



The prohibition of retroactive law and other safeguards when conducting institutional reform

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The prohibition of retroactive law and other safeguards when conducting institutional reform: The right to non-recurrence in Bosnia and Herzegovina

By Helga Molbæk-Steensig*

ABSTRACT

This article will review the potential conflicts between the principle of the prohibition of retroactive law and the transitional justice mechanism of vetting and lustration, and debate the best and safest route to restore the integrity of and the faith in public offices. The prohibition of retroactive law is the guiding principle behind the human right of nullum crimen/poena sine lege, the protection against punishment for something that was not a crime at the time it was committed.

Vetting and lustration mechanisms are not the foremost candidates to come into conflict with this right, since the right cannot be utilised unless there are proceedings before a criminal court. The principle of universal jurisdiction means that the gravest crimes and human rights abuses are exempt from the principle of nullum crimen sine lege, because they are illegal under international law even if there is no national law. This leaves us in a situation where the principle is applicable neither when judging the gravest crimes, nor when administrative justice is employed. Lustration resulting in barring from a particular profession can, however, be an intensive interference with an individual's daily life and access to the job market. Because of this intensity, the UN has issued four guidelines for conducting fair and efficient institutional reform.

This article will touch upon the philosophical, practical and legal background for the prohibition of retroactive law in relation to the benefits of lustration, and conduct a discussion between the two concerns. Lustration mechanisms must be conducted in a fair manner, not just because it is the right of the accused, but for security reasons, and because lustration is conducted in part to restore faith in public institutions. The case of Bosnia and Herzegovina (BiH)'s police, and judicial reform will be utilised as an example of vetting and lustration mechanisms, its benefits and pitfalls.

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Introduction

The prohibition of retroactive law has two distinct functions, one with a human rights perspective – the *nullum poena sine lege* principle⁴⁴⁸ and one with a rule of law perspective. In a human rights view, the principle protects the individual from arbitrary government action and vengeance; from a rule of law perspective, the principle ensures the predictability of law. In researching for this essay, I hypothesized that vetting and lustration mechanisms, if performed according to the UN's guidelines, will not come into conflict with the human rights perspective, but that they may come into conflict with the rule of law perspective. There are four UN guidelines for institutional reform to avoid conflict with the rule of law. In this article, I will establish a theoretic framework, debating the prohibition of retroactive law and the UN guidelines, and apply that framework to the cases of police and judicial reform in Bosnia, reviewing both legal procedures, compliance with transitional justice goals and security concerns.

From a legal starting point, it is important to note that both *nullum crimen* and *nullum poena* will only come into play if there is a trial within criminal law. This is where the 'administrative' part of 'administrative justice' comes into play. Within the right to a fair trial, including the prohibition of retroactive law, a person's freedom, which is often at risk in a criminal trial, is protected, but a person's job security is not. Therefore, *nullum crimen/poena sine lege* is not applicable in cases of lustration that are not followed by a criminal trial. None the less, lustration can heavily influence an individual's career and livelihood, and therefore it is important to ensure a fair assessment both materially and procedurally. For this reason, scholar and lawyer Andreu-Guzmán argues from a normative standpoint that accused at risk of dismissal should be afforded legal protections similar to those granted by art. 6 in the ECHR, even though the European Court has specifically attested that art. 6 does not apply to dismissal from public service.⁴⁴⁹

Administrative justice

For the purposes of this article, I will be employing Duthie's definitions, in which purging refers to interventions aimed at a person's affiliation with a group or party rather than individual responsibility for past abuses,

which has a largely negative connotation.⁴⁵⁰ The terms vetting and lustration both refer to the process of assessing an individual's integrity and skill, with lustration as subsequent while vetting is prior to assuming office. The term 'administrative justice' will be used only in its technical sense as procedures carried out outside the judicial system.

