

**THE  
BLINDFOLDING  
JUSTICE  
IN BOSNIA  
AND  
HERZEGOVINA?**

**STATE CAPTURE OF BOSNIA AND HERZEGOVINA'S  
JUDICIARY AND PUBLIC PROSECUTION**



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***Contributing Authors:***

Srđan Blagovčanin, Edin Hodžić, Sevima Sali-Terzić

***Project Coordinators:***

Mervan Miraščija, Open Society Fund Bosne i Hercegovine  
Srdjan Cvijić, Open Society European Policy Institute

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Mervan Miraščija, Srdjan Cvijić

***Contributor to the editorial tasks:***

Svjetlana Nedimović

***Proof-read:***

Mirjana Evtov

***Cover design by:***

Miodrag Spasojević Štrika

***Layout and DTP by:***

Samir Kamenjaš

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Sarajevo, 2021.



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# FOREWORD

Not so long ago, the 34<sup>th</sup> US President Dwight D. Eisenhower has said: “The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.” And that is the real truth. Without the rule of law, there is no legal peace, no democracy, no freedom and equality of people, no sense of security. It is not without reason that all the highest legal acts of modern states, or Treaty on the European Union have positioned this principle as the highest of the postulates according to which these systems function today.

The judiciary is one of the main pillars of the rule of law. A strong, independent, professional, efficient and ethical judiciary is the best shield for ordinary people. European Commission President Jean-Claude Juncker has also stressed that undermining independent national judiciaries meant to strip citizens of their fundamental rights. There cannot be any progress or social justice without a strong judicial system.

Unfortunately, Bosnia and Herzegovina is not among countries that can boast of a good judicial system. Shortcomings of the previous, socialist system have not been overcome. We have not overcome *childhood diseases* of transition, nor have the Dayton Peace Agreement and its Annex 4, as the Constitution of Bosnia and Herzegovina, established a functioning third pillar of government. Given that a state as poor as ours cannot provide an adequate material basis for technical, administrative and educational impetus for development, it is no wonder that the judiciary is exposed to pressures, immoral offers, negative challenges, overt or covert attacks, and what not. In other words, politics as a means of governing tends to “capture” judiciary, thus privatizing and instrumentalizing the state and its monopoly of power.

A captured state and a captured judiciary are key to establishing a system of controlled irresponsibility, in which political cartels, to the detriment of common men, will get rich, enjoy the benefits of the class system while being protected from any kind of negative sanction. This creates a predisposition towards legalization of a society and the state of unequal chances, again to the detriment of common men. What is thirty years of a post-Dayton controlled disorderly system compared to a future that smells of a well-protected, covert concentrated economic power of political oligarchy, which will spill over into the accumulation of legislative, executive and judicial power? James Madison, the father of the first US Constitution, which is still in force, would say it is synonymous with *tyranny*.

Therefore, any form of civic effort to establish the rule of law with an independent and impartial judiciary in Bosnia and Herzegovina is commendable. It is in this context that we should look at this publication, which very clearly explains the notion of “captured justice”, by analysing the concrete examples, segment by segment, and, at the end, recommending steps that the State should take in order to *break away* from the targeted control.

The publication provides a good basis for understanding the many individual factors that make a difference between free and captured judiciary. It addresses, inter alia, the most important segments of an independent and impartial judiciary, such as the smart organization of the judiciary, its quality and material base, and financial freedom, as well as fair system of the judicial accountability, modern technological development and continuous improvement of knowledge and skills of judges and prosecutors.

The overview of the judiciary in Bosnia and Herzegovina, unfortunately, shows how far we are from the required European minimum in this regard, how far we are from the minimum required to be considered a part of the community of democratic states with the rule of law. The overview of the judiciary in Bosnia and Herzegovina given in the publication shows not only how vulnerable the BiH judiciary is, but how wounded it is, and how much effort it takes for all the wounds to heal, and for the soul of justice to be enlightened and stabilized.

Consequently, after reading this publication, after reading this basic, high-quality text that is understandable to ordinary people, we can only ask: *Quo vadis*, and Is there any room for optimism? It takes not only the will and knowledge to implement the measures and recommendations provided in the publication, but also a lot of time and material support. When, in addition, it is realized which problems are still on the way – as well explained in the publication – only true inner strength and desire could overcome the feeling of helplessness in regard to that “captivity”.

But do we have a choice? Is there any room for us to choose? Back in ancient times, the philosopher Baruch Spinoza emphasized that, in principle, the ultimate purpose of the state is – freedom! Therefore, there is no choice but to fight for a free judiciary – because a free judiciary is a condition of a free and healthy state, and thus a condition of a free society. This publication is a contribution to that effort. It should be read by everyone, but especially by those involved in democratic processes, from holders of public office, through members of non-governmental organizations and professional associations, to journalists and academics. To understand the problem of captured justice is to understand an essential problem of our lives today.

Today's Bosnia and Herzegovina, like most of the Western Balkans states, lags far behind in terms of bringing the judicial reforms to European Union standards. Not only is there no progress in this respect, but an actual regression. Unless our country comes closer to European values, it cannot become an equal partner in the community of democratic states ruled by law. The review of the judiciary in Bosnia and Herzegovina as measured by “captured judiciary” test indicates a strong need for public and social activism in all fields. Therefore, a proactive attitude towards the state and society is the obligation of every citizen. Reliance on the international community must not be used as a reason for our passivity, because the international community is not a solution but a partner in the ever-going process we find ourselves in.

Nedim Ademović, Dr. iur.

Open Society Fund Bosnia and Herzegovina Board Chair

# EXECUTIVE SUMMARY

State capture is evidently a problem across the Western Balkans region, and Bosnia and Herzegovina (BiH) is no exception.

What is however easily overlooked is the phenomenon of capture of different branches of government. State capture is a problem of formidable proportions and complexity, with a cobweb of interconnections among its elements, which easily hampers efforts at getting to the root of the problem. If however we look at the phenomenon of capture in a disaggregate form, by focusing on different branches of government, it allows us to differentiate between dimensions of capture and identify more precisely the exact processes and mechanisms. This can help disentangle both the problem and the pathways to its solution, and even reveal more accessible entry points into the state system capture as a whole.

The study that we are presenting here, in distinction to the numerous previous papers on BiH, takes the capture of the judiciary as both the key problem and key operative concept. Overall, it could be argued that BiH, with the direct support from the international actors involved in the peace implementation, did make considerable progress in establishing and strengthening the judicial system. This particularly holds for the early phase of the reforms, dating back to the period 1998-2006. Due to the later changes in the approach and role of the international actors, with their increasing reliance on the conditionality approach that is an inherent feature of the European Union (EU) integration process, the judicial reform lost the momentum. The power vacuum left after the international actors had pulled out of the operational management of the reform has been filled by local political actors whose primary interest is to maintain the status quo. And the *status quo* is that of the captured judiciary.

In a nutshell, the study examines the extent to which the undue influence on the judiciary by the political and economic elites affects the performance of judges and prosecutors in BiH, particularly when it comes to addressing high-level corruption. The study looks into the procedural and institutional channels of such influence, as well as the actual practice and instances of undue influence on the judiciary in BiH.

## The methodological approach

**The analytical framework operationalizes key categories of captured judiciary**, focusing on organizational factors, independence, accountability, general conditions in which the judiciary operates, and coverage of corruption risks by the relevant strategic and policy documents. In this sense, the general understanding of captured judiciary for the purposes of this study presupposes the following elements: low independence safeguards, low accountability mechanisms, insufficient structural safeguards within the judiciary, unfavourable general conditions in which the judiciary operates, high

corruption risk and pressures, presence of internal corruption transactions, high level of deviant behaviour in the field, and inadequate response to identified [capture-related] risks [and practices] in the sector.

**This study combines several methodological tools and approaches.** We use analysis of primary sources, that is – the legal framework pertaining to the categories and indicators of interest. Secondly, we employ desk review on the situation in the judiciary, including relevant media reports. Thirdly, the research relies on the interviews with members of the judiciary, to shed light on various factors operating in practice and substantiate the indicators. Finally, the research uses case studies – i.e. relevant cases documented through the work of investigative journalists – to identify typical situations of undue interference in the work of the judiciary. These case studies constitute a crucial element of the overall approach and have therefore been particularly looked into to uncover the instances and elements of the capture.

## Key Findings

Overall, **organizational aspects** of the functioning of the judiciary allow the considerable scope for the exercise of undue influence. In particular, **the highly fragmented financing system** does not guarantee the crucial assumption of the overall independence of the judiciary – financial independence. **Prosecutor’s discretion is effectively unfettered in practice. Case management system** has been established, but due to a very common practice of **reassigning cases, it effectively opens the door to undue internal influence.**

Key challenge for the judiciary in BiH in terms of **accountability arises from** legal provisions and structural conditions which open too wide a space for **selective accountability and undue hierarchical influence.** The influence exerted by the High Judicial and Prosecutorial Council (HJPC) on the work of the Office of Disciplinary Counsel (ODC) is rather significant, which calls into question the ODC’s independence. Insufficient clarity as to what constitutes a disciplinary offence is another problem. Ethical codes for judges and prosecutors contain general provisions on incompatibility and refraining from inappropriate connections, political engagement, political preferences and affiliations. Nonetheless, neither the ethical codes nor the Guidelines for the prevention of conflict of interest elaborate on the issue of inappropriate contacts within and outside the judiciary and do not reflect the real-life ethical challenges of members of the judiciary in BiH.

Although formal guarantees of **independence** and **impartiality** are in place, there are still numerous shortcomings in practice that hamper the possibility of fully independent judiciary. Most serious concerns pertain to the **HJPC’s composition, the appointment procedures of its members, their accountability and the HJPC’s limited capacity to address pressing issues,** most specifically the issues of integrity of its members. Appointments of judges and prosecutors are not transparent, and it is difficult to analyse and assess to what extent the selection and appointment criteria set forth in the Law on HJPC are being implemented. As to the appraisal system, the main

problem that fuels the undue influence on judges and prosecutors is the lack of clear, objective criteria in the Law on HJPC for the promotion of judges and prosecutors.

When it comes to **general conditions**, the level of public trust in the judiciary in BiH has been consistently low over the years. Another important general condition of the work of judges and prosecutors is the professional culture, particularly the level of interaction with political figures and economically powerful individuals and groups. The parameters of inappropriate contacts beyond the obvious ones are mostly unclear. Lack of reactions of the professional community to even the obvious cases of inappropriate contacts can partly be ascribed to the generally weak and passive professional associations. Nonetheless, consistent silence of the professionals on such practices contributes to the impression that what would otherwise be considered inappropriate contacts is effectively tolerated.

Another problem is widely practiced self-censorship within the judiciary in BiH. The lack of political will, obstruction of reforms by political actors and from within the judiciary as well as fragmentation of strategies and action plans, coupled with policy-making without basis in evidence, all result in an inadequate reaction to the key problems in the sector and a close to minimal effect of anti-corruption policies and activities.

## Conclusions and Recommendations

**The analysis shows that the judiciary in Bosnia and Herzegovina is in the state of institutional capture. Given the cumulative impact of external factors, it can be concluded that external actors are in the position to effectively control functioning of the judiciary. The external control is coupled with the internal mechanisms of undue influence. While in practice it is not always possible to make a clear distinction between undue influence and lack of capacity, this in no way alters the situation - the lack of capacity in fact increases susceptibility of the judiciary to capture.**

The above problems create a vicious cycle making it hard to prioritize the reforms necessary. Nonetheless, although numerous reforms would be both essential and urgent, there are those among them that take the precedence simply because they can help create the setting for more demanding, structural reforms. The latter namely concern **in-depth revision of the policy and strategic framework in the field** so as to address key problems of the judiciary.

### Key Recommendations:

- Comprehensive **independent vetting of judges and prosecutors**, following the lessons from Albania, should be performed.
- **Full institutional and financial independence, accountability and transparency** of the judiciary must be ensured.

This includes above all enhancing **prosecutorial accountability** (particularly in terms of introducing effective review mechanisms and transparency in the cases of so-called “negative” decisions by the prosecutors) and **transparency** in terms of decisions and assets declarations. **Reporting and review mechanisms** should be established in the process of reassigning of cases.

- **Objectivity and transparency of the appointment process and career advancement** must be improved and based on merits, ethics and integrity.
- **It is necessary to amend specific aspects and provisions of disciplinary procedures** (including the list of offences, penal policies, the position of the Disciplinary Counsel etc.) and **ethical codes**, as well as regulations related to the role and the position of legal associates, advisors and expert witnesses.

However the reforms are prioritized, one stands out: **the reform of the HJPC**, given its immense influence. The HJPC needs to be strengthened against undue influence but also restructured to avoid concentration of powers (e.g. by providing for separate judicial and prosecutorial sub-councils).

**Alternative models of organisation and functioning of the HJPC (or equivalent authority) should be seriously considered.**

# 1. ANALYSING CAPTURE OF THE JUDICIARY: KEY CONCEPTS, ANALYTICAL FRAMEWORK AND METHODOLOGY

## 1.1. Introduction

Judiciary in BiH has long been in the focus of attention of international and domestic actors. Successful reform of the judiciary is generally considered to be an important factor of progress in many crucial areas of democracy building and consolidation, such as good governance or the fight against corruption. Significant efforts and donor funds have indeed been invested in reforming and improving the work of the judiciary in BiH. However, many recent reports detect little tangible progress in the field.

Numerous reports have addressed the state of affairs in the judiciary in BiH from various perspectives. For example, a relatively recent study examined the integrity of the judiciary and potential risks of corruption in the judiciary.<sup>1</sup> An EU-sponsored expert report is the latest publication of relevance. It addresses the critical problems in the judiciary of BiH through the prism of the broader rule of law considerations.<sup>2</sup> The report that we are presenting here, in distinction to most of the previous ones, takes the capture of the judiciary as both the key problem and key operative concept throughout the analysis.

State capture is evidently a problem in many Western Balkans states. Many reports indicate the presence of various mechanisms which allow the use of public resources and public institutions for private gain. The region arguably exhibits two principal modes of state capture. One of the two modes is party state capture (where political parties use state institutions in pursuit of political power), the other is corporate state capture (where private interests use various mechanisms to subvert the legitimate channels of political influence).<sup>3</sup>

Bosnia and Herzegovina is part of this trend. The World Bank Governance Indicators - control of corruption, government effectiveness, and the rule of law - can be taken as reliable indicators of state capture. They are showing that Bosnia and Herzegovina

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<sup>1</sup> USAID-ov Projekat pravosuđa u BiH, Dijagnostička analiza integriteta pravosudnog sektora u BiH i mogućih rizika od nastanka korupcije ili neetičnog ponašanja u pravosuđu /USAID Justice Project in BiH: Diagnostic Analysis of the Integrity of the Judiciary Sector in BiH and Potential Risks of Corruption or Unethical Conduct in the Judiciary, October 2015 [hereinafter USAID Diagnostic Analysis, 2015]. Document in BiH official languages [with Executive Summary in English] available for download at: [https://vstv.pravosudje.ba/vstv/faces/pdfservlet;jsessionid=29b254078c33b08e22cd57c82140a-4500242d98243a6e391db9a60772821d3f4.e34TbxyRbNiRb40Pbx4LaxmSaNz0?p\\_id\\_doc=38884](https://vstv.pravosudje.ba/vstv/faces/pdfservlet;jsessionid=29b254078c33b08e22cd57c82140a-4500242d98243a6e391db9a60772821d3f4.e34TbxyRbNiRb40Pbx4LaxmSaNz0?p_id_doc=38884)

<sup>2</sup> Expert Report on Rule of Law issues in Bosnia and Herzegovina [Brussels, 5 December 2019], available at <http://europa.ba/wp-content/uploads/2019/12/ExpertReportonRuleofLawissuesinBosniaandHerzegovina.pdf>

<sup>3</sup> See e.g. Abby Innes, "The political economy of state capture in central Europe", 52:1 Journal of Common Market Studies [2013], pp. 88-104.

has moved significantly downwards, scoring around mid-30<sup>th</sup> percentile, with only the rule of law indicator higher than 40<sup>th</sup> percentile.<sup>4</sup> Similarly, according to a survey conducted in 2015, around half of respondents from the general public consider corruption to be the most severe problem of the judiciary in BiH, and political influence on the judiciary as the second-largest problem in this field. As for respondents from the professional community, around 90 per cent believe that corruption is present among judges and prosecutors. It is of particular relevance for this research project that the professionals participating in the survey found many of the perceived corruption practices in the judiciary to be related to links with political and financial power holders and their influence over the judiciary.<sup>5</sup>

This research project aims to examine the extent to which undue influence on the judiciary by the political and economic elites is a problem affecting the performance of judges and prosecutors in BiH, particularly when it comes to addressing high-level corruption. We therefore examine the procedural and institutional avenues of such influence, as well as the actual practice and instances of undue influence.

