and the ability to manage human resources and minimal success achieved in the competition procedure[54], or Article 38, which provides for the formation of four nomination papers candidates for judicial office: a sub-state at the level of B&H, a sub-district of the Brcko District of B&H, a sub-district of the Federation of B&H and a sub-district of the Republika Srpska, as well as a five-member HJPC from the Federation of Bosnia and Herzegovina Srpske. This latter solution, from the point of view of efficiency and costs of conducting the competition procedure, probably has its justification. However, some other fundamental questions may be raised. First, how much will the Commission, within the candidate candidate and the four nominating candidates for appointment to the HJPC, uniformly apply the criteria for ranking candidates, and how different will be and how much will lead to differences in the quality of the candidates finally nominated. Second, how much will the sub-members of the Federation of B&H consist of only members of the Federation Councils, and the members of the Republika Srpska sub-councils only members of the Republika Srpska, will further fragment the already fragmented non-unified judicial system in the country. Therefore, in the interest of a unified approach to the tendering procedure and the uniform evaluation of candidates for judicial positions, all sub-committees should be composed of Council members from both Entities. Similarly, in order to better evaluate the professional capacity of candidates for judicial office, it would be useful for one of the three members of the committee to be an active second-instance judge who is not a HJPC, especially when the committee evaluates (credits) the first-instance judge. This solution would contribute not only to improving the quality of the appointed judicial office holders, but also to greater working connections and opening up the HJPC to the judicial community.

It is unacceptable and nepotistic views of some HJPC members not to see anything "dangerous in the situation of a husband and wife sitting in court", which show that some members of the judicial "government" unfortunately live our gloomy social reality. Therefore, the decision in the innovator of the HJPC Rules of Procedure (Art. 49) should be respected that, when selecting a candidate for interview, the candidate will not be invited to the interview if he / she is: his blood relative employed in a straight line, without restriction, in a sideline to the fourth

[54]The ranking of candidates who have applied for the leadership position is based on the following criteria:
a) the candidate's expertise;
b) legal analysis capacity;
c) the ability of the applicant to responsibly, independently and impartially perform the function for which he or she has applied, professional impartiality and reputation, and out-of-work behavior;
d) the applicant's previous work experience;
e) education and training, publication of scientific papers and other professional activities;
f) communicativeness;
g) managerial skills and experience and ability to manage human resources.

degree, or spouse or spouse by degree or relative of an extramarital spouse to another degree. This is probably ever in our public places, formally the best-regulated protection against nepotism. Let reality alone be no different from the norm, and let this be an example to everyone in public affairs.

However, the HJPC Rules of Procedure, by its legal nature and scope, is an act on its organization and internal work (as otherwise, every rulebook) and does not have the legal force of law, so that it cannot even elaborate on all current key issues of judicial reform, strengthening its independence and impartiality, or respond to them. After all, the HJPC does not solely, in isolation and independently of social needs and interests, create a "judicial life" on a "one-on-one" principle. Therefore, a larger, rightly expected contribution to this, as per the rule of law and democratic society, can only be made by adopting and consistently implementing the Law on Amendments to the HJPC Law, the Law on Courts, then the Criminal Legislation and other legal regulations on the B&H judiciary . Considering that this is an urgent rather complex and extensive work, in which complete and not half-solutions should be reached, which presupposes a great deal of experience and knowledge in the domestic judiciary and the European acquis, and a particularly complete commitment to the principle of independence and impartiality of the judiciary and its depoliticization. , the task can be successfully accomplished by proposing to the Parliamentary Assembly of B&H the Law on Amendments to the Law on the HJPC, only a representative and competent working group organized by the Ministry of Justice of B&H and the HJPC, which would be, apart from their representatives and representatives of the Entity Ministries of Justice, current and former judges. The Court of B&H, the Entity Supreme Courts, the Prosecutor's Office of B&H and the Entity Prosecutor's Offices, prominent legal experts and theorists in various fields of work, representatives of civil society and representatives of the European Union and the OSCE in B&H. It would be useful and productive for as many members of the working group to be politically non-aligned, since persons politically connected and obliged to any political option, objectively, in current B&H social and political realities, cannot make the expected, necessary contribution to creating an independent, an impartial and depoliticised effective judiciary.

In order to prepare and direct future candidates for judges and prosecutors in a timely and quality manner, it would be worth considering the introduction of a judicial course at law faculties, and also that the education (students on them) lasts longer than the education of students in the general legal direction. For, we will agree, between the work of a lawyer in routine legal administrative and similar affairs, and the demanding work of a judge or prosecutor, which presupposes more legal knowledge, possession of the whole set of interdisciplinary skills, personal independence and self-confidence, and considering the legal consequences that their jobs produce, cannot to put a sign of equality. Traditionally, the esteemed and respected title of judge, truncated by current weaknesses in the judiciary, can only be reaffirmed by their necessary professional knowledge, consistent professional, independent and independent work in the application of law.

In order to take a more objective view of the state of the judiciary, it may be counterproductive, even offensive in the ongoing rage of justifying criticism of the state of the judiciary, to impose a collective stigma on all its actors, since a large proportion (not say most) of judges and prosecutors, linking their legal knowledge with sociological knowledge, legal facts and social phenomena, avoiding falling into formalism and technocratism, doing their

job professionally and responsibly. But, precisely because of this, it is their moral obligation to use the power of personal example, and such, in their own interest, to become the internal generator of positive change in the judiciary. Otherwise, they themselves could become morally responsible for the unsatisfactory condition in it.