In a society transitioning out of conflict or authoritarian rule, reforming institutions can be necessary both to restore faith in those institutions and to ensure the integrity and fairness of them. Vetting and lustration are not mechanisms to ensure justice for the victims of corrupt or abusive institutions as they are not judicial mechanisms and cannot afford proper procedural protections to those accused. Rather, vetting and lustration mechanisms ensure the right to non-recurrence for victims of abuse and ensure effectiveness of public institutions. This means that in a lustration scenario, civil servants can be fired or barred without proof of criminal wrongdoing, but due to an assessment of impaired integrity or incompetence. In cases where it is suspected that criminal activities have taken place, the matter should be referred to a prosecutor and criminal court.

Below are a few examples of how lustration has taken place in transitioning societies and how the mechanism can come into conflict with the prohibition of retroactive law, followed by the current UN guidelines for successful and fair vetting and lustration.

- ***Jus post bellum***

Lustration/vetting is the systematic screening, barring and firing of people from official office positions due to an assessment that their integrity is impaired. In some instances, the process can be part of *jus post bellum*, the settlements reached to end a war. Meierhenrich argues that this should always be the case, because the lustration process inevitably creates winners and losers, which should be provided for outwardly in the terms of peace.⁴⁵¹ *"The principle of publicity demands the publication or promulgation of lustration guidelines (or guidelines for the administration of justice more generally) in advance of the war"*⁴⁵².

⁴⁴⁸ ECHR art. 7

⁴⁴⁹ Andreu-Guzmán 2007: 464-469

⁴⁵⁰ Duchie 2007: 18

⁴⁵¹ Meierhenrich 2006: 102-103

⁴⁵² Ibid. 2006: 117 (his emphasis)

Meierhenrich writes his piece on lustration in relation to the US occupation of Iraq. In cases where the outcome of the war is uncertain and where the war was unplanned, such as in civil war situations, it is not always possible to publicize the lustration guidelines in advance of the war. In the case of BiH, the Dayton agreement does proscribe police and military reform,⁴⁵³ but it does not include specific guidelines for how such a lustration should take place.

- **Ordinary law**

In other cases, lustration can take place as ordinary legal procedures; this was the principle behind the lustrations in Denmark and Norway after the Second World War. The war itself was considered a violation of national and international law and the puppet regimes and collaborations with occupying Germany were thus unlawful as well. In this light, both lustrations and criminal trials of collaborators were simply the reintroduction of rule of law after the fall of the Nazi regime. While the lustrations did not come into conflict with human rights, the trials in some cases did, because the human right of *nullum poena sine lege* includes that the punishment for a crime cannot be retroactively increased. This means that in terms of sentences in Denmark and Norway, retroactive law was applied even to enforce the death penalty, which is a clear violation of *nullum poena sine lege*.⁴⁵⁴ This is important to the topic of institutional reform because a vengeful and unlawful prosecution of collaborators will not benefit the goal of restoring faith in public institutions.

- **UN guidelines**

In 2004, the Secretary General of the UN advocated vetting mechanisms because when performed correctly they can play an important part in enhancing legitimacy and efficiency of public institutions. Meanwhile, the mechanisms can come into conflict with labour laws, and in the case of judicial reform, the human right to a fair trial. They risk creating a surge of unemployment and disgruntled groups; in the case of police and military these groups are armed and trained in combat, which could pose a security risk.

The UN provides four recommendations for legitimate and safe vetting processes.⁴⁵⁵ First, they should function in a respectful manner

towards both victims and those suspected. This is a demand for a fair assessment of the integrity of the accused without imposing on the states a demand of a full trial with the accompanying demands of legal assistance and contradiction, which is a lengthy and expensive process. This recommendation allows for administrative justice outside the judicial system whilst still making material demands.

Second, civil society should be consulted early on and the public should be informed. This recommendation is in line with the general demands that trials should be public, but it also touches on the perception of fair institutions and respect for victims and employees. Civil society consists of both victims groups, unions for civil servants, and representatives from other groups in society. Consulting the civil society allows all interested parties a voice, which is important to review security and incoherency risks. Informing the public of the results contributes to restoring the image of the troubled institutions.