The research is based on the premise that structural problems and numerous gaps and inconsistencies in the relevant legal and institutional framework open the door to political influence. The undue influence thus exercised leads to the capture of the judiciary, preventing the relevant actors from tackling crucial problems in the state, including high-level corruption. Thus, we believe that a clear and convincing identification of structural – legal and institutional – problems enabling the capture of the judiciary is a precondition for setting priorities in the reform processes. Furthermore, if the identification is made from the perspective of state capture, it will enable defining and advocating for actionable measures to address the capture of the judiciary. Ultimately, it may allow creating favourable conditions for a more efficient work of judges and prosecutors, particularly in terms of addressing high-level corruption.

## 1.2. Key concepts and factors related to the captured judiciary

It should be noted at the outset that judiciary can be one of the captured institutions but, given its position and role in a society, it is also often itself used as a prominent mechanism of state capture in general.<sup>6</sup> Two concepts and two types of undue influence on regulation and practice, respectively, are particularly relevant for our research: a) **administrative corruption** – which concerns the undue influence of individuals or groups on the implementation of laws and regulations in specific cases, and b) **state capture** in the narrow sense, which denotes the undue influence in the

<sup>4</sup> See <http://info.worldbank.org/governance/wgi/#reports>

<sup>5</sup> USAID Diagnostic Analysis, 2015 [see here footnote 1].

<sup>6</sup> See e.g. Arolda Elbasani, “Judiciary as a mechanism of state capture: external actors, party patronage and informality”, [Heinrich Boll Stiftung, Perspectives Southeastern Europe: Captured states in the Balkans, Issue 3, September 2017], pp. 26-30.



formulation and content of the relevant laws, rules, regulations or decrees.<sup>7</sup> This project employs a broader notion of the captured judiciary: it focuses on the regulatory framework governing the work of the judiciary, but also on the practice of judges and prosecutors. It takes the perspective of opportunities for, and the actual presence of, the undue influence by the political and economic elites, while looking into the hierarchical influence as well. In other words, considering the definitional elements of capture, as well as the specificities of the BiH context, we believe that capture of the judiciary in BiH is a complex phenomenon which entails a combination of political, economic and hierarchical influences.

Capture in the judiciary is part and parcel of corruption as a broader phenomenon. Indeed, corruption in the judiciary is a rather complex concept which reflects a rather complex practice. Corruption is much more and much wider than just bribery, as it

includes *all forms of inappropriate influence* that may damage the impartiality of justice, and may involve any *actor* within the justice system, including lawyers and administrative support staff. The question of corruption is not only a matter of relations between judicial personnel and 'court users' (public and private parties in civil cases, prosecutors and accused in criminal cases); it is also about internal relations in the judiciary. The 'gain' need not be material. It can also be sexual favours, or the offered 'furtherance of political or professional ambitions' ... and may also take the form of avoiding something undesired, in the form of threats. Biased decision-making is thus not only a matter of the personal integrity of judicial personnel, but concerns the structural protection of judicial independence and the insulation of judicial decision-makers from illegitimate political and hierarchical influence.<sup>8</sup>

Thus, while corrupt practices may be, and often are, numerous and widespread, the focus from the perspective of the captured judiciary is placed precisely on the illegitimate political, economic, and hierarchical influence. Nonetheless, it needs to be noted that political, economic, and hierarchical influence is not a phenomenon that can be studied and analysed in isolation from other, related practices. Those are primarily bribery, corrupt behaviours within the judiciary, to name but a few, as such practices are often tools for exerting inappropriate influence by various power groups. Bribery, for example, may be used to influence the prosecutors to reduce/drop charges or slow down the proceedings in individual cases, or the judges to reduce the sentence or slow down the conduct of individual cases.<sup>9</sup>

<sup>7</sup> James H. Anderson and Cheryl W. Gray, *Anticorruption in Transition: Who is Succeeding...And Why* [Washington: World Bank, 2006], p. 7, available at <https://openknowledge.worldbank.org/handle/10986/7089>;

<sup>8</sup> Siri Gloppen, "Courts, Corruption and Judicial Independence", in Tina Soreide and Aled Williams (eds.), *Corruption, Grabbing and Development: Real World Challenges* [Cheltenham and Northampton: Edward Elgar Publishing, 2014] p. 69.

<sup>9</sup> Cf. Transparency International, *Combating Corruption in Judicial Systems: Advocacy Toolkit*, p. 60, available at [http://www.opentrial.info/images/d/d8/Advocacy\\_Tool\\_Kit.pdf](http://www.opentrial.info/images/d/d8/Advocacy_Tool_Kit.pdf); USAID Diagnostic Analysis, 2015 [see here footnote 1]

Political and hierarchical influences are evidently related. In many cases, the undue political influence on the judiciary comes not directly from the political branch, but rather from within the judicial hierarchy. The internal influence may assume different forms. One is the direct pressure by the superiors. The other is self-censorship, which is a more subtle form of influence: judges and prosecutors anticipate that a “wrong” decision in a case of interest to various power groups is likely to harm their career prospects. The mechanism may also be activated by allocating cases to judges and prosecutors who are likely to deliver desired decisions.<sup>10</sup> This research, therefore, posits that numerous corrupt practices within the judiciary, if analysed as part of a whole and within a plausible analytical framework, can be seen as indicators of the captured judiciary.

Undue political and economic influence on the judiciary can further be defined by methods and ways in which the various power groups influence the behaviour of judges and prosecutors. The inappropriate influence can thus be defined in terms of “threats, punishments, or rewards carried out or granted by elected power holders in a covert or public way without any legal action.”<sup>11</sup>

Some forms of undue political influence are openly illegal, such as bribes, blackmail, and threats. Other forms of influence in this context are somewhat more subtle and not necessarily illegal as such, but rather “stem from the ways in which relations between the judiciary and other arms of government are organised, or reflect a legal culture where judges are expected to defer to political authorities.”<sup>12</sup>

Furthermore, this influence can be direct or subtle, depending among other things on how open it is to the public. Direct influence is mainly directly observable and involves verbal attacks, threats of violence, and physical attacks. Indirect influence relates to informal communication between the judiciary and the power holders, personal connections and networks, and bribery.<sup>13</sup> General literature on informal influence and capture finds that threats by various interest groups often function as an important mechanism of the capture of the judiciary. In this sense, even otherwise honest duty holders can to various degrees be influenced by “nasty” pressure groups – they succumb to threats rather than any potential benefit. These threats range from smear campaigns within influential circles, attacks in the media or through the judicial system itself [accusing the individual duty holders of crimes or misdemeanours] etc.<sup>14</sup>

The ways the political branch, as well as the private sector, can influence the judiciary greatly depends on the nature and characteristics of a judicial system itself. Nonetheless, two main points of the potential influence by the political branch on the judiciary can typically be identified: first, the process of appointments of duty holders,

<sup>10</sup> Gloppen, “Courts, Corruption...”, p. 72

<sup>11</sup> Mariana Llanos et al., “Informal Influence in the Judiciary in New Democracies: A Comparison of Six African and Latin American Cases” [Hamburg: GIGA Working Papers, 2014] p. 6.

<sup>12</sup> Gloppen, “Courts, Corruption...”, p. 71

<sup>13</sup> Mariana Llanos et al., “Informal Influence...”, pp. 6-7.

<sup>14</sup> Ernesto Dal Bo and Rafael Di Tella, “Capture by Threat”, 111:5 *Journal of Political Economy* [2003].

and second, undue interventions *ex post*, when judges and prosecutors are already appointed.<sup>15</sup>

The above considerations suggest several safeguards against the inappropriate influence of political and private sector on the judiciary. At the same time, however, these safeguards can also serve as potential avenues for influence on the judiciary by the political and economic elites. Independence of the judiciary from other state institutions as well as the private sector is a category of considerable importance in this sense.

Independence is evidently the opposite of capture in many ways. The indicators of independence taken in reverse can also be seen as indicators of the captured judiciary. According to a clear and succinct formulation by Ackerman, independence in this context implies the demand that “judges’ careers do not depend on pleasing those with political and economic power.”<sup>16</sup> It is important to note that independence entails both structural independence of the judiciary from other branches of government and independence of individual judges and prosecutors.<sup>17</sup>

Independence can be assessed on the basis of objective and subjective indicators. Objective indicators are related to “legal and other objectively observable aspects of the legal system that are essential for independence and accountability...”<sup>18</sup> Subjective indicators are a matter of perceptions and opinions – of the general population, “users” of the justice system, and judges and prosecutors themselves.<sup>19</sup>

There are several vital factors of independence of the judiciary from the political or economic elites. The first group of factors concerns the structural conditions for judges and prosecutors (as well as other staff in courts and prosecutors’ offices) themselves: qualifications, criteria and methods of selection, including the role of political bodies and judicial councils in the appointment procedures; tenure and career path; budgetary and financial regulations, salaries and benefits; systems for evaluation of work of judges and prosecutors; job security, conditions and criteria for removal; regulation protecting judges and prosecutors from threats and intimidation.<sup>20</sup> It is generally considered, for example, that if more actors are involved in the process of appointment and removal of judges and prosecutors, the judiciary is better protected and separated from political power. The same goes for the systems where decisions on the removal of judges are left to the discretion of judges themselves.<sup>21</sup>

Second, rules on the organisation of the judiciary also matter for the independence of judges and prosecutors: rules on the funding of the judiciary as a whole; the level

<sup>15</sup> See e.g. Mariana Llanos et al., “Informal Influence...”, pp. 4-5.

<sup>16</sup> Susan Rose Ackerman, “Judicial Independence and Corruption”, in Transparency International, *Global Corruption Report 2007* [Cambridge: Cambridge University Press, 2007] p. 16.

<sup>17</sup> European Network of Councils for the Judiciary (ENCJ), *Independence, Accountability and Quality of the Judiciary: Performance Indicators 2017* [Paris, June 2017], pp. 11-14.

<sup>18</sup> *Ibid.*, p. 12.

<sup>19</sup> Cf. *Ibid.*

<sup>20</sup> Ackerman, “Judicial Independence...”, pp. 18-19; Gloppen, “Courts, Corruption...”, p. 71.

<sup>21</sup> Mariana Llanos et al., “Informal Influence...”, p. 8.

of prosecutorial discretion in deciding to prosecute or not in specific cases; rules on *ex parte* communication with judges in particular cases; whether judges sit in panels or decide alone; the role of clerks and other staff in the judiciary and checks on their behaviour; the functioning of the case management system – allocation of cases to judges and prosecutors; the complexity of proceedings.

General conditions in which the judiciary operates are also important in this respect. Thus, public support significantly contributes to the independent judiciary: the greater the public support, the more likely it is that the judges and prosecutors will resist the political branch. The second aspect of this broad category is the level of professional culture and commitment to independence within the judiciary itself. This aspect concerns the written and unwritten rules of the relationship of judges and prosecutors with the political branch and centres of economic power. In this sense, “a professional culture that emphasises neutrality towards political power increases the moral costs of collusion with politicians.”<sup>22</sup> The prevalence of contacts with the political branch and the degree of tolerance to them in the professional circles and the broader public will be considered an important indicator of capture in this research.

Nonetheless, independence alone is not a sufficient safeguard against undue political influence on the judiciary. As Ackerman [see footnote 20] and many others argue, it needs to be coupled with accountability to produce desired effects in this sense. Evidence suggests that strengthened independence of the judiciary is correlated with lower levels of corruption. Other authors however claim that, if there is a high level of political influence in the judiciary, an anti-corruption response might “require reforms that make judges less accountable to the rulers, for example by weakening the mechanisms that political power-holders [and the judicial hierarchy] can use to influence judges’ rulings.”<sup>23</sup> Contrary to that claim, some empirical, econometric research findings indicate that independence of the judiciary without accountability may have adverse effects in terms of corruption.<sup>24</sup> This consideration is particularly pertinent given the findings and trends regarding the judicial hierarchy and the overall functioning of regulatory bodies in the branch. Some case studies suggest that the introduction of independent regulatory bodies with extensive powers and limited accountability are linked to judicial corruption<sup>25</sup> or increased nepotism.<sup>26</sup>

It is therefore important to look into the essential mechanisms of accountability of judges and prosecutors, as well as the members of the High Judicial and Prosecutorial Council (HJPC) of BiH: the quality of rules and practice of disciplinary proceedings

<sup>22</sup> Donatella Della Porta, “A judges’ revolution: Political Corruption and the Judiciary in Italy”, 39 *European Journal of Political Research* [2001] pp. 2-3.

<sup>23</sup> Gloppen, “Courts, Corruption...”, p. 74.

<sup>24</sup> Stefan Voigt and Jerg Gutmann, “On the Wrong Side of the Law: Causes and Consequences of a Corrupt Judiciary”, 43 *International Review of Law and Economics* [2015] pp. 155-166.

<sup>25</sup> Maria Popova, “Why doesn’t the Bulgarian Judiciary prosecute corruption?”, 59:5 *Problems of Post Communism* [2012] pp. 35-49.

<sup>26</sup> Michal Bobek and David Kosar, *Global solutions, local damages: a critical study in judicial councils in Central and Eastern Europe*, College of Europe Research Paper in Law 07/2013, available at [http://aei.pitt.edu/47507/1/researchpaper\\_7\\_2013\\_bobek\\_kosar.pdf](http://aei.pitt.edu/47507/1/researchpaper_7_2013_bobek_kosar.pdf)

against judges and prosecutors (as well as accountability mechanisms related to the HJPC members), quality of regulations on corruption in the judiciary, including the existence and quality of internal rules in this context (e.g. ethical codes and their implementation); conflict of interest and asset disclosure rules and practices, the openness of court proceedings to the public and the press; transparency and public availability of prosecutorial and judicial decisions.<sup>27</sup>

### 1.3. Key questions and methodological approach

Our main research question is therefore the following: What is the extent and what are the principal avenues, principal agents, and key mechanisms of the capture of the judiciary in Bosnia and Herzegovina?

Two aspects of this question are equally crucial for this study:

- a) What are the main formal (legal, institutional, procedural) elements of the capture of the judiciary in BiH?
- b) What are the main informal elements and mechanisms of the capture of the judiciary in Bosnia and Herzegovina?

In other words, as already noted, we study the capture of the judiciary in the broader perspective to include both the relevant rules and regulations that are enabling or preventing capture and actual mechanisms, methods and forms of capture in practice.

In developing our analytical framework for the study of this mostly unexplored phenomenon, we partly rely on the framework used in the studies of state capture at the institutional level and in specific fields, as suggested by the Center for the Study of Democracy.<sup>28</sup> The relevant parts of the state capture framework are used in combination with factors and indicators of the capture of the judiciary, as elaborated in the previous section.<sup>29</sup>

These indicators are undoubtedly complex to measure. Nonetheless, the logic behind them is relatively simple. Low independence safeguards, low accountability mechanisms, insufficient structural safeguards within the judiciary, unfavourable general conditions in which the judiciary operates, high corruption risk and pressure, presence of internal corruption transactions, high level of deviant behaviour in the field, and inadequate response to identified (capture-related) risks (and practices) in the

<sup>27</sup> See e.g. European Network of Councils for the Judiciary (ENCJ), *Independence, Accountability and Quality of the Judiciary: Performance Indicators 2017*; Transparency International, *Combating Corruption in Judicial Systems: Advocacy Toolkit*, pp. 23-31; also: USAID Diagnostic Analysis, 2015 [see here footnote 1]

<sup>28</sup> Center for the Study of Democracy, *State Capture Diagnostic Roadmap*, Working Paper, August 2016, p. 11

<sup>29</sup> A more detailed list of indicators is presented at the beginning of each subsequent section.

sector – these elements combined inevitably and convincingly produce a model of a captured judiciary.