Third, the vetting process should pay attention to skills and objective qualifications. This recommendation has to do with the risk of de-skilling the civil service or public offices. It is particularly relevant in transitions from authoritarian rules to democracy where the class in charge may be the only one trained for power.

Fourth, procedural protections should be afforded to all, whether existing members or new applicants. This is vital for an appearance of fairness and for the process to yield the desired result. By only vetting new hires, the existing institution would not be reformed, and if only the current employees were lustrated, continuity and effectiveness would not be ensured. Moreover, by affording the same procedural protections to both groups in terms of proof of incompetence or lack of integrity, the best candidates can be employed both in terms of skill and moral integrity.

The prohibition of retroactive law

*"No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law."*⁴⁵⁶

Although we have already determined that legally speaking, the human right to protection from retroactive law will rarely come into use in a vetting/lustration scenario, it is a central

⁴⁵³ Dayton Agreement annex 7

⁴⁵⁴ Dahl 2006

⁴⁵⁵ Secretary General 2004: 18

⁴⁵⁶ Hobbes, Leviathan (1651) as quoted by Popple 1989: 253

philosophical protection and normative guideline, which is why we will briefly go through it here. The prohibition of retroactive law has two distinct functions. One is as a human right, the other as a central element of the rule of law: legal certainty.

- **The human rights perspective**

An argument in favour of a prohibition of retroactive law is, similarly to all human rights provisions based in an attempt to protect the individual from the superior force that is society, particularly tyrannical societies.⁴⁵⁷ The same principle is at work in the freedom of religion or prohibition of discrimination or any other material human right. It is based in the idea of an inherent dignity for all human beings and the need for protection for the individual against a superior power. This means that individuals are rights-subjects, while institutions are duty-subjects. This reasoning explains how a powerful institution such as a civil service or a public office cannot be protected by the principle. The individual within that office is protected, but only in a situation where their human rights are affected.

- **Prohibition of retroactive law as legal certainty**

Another argument for the prohibition of retroactivity is that it is a central part of legal certainty. Legal scholar Maxeiner is an advocate for this view:

*“As a general principle of European legal systems, legal certainty “requires that all law be sufficiently precise to allow the person—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.” (Korchuganova v Russia 2006 at ECtHR). It means that: (1) laws and decisions must be made public; (2) laws and decisions must be definite and clear; (3) decisions of courts must be binding; (4) limitations on retroactivity of laws and decisions must be imposed; and (5) legitimate expectations must be protected.”*⁴⁵⁸

In other words, the prohibition of retroactivity is a central principle of the rule of law. Without it, it would be impossible to predict one’s legal position. The idea that legal certainty is accomplishable is central in Europe while American scholars have, to a degree, since the 1920s moved towards the theory of realism,

arguing that legal certainty is not always possible and judge-made law is a reality. A central term here is legal indeterminacy, the idea that because it is impossible to foresee one’s legal position with absolute certainty, an individual should be guided by the law as well as their morals and they should be protected from arbitrary government action.⁴⁵⁹ This American approach is closer to the ‘protection of the individual’ argument I made above. The principle of legal certainty and by proxy the prohibition of retroactivity is there to protect the individual from arbitrary government action; it is not there to protect an arbitrarily abusive institution from justice.

While legal certainty is a good ideal, the importance of case law is a testament to its unobtainability. In relation to institutional reform, the principle is therefore not a convincing reason not to complete lustration and vetting mechanisms.