When it comes to methodology, one should note that there is very little research into informal political influence on the judiciary, due mainly to the extremely covert nature of the phenomenon. Thus, available methodological tools for identifying the presence and the extent of political influence remain scarce. One of the rare available studies of the phenomenon uses interviews with experts and practitioners, relying mostly on their perceptions.<sup>30</sup> Another study, which in many ways inspired our approach, combines desk research and analysis of specific cases using the methods of investigative journalism to identify examples, key areas and mechanisms of the capture of the judiciary.<sup>31</sup> It is also particularly important to note that, according to research on informal influence in general, extensive fieldwork involving surveys and interviews is considered an optimal method for this kind of analysis.<sup>32</sup> At the same time, as suggested already in the previous section, informal influence will often have to be inferred from several qualitative indicators, since it is usually not directly observable.

This study therefore combines several methodological tools and approaches. We use analysis of primary sources – the legal framework pertaining to the categories and indicators of interest. Secondly, we employ desk review on the situation in the judiciary, including relevant media reports, in areas of our concern. Thirdly, the research relies on interviews with members of the judiciary, to shed additional light on enabling factors in practice and give additional weight to the identified indicators of state capture in the judiciary on structural, institutional and policy levels. Finally, the research uses case studies – i.e. relevant cases documented through the work of investigative journalists – as they allow us to identify typical problems of undue interference in the work of the judiciary. These case studies constitute a crucial element of the overall approach and have therefore been particularly looked into to uncover instances and elements of the capture of the judicial system in BiH.

<sup>30</sup> This study analysed the perceived existence of direct and indirect influence on the judiciary, respectively, in six countries. It uses three modes of influence for each of the two types of influence. For each interviewee the existence of influence was established if at least two modes of influence per each type are confirmed. See Mariana Llanos et al., “Informal Influence...”.

<sup>31</sup> Branko Čečen et al., *When Law Doesn't Rule: State Capture of the Judiciary, Prosecution, Police in Serbia* (Open Society European Policy Institute, Center for Investigative Journalism of Serbia and Transparency Serbia, 2017 [updated 2018], available at <https://www.opensocietyfoundations.org/sites/default/files/when-law-doesn%27t-rule-20181009.pdf>

<sup>32</sup> See Mariana Llanos et al., “Informal Influence...”, p. 5. This is also confirmed by a study conducted in Croatia on the capture at the level of local government units, which also employs fieldwork and interviews with stakeholders as a key element of the methodological approach. See Drazen Hoffmann et al., *Croatia's Captured Places* (Zagreb: Gong, 2017), available at [https://www.gong.hr/media/uploads/croatia's\\_captured\\_places.pdf](https://www.gong.hr/media/uploads/croatia's_captured_places.pdf)

## 2. ORGANISATIONAL FACTORS

The literature and international standards address organisational aspects of the judiciary mainly from the angle of their relation to the independence of the judiciary. The organisation should also ensure the accountability of the justice system and facilitate access to justice.

In this respect, international standards emphasise the risk of compromising judicial independence through the presence of the executive in the exercise of administrative functions of the judiciary. The standards recommend avoiding such situations.<sup>33</sup> Similarly, these standards also consider the issue of financial independence of the judiciary, i.e. the need to prevent undue influence on the judiciary by influencing its financing. Finally, international standards stress that the judicial system is bound to ensure that its actions are based on the law and to operate efficiently, which is an aspect to which the organisation of the judiciary should contribute.<sup>34</sup>

This study looks into organisational aspects of the judiciary on the basis of the following indicators:

### *Rules and regulations*

- rules on financing [structural financial independence];
- the level of prosecutorial discretion in deciding to prosecute or not in specific cases;
- rules on *ex parte* communication with judges;
- whether judges sit in panels or decide alone;
- role of clerks and other staff in the judiciary and checks on their behaviour;
- the functioning of the case management system – allocation of cases to judges and prosecutors, the functioning of the system of automatic allocation of cases and instances [and prevalence] of reassigning cases by court presidents and chief prosecutors;
- the complexity of proceedings.<sup>35</sup>

### *Practice*

- prevalence of instances of misusing the organisational factors in pursuit of undue influence.

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<sup>33</sup> Consultative Council of European Judges [CCJE] and Consultative Council of European Prosecutors [CCPE]; Report: Challenges for judicial independence and impartiality in the member states of the Council of Europe, 2016, available at: <https://rm.coe.int/168066d624>

<sup>34</sup> Max Visser, Roel Schouteten & Josje Dijkers [2019] Controlling the Courts: New Public Management and the Dutch Judiciary, *Justice System Journal*, 40: 1, pp. 39-53

<sup>35</sup> Generally speaking, the more complex the proceedings, the more opportunities for the power groups to intervene in individual cases.

## 2.1. Organisation and financing of the judiciary

Financial independence undoubtedly constitutes a vital aspect of the judiciary's overall independence, as indicated by various international standards. European Network of Council for the Judiciary (ENCJ) concludes that "the minimum conditions for judicial independence include financial security."<sup>36</sup> An adequate budgeting process makes the judiciary less vulnerable to undue influence. According to Opinion No. 10 of the Consultative Council of European Judges (CCJE) of 2007, the courts can only be properly independent if they are provided with a separate budget and administered by a body independent of the executive, whether it is a Council for the Judiciary or another judicial authority.<sup>37</sup>

The judiciary in BiH is composed of four subsystems mirroring the administrative-territorial organisation of the country. It has one common umbrella institution, namely the High Judicial and Prosecutorial Council, which is responsible for appointing judges and prosecutors, initiating and conducting disciplinary proceedings and determining disciplinary liability.<sup>38</sup> Courts and Prosecutor Offices (POs) in Bosnia and Herzegovina are financed from 14 different sources of financing. Each administrative level of the judicial system is financed from the budget of that administrative level (state, entity and cantonal budgets respectively).

The procedure for courts and POs is the same as for all other budget beneficiaries. Following the applicable legal provisions, courts and POs prepare the budget and submit it to the ministries of justice and/or finance. The ministries of finance prepare a draft budget and submit it to the [respective] governments for approval. The governments approve the draft budget and submit it to the [respective] parliaments for decision. Judicial institutions in Brčko District (BD) BiH are an exception as the Judicial Commission of the BD BiH, which is responsible for administrative management of the judiciary, proposes the budget to the District Assembly. The Law on Budget of the BD BiH explicitly stipulates that The Mayor or District's Finance Directorate may not modify the budget submitted by the Judicial Commission.

The High Judicial and Prosecutorial Council (HJPC) plays an advisory role in the budgeting process and does not have any more significant influence on the amount of funding approved for the judicial institutions.<sup>39</sup> When comparing the HJPC's compe-

<sup>36</sup> European Network of Council for the Judiciary (ENCJ). 2016. Funding the Judiciary

<sup>37</sup> Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe: Opinion No. 10 [2007] On the Council for the Judiciary at the service of society. Strasbourg, 21-23 November 2007, available at: <https://rm.coe.int/168074779b>

<sup>38</sup> Law on HJPC BiH [Official Gazette of BiH, Nos. 25/04, 93/05, 48/07 and 15/08].

<sup>39</sup> Law on HJPC BiH [Official Gazette of BiH, Nos. 25/04, 93/05, 48/07 and 15/08], Law on the Court of BiH [Official Gazette of BiH, Nos. 49/09, 74/09 and 97/09], Law on the Prosecutor's Office of BiH [Official Gazette of BiH, Nos. 24/02, 42/03, 03/03, 37/03, 42/03, 09/04, 35/04, 61/04 and 97/09], Law on Courts in the Federation of BiH [Official Gazette of FBiH, Nos. 38/05, 22/06, 63/10, 72/10, 7/13 and 52/14], Law on Courts of the Republika Srpska [Official Gazette of RS, Nos. 111/04, 109/05, 37/06, 17/08 and 37/12], Law on Prosecutors' Offices of the Republika Srpska [Official Gazette of RS, Nos. 55/02, 85/03, 115/03, 115/04, 37/06 and 68/07], Law of the Federal Prosecutor's Office of the Federation of BiH [Official Gazette of FBiH, No. 19/03] and cantonal laws on prosecutors' offices in FBiH,



tencies to the competencies of judicial institutions in several European jurisdictions, as well as those of the countries in the region, it can be concluded that HJPC's competencies are most limited and do not support financial independence of the judiciary.

Budgets of courts and POs are an integral part of the budget of their respective level of government, and there are no specific procedures that would allow for financial autonomy of the judiciary as recommended by international standards, except in the BD BiH. Budgets are drafted, enacted, and executed for each level of government separately, without coordination in place. This problem is particularly conspicuous in the Federation of BiH. Cantonal courts/POs and municipal courts are funded from cantonal budgets even though most decisions related to funding requirements are determined on the entity and state levels. For example, the HJPC determines the number of judges and prosecutors. However, their salaries and other payments, the number of courts and their seats, the criteria for the number of support staff, and attorney fees that form the bulk of criminal process expenses, are all generated through decisions taken on the Federation level.

Ministries can, therefore, influence the work of judicial institutions in the same way as in case of other budget users, through the process of budget drafting, enacting and execution, or by not approving a sufficient amount of funds. The Venice Commission notes that financial independence of the judiciary in BiH can be compromised by the institutions that make decisions regarding judicial budgets. Moreover, judicial bodies may be vulnerable to pressure from the institution deciding on the budget. The extreme fragmentation of the financing system further aggravates the problem.<sup>40</sup>

To address this, the HJPC adopted the recommendations for improving the judicial institutions financing system in 2011. They were aimed at strengthening the HJPC's role in the budgeting process and establishing the HJPC as the formal proposer of the budgets for judicial institutions.

There is a general perception among judges and prosecutors that planning and allocation of budgets are not based on objective criteria. The process depends on informal, even personal relations between the responsible persons in the judiciary and those in the executive authorities. The situation ultimately leads to more generous funding allocated to the institutions whose members maintain closer connections with the executive, while institutions which have equal or even larger needs receive

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Law on Courts of BD BiH [Official Gazette of Brčko District, Nos. 09/07, 19/07, 20/07, 39/9, 10/02 and 31/11], Law on the Prosecutor's Office of Brčko District [Official Gazette of Brčko District, No. 19/07], Law on Budgets in FBiH [Official Gazette of FBiH, Nos. 19/06, 76/08, 5/09, 32/09, 51/09, 9/10, 36/10, 45/10, 25/12, 102/13, 9/14 and 26/14], Law on Budget System of the RS [Official Gazette of RS, Nos. 96/03, 14/04, 67/05, 34/06, 128/06, 117/07, 126/08, 92/09 and 121/12], Law on Financing of Institutions of BiH [Official Gazette of BiH, Nos. 61/04, 49/09 and 42/12], Law on Budget of Brčko District BiH [Official Gazette of Brčko District, No. 34/08], and laws on budget execution at the appropriate levels of government which are, as a rule, adopted every year.

<sup>40</sup> EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW [VENICE COMMISSION] OPINION ON LEGAL CERTAINTY AND THE INDEPENDENCE OF THE JUDICIARY IN BOSNIA AND HERZEGOVINA Adopted by the Venice Commission at its 91<sup>st</sup> Plenary Session [Venice, 15-16 June 2012].

less.<sup>41</sup> In one of the interviews conducted under this study, a judge remembered that, while he was presiding over a municipal court, the ministry of finance cut down the court's budget so drastically that after a few months the court was not able to use electricity or send mail without overspending the budget.<sup>42</sup>

The budget allocation for the judiciary overall has increased steadily over the last few years (Table 1). BiH allocated 33.70 € per inhabitant to the judiciary in 2016, while the European average of the budget allocated to the judicial system per inhabitant was 64 €. It should be noted that of all member states of the Council of Europe, BiH allocates the highest percentage of GDP (0.77%) to the judiciary.<sup>43</sup>

2016	2017	2018
221,236,543 BAM	234,229,632 BAM	251,211,361 BAM

Table 1. The overall budget of the judiciary <sup>44</sup>

BiH has also received substantial development aid in the process of judicial reform. Between 2004 and 2018, the international donors invested 97 million BAM in project activities involving judicial institutions at all government levels.<sup>45</sup>

The budget allocated to the judiciary is continuously rising as well as the already significant contribution by donors for the judicial reform process. However, there remains a large discrepancy between the budgets approved for the courts and POs on the one hand and minimum required for efficient operations as estimated by the HJPC. The total budget approved is approximately 18 million BAM lower than the required budget as estimated by the HJPC.<sup>46</sup>

<sup>41</sup> USAID Diagnostic Analysis, 2015 [see here footnote 1]

<sup>42</sup> Interview Zadrić, Marin. Judge of the Cantonal Court in Mostar. Project interview, 11/12/2019. For the purpose of this research project, interviews with a number of judicial holders at different administrative levels in BiH have been conducted. Integral versions of interviews are kept in the project archive.

<sup>43</sup> European Commission for the Efficiency of Justice (CEPEJ): European Judicial Systems: Efficiency and quality of justice, CEPEJ Studies No. 26 2018 Edition [2016 data], available at <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c>

<sup>44</sup> Official HJPC statistics

<sup>45</sup> High Judicial and Prosecutorial Council of Bosnia and Herzegovina 2018 Annual Report. The European Union is the largest single donor with 48.6 million BAM, which was used to procure computer equipment, software and other equipment for the digitalization of the judiciary on all levels as well as for renovating and furnishing judicial buildings. The EU is followed by the Kingdom of Norway with 14.2 million BAM and the Kingdom of Sweden with 9.2 million BAM. Out of these funds, the amount of 58.5 million BAM was used for the procurement of equipment, 23 million BAM for building renovation and 4.4 million BAM for the maintenance of the judicial information system.

<sup>46</sup> High Judicial and Prosecutorial Council of Bosnia and Herzegovina 2018 Annual Report

## 2.2. Prosecutorial discretion

Prosecutorial discretion is the authority entrusted to prosecutors to decide whether or not to bring criminal charges, what charges to bring, as well as which cases can be resolved without criminal proceedings. While prosecutorial discretion is inherent to the mandate of the prosecutor, it is important to have adequate mechanisms in place to ensure accountability and prevent abuse of discretionary powers.

### ***Disciplinary Sanctions against Judges and Prosecutors: Džemal Karić***

*In 2013, Sarajevo prosecutor Džemal Karić dropped the abuse of office charges against the former CEO of the Cantonal Public Transit Authority [GRAS] Ibrahim Jusufrić. Karić did not inform the Sarajevo Canton Attorney General's Office, thereby preventing the possibility of appealing his decision.*

*Jusufrić was later accused of abuse of office because he made an illegal decision to buy a cleaning system for buses which incurred damages to the public company of more than 880,000 BAM.*

*Center for Investigative Reporting, July 2019*

<https://www.cin.ba/disciplinske-kazne-protiv-sudija-i-tuzilaca/>

International standards employ three distinct approaches to enhancing the prosecutors' accountability:

- (i) Enhancing transparency, in terms of clear reporting requirements on the activities undertaken and especially on the decisions not to prosecute. International standards strongly recommend application of these requirements;<sup>47</sup>
- (ii) Ensuring the rights of victims to bring cases, where prosecutors have decided not to prosecute directly - intergovernmental organisations encouraged governments to introduce such provisions;<sup>48</sup>
- (iii) Introducing judicial review in cases where prosecutors decided not to indict - while international standards do not specify the criteria for judicial review of cases where judicial review of prosecutorial discretion may be applied, they emphasise the importance of such a mechanism as a safeguard of prosecutorial accountability.<sup>49</sup>

<sup>47</sup> The Council of Europe, Recommendation No. R [87] 18 of the Committee of Ministers to Member States, Concerning the Simplification of Criminal Justice, adopted on 17 September 1987, available at: <https://rm.coe.int/16804e19f8>; and Recommendation No. Rec[2000] 19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system, adopted on 6 October 2000, available at <https://rm.coe.int/16804be55a>

<sup>48</sup> The Council of Europe, Recommendation No. Rec[2000] 19 of the Committee of Ministers (see here footnote 48); Opinion No. 12 [2000] of the Consultative Council of European Judges [CCJE] and Opinion No. 4 [2000] of the Consultative Council of European Prosecutors [CCPE]: Bordeaux Declaration "Judges and Prosecutors in a Democratic Society", Strasbourg, 8 December 2009, available at: <https://rm.coe.int/1680747391>.

<sup>49</sup> The Council of Europe, Recommendation No. Rec[2000] 19 of the Committee of Ministers (see here footnote 48); Opinion No. 12 [2000] of the Consultative Council of European Judges [CCJE] and Opin-

Given that discretionary power entails a risk of being exercised non-transparently, and applying subjective and potentially biased standards, it is vital to have in place clear and relatively self-executing provisions.

International standards recognise the importance of defining coherent and clear guidelines for the exercise of prosecutorial powers. The Council of Europe Committee of Ministers called on governments to “define general principles and criteria to serve as a reference against which decisions are taken by prosecutors in individual cases”.<sup>50</sup>

The Venice Commission warns that the highest risk in terms of prosecutorial accountability [or rather a lack thereof] arises precisely when the prosecutors decide not to prosecute, given that the rest of the POs’ powers are subject to scrutiny by courts during the proceedings.<sup>51</sup>

According to the criminal procedural codes, initiating and conducting investigations is entrusted to the prosecutor.<sup>52</sup> The codes mentioned above govern the actions of the prosecutor as well as the authority to issue appropriate procedural acts [order to conduct an investigation, order not to conduct an investigation, order to terminate investigation]. In applying legal provisions to the facts, the prosecutor has a significant degree of discretion.<sup>53</sup> The decision of the prosecutor in criminal proceedings is based on the principle of free evaluation of evidence, which means that evaluation of the existence or non-existence of facts will not be limited to special evidentiary rules.

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ion No. 4 [2000] of the Consultative Council of European Prosecutors [CCPE]: Bordeaux Declaration “Judges and Prosecutors in a Democratic Society”, Strasbourg, 8 December 2009, available at: <https://rm.coe.int/1680747391>.

<sup>50</sup> Venice Commission, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecutorial Service, para. 45 [see here footnote 47]

<sup>51</sup> Criminal Procedure Code of BiH [Official Gazette of BiH, Nos. 03/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13], Criminal Procedure Code of FBiH [Official Gazette of FBiH, Nos. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13, 59/14], Criminal Procedure Code of RS [Official Gazette of RS, No. 53/12], Criminal Procedure Code of BD BiH [Official Gazette of BD BiH, No. 33/13].

<sup>52</sup> The criminal legislation of BiH in principle requires taking action by the prosecutor every time when there is evidence that a criminal offence has been committed, but it also allows the prosecutor to refrain from initiating prosecution if the evidence shows that it is an insignificant offence. Apart from that, it prescribes situations in which the prosecutor may issue an order not to conduct any investigation: if it is evident from the report and the supporting documents that the reported act does not constitute a criminal offence; if there is no ground to suspect that the reported person committed the criminal offence; if the statute of limitation is applicable or if the criminal offence is subject to amnesty or pardon or if any other circumstances exist that preclude criminal prosecution.

<sup>53</sup> The criminal legislation of BiH in principle requires taking action by the prosecutor every time when there is evidence that a criminal offence has been committed, but it also allows the prosecutor to refrain from initiating prosecution if the evidence shows that it is an insignificant offence. Apart from that, it prescribes situations in which the prosecutor may issue an order not to conduct any investigation: if it is evident from the report and the supporting documents that the reported act does not constitute a criminal offence; if there is no ground to suspect that the reported person committed the criminal offence; if the statute of limitation is applicable or if the criminal offence is subject to amnesty or pardon or if any other circumstances exist that preclude criminal prosecution.

According to the provisions of the criminal procedure codes and organisational laws on POs, prosecutors are autonomous in the prosecution of specific criminal offences. The Chief Prosecutor may issue mandatory operational instructions which are general instructions regarding the work and activities of prosecutors, as well as special instructions for taking actions in specific cases. Prosecutors cannot contest the instructions issued by their superiors. Criminal procedure codes allow the collegium of all prosecutors to end investigations that have not been finalised within six months following the issuance of the order to conduct the investigation, which is a mechanism of internal control within POs.

Criminal procedure codes provide that a complaint against so-called “negative” decisions by the prosecutor, which are the orders not to conduct an investigation and to terminate an investigation, can be lodged. The codes set forth the deadline for lodging the complaint and state that the complaint is to be submitted to the prosecutor’s office. However, the nature of the complaint or the procedures and deadlines is not specified. Nor is there a reference to the type of decisions that can be taken and their legal effect.

Entity POs tried to address this legal void in different ways. In FBiH, the Chief Prosecutor issued two guidelines on handling complaints in case of the negative prosecutorial decisions or complaints about inefficient work of the prosecutors’ offices.<sup>54</sup> The guidelines provide that in taking a negative decision, prosecutors shall inform the injured party about the possibility of lodging a complaint with the Federal Prosecutor’s Office. In RS, the Rules on Internal Organisation and Operations state that the board of prosecutors shall provide their opinion on complaints.<sup>55</sup> The RS Prosecutor’s Office has been accepting and deciding on complaints against the final decisions of the district prosecutors’ offices since 2012. This practice, however, is not specified in the Rules, nor has the Chief Prosecutor issued a special guideline to specify the criteria for considering and deciding upon complaints against decisions by the district prosecutors’ offices.<sup>56</sup> In the Prosecutor’s Office of BiH and the Prosecutor’s Office of BD BiH, there is no possibility of reviewing negative prosecutorial decisions by anyone outside of these institutions, and no rules or guidelines prescribe the handling procedure.

Criminal procedure legislation in BiH provides that the injured party and the person who filed criminal charges are authorised to complain against the order not to conduct an investigation, while solely the injured party is entitled to complain against the order to terminate the investigation.<sup>57</sup> It remains unclear why the legislator resorted to

<sup>54</sup> Mandatory instruction by the Chief Federal Prosecutor on the procedure for handling complaints against orders not to open an investigation, orders to cease investigation, as well as complaints about inefficiency of prosecutors in criminal cases, No. A-632/13 dated 29/10/2013 and the Supplement to the Instruction dated 13/03/2015, and Mandatory instruction by the Chief Federal Prosecutor on the competence to render decisions on how to handle complaints lodged against orders not to conduct an investigation, orders to terminate an investigation, No. A-376/2015 dated 25/06/2015.

<sup>55</sup> Rules on internal organization and operations of the prosecutors’ offices of the Republika Srpska [Official Gazette of RS, Nos. 86/12 and 111/16].

<sup>56</sup> USAID Diagnostic Analysis, 2015 [see here footnote 1]

<sup>57</sup> Criminal Procedure Code of BiH [Official Gazette of BiH, Nos. 03/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29 / 07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13],

this solution, considering that it narrows down the scope for the supervision of POs' work.

It also remains controversial whether, or not, the law enforcement agencies [such as police and tax authorities] have the right to complain against the order not to conduct an investigation, when the agencies act in their capacity of entities authorised to file criminal charges. In practice, different POs have differently applied the provisions governing this issue. Thus, the District Prosecutor's Office in Banja Luka has rejected such complaints as inadmissible while some cantonal POs in the Federation of BiH accepted them as having been filed by the authorised person.<sup>58</sup> In any case, it could be beneficial to make it possible for law enforcement agencies to lodge complaints, particularly in cases of corruption committed to the detriment of the public interest.

According to a survey of attitudes of the professional community conducted under the USAID Diagnostic Study,<sup>59</sup> 50 per cent of respondents among judges believe that the risk of corruption / unethical conduct in the process of handling complaints against negative prosecutorial decisions is low. However, 26 per cent believe it is high, and 13 per cent – very high. The perception among attorneys is a bit different, with 21 per cent thinking that the risk of corruption/unethical conduct in the process of handling complaints against negative prosecutorial decisions is very high, 51 per cent deeming it high and 21 per cent finding it low.

In the interviews carried out under our research, judges and prosecutors tend to agree that there is a lack of transparency regarding negative decisions while the mechanisms to review negative decisions by prosecutors are rather weak.<sup>60</sup>

Although international standards prescribe the need to increase POs' transparency in terms of reporting, as a way of strengthening accountability, there are no available official statistics on the number of complaints received against negative prosecutorial decisions, or their outcomes.

Statistics on the number of complaints against negative prosecutorial decisions or their outcomes are limited and available only in analyses published in specialised publications.

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Criminal Procedure Code of FBiH [Official Gazette of FBiH , Nos. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13, 59/14 ], Criminal Procedure Code of RS [Official Gazette of RS, No. 53/12], Criminal Procedure Code of BD [Official Gazette of BD. No. 33/13].

<sup>58</sup> USAID Diagnostic Analysis, 2015 [see here footnote 1]. The survey included 297 respondents in October 2015 and was conducted by the agency Prizma Istraživanja.

<sup>59</sup> Interview Perić, Branko. Judge of the BiH Court. Project interview, 22/11/2019.

<sup>60</sup> Interview Perić, Branko. Judge of the BiH Court. Project interview, 22/11/2019.

Year	Number and percentage of dismissed complaints	Number and percentage of rejected complaints	Number and percentage of upheld complaints
2011	6 - 2.65%	202 - 89.38%	18 - 7.97%
2012	7 - 2.84%	201 - 81.71%	38 - 15.45%
2013	1 - 0.46%	179 - 82.87%	36 - 16.67%
2014	14 - 4.36%	263 - 81.93%	44 - 13.71%
2015	14 - 4.06%	288 - 83.48%	43 - 12.46%
2016	13 - 3.89%	287 - 85.93%	34 - 10.18%
2017	10 - 3.94%	219 - 86.22%	25 - 9.84%
Total	65 - 3.35%	1,639 - 84.40%	238 - 12.26%

Table 5. Statistics of dismissed, rejected and upheld complaints against orders not to conduct an investigation and against orders to terminate an investigation - the District Prosecutor's Office Banja Luka.<sup>61</sup>

The analysis of data for the District Prosecutor's Office in Banja Luka is very indicative. Statistics show that victims and injured parties were far more likely to file complaints, which is understandable given that the victims are directly affected by a criminal offence or its consequences and have an interest in the prosecution of the perpetrators. Such indicators, however, confront us with the issue of complaints in the cases of large-scale corruption. In those cases, no single individual appears as the injured party, since the damage is done to the public interest or the taxpayers and the public budget. As mentioned earlier on, the law enforcement agencies usually document the offence in such cases. The District Prosecutor's Office in Banja Luka has however rejected the complaints lodged by law enforcement agencies, as inadmissible.

Year	Number and percentage of dismissed complaints	Number and percentage of rejected complaints	Number and percentage of upheld complaints
2011	3 - 2.34%	119 - 92.97%	6 - 4.69%
2012	4 - 3.45%	104 - 89.65%	8 - 6.90%
2013	0 - 0%	85 - 95.51%	4 - 4.49%
2014	5 - 3.36%	125 - 83.89%	19 - 12.75%
2015	5 - 3.27%	140 - 91.50%	8 - 5.23%
2016	4 - 2.82%	129 - 90.85%	7 - 4.93%
2017	5 - 4.50%	98 - 88.29%	8 - 7.21%

Table 3. Statistics of dismissed, rejected and upheld complaints against orders not to conduct an investigation - the District Prosecutor's Office Banja Luka.<sup>62</sup>

Analysing the statistics on the number of rejected and accepted complaints against orders not to conduct an investigation, the mere fact that the number of complaints accepted per year is single-digit raises the question of the effectiveness of this legal remedy.

<sup>61</sup> Based on annual reports of Prosecutor office Banja Luka and Janković, R. Complaint Against Orders not to conduct an investigation, orders to terminate an investigation, Yearbook Faculty of Law Banja Luka 2018.

<sup>62</sup> Ibid.

Year	Number of orders to terminate an investigation	Number and percentage of dismissed complaints	Number and percentage of rejected complaints	Number and percentage of upheld complaints
2011	1193	3 – 3.06%	83 – 84.70%	12 – 12.24%
2012	1110	3 – 2.31%	97 – 74.61%	30 – 23.08%
2013	837	1 – 0.78%	94 – 74.02%	32 – 25.20%
2014	1442	9 – 5.23%	138 – 80.23%	25 – 14.54%
2015	1535	9 – 4.69%	148 – 77.08%	35 – 18.23%
2016	1562	9 – 4.64%	158 – 81.44%	27 – 13.92%
2017	1268	5 – 3.50%	121 – 84.61%	17 – 11.89%

Table 4. Statistics of dismissed, rejected and upheld complaints against orders to terminate an investigation – the District Prosecutor's Office Banja Luka.<sup>63</sup>

If we compare the number of total complaints (both against orders to terminate an investigation and orders not to investigate) to the total number of these orders, we find that the percentage of complaints filed against orders not to investigate is higher than the share of complaints against terminations. In practice, the distinction between the prosecutorial order not to conduct an investigation and the order to terminate investigation is often blurred. In some cases, prosecutors opt for the latter even if they did not initially issue an order to conduct an investigation because orders to terminate investigation carry more credits in performance appraisals.<sup>64</sup>

Year	Number and percentage of dismissed complaints	Number and percentage of rejected complaints	Number and percentage of upheld complaints
2011	6 – 2.65%	202 – 89.38%	18 – 7.97%
2012	7 – 2.84%	201 – 81.71%	38 – 15.45%
2013	1 – 0.46%	179 – 82.87%	36 – 16.67%
2014	14 – 4.36%	263 – 81.93%	44 – 13.71%
2015	14 – 4.06%	288 – 83.48%	43 – 12.46%
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Total	65 – 3.35%	1,639 – 84.40%	238 – 12.26%

Table 5. Statistics of dismissed, rejected and upheld complaints against orders not to conduct an investigation and against orders to terminate an investigation – the District Prosecutor's Office Banja Luka.<sup>65</sup>

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.



Overall, the percentage of 12.26 of accepted complaints against both types of negative prosecutorial decisions, albeit relatively low at first glance, does not speak in and of itself about the effectiveness of this legal remedy. However, if we know this percentage but lack data on the outcome of accepted complaints, we can attempt an assessment of the remedy only by looking into the general statistics on the number of investigations resulting in a final conviction. The assessment of the remedy will undoubtedly be limited. Besides, there is the problem, shown above in Table 2, that the injured parties are seven times more likely to lodge a complaint than the persons who filed criminal charges. In the cases of criminal offences against official duty, or grand-scale corruption offences, in which the injured party is not a single individual, the charges are brought by law enforcement agencies – or, potentially, conscientious individuals or non-governmental organisations – but complaints by the agencies are rejected as inadmissible.