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- *The prohibition of retroactive law in relation to universal jurisdiction*

The Rome statute established the International Criminal Court and entered into force in 2002. Although it deals with crimes that may fall under universal jurisdiction, it also has provisions on the prohibition of retroactive law.⁴⁶⁰ The crimes within its jurisdiction – genocide, crimes against humanity, war crimes, and the crime of aggression⁴⁶¹ – are not subjectable to any statute of limitations⁴⁶², but crimes committed before the statute’s entry into force cannot be judged under the statute.⁴⁶³

However, the concept of universal jurisdiction for grave crimes is not new, and it was in force before the Yugoslav wars. For example, the Geneva conventions and protocols dating from the 1940s maintain that all signatories are obliged to search for and put before their own courts people indicted for: Wilful killing, torture, inhumane treatment and unlawful destruction or appropriation of property, unlawful deportation or detainment, as well as a few other crimes.⁴⁶⁴ The Nuremberg trials, which took place before the establishment of

⁴⁵⁹ Ibid.: 36

⁴⁶⁰ Rome statute art. 22-24

⁴⁶¹ Ibid. art. 5

⁴⁶² Ibid. Art. 29

⁴⁶³ Ibid. Art. 24(1)

⁴⁶⁴ Convention I Art 49(1,2) and 50, Convention II art 50 and 51, Convention III art 129-130 (extradition also possible), Convention IV art 146-147, Protocol I art 85

⁴⁵⁷ Popple 1989: 254

⁴⁵⁸ Maxiener 2008: 32

the ICC and ICJ, gained their legal basis from The Hague conventions and the first Geneva protocols, dating from the late nineteenth century and early twentieth century, utilising the concept of customary law to indict Germany even though the country had not signed Hague conventions.

The ICTY gains its jurisdiction from the universal jurisdiction clauses in the Geneva conventions⁴⁶⁵ and the power of the UN Security Council to establish ad hoc criminal tribunals. The latter has been disputed by some of those indicted by the court, but the former is indisputably established in the Geneva conventions and ratified by 196 countries and is an established fact in international law.

The question then remains, whether the enabling crimes of a corrupt administration fall within the protection of *nullum crimen/poena sine lege* or whether the resulting crimes of that negligence or corruption are harsh enough that universal jurisdiction applies. In international law, the Geneva conventions' lists of crimes under universal jurisdiction has been considered exhaustive, which means that lesser and other crimes are not under universal jurisdiction and the perpetrators are thus protected by the prohibition of retroactive law. On the other hand, the crimes committed by an abusive regime or during war times have often been illegal under then-domestic law as well as under current law, though not enforced. Here it is relevant to note that non-enforcement or non-outlawing human rights abuses can be a human rights violation, as was established at the ECtHR in the *Söderman v Sweden* case.⁴⁶⁶

Institutional reform in Bosnia and Herzegovina

The above findings establish a theoretical framework upon which a material analysis can take place. The key points of the framework can be summarised as follows. The human right of *nullum poena sine lege*, like all human rights is an instrument for protecting the weak from the strong, and therefore it cannot be used to protect an abusive public institution from the consequences of abusing citizens. Moreover, the prohibition of retroactive law is only applicable in criminal trials where the accused's personal freedom is at risk.⁴⁶⁷ There

is nothing in the ECHR to hinder a change in labour laws that allows for lustration. In the case of employees in the judicial system, the removal of life tenure may come into conflict with the human right to a fair trial⁴⁶⁸ because the ECtHR considers protections such as predictable judge tenure necessary to ensure the independence of a court.⁴⁶⁹

However, there are other elements to consider when completing institutional reform including vetting and lustration. The four UN guidelines, (1) respect for victims and the accused, (2) inclusion of civil society and informing the public, (3) attention to skills, and (4) process and protections to both existing and future employees, include elements to ensure fairness and efficiency in institutional reform. These guidelines are made to ensure non-recurrence both by not enraging the group being vetted, which is why the process must be fair, and to ensure that the institutions are reformed to contain neither the individuals nor the policies and traditions of abuse. In the following paragraphs, I will review the Bosnian police and judicial reform in relation to the UN guidelines and the security and non-recurrence considerations.

In 2007, the international centre for transitional justice (ICTJ) published a book on institutional reform as a transitional justice mechanism. In Alexander Mayer-Rieckh's chapter on institutional reform in BiH, he distinguishes between two kinds of reform: the BiH judicial reform was a reappointment-type reform, while the police reform was a review-type reform.⁴⁷⁰ In a reappointment scenario, the institution is reformed and all employees will have to reapply for the new positions, and some will be reappointed while others will not. In a review scenario, all employees are reviewed for their skill and integrity, and those that are not up to specs are fired or barred from their positions, while the rest keep their positions. This creates two very different narratives; those not reappointed are not as stigmatised as those reviewed and found not to be qualified, because a non-reappointment may be similar to a firing from cutbacks while failing the review suggests wrongdoing. In some cases, where the public opinion of the institution is damaged because of lack of integrity, the stigma may be necessary to improve public trust in the institution. In the

⁴⁶⁵ ICTY statute art. 2

⁴⁶⁶ *Söderman v Sweden* 2013

⁴⁶⁷ ECHR art. 7

⁴⁶⁸ ECHR art. 6(1)

⁴⁶⁹ *Baka v Hungary* 2016 § 78

⁴⁷⁰ Mayer-Rieckh 2007: 182, 208

BiH case, the review of the police force was more controversial than the reappointment of judges and prosecutors, despite the fact that life tenure is the rule for judges in the current BiH constitution,⁴⁷¹ and a recommendation for the human right of a fair trial.⁴⁷²

The reasoning behind the vetting processes of the police and judiciary were also different. The police force had two major problems. First, the number of police officers pre-vetting was three times the number of officers pre-war, which suggested that a large number were not trained police,⁴⁷³ and second, the police force harboured ethno-nationalist sentiments, did not consistently investigate incidents where minorities were threatened or hurt, and contained individuals who had contributed to war crimes in the 1990s.⁴⁷⁴ Meanwhile the main problem with the judiciary was inefficiency and cost. There were too many courts and their backlogs were substantial.

Police reform

In addition to doubts about the aptitude and integrity of officers, there were also more common problems with the police force. There were very few female and minority officers, which hurt representativeness, and law enforcement was perceived as habitually corrupt. Vetting the police force was part of the Dayton Agreement Annex seven on the safe return of refugees,⁴⁷⁵ but efforts to complete it in the early years after Dayton did not succeed, in part because of political obstruction. This led to the UN resolution 1088 in 1996, which increased the mandate of the United Nations Mission in BiH (UNMIBH) including the international police force and the power of the high representative. The result was agreements on police vetting with both entities.

The review process started in 1999 where 23.751 people registered themselves as police officers. Only people registering would be vetted and either certified or not certified.⁴⁷⁶ This was already a significantly lower number than the 44.750 reported by the UN Secretary General during a reconnaissance mission in 1995.⁴⁷⁷ The number in the Secretary General's report may be a little high due to the

chaotic situation in 1995, but the difference is too large for it not to be an indicator that a significant portion of the people acting as police in 1995 either did not wish to be investigated for certification, had left the profession, or left the country in the intermediate years. Of the registered 23.751, 16.803 were provisionally authorized, the remaining were excluded immediately for indicators that were easily determined, citizenship, age, whether they had police training, and whether they were actually doing police work. The provisionally authorized were then certified following an extensive background check and were not certified if they had lied to the UNMIBH, broken the law, lacked integrity during the conflict, or if they violated property legislation. The violation of property legislation is an indicator of wartime misconduct because many minority families were forced to leave their apartments, which in turn had been taken over by paramilitary forces.⁴⁷⁸