### ***Special Prosecutor Abandons Investigation into Milorad Dodik***

*The Special Prosecutor's Office stated that it had not found evidence suggesting that Milorad Dodik, President and former Prime Minister of Republika Srpska, and the others had abused authority. The abuse was suspected in the case of the construction of the administrative seat of the RS Government, the RS Broadcasting Corporation and a portion of Gradiška – Banja Luka highway, and concerned favouring the Integral Inženjering Corporation that made millions from the deals.*

*The BiH Prosecutor's Office launched the investigation in February 2009 after the State Investigation and Protection Agency (SIPA) had submitted its report on the case. SIPA charged Dodik, six former RS ministers, six officeholders and managers of public companies and the directors of Integral Inženjering Corporation for organized crime, abuse of office, money laundering and tax evasion.*

*SIPA found that the suspects had caused the 115 million BAM loss to the RS budget.*

*Center for Investigative Reporting, December 2011*

<https://www.cin.ba/en/specijalno-tuzilastvo-obustavilo-istragu-protiv-milorada-dodika/>

A study conducted at the level of the Cantonal Prosecutor's Office in the Tuzla Canton over five years (2010-2014) looked at 150 cases in which the order was issued not to conduct an investigation and 150 cases in which the order was issued to terminate an investigation. Of the 150 issued orders not to conduct an investigation, a complaint was lodged in only three cases. None of the three was accepted. In the case of 150 orders to terminate an investigation, a complaint was lodged in six cases, and only one was accepted. The statistics, in this case, are most indicative of the limited effectiveness of this legal remedy.<sup>66</sup>

Considerable challenges arise in practice due to the significant degree of prosecutorial discretion, coupled with the existing legal void and lack of transparency in the process of handling complaints against negative decisions by the prosecutors. For

<sup>66</sup> Tulumović, M. [2016]. The Complaint About Not Conducting The Investigation in Practice Cantonal Prosecutor's Office of Tuzla Canton. *Annals of the Faculty of Law in Zenica*, 9 [17], pp. 299-318.

example, a prosecutor who issues a negative decision may not take into account all the evidence collected and elaborate properly on it when making a decision. The authorized person handling the complaint against such a decision will often have access only to the decision and the evidence listed in it. The insight thus limited significantly undermines the relevance of the complaint as a legal remedy against negative prosecutorial decisions.<sup>67</sup>

### **Your Very Own Prosecutor**

*Prosecutor Džemal Karić is accused of working on behest of Alija Delimustafić, a businessman and wartime minister of internal affairs of the Republic of Bosnia and Herzegovina (BiH), in court cases against Delimustafić's brothers Enver, Mirsad and Hajrudin.*

*In one case, Karić unlawfully provided legal advice to the opposing defendants' attorney, while in two other criminal cases he helped Delimustafić's brothers avoid long-term prison sentences, which allowed their firms to keep illegal gain worth millions.*

*Together with the attorney and expert witness, Karić helped usher a retrial of the convicted Delimustafić brothers, only to drop the prosecution later, which resulted in dismissal of the cases.*

*During the investigation, Karić said that Delimustafić had paid him 5,000 BAM for his services.*

*Center for Investigative Reporting, March 2020*

<https://www.cin.ba/en/tuzilac-za-pocastiti/>

## **2.3. Rules on *ex parte* communication with judges**

Relevant international and regional standards of judicial conduct and ethics emphasize the importance of impartiality of judges. In that regard “the principle of impartiality generally prohibits private communications between the judge and any of the parties or their legal representatives, witnesses or jurors.”<sup>68</sup> Furthermore, “not only must the Judge be impartial, he must be seen by all to be impartial.”<sup>69</sup>

<sup>67</sup> USAID Diagnostic Analysis, 2015 [see here footnote 1]

<sup>68</sup> The Bangalore Principles of judicial conduct, 2002, available at: [https://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)

<sup>69</sup> *The Judges' Charter in Europe* adopted on March 20, 1993 in Wiesbaden (Germany) by the European Association of Judges.

### ***A Neighbourly Deal between A Judge and A Convict***

*A summer house near the natural reserve of Bijambare changed three owners in two years – Vladimir Špoljarić, a judge at the Cantonal Court in Sarajevo; Esed Radeljaš, a politician convicted of fraud; and Nedžad Kapetanović, the former attorney general of Novi Grad municipality in Sarajevo.*

*Špoljarić and Kapetanović would decide on Radeljaš's fate before they signed a property deal with him: Špoljarić signed an order that erased Radeljaš's criminal record when the statute of limitation on the case had expired. Kapetanović was involved in an administrative case that resulted in the state paying a million BAM of compensation to Radeljaš.*

*When asked why he had not stopped the sale of the house when he had realized who the buyer had been was, judge Špoljarić replied that he had done nothing illegal: "What would you have done? There we were, all done. I was in a hurry to sell it, you see," said Špoljarić. The judge also admitted that the contract stated a price lower than the sum that he had got paid in reality – for reasons of tax evasion.*

*Center for Investigative Reporting, December 2015*

<https://www.cin.ba/en/komsijski-dogovor-sudije-i-osudenika/>

Following international standards, the current legislation expressly prohibits *ex parte* communication. The Law on HJPC provides that the following constitutes disciplinary offences: "a patent violation of the obligation of proper behaviour towards parties in a proceeding, their legal representatives, witnesses, or other persons" and "engaging in inappropriate communications with any parties to a proceeding or their representatives".<sup>70</sup> According to the Code of Ethics for Judges, judges should be mindful that their communication with the parties to the proceedings and other persons raises no doubt as to their independence and impartiality. The judges must refuse every attempt by the parties to the proceedings to have an *ex parte* communication with them, keeping this prohibition in mind even when it appears that *ex parte* communication would be more efficient and practical.<sup>71</sup> The Code of Ethics is advisory and serves as guidance.

In 2018, the Office of Disciplinary Counsel (ODC) registered 895 complaints or 16.9 per cent fewer than in 2017. Complaints on the treatment of parties in proceedings by judge constitute 8% of the total number of complaints. The ODC initiated 33 disciplinary proceedings in 2018, while three initiated proceedings referred to the treatment of parties in proceedings by a judge or a prosecutor. Most disciplinary proceedings were initiated against judges due to a disciplinary offences "neglect or careless exercise of official duties" [10 of the total number of proceedings].

In 2018, a total of 30 proceedings initiated in 2016, 2017 and 2018 were completed. Disciplinary liability was established in 27 proceedings. Disciplinary liability of judges was most commonly found for the following disciplinary offences: neglect or careless exercise of official duties [12 judges], unjustified delays in issuing decisions or any other act related to the exercise of judicial functions, or any other repeated disregard

<sup>70</sup> Law on HJPC BiH [Official Gazette of BiH, Nos. 25/04, 93/05, 48/07 and 15/08].

<sup>71</sup> Code of Ethics for Judges [Official Gazette of BiH, Nos. 13/06, 24/15, 94/18].

of the duties of the judicial function [4 judges], behaviour inside or outside the court that demeans the dignity of a judge [5 judges].

### ***Disciplinary Sanctions Against Judges and Prosecutors: Sabira Sokolović***

*Disciplinary Commission of High Judicial and Prosecutorial Council publicly reprimanded judge Sabira Sokolović of the Municipal Court in Sarajevo, because of her ex parte meetings. A photo from her undisclosed meeting with a party appeared on Facebook.*

*Center for Investigative Reporting, July 2019*

<https://www.cin.ba/disciplinske-kazne-protiv-sudija-i-tuzilaca/>

## **2.4. The role of clerks and other staff in the judiciary and checks on their behaviour**

Professional associates assist judges and prosecutors and cannot independently handle cases, except as per authorisation and under direct supervision. Neither the role nor the position of officers (“professional associates”) and advisors is comprehensively regulated in the judicial system of BiH. The RS Law on Courts stipulates that professional associates are recruited via a public vacancy announcement published by the court president.<sup>72</sup> The chief prosecutor selects professional associates in the prosecutors’ offices in RS for a term of up to six years.<sup>73</sup> Candidates are selected via the process of competition.

In the judicial institutions at the state level, professional associates and advisors are appointed by the court president or chief prosecutor. In BD BiH, professional associates are appointed by the BD Judicial Commission. They have no authority to independently decide on how to handle cases.

In FBiH, professional associates in municipal courts are selected by the HJPC. In contrast, other professional associates and advisors in courts and prosecutors’ offices are selected on a competitive basis following a public call published by the FBiH Civil Service Agency. The court president/chief prosecutor makes the final decision on the appointment. The selected candidates acquire the status of civil servants. Professional associates in municipal courts in FBiH can act independently in small-value disputes, non-contentious and enforcement proceedings. They implement the procedure in full and take judicial decisions, and their performance is appraised in the same way as that of judges.<sup>74</sup>

The question of disciplinary liability of professional associates is not uniformly regulated either. Disciplinary liability of professional associates appointed by the HJPC

<sup>72</sup> Law on Courts of RS [Official Gazette of RS, No. 37/12].

<sup>73</sup> Law on Prosecutors’ Offices of RS [Official Gazette of RS, Nos. 55/02, 85/03, 115/03, 37/06 and 68/07]

<sup>74</sup> Law on Courts in FBiH [Official Gazette of FBiH, Nos. 38/05, 22/06 and 63/10, 72/10, 7/13, 52/14]

[in FBiH] is established in accordance with the rules that are applied to judicial office holders, before the Office of the Disciplinary Counsel [ODC], while professional associates in RS and BD BiH are held to account in accordance with the rules applicable to civil servants. Disciplinary liability of professional associates within BiH judiciary is determined according to the rules applicable to employees of the institutions of BiH.

The role and status of professional associates vary significantly in different European jurisdictions.<sup>75</sup> However, harmonisation of their status within BiH, that would be based on the principles of merit and promotion of competitiveness in recruitment as well as an appropriate appraisal of their performance, would undoubtedly be of immense importance for the functioning of the judiciary.

## 2.5. Whether judges sit in panels or decide alone

International standards usually recommend adjudication by single judges “wherever the seriousness of the offence allows”. In practice as well there seems to be a trend towards more significant role by single judges, although the dividing line [between single judge and panel] differs considerably between countries.<sup>76</sup>

Pursuant to the Criminal Procedure Codes, the Panel of the Court’s Criminal Division composed of three judges adjudicates in the first instance. An individual judge tries all criminal cases for which the law prescribes the principal punishment of a fine or an imprisonment sentence of up to ten years.<sup>77</sup> According to the law, the preliminary proceeding judge and the preliminary hearing judge are authorised to make appropriate procedural decisions at certain stages of the proceedings.

## 2.6. The functioning of the case management system

Concerning the automatic allocation of cases, the Venice Commission states that in addition to the existence of objective pre-established parameters for allocation of cases, the allocation process should also be subject to review. The absence of such

<sup>75</sup> Summary of the responses to the questionnaire for the preparation of the CCJE Opinion No. 22 [2019] on “The role of court clerks and legal assistants within the courts and their relationships with judges” available at: [https://rm.coe.int/summary-of-the-responses-to-the-questionnaire-for-the-preparation-of-o/168093f579#\\_ftnref1](https://rm.coe.int/summary-of-the-responses-to-the-questionnaire-for-the-preparation-of-o/168093f579#_ftnref1)

<sup>76</sup> The Council of Europe, Recommendation No. R [87] 18 of the Committee of Ministers [see here footnote 48]

<sup>77</sup> Criminal Procedure Code of BiH [Official Gazette of BiH, Nos. 3/03, 32/03 - correction, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 29/07, 53/07, 58/08, 12/09, 16/2009, 53/09, 93/09, 72/13 and 65/18], Criminal Procedure Code of RS [Official Gazette of RS, Nos. 53/12, 91/17 and 66/18], Criminal Procedure Code of FBiH [Official Gazette of FBiH, Nos. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09]

rules could easily lead to abuse which may jeopardise the internal independence of the judiciary.<sup>78</sup>

The Law on the High Judicial and Prosecutorial Council provides that courts and POs can introduce automated case-tracking and registration systems only after obtaining the prior approval from the HJPC.<sup>79</sup> In this regard, the HJPC adopted rules on automated case management in courts and POs.<sup>80</sup> The allocation of cases is done automatically according to pre-provided parameters. In most courts and POs, the automated case management system is operational, but there are a few POs where the system has not yet taken hold.<sup>81</sup> Reassignment of cases is allowed, but it may be performed only by the chief prosecutor / court president, on condition that they provide a written reasoning for each reassignment, and mandatorily file them into TCMS / CMS.<sup>82</sup>

According to the response received from the Prosecutor's Office of BiH in the course of this study, no statistical record is kept of the number of reassigned cases.<sup>83</sup> The interviews of judges and prosecutors carried out for this research confirm the common practice of reassigning cases without appropriate reasoning and records-maintenance. The interviews also suggest that the problem of reassigning cases without appropriate reasoning and keeping of records is more common in POs.<sup>84</sup>

According to a survey of attitudes of the professional community conducted under the already cited USAID diagnostic study,<sup>85</sup> 19 per cent of the respondents in POs [prosecutors and professional staff] strongly agree that the allocation of cases among prosecutors is clear and transparent, while 39 per cent somewhat agree with that statement. Twenty-three per cent of the respondents strongly disagree that the allocation of cases among prosecutors is clear and transparent, and 19 per cent somewhat disagree with that statement. Among the respondents in courts [judges and professional staff], 28 per cent strongly agree that reassigning of cases is always done for justified and legitimate reasons, while 38 per cent somewhat agree with that statement.<sup>86</sup>

<sup>78</sup> CDL-AD[2014]031-e, Joint Opinion of the Venice Commission and the Directorate of Human Rights [DHR] of the Directorate General of Human Rights and the Rule of Law [DGI] of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, adopted by the Venice Commission at its 100th Plenary Session [Rome, 10-11 October 2014].

<sup>79</sup> Law on HJPC BiH [Official Gazette of BiH, Nos. 25/04, 93/05, 48/07 and 15/08]

<sup>80</sup> Rules for case management in courts [CMS] [Official Gazette of BiH, No. 04/16], Rules for case management in prosecutors' offices [TCMS] [Official Gazette of BiH, Nos. 04/16, 37/16, 84/16 and 40/17]

<sup>81</sup> USAID Diagnostic Analysis, 2015 [see here footnote 1]

<sup>82</sup> *Ibid.*

<sup>83</sup> Decision of the Prosecutor's Office of BiH, No. A-I\_ZSPI-15/19

<sup>84</sup> Interview Perić, Branko. Judge of the BiH Court. Project interview, 22/11/2019; Project interview 18/11/2019. The interviewed person requested both personal and institutional anonymity.

<sup>85</sup> The survey included 297 respondents in October 2015 and was conducted by the agency Prizma Istraživanja.

<sup>86</sup> USAID Diagnostic Analysis, 2015 [see here footnote 1]

Furthermore, there is no proper procedure to review the process, which leaves room for possible abuse. The media regularly report about the practice of case reassignment, which is especially common in POs.<sup>87</sup>

### **How Reassigning Works**

*During 2017 and 2018, Sarajevo Canton Prosecutor's Office filed three indictments on organized crime charges against lawyers, judges, court clerks and court couriers. Prosecutors found that some court clerks in the Municipal Court in Sarajevo had got around a computer system used to assign cases randomly in order to prevent judges from hand-picking them.*

*According to one of the indictments, clerk Tanja Jović took money from lawyer Ismet Hamzić to assign his cases to judge Milena Rajić. Jović did this in cahoots with another clerk who would temporarily turn off the automatic assignment of cases for all judges except Rajić. Jović would use that interval to import litigation manually into the CMS system. This way Hamzić's cases ended up with his favourite judge who would prioritize them over all other cases, as the indictment stated.*

*Center for Investigative Reporting, May 2019*

<http://imovinapoliticara.cin.ba/imovina-sudija-i-tuzilaca/>

## **2.7. Complexity of proceeding<sup>88</sup>**

The complexity of proceedings may concern questions of fact as well as legal issues, or both. Complexity can be [among other factors] due to: [i] the nature of the facts that are to be established [large amounts of evidence that have to be presented], [ii] the number of accused persons and witnesses, [iii] international elements, [iv] the joinder of the case to other cases, [v] the intervention of other persons in the procedure, [vi] a high level of public interest.<sup>89</sup>

An aspect to be considered when it comes to dealing with complex cases is the motivation of judges and prosecutors. Dealing with complex cases is time-consuming and very often associated with some degree of risk, particularly in corruption cases, since persons involved in corruption possess political power, influence and money. On the other hand, in existing appraisal system judges and prosecutors are not given any performance credit for dealing with complex cases. Furthermore, lengthy procedures

<sup>87</sup> Ibid. The survey included 297 respondents in October 2015 and was conducted by the agency Prizma Istraživanja.

<sup>88</sup> Generally speaking, the more complex the proceedings – the more instances and opportunities for the power groups to intervene in individual cases.

<sup>89</sup> Kuijter, M., "The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings", Human Rights Law Review, Oxford University Press 2013

in complex cases could result in a lower performance score.<sup>90</sup> Therefore, it is pragmatic and less risky to work on more straightforward cases and achieve the required performance standards.<sup>91</sup>

In the interview done for this study, a judge of the state court confirmed that the complexity of court proceedings creates more opportunities for inappropriate influence on the proceedings. The presentation of illegally obtained evidence, orders/warrants lacking reasoning and twisted interpretation of justice by judges are the main manifestations of the problem.

Criminal investigations are particularly prone to inappropriate influence and criminal conduct.

Complex cases often require relevant expertise in order to be resolved successfully. Adequate access to expert knowledge is ensured to the greatest extent possible through expert witness testimonies. International standards emphasise that expert witnesses should have the appropriate competence and exercise impartiality in their work.<sup>92</sup> Expert witness testimony is used in the criminal procedure when, in order to establish or evaluate some important facts, it is necessary to obtain an expert opinion which requires specialised knowledge and professional skills of an expert in the relevant profession. Expert witness testifies as per the orders of the prosecutor's office or the court. The testimony can be conducted in the investigation and trial phase of the proceedings.<sup>93</sup>

Laws on Expert Witnesses of RS and FBiH<sup>94</sup> and the Rules on conditions for performing expert witness tasks of BD govern the following: the conditions for performing expert witness tasks, the procedure for appointment and dismissal of expert witnesses, the procedure for entry into and deletion from the list of expert witnesses, the rights and obligations of persons performing expert witness tasks. While these three pieces of legislation similarly regulate the aforementioned matters, at the state level there is no legislation governing the area of expert witness testimony, including their selection and appointment.

At the entity and BD levels, expert witnesses are appointed on the basis of a public call published by the entity justice ministers or the BD Judicial Commission. The jus-

<sup>90</sup> More on performance scores under section 3] Independence.

<sup>91</sup> The USAID/BiH Monitoring and Evaluation Support Activity (MEASURE-BiH), Brief Assessment of BiH Justice Sector, 2018.

<sup>92</sup> EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE [CEPEJ] Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe's Member States Document adopted by CEPEJ at its 24<sup>th</sup> Plenary meeting [Strasbourg, 11-12 December 2014]

<sup>93</sup> Criminal Procedure Code of BiH [Official Gazette of BiH, Nos. 3/03, 32/03 – correction, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 29/07, 53/07, 58/08, 12/09, 16/2009, 53/09, 93/09, 72/13 and 65/18], Criminal Procedure Code of RS [Official Gazette of RS, No. 53/12, 91/17 and 66/18], Criminal Procedure Code of FBiH [Official Gazette of FBiH, No. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09].

<sup>94</sup> Law on Expert Witnesses of RS [Official Gazette of RS, No. 74/17] and Law on Expert Witnesses of FBiH [Official Gazette of FBiH, Nos. 49/05 and 38/08]



tice ministers or the BD Judicial Commission appoint a commission to verify if the candidates have the necessary expertise to perform expert witness tasks and to assess their impartiality and integrity. After completion of the procedure, justice ministers, or court presidents in BD, appoint expert witnesses, based on which a list of expert witnesses is compiled. The Laws stipulate that the list of expert witnesses is not binding for the court or other authority conducting the proceedings or other participants in the proceedings.

The existing legal framework in BiH regarding the work of expert witnesses does not offer adequate guarantees to ensure the integrity of expert witness testimony processes. The very process of appointing expert witnesses fails to ensure that these procedures are implemented on the basis of merit. Furthermore, there is the unresolved matter of ensuring appropriate monitoring and control of the quality of work of expert witnesses. At the state level, as discussed earlier, the work of expert witnesses remains unregulated by an appropriate piece of legislation.<sup>95</sup>

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<sup>95</sup> USAID's Justice Activity: Analysis of the System for Engaging Expert Witnesses in Cases of Corruption and Organized and Economic Crime, December 2017, a document in BiH official languages with Summary and Recommendations in English available at: [https://www.pravosudje.ba/vstv/faces/pdfservlet;jsessionid=bad1d322598f16c470cbe3f910288e6ed00e5f5abbb3439cf6ba7fa2973a86b7.e34TbxyRbNiRb40Rbh4Ob3yLb3z0?p\\_id\\_doc=44910](https://www.pravosudje.ba/vstv/faces/pdfservlet;jsessionid=bad1d322598f16c470cbe3f910288e6ed00e5f5abbb3439cf6ba7fa2973a86b7.e34TbxyRbNiRb40Rbh4Ob3yLb3z0?p_id_doc=44910)



**June 2016**

The Prosecutor's Office launched a new investigation against Ljubo and Bekrija Seferović for failure to render help to an injured person and tampering with evidence; the investigation against Vasvija Seferović was dropped due to the lack of evidence

**June 2016**

Cantonal Court ordered one-month detention for Ljubo and Bekrija Seferović

**August 2016**

Prosecutor's Office filed indictment against Bekrija and Ljubo Seferović

**August 2016**

Cantonal Court confirmed the indictment

**September 2016**

Ljubo and Bekrija Seferović pleaded not guilty

**October 2016**

The trial of Ljubo and Bekrija Seferović began

**March 2017**

The Prosecutor's Office issued a decision to conduct an investigation against several police officers on allegations of police misconduct and the breach of official secrets

**July 2017**

Cantonal Court in Sarajevo acquitted Ljubo and Bekrija Seferović

**April 2019**

FBiH Supreme Court upheld Prosecutor's Office's appeal in part and ordered a retrial before the Cantonal Court

**September 2019**

BiH Prosecutor's Office opened a case alleging organized crime behind Dženan Memić's death

**January 2020**

Cantonal Court in Sarajevo acquitted Ljubo and Bekrija Seferović following the retrial

**January 2020**

Cantonal Prosecutor's Office announced it would appeal the verdict

**Case Status (as of 17 June 2020)**

- > The Supreme Court of the Federation of BiH will rule on the appeal submitted by the Sarajevo Cantonal Prosecutor's Office against the Sarajevo Cantonal Court's second acquittal of **Ljubo and Bekrija Seferović**.
- > The BiH Prosecutor's Office launched an investigation against several persons on organized crime charges in the case of **Dženan Memić**.

### 3. INDEPENDENCE

The existence of independent and impartial tribunals is at the heart of a judicial system that guarantees human rights in full conformity with international human rights law. The constitution, laws and policies of a country must ensure that the justice system is truly independent of other branches of the State. Within the justice system, judges, lawyers and prosecutors must be free to carry out their professional duties without political interference. They must be protected, in law and practice, from attack, harassment or persecution as they carry out their professional activities in defence of human rights. They should, in turn, be active protectors of human rights, accountable to the public and must maintain the highest level of integrity under national and international law and ethical standards.

In this study, the independence of the judiciary will be considered based on the following indicators:

#### *Rules and regulations*

- Criteria and method of selection and appointment of judges and prosecutors;
- Tenure and career path;
- Salaries and benefits;
- System for evaluation of work of judges and prosecutors (qualitative vs quantitative criteria);
- Job security, conditions and criteria for removal;
- Regulations protecting judges and prosecutors from threats and intimidation.

#### *Practice*

- Prevalence of practices jeopardising the independence of judges and prosecutors.

#### **3.1. Rules and regulations on independence in general**

The UN Basic Principles on the Independence of the Judiciary (UN Basic Principles) posit the requisite of independence in the first Principle: “The independence of the judiciary must be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”<sup>96</sup>

<sup>96</sup> United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August-6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

The Council of Europe's Recommendation [R [94] 12] on the Independence of Judges states that the independence of judges must be guaranteed by inserting specific provisions in constitutions or other legislation. It further states that "[t]he executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges."<sup>97</sup>

The Universal Charter of the Judge [Universal Charter] establishes that "[t]he independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence."<sup>98</sup>

The principle of the separation of powers is the cornerstone of an independent and impartial justice system. The European Court of Human Rights [ECtHR] has reaffirmed that respect for the principle of the separation of powers is an essential principle of a functioning democracy.<sup>99</sup>

Independence, in general terms, refers to the autonomy of a given judge or tribunal to decide cases applying the law to the facts. This independence pertains to the judiciary as an institution [institutional independence] and a particular judge [individual independence].<sup>100</sup> Individual independence means that individual judges are free from unwarranted interferences when they decide a particular case. In other words, institutional independence is not sufficient to guarantee the right to a fair trial unless the individual independence is guaranteed as well.

General criteria to establish if the tribunal is independent, according to the European Court of Human Rights [ECtHR] are: the manner of appointment of its members; term of office; the existence of safeguards against outside pressures; irremovability of judges by the executive; and the question of whether the court or a judge presents "an appearance of independence" ["a court or judge must not only fulfil these objective criteria but must also be seen to be independent"].<sup>101</sup>

The independence of prosecutors differs from that of judges. As the Venice Commission, *inter alia*, noted:

The 'independence' of prosecutors is not of the same nature as the independence of judges. While there is a general tendency to provide for more independence of the prosecution system, there is no common standard

<sup>97</sup> Council of Europe, Recommendation No. R [94]12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 13 October 1994, Principle 2 [b], available at: [https://www.euromed-justice.eu/en/system/files/20090123125232\\_recR%2894%2912e.pdf](https://www.euromed-justice.eu/en/system/files/20090123125232_recR%2894%2912e.pdf)

<sup>98</sup> The Universal Charter of the Judge, approved by the International Association of Judges [IAJ] on 17 November 1999, article 1. Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Chevrol%20v.%20France%22%5D%2C%22itemid%22:%5B%22001-60941%22%5D%7D>

<sup>99</sup> ECtHR, *Chevrol v. France*, judgment of 13 February 2003, appl. No. 49636/99, para. 74. Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Chevrol%20v.%20France%22%5D%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%5D%2C%22itemid%22:%5B%22001-60941%22%5D%7D>

<sup>100</sup> UN Basic Principles, Principles 1-7 [see here footnote 96]

<sup>101</sup> ECtHR, *Campbell and Fell v. United Kingdom*, judgment of 28 June 1984, appl. No. 7819/77 and 7878/77, para. 78 with further references

that would call for it. Independence or autonomy are not ends in themselves and should be justified in each case by reference to the objectives sought to be attained.<sup>102</sup>

States have a duty to ensure that prosecutors can carry out their professional functions impartially and objectively. Unlike with judges, international law does not contain a provision that guarantees the institutional independence of prosecutors. This is so because in some systems prosecutors are appointed by the executive branch of power or are under a certain level of dependency of this power. This arrangement is related to the duty to observe certain orders received from the Government. Regardless of how the relationship between prosecutors and the executive is dealt with in a particular state, States always have a duty to provide safeguards so that prosecutors can conduct investigations impartially and objectively.<sup>103</sup>

### 3.1.1. Constitutional guarantees

There are no explicit guarantees for judicial independence in the BiH Constitution. Existing judicial institutions at the State level – i.e. the HJPC, the Court of BiH and the BiH Prosecutor's Office – are not stipulated for in the BiH Constitution. However, Article II/2 of the BiH Constitution regulates:

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.<sup>104</sup>

Judicial independence is therefore guaranteed by the direct application of the ECHR and its Article 6, the right to a fair trial. Venice Commission, European Commission and other international organisations continue to warn that this lack of explicit constitutional protection of State judicial institutions leaves them at risk of interference from the executive and legislative branches of government.<sup>105</sup> The Venice Commission notes that BiH is not the only country in which a judicial council has been created by ordinary legislation (this is also the case in, for instance, Denmark and Hungary),

<sup>102</sup> Venice Commission, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecutorial Service, para. 86 [see here footnote 47]

<sup>103</sup> UN Guidelines on Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Guideline 4; available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>. Council of Europe, Recommendation No. R(2000)19 of the Council of Ministers, Principle 11 [see here footnote 49]. See also: Consultative Council of European Prosecutors [CCPE], Opinion No. 9(2014) on „European norms and principles concerning prosecutors“, CCPE[2014]4Final, 17/12/2014, this and other relevant CoE documents available at: <https://www.coe.int/en/web/ccpe/independence-accountability-and-ethics-of-prosecutors>

<sup>104</sup> Constitution of Bosnia and Herzegovina available at: <http://www.ccbh.ba/osnovni-akti/ustav/?title=preambula>

<sup>105</sup> Venice Commission, Opinion on Legal Certainty and the Independence of the Judiciary in BiH, para. 100, Strasbourg 18 June 2012, CDL-AD[2012]014 available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\[2012\]014-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD[2012]014-e) and Opinion on the Draft Law on HJPC of BiH, para. 127, Strasbourg 24 March 2014, CDL-AD[2014]008 available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\[2014\]008-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD[2014]008-e)

but that “an explicit constitutional basis would facilitate the role of the HJPC as the guarantor of the independence of the judiciary.”<sup>106</sup>

In contrast, the status and independence of judicial institutions at the entities' level is guaranteed in the Constitutions of the two Entities, Federation of BiH (FBiH)<sup>107</sup> and Republika Srpska (RS).<sup>108</sup>

The Constitution of BiH provides no guarantees regarding the autonomy and independence of prosecutors either. Nor is there any reference to prosecutors' services in FBiH Constitution, other than a reference to the HJPC duty to ensure “autonomy, independence, impartiality, professionalism and efficiency of judiciary and prosecutor's function in the Federation.”<sup>109</sup> The Constitution of Republika Srpska, on the other hand, guarantees that “public prosecution is an autonomous state body.”<sup>110</sup>

### 3.1.2. Legislative guarantees

The Law on High Judicial and Prosecutorial Council of BiH [Law on HJPC]<sup>111</sup> provides that the HJPC has the task of ensuring the maintenance of an independent, impartial and professional judiciary.<sup>112</sup> The Entities' Laws on Courts<sup>113</sup> also provide guarantees for judicial independence from both the legislative and executive branches by regulating that “no one shall influence the independence and impartiality of courts in their adjudication.”<sup>114</sup>

As to the legislation that governs the organisation and functioning of the prosecutor's offices in BiH, the situation is quite complicated. There are 15 laws on prosecutors' offices: the one at BiH level establishing the Prosecutor's Office of BiH; the Federation Law establishes the Prosecutor's Office of FBiH, whereas ten Cantonal laws establish Prosecutor's Offices in each of the Cantons. In RS, the Law on Public Prosecutor's Offices in RS establishes the Prosecutor's Office of RS and six District Prosecutor's Offices. In addition to this, there had been the Special Prosecutor's Office for Prevention of Organised and Most Severe Forms of Economic Crimes [Special Prosecutor's Office], but it ceased to exist in 2016.<sup>115</sup>

<sup>106</sup> Ibid, CDL-AD[2014]008, para. 24 [see here footnote 105]

<sup>107</sup> Article IV.C.4[3] of the FBiH Constitution [Amendment LVIII], available only in BiH official languages at: <https://www.predstavnickidom-pFBiH.gov.ba/bs/page.php?id=103>

<sup>108</sup> Article 121[2] of RS Constitution, available only in BiH official languages at: [https://www.narodnaskupstinars.net/sites/default/files/upload/dokumenti/ustav/lat/ustav\\_republike\\_srpske.pdf](https://www.narodnaskupstinars.net/sites/default/files/upload/dokumenti/ustav/lat/ustav_republike_srpske.pdf)

<sup>109</sup> Article IV.C.4[4] of the FBiH Constitution [Amendment LVIII] – see here footnote 107

<sup>110</sup> Article 128 of RS Constitution [see here footnote 108]

<sup>111</sup> Official Gazette of BiH No. 25/04, 93/05, 15/08 and 48/07; official text of the Consolidated Law on HJPC available at: [https://www.pravosudje.ba/vstv/faces/pdfservlet?p\\_id\\_doc=14047](https://www.pravosudje.ba/vstv/faces/pdfservlet?p_id_doc=14047)

<sup>112</sup> Law on HJPC, Art. 3 [see here footnote 111]

<sup>113</sup> The Law on Courts in the Federation of Bosnia and Herzegovina, Official Gazette of FBiH No. 38/05, 22/06 and 63/10 and The Law on Courts in the Republika Srpska, Official Gazette of RS No. 37/12, 44/15 and 100/17

<sup>114</sup> Ibid, Art. 3 of both Laws

<sup>115</sup> “Specijalno tužilaštvo RS više ne postoji”/RS Special Prosecutor's Office Is No More, 01/07/2016. Available only in BiH official languages at: <https://www.atvbl.com/specijalno-tuzilastvo-rs-vise-ne-postoji>

In Brčko District BiH, the Law on the Prosecutors' Office of BD BiH established the Prosecutors' Office of Brčko District. All these legislations guarantee the autonomy of Prosecutors' Offices.<sup>116</sup>

### 3.1.3. In practice

It is quite unfortunate that neither the constitutions nor the legislation define what "independence" is. Moreover, they do not provide for specific safeguards or measures to ensure the independence of judiciary and autonomy of prosecution in practice, particularly in relation to outside pressures that judicial institutions are subjected to [more about that here in the section on the Prevalence of Outside Corruption Pressures].