A central point from the UNMIBH police reform when analysed with the theoretical framework presented in this article is that the standard of proof utilised in the vetting process was 'grounds for suspicion', the same standard of proof that requires domestic police to start a criminal investigation. The officers did not get the possibility of contradiction or oral presentation. While this would be a problem in a criminal trial, the implementation of this standard of proof is in line with the UN recommendation of 'respect towards both victim and the accused'. It facilitated a fast vetting, which was respectful towards victims who needed the people responsible for atrocities out of the police force as soon as possible, and it was respectful towards the accused in that it applied a consistent and relatively strict standard of proof. An issue with the process was that it lacked a mechanism for transferring the information gathered in the background check to police investigators and criminal courts for prosecution. When the certification process was over, the information on certified and non-certified police was archived in UN archives in the US rather than turned over to police, which made it difficult to determine, whether a new recruit was in fact a previously non-certified police officer with a history of human rights abuse. Both the risk of rehire and the lack of prosecution of non-certified is problematic and

⁴⁷¹ Dayton Agreement annex 4, article VI(1c)

⁴⁷² ECHR article 6.

⁴⁷³ Report of the Secretary-General, S/1995/1031: 22

⁴⁷⁴ Mayer-Reickh 2007: 187

⁴⁷⁵ Dayton Agreement: Annex 7 Chapter 1 article 3e

⁴⁷⁶ Mayer-Reickh 2007: 188

⁴⁷⁷ Report of the Secretary-General, S/1995/1031: 22

⁴⁷⁸ Mayer-Reickh 2007: 189-192

not respectful towards victims.⁴⁷⁹ An appeal mechanism was planned for officers that were not certified and wished to have their case reviewed, but the abrupt discontinuation of the process in 2002 meant that many did not get a chance to utilise it – which is not in line with respect for the accused.

In relation to including civil society and informing the public, the police reform included establishing a civilian commissioner's office for police complaints and introducing new uniforms, insignia and procedures. This is important to the goal of restoring faith in institutions in addition to restoring fairness of institutions.

The UN guideline of offering attention to skill and affording the same protections to new and existing civil servants were both completed by creating the new police academy for training new officers. The police reform has been criticised from both victims associations, non-certified police, and academics reviewing it. A major problem was its abrupt termination in 2002 when the EU police task force took over from the UN international police force. This left a situation with uncertainty about the rights to review of the decision for non-certified police, some courts found the non-certification to be a violation of labour laws while others denied that they had jurisdiction.⁴⁸⁰ This means that the security concern about the future of the many disarmed police voiced in 1995 by the secretary general was not addressed.⁴⁸¹ Positive outcomes of the reform include greater faith in the police force also from minorities, greater representativeness both ethnically and gender wise, and fewer crimes against minorities.⁴⁸²

The judicial reform

The post-Dayton judicial system needed a serious overhaul. Many high level judges and prosecutors had left the country during the conflict, and the remaining were a mix of competent and incompetent judges, too many with nationalist agendas. Moreover, the judicial system was fragmented into territories that worked independently from one another, leading to arbitrariness depending on which court a case ended up before. The many local courts resulted in a very high number of judges, administrators and prosecutors, which

was expensive, while the courts were still inefficient and had huge backlogs of cases.⁴⁸³

The reform was undertaken by the independent judicial commission, a body under the office of the High Representative. The goal was to reduce the overall number of judges, improve ethnic and gender representativeness, and improve competence and efficiency. The method was a state-wide reappointment process where all judges and prosecutors were dismissed and invited to apply for the new positions in the reformed court system. The reappointment process of reading applications and conducting interviews was undertaken by three judicial councils, one from each entity and one on the state level. All councils were a mix of prosecutors, judges and attorneys from both entities as well as international members, all appointed by the High Representative.⁴⁸⁴

The result was a reduction in the number of courts, judges and prosecutors by about a third each. All personnel could apply for more than one position, and outside applicants could compete as well. The process did improve confidence in the judicial system,⁴⁸⁵ and the ethnic representativeness,⁴⁸⁶ but it was costly: 140 staff worked full time in 21 months to appoint approximately one thousand judges and prosecutors. Unlike the police reform, the judicial councils had national as well as international staff and following the reform the three councils were merged into one, the High Judicial and Prosecutorial Council (HJPC), which was nationalised and is now in charge of appointment and discipline. This meant that the judicial reform did not have the same contingency problem that the police reform had, and that it did a better job of including locals and civil society in the process.