On the other hand, however unfortunate the lack of regulations may be, it is not the main obstacle to the independence of the judiciary. The Constitution of BiH clearly states that BiH "shall operate under the rule of law" [Article 1/2 of BiH Constitution], and independence of the judiciary is an element of the rule of law. Besides, as already pointed out, judicial independence is strongly and explicitly guaranteed through the direct application of the ECHR and its Article 6, provided for in Article 11/2 of BiH Constitution. The Law on HJPC also tasks the HJPC with ensuring the maintenance of an independent, impartial and professional judiciary. What is lacking, however, is a strong HJPC that is able to perform this task effectively [more about that under the section on the Prevalence of Outside Corruption Pressures]. The discrepancy between the law and practice is what undermines the independence of the judiciary. Judges and prosecutors who were interviewed for this study mostly agree that the entity legal framework guarantees the independence of the judiciary. It is in practice that the judiciary encounters numerous problems which compromise its independence. Some of the interviewees mentioned the following problems: informal internal requests for a specific action in a case, hierarchical pressure, media pressures, "personality traits and character of judicial officials", etc.

#### ***From interviews***

Legal framework pertinent to independence of the judiciary in BiH is at the highest level. Hierarchical influence is generally present in judicial profession, especially in courts such as the Court of BiH, which has appellate jurisdiction over the cases that were previously tried in the first instance proceedings. [*Perić, Branko. Judge of the BiH Court. Project interview, 22/11/2019*]

... difficulties [related to independence] are evident in practice. Those ... include informal requests on specific action in some cases, both by internal players such as supervisors, and from the outside, i.e. by law enforcement agencies. [*Project interview, 18/11/2019. Interviewed person requested both personal and institutional anonymity.*]

Personality traits and character of judicial officials heavily impact their independence. [*Tica, Senad. Judge of the Supreme Court of RS. Project interview, 20/12/2019*]

<sup>116</sup> E.g. Article 2 of the BiH Law on Prosecutor's Office [Consolidated text of the Law in "Official Gazette of BiH" No. 49/09]; Article 1 of the FBiH Law on Federal Prosecutor's office ["Official Gazette of FBiH" No. 19/03]; and Article 2 of the Law on Public Prosecutors' Offices in RS ["Official Gazette of RS" No.69/16]



In the light of these observations, it appears that insisting on amendments to the BiH Constitution in order to ensure judicial independence is not dealing with the crux of the matter. It is also a politically impossible task in the current political circumstances in BiH which should not be at the top of any recommendations that seek to strengthen the independence of the judiciary. As an illustration, the European Court's of Human Rights judgment in *Sejdić and Finci v. Bosnia and Herzegovina* case,<sup>117</sup> the implementation of which requires constitutional changes, has not yet been implemented even though it has been eleven years since the judgment was delivered.

### 3.2. Criteria and methods of selection and appointment of judges and prosecutors

In order to guarantee the independence and impartiality of the judiciary, international law requires states to appoint judges transparently and based on the strict selection criteria. There are two crucial issues related to the appointment of judges. First is clear selection criteria based on merit. There is no agreement in international law as to the method of appointment, and a certain degree of discretion is left to individual states, provided that the selection is always based on the candidates' professional qualifications and personal integrity. Second is the importance of both the body in charge of appointing members of the judiciary and the procedure to be followed. International standards do not explicitly determine which body within a state should have the power to appoint judges or the exact procedure to be followed. Nevertheless, any appointment procedure must guarantee judicial independence, both institutional and individual, as well as impartiality, both objective and subjective.

International standards require that all decisions concerning the professional career of judges should be based on objective criteria, and the selection and appointment of judges should be based on merit, concerning qualifications, integrity, ability and efficiency.<sup>118</sup>

Appointment of judges and prosecutors in BiH is regulated in the Law on HJPC and its Book of Rules. The Law on HJPC prescribes general criteria for the selection and appointment of judges,<sup>119</sup> including the criteria of professional standing in Article 22 that stipulates that judges and prosecutors "shall be individuals possessing integrity, high moral standing, and demonstrated professional ability with the appropriate training and qualifications."

<sup>117</sup> Judgment of 22 December 2009, appl. Nos. 27996/06 and 34836/06; available for download at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22SEJDI%20AND%20FINCI%22%2C%22itemid%22:%5B%22001-96491%22%5D%7D>

<sup>118</sup> See: UN Basic Principles, Principle 10 [see here footnote 96]; CoE, Rec. [94]12, Principle I.2 [see here footnote 97]; Universal Charter of the Judge, approved by the International Association of Judges [IAJ] on 17 November 1999, Article 9, available at: <https://www.iaj-uim.org/universal-charter-of-the-judges/>; European Charter on the statute for judges, Council of Europe, DAJ/DOC [98 ]23, operative paragraph 1.6, available at: <https://rm.coe.int/16807473ef>

<sup>119</sup> Law on HJPC, Article 21 [see here footnote 111]

The Law on HJPC also provides for specific criteria for the appointment of judges and court presidents to the Court of BiH [Article 23], Supreme Courts of Entities [Article 25], Appellate Court of Brčko District BiH [Article 26], District Courts of RS and Cantonal Courts of the FBiH [Article 27] and Basic Courts of RS and the Brčko District BiH and Municipal Courts of FBiH [Article 28]. Also, it prescribes specific criteria for the appointment of the Chief Prosecutor, Deputy Chief Prosecutors and Prosecutors of the Prosecutor's Office of Bosnia and Herzegovina [Article 29], Prosecutor's Office of the Republika Srpska and Federation Prosecutors Office [Article 30], District and Cantonal Prosecutor's Offices [Article 31] and Chief Prosecutor and Prosecutors of the Prosecutor Office's of Brčko District [Article 32].

The criteria and appointment procedure is regulated in detail in the HJPC's Rules of Procedure.<sup>120</sup> According to Article 46 thereof the ranking of candidates will be based on the following criteria: merit; the ability for legal analysis; ability to responsibly, independently and impartially perform the duties related to the position, previous work experience, professional independence and reputation, behaviour out of office, education and professional training, publications and other professional activities, and "communicativeness and ability to present".

Appointment procedure, as regulated in the Rules of Procedure, has several phases: receiving applications, verification of applications, qualification [written] exam, interview, ranking and proposal of candidates to the HJPC. In the last phase, the nominated Sub-Council that is formed to complete the appointment procedure and is composed of the HJPC members selects candidates and decides whom to invite for an interview. After the interviews, the Sub-Committee recommends to the HJPC the best candidates for appointment.

### 3.2.1. In practice

The participants in USAID's survey recognized the appointment of judges and prosecutors as the most controversial issue in the judiciary of BiH.<sup>121</sup> Although recommended in numerous reports on the judiciary, the more transparent, efficient and merit-based appointment of judges remains an unresolved issue that should be a matter of priority. Improvement of the appointment process is contingent upon the amendment of the Law on the HJPC, the process that has been unsuccessfully underway for several years. One of the main problems is that the whole appointment process has not been transparent, and it is difficult, if not impossible, to analyse how the selection and appointment criteria have been implemented. This lack of transparency is one of the causes of public distrust in the independence of the judiciary, and a considerable potential risk for corruption.

GRECO 2015 Evaluation Report noted that criticisms concerning the lack of a track record of successfully prosecuted cases and convictions, decisions perceived as po-

<sup>120</sup> Available for download, only in BiH official languages at: [https://vstv.pravosudje.ba/vstv/faces/docServlet?p\\_id\\_doc=31245](https://vstv.pravosudje.ba/vstv/faces/docServlet?p_id_doc=31245)

<sup>121</sup> USAID Diagnostic Analysis, 2015, p. 29 [see here footnote 1]

litically motivated, poor prioritization of cases and length of procedures, may all be linked to shortcomings in the appointment and promotion system. It also noted the strong criticism of those interviewed by GRECO evaluation team (GET) regarding the superficiality of the appointment process, lack of transparency and vulnerability to personal and political links – that can often result in inexperienced judges and prosecutors being called on to work on complex cases – and apparent opportunities for subjectivity in interviewing candidates.<sup>122</sup>

Although there have been some efforts by the HJCP to increase the objectivity and transparency of the process, the initial recruitment process still does not place much emphasis on questions of merits, ethics and integrity in the candidates' examination. The ethnicity criterion that has to be taken into account in appointments to judicial and prosecutorial positions further complicates the process and is widely recognized as taking precedence over professional competence in some appointment decisions. Moreover, the ethnicity criterion allows the final appointment to override the results of the tests.<sup>123</sup>

#### **From interviews**

Rules governing election and appointment of judicial officials are only partially well-drafted. There is a legal loophole allowing manipulation and election based on friendly and political criteria, manifested in the 20% weight given to the interview in the process of electing judicial officials. [*Perić, Branko. Judge of the BiH Court. Project interview, 22/11/2019*]

Written test for the election of judges is too extensive and demanding, without a guarantee that candidates who pass it will competently perform judicial function. [*Filipović, Ljiljana. Judge of the Supreme Court of FBiH. Project interview, 24/12/2019*]

Neither regulations nor practice regarding election and appointment of judicial officials are at a satisfactory level in BiH... [the test]... allows for manipulation in scoring, as the benchmarks are not objective. [*Project interview, 18/11/2019. Interviewed person requested both personal and institutional anonymity.*]

In addition, a survey conducted by USAID shows that those “who have experienced the procedure of qualification exam and/or interview, noted that they had not been able to review the test results, implying that they had not been able to check their answers to specific questions for accuracy. They also stressed that they had not been able to find out how they were rated by interviewers, and that they had not been informed of the reasons for the given scores, which is in contravention with the recommendations of the Consultative Council of European Judges.”<sup>124</sup>

<sup>122</sup> GRECO, Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report on Bosnia and Herzegovina, adopted on 4 December 2015, at GRECO's 70th Plenary Meeting, para. 94 [hereinafter: GRECO Evaluation Report on BiH, 2015]. Greco Eval IV Rep [2015] 2E available at: <https://rm.coe.int/16806c4999>

<sup>123</sup> Ibid, paras. 94-95 [see here footnote 122], and Diagnostic Analysis, p. 31 [see here footnote 1]

<sup>124</sup> Diagnostic Analysis, p. 29 [see here footnote 1]

It is quite worrying that the current system allows the members of the HJPC, who come from lower instances and lack adequate qualifications, to evaluate the quality and legal knowledge of candidates who applied to higher judicial instances. The Venice Commission stressed as crucial that colleagues from the same level appoint higher court judges, in order to ensure the independence of the judiciary.<sup>125</sup> The recommendation has never been followed through.

The media have been regularly reporting on the problems in the appointment process of both judges and prosecutors, and in particular, that the candidates are not being ranked solely based on merit. A Justice Report stated in 2015 that

[s]ome of the candidates who were elected as the best possible fits for positions at the Prosecutor's Office of Bosnia and Herzegovina never raised an indictment. Young and without extensive prosecutorial experience, these hires are working on war crimes cases, one of the most complex areas of criminal law. The inexperience and incompetence of judges and prosecutors are some of the major problems discussed in the judicial community.<sup>126</sup>

Cases from 2019 show that non-compliance with the set criteria and procedure for the appointment of judges remains a major problem. E.g. Amir Kapetanović, the former judge of Banja Luka District Court, was ranked the 11<sup>th</sup> after testing on the list of candidates for the position of the judge of the Court of BiH. However, despite his low ranking, HJPC appointed him to that position, without any explanation whatsoever. Dalida Burzić, the former Chief Prosecutor of the Sarajevo Canton, was appointed to the position of the judge in the Court of BiH following her decision not to prosecute an alleged close friend of Milan Tegeltija, the president of the HJPC. Sabina Sarajlija, the former prosecutor in the Prosecutor's Office of the Sarajevo Canton, was appointed to the position of Chief Prosecutor mostly because of a last-minute promotion by Burzić at the very end of her mandate at the same position. The promotion by Burzić put Sarajlija ahead of other prosecutors who applied for the same position.<sup>127</sup>

<sup>125</sup> Venice Commission, Opinion on the constitutional regime of Bosnia and Herzegovina, no. CDL-INF[1998]015, Strasbourg, 1<sup>st</sup> July 1998, Chapter B.1, para. 9, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF\[1998\]015-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF[1998]015-e)

<sup>126</sup> "Problematic Hiring Procedures at HJPC Worry Bosnia's Legal Community", 27/5/2015. available at: <http://www.justice-report.com/en/articles/problematic-hiring-procedures-at-hjpc-worry-bosnia-s-legal-community>

<sup>127</sup> "How HJPC and Tegeltija appoint judges and prosecutors: Sabina Sarajlija should be told to apply", 24/5/2019; available only in BiH official languages at: <https://www.oslobodjenje.ba/vijesti/bih/kako-vstv-i-tegeltija-biraju-sudije-i-tuzioce-treba-sabini-sarajliji-reci-da-se-prijava-na-konkurs-459793>

**From interviews**

Rules and regulations on elections and appointments of judicial officials are well-drafted. The problem lies in their application. Procedures for filling a vacancy at judicial institutions take an unduly long time and this is something the professional community has been warning the HJPC of. [Zadrić, Marin. *Judge of the Cantonal Court in Mostar. Project interview, 11/12/2019*]

Rules and regulations on elections and appointments of judicial officials are not satisfactory. They are, in fact, over-regulated, too complicated and not in line with international standards. Written examination for the first-time election of judicial officials is very demanding – even more than the bar exam ... The interview allows for manipulation in scoring of candidates ... Key issue in the appointment procedure is the value of the interview, which can be used to manipulate ranking of the candidates. [Project interview, 02/12/2019. Interviewed person requested both personal and institutional anonymity.]

The legislation on elections and appointments of judicial officials is not satisfactory, which is manifested in the quality of elected staff. [Filipović, Ljiljana. *Judge of the Supreme Court of FBiH. Project interview, 24/12/2019*]

Main problems with the current practice [of appointments] of judicial officials are the lack of transparency of the procedure and poor quality of elected judicial staff. [Tica, Senad. *Judge of the Supreme Court of RS. Project interview, 20/12/2019*]

There are serious allegations about heavy political influence on the appointment process. E.g. the HJPC appointed Jadranko Grčević to the position of the president of the Basic Court I Brčko though he had had inappropriate contacts with politicians about the dismissal of the Brčko District mayor, and after he had informed politicians about some court cases. ODP initiated disciplinary proceedings against him for harming the dignity of justice office and endangering public confidence in the impartiality and credibility of the judiciary. However, the HJPC's first instance disciplinary commission concluded that the evidence against him had been illegally acquired and dismissed the case. He did receive a written warning, but it was not published, and it is the mildest sanction for a judge who has committed a disciplinary misdemeanour. The ODP appealed the decision, but the second instance HJPC's disciplinary panel rejected it.<sup>128</sup>

In the 2019 European Commission Report, it was noted once again that the system of appointment and career advancement of judges and prosecutors is not sufficiently based on merit, especially regarding presidents of courts and chief prosecutors. It was concluded that the criterion of ethnicity often prevails over merit, which is a source of serious concern and is in conflict with EU principles. It was also suggested that the conditions for the first entry into the judiciary should be different from those applied to transfer and promotion during the career.<sup>129</sup>

<sup>128</sup> Full story by Center for Investigative Reporting [CIN]: „Injustice at the Justice Square“, available at: <https://www.cin.ba/en/nepravda-na-trgu-pravde/>

<sup>129</sup> European Commission, Analytical Report Accompanying the document Communication from the Commission to the European Parliament and the Council Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union, {COM[2019] 261 final}, Brussels, 29.05.2019, SWD[2019] 222 final, p. 32 and 34, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-analytical-report.pdf>

USAID's survey among judges and prosecutors revealed disturbing findings on the appointment process. Slightly more than 50% of the respondents in courts and prosecutors' offices stated that the process of selection, appointment and removal of judges and prosecutors is objective, transparent, fair and independent. As to the criteria for the selection of judges and prosecutors, 53% of the respondents in courts and 61% in prosecutors' offices believed that they were not objective, fair and transparent. Over 70% of the respondents in courts and over 80% in prosecutors' offices believed that an "inadequate appointment system can, to a certain degree, contribute to the occurrence of corruption in the judiciary."<sup>130</sup> The survey among judges and prosecutors in this study shows that they consider both the regulations and practice in the appointment process overall as unsatisfactory. Most of them consider that the critical element of the appointment procedure is the value of the interviews with candidates for a judicial/prosecutorial position, which allows for the manipulation with their rankings.

In addition, several reports stress that the Law on HJPC does not secure the right to appeal the decision on the appointment of judges and prosecutors. As a result, these decisions lack a detailed explanation of the selection of a particular candidate and contain only generic phrases. The absence of a legal remedy against the decision on the appointment is not in compliance with the standards, which require that a body in charge of appointments should secure a satisfactory level of documentation in relation to each candidate, in order to secure a possibility of an appeal to each unsuccessful candidate.<sup>131</sup> This lack of oversight and protection through the appeal's process, combined with other mentioned shortcomings, is one of the factors that could contribute to the occurrence of corruption in the process of appointment to judicial posts.

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<sup>130</sup> Diagnostic Analysis, p. 32 [see here footnote 1]

<sup>131</sup> Venice Commission, Opinion No. CDL\_AD[2014]008, para. 78; GRECO Evaluation Report on BiH, 2015, para. 90 [see here footnote 122]; European Commission 2019 Communication, p.11 [see here footnote 129]

### ***Injustice at Justice Square***

*Jadranko Grčević has presided over the Basic Court in Brčko District since its founding in 2001. HJPC reappointed Grčević to this office even after his surreptitiously recorded conversation with then Brčko Mayor Dragan Pajić had leaked.*

*“Pa, they are sacking me and you’re not answering [my phone calls],” Pajić groaned to Grčević at the beginning of a conversation recorded May 18, 2011. The following day, the Brčko Assembly legislators were discussing the termination of the mayor’s mandate. The mayor and the judge conversed about the balance of political powers and outvoting in the Assembly.*

*“They have all the Bosniaks and that Bogičević and Staka... Now we think that it is, now that it isn’t. We’re not sure if they have Niko Babić.” Pajić talked about Grčević’s friend, legislator Babić. The following morning, on the day he was to take part in the vote on the termination, Babić was called to the Court’s president’s office.*

*In his intercepted telephone conversations, Grčević also talked about ongoing cases. He asked Miron Bura, former director of the Office for Managing Public Property for Brčko government, to receive a friend of his mother’s and talk to her about compensation for some expropriated land.*

*Grčević appeared before the HJPC on account of his conversations but was never sanctioned because the evidence against him was found not to be legal.*

*Center for Investigative Reporting, May 2017*

*<https://www.cin.ba/en/nepravda-na-trgu-pravde/>*

## **3.3. Tenure and career path**

### **3.3.1. Tenure**

One of the essential conditions for judges to retain their independence is that of security of tenure. International standards on the independence of the judiciary establish a number of requirements related to the conditions of service and tenure of judges. States have the duty to guarantee the conditions of service and tenure in their legislation.<sup>132</sup> Judges, whether appointed or elected, shall have guaranteed tenure until their mandatory retirement age or the expiry of their term of office, where such exists.<sup>133</sup> While international standards do not unambiguously state that the life tenure for judges is preferable, as this is inevitably conditioned upon their ability to discharge their functions properly, such tenure provides a strong safeguard for judicial independence.

<sup>132</sup> UN Basic Principles, Principle 11 [see here footnote 96]; Recommendation No. Rec [94] 12 of the Committee of Ministers, Principle I-3 [see here footnote 97]

<sup>133</sup> UN Basic Principles, Principle 12 [see here footnote 96]

As to the prosecutors, it is desirable that they are appointed until retirement.<sup>134</sup> Appointments for limited periods with the possibility of re-appointment bear the risk that the prosecutor might be susceptible to the influence of those who have the authority to reappoint him/her. However, the tenure until retirement is not a *sine qua non* for prosecutors as it is for judges since it depends on the systems set up in different states. Nevertheless, states should take effective measures to ensure that the recruitment of public prosecutors is carried out according to fair and impartial procedures embodying safeguards against any approach which favours the interests of specific groups and excluding discrimination on any ground. States should also take effective measures to ensure that “public prosecutors have reasonable conditions of service such as remuneration, tenure and pension commensurate with their crucial role as well as an appropriate age of retirement and that these conditions are governed by law”.<sup>135</sup>

The principle of irremovability applies to judges but not to prosecutors. Nonetheless, prosecutors should have a possibility to appeal against compulsory transfers.<sup>136</sup>

The term of office for judges and prosecutors, as provided for in the Law on HJPC BiH, is permanent and without probation period which accords with international standards. The mandatory retirement age for judges and prosecutors is age 70.<sup>137</sup> Presidents of all courts are appointed to the mandate of six years and can be re-appointed [the Law does not limit the number of reappointments]. There are exceptions for presidents of Basic (RS and BD BiH) and Municipal (FBiH) courts who are appointed to the mandate of 4 years with a possibility of unlimited reappointments.<sup>138</sup> The mandate of Chief Prosecutors and their Deputies of BiH, RS and FBiH Prosecutors’ Offices is six years, and that of RS District, FBiH Cantonal and BD BiH Prosecutors Offices is five years. They can also be reappointed without limitations.<sup>139</sup>

The Law on HJPC regulates the termination of the office of judges and prosecutors [mandatory retirement age, resignation from office, removal from office as a consequence of disciplinary proceedings or permanent loss of the working capacity to perform his/her judicial or prosecutorial function].<sup>140</sup> The mandate of Court Presidents ends upon expiry of the period for which he/she was appointed. The mandate of Chief Prosecutors and their Deputies terminates upon reaching mandatory age for retirement or upon the expiry of the period for which he/she was appointed. In case of the termination of the mandate of a Court President, Chief Prosecutor or his/her Deputy, he/she shall continue to perform a judicial or prosecutorial function in

<sup>134</sup> Venice Commission, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecutorial Service, para. 50 [see here footnote 47]

<sup>135</sup> Recommendation No. Rec[2000] 19 of the Committee of Ministers, para 5. a) and d) – see here footnote 48.

<sup>136</sup> Venice Commission, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, CDL-AD[2014]042, para. 80, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\[2014\]042-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD[2014]042-e)

<sup>137</sup> Law on HJPC, Art. 90, note 113.

<sup>138</sup> Ibid, Art. 23 and 25-28

<sup>139</sup> Ibid, Art. 29-32

<sup>140</sup> Ibid, Article 88



the same court or prosecutors' office.<sup>141</sup> The Law on HJPC provides for a temporary extension of the mandate of Court President, Chief Prosecutor or Deputy Chief Prosecutor in case that their mandate expired, but only until a new President or Chief Prosecutor is appointed.<sup>142</sup>

In addition, the Law on the HJPC allows for a temporary transfer of a judge to another court of the same or lower instance, but only as an exception from the general rule of their appointment for life. To this end, the Law clearly defines requirements for such temporary transfer, reasoning, procedure, duration of the transfer and consent by the judge. As for temporary transfers of prosecutors, the Law makes a reference to the relevant law on prosecutor's offices for provisions on this matter.<sup>143</sup> Judges cannot be transferred without their consent, except by the HJPC for organizational reasons, up to three months or as a disciplinary sanction.

It can be concluded that judges and prosecutors in BiH enjoy a high level of protection in terms of the guarantee of life tenure and irremovability. The reasons for removal from office as the basis to terminate the term of office are narrowed down only to dismissal by the HJPC as a result of disciplinary proceedings, and cases where medical documents prove that a judge or prosecutor is permanently unfit for work.

### 3.3.2. Career path

Another aspect of tenure refers to the factors that determine promotions. The criteria are similar to those that regulate appointment, i.e. wherever such a system exists, it should be based on objective factors, in particular ability, integrity and experience.<sup>144</sup> The European Charter on the statute for judges [European Charter] contemplates two systems of promotion of judges. One system is based on seniority: the judges are promoted after spending a fixed time at a post (and are still able to discharge their professional duties). The other is a system of promotions based on merit, in which factors such as sex, or ethnic or social origin, or philosophical and political opinions or religious convictions have no role to play. If not based on seniority, a system of promotion must be based "exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, employing objective appraisals performed by one or several judges and discussed with the judge concerned." There are two potential issues here: judges illegitimately barred from promotion, and judges unduly promoted – both can affect the independence of judges. Therefore the European Charter defines the criteria for the promotion exclusively as the qualities and merits observed in the performance of judicial duties through objective assessments.<sup>145</sup>

The Law on HJPC does not regulate the career path of judges and prosecutors. However, the HJPC has the competency to establish the criteria for the evaluation of judg-

<sup>141</sup> Ibid, Article 88 [3]

<sup>142</sup> Ibid, Article 89

<sup>143</sup> Ibid, Art. 50-53

<sup>144</sup> UN Basic Principles, Principle 13 [see here footnote 96]

<sup>145</sup> European Charter, paras 2.1 and 4.1 [see here footnote 118]

es and prosecutors (discussed in more detail under “Evaluation of the work of judges and prosecutors”).

### 3.3.3. In practice

Most judges are subject to yearly performance appraisals carried out by the president of their court, following the new set of criteria adopted by the HJCP in 2018. The results of the appraisals are the determining factor (representing 80% of the overall assessment of the candidate under the previous system) in promotion procedures. The GET heard major criticism of the ineffectual appraisal system that did little to distinguish among candidates. GRECO 2015 Evaluation Report highlighted “the lack of knowledge about actual performance from some appraisers, too great attention paid to numerical data about cases processed rather than qualitative information about the complexity of work, and reluctance to performance manage instead of moving problems on.” Therefore, GRECO recommended “that further steps are taken to improve the performance appraisals (with a priority given to qualitative over quantitative criteria) to both enforce the high ethical and performance standards expected from judges and prosecutors and assist in identifying meritorious candidates for promotion.”<sup>146</sup>

Centar za istraživačko novinarstvo/Investigative Reporting Centre Sarajevo (CIN) emphasized that “according to the European Commission’s recommendations, sanctioned judges and prosecutors should be prohibited from appointments in other judiciary institutions or to positions of the chief prosecutor and presidents of courts.” However, CIN research shows that disciplinary punishments do not make it harder for judges and prosecutors to advance professionally, even though HJPC members may take these punishments into account when deciding on appointments to judicial offices and promotion. For example, a lenient disciplinary sanction did not affect the career of Miroslav Krkeljaš. Having been punished for misconduct in the Municipal Court in Sarajevo, Krkeljaš was afterwards appointed to the position of the FBiH Supreme Court judge. Meanwhile, he was also a judge of the District Court in East Sarajevo.

CIN reporters discovered another five cases of judges and prosecutors who had at some point received some disciplinary measure were promoted and/or reappointed. Some of them, like Slobodanka Kojić, were reappointed as courts’ presidents. Ms Kojić was a judge of Municipal Court in Gradačac. She worked on three criminal cases related to theft, fraud and violent behaviour. Kojić had not concluded the cases timely, and the statute of limitations expired. In 2013, a disciplinary commission punished her by decreasing her salary by five per cent over three months. Regardless of that, four years later HJPC members reappointed her for the second time as the Court’s president.

Disciplinary punishment was also not an obstacle for Jadranko Grčević’s advancement in career. A year after the punishment, HJPC appointed him for the third time as the president of the Basic Court in Brčko District. Grčević was punished with a public reprimand because he commented in the media how prosecutors and police had conducted their cases.<sup>147</sup>

<sup>146</sup> GRECO, Evaluation Report on BiH, 2015, para. 99 [see here footnote 122]

<sup>147</sup> Full story by CIN available at: <https://www.cin.ba/en/blage-kazne-za-greske-sudija-i-tuzilaca/>

These cases signal a strong need to establish clear objective criteria in the Law on HJPC for the promotion of judges and prosecutors to ensure that quality, merit and the impeccable record would become decisive in the decision-making process, in particular when deciding on the promotion to higher judicial positions, and positions of courts' presidents or chief prosecutors.

### 3.4. Salaries and benefits

International standards on judicial independence require that adequate remuneration and pensions are appropriately secured by law.<sup>148</sup>

In BiH, judges' and prosecutors' salaries are regulated by the relevant laws of the State, the Entities and BD BiH.<sup>149</sup> The salaries vary depending on the level of the court, the position in the court and the years of service. Performance appraisals have no impact on judges' or prosecutors' salaries. The laws include a mechanism which ensures harmonization of salaries with the average salary of the relevant pay grade in BiH and set principles according to which salary and other allowances of judges may not be reduced during their term of office. As noted in USAID's Diagnostic Analysis, such financial security "can be an important guarantee of individual independence of judicial officials [although recent surveys show that guaranteed high salaries will not necessarily diminish the appetite of those who accept bribe]." It was also highlighted that how the law regulates the salaries of the judicial officials in BiH

has been a limiting factor during the past several years in terms of possible adjustments of the salaries of judges and prosecutors so they can keep up with changes of salaries in other branches of the authority, and in order to prevent major disproportion between the salaries of judicial officials and of those from the other branches of the authority. This seriously challenges a true political commitment to effective functioning and strengthening of judiciary and genuine fight against corruption. Another point about unequal status of judicial officials has been made primarily with respect to inadequate remuneration of prosecutors of cantonal, and/or district prosecutors' offices. Namely, they receive salaries in the order of the municipal, and/or first instance court officials, while these prosecutors also prosecute cases before cantonal, and/or district courts. Furthermore, different treatment with regard to disbursement of other allowances was also stressed, depending on the level of the authority. There are such differences within the Federation of BiH, in some cantons judges and prose-

<sup>148</sup> E.g. UN Basic Principles, Principle 11 [see here footnote 96]; Recommendation No. R [94] 12 of the Committee of Ministers, Principle III 1[b] – see here footnote 97

<sup>149</sup> Law on Salaries and Other Allowances in Judicial and Prosecutorial Institutions on BiH level [„Official Gazette of BiH“, no. 90/05 and 32/07]; in the Federation of BiH [“Official Gazette of FBiH“, no. 72/05, 22/09 and 55/13]; in Republika Srpska [„Official Gazette of RS“, no. 66/12 and 66/15], and in BD BiH [„Official Gazette of BD BiH“ no. 1/6 and 21/14], all available only in BiH official languages at: <https://vstv.pravosudje.ba/vstv/faces/kategorije.jspx?ins=141&modul=1172&kat=1180&kolona=4632>

cutors receive all allowances, including overtime payment, while in other cantons they do not receive any. Such work conditions are not supportive to the financial integrity of judicial officials.<sup>150</sup>

There has been no analysis of the effects of salary reform in the judiciary, so it cannot be evaluated whether the purpose of the reforms and desired objectives have been achieved. More specifically, it cannot be evaluated if the judicial officials receive salaries proportionate to the income of the members of other branches of the authority. Nor can there be valid assessment if the financial status of officials who perform identical duties is equal across all levels and if there is a balance in the system of remuneration of judges and prosecutors in BiH. However, the shortcomings mentioned in the Diagnostic Analysis could be a contributing factor to the occurrences of corruption in the judiciary.

### **3.5. Evaluation of the work of judges and prosecutors (qualitative vs quantitative criteria)**

International standards state that evaluation of judges must be based on objective criteria