In 2015, the EU has reviewed the judicial reform, and found the Bosnian courts to be in line with European standards on paper regarding ethical standards, competence, impartiality, and cooperation between the entities, but there is a lack of safeguards to ensure the goals. Moreover, a case still takes on average seven years to make it through the judicial system, but the courts are chipping away at the backlog by completing on average

⁴⁷⁹ Mayer-Reickh 2007: 211

⁴⁸⁰ Ibid: 193-195

⁴⁸¹ Report of the Secretary-General, S/1995/1031: 22-23

⁴⁸² Mayer-Reickh 2007: 192

⁴⁸³ Ibid: 195-196

⁴⁸⁴ Ibid: 197-198

⁴⁸⁵ Ibid: 202

⁴⁸⁶ Ibid: 201

110 percent of the number of cases they get in a year.⁴⁸⁷

The reappointment process can be said to be in line with the UN guidelines in the following manner: (1) Respect towards victims and the accused is the most problematic one since judges generally have life tenure, which was suspended in this process, only to be reinstated afterwards. While the citizens have suffered from an inefficient and partial judicial system, there were no victims in the same sense as in the police reform, because the main issue with the judicial system was not lack of integrity, but lack of competence. (2) Inclusion of civil society and informing the public was accomplished by publishing the new hires in the official gazette. Civil society was included only indirectly in advising the councils generally and not on individual judges. (3) Attention to skills was the main part of the reappointment process. A problem with the process was a lack of good applicants. There were only about two applicants per position, and by the end of the process, 8 percent of positions remained unfilled.⁴⁸⁸ (4) Process and protections to both existing and future employees was accomplished by having both existing and new applicants take part in the competition for the positions.

Conclusion

Institutional reform is a mechanism for ensuring the right to non-recurrence. It should not, and cannot be used to ensure the right to justice. It should contribute to the right to truth and the right to justice, by passing on the information gathered in the vetting process to investigative truth commissions and to the judicial system for criminal prosecution. Because institutional reform is about the right to non-recurrence and not the right to justice, it cannot take away the accused's personal freedom, and subsequently, vetting and lustration mechanisms do not have to comply with the protections afforded in court trials. The only thing an individual risks in a lustration process is their job, and because of this, they are not protected by the human right of *nullum poena sine lege*. The prohibition of retroactive law only applies in criminal court cases.

Although job security is not protected by the prohibition of retroactive law, lustration

mechanisms can leave large groups of disgruntled former civil servants out of a job. This is problematic for economic prosperity and unemployment rates, and in the cases where they are dismissed for lack of integrity and human rights abuse, it can be a security problem as well. To ensure the fairness, effectiveness and safety of institutional reform, the UN has issued four guidelines, (1) respect for both victims and the accused, (2) inclusion of civil society and informing the public, (3) attention to skills and competence, and (4) process and protections afforded to both existing and future employees.

UN bodies under the Office of the High Representative undertook the BiH police- and judicial reform, and they appear to have had the guidelines in mind. There have however been constraints in the form of political pressure, time and resources. A key problem with the police reform was its abrupt conclusion and lack of information sharing both for criminal prosecution purposes and for vetting future employees. Additionally, both the many non-certified police, and the large number of officers that never submitted their case for review could pose a security risk that may have to be addressed. The judicial reform employed instead a joint approach with both national and international staff in the reappointment councils, and a future assurance in the form of the councils continuing as one monitoring body after the reform. The main challenges for the judicial system in BiH remain cooperation between the entities, elimination of the large backlog of cases, and attracting enough qualified candidates for judge and prosecutor positions.

⁴⁸⁷ European Commission: Bosnia and Herzegovina 2015 Report: 12-15.

⁴⁸⁸ Mayer-Reickh 2007: 201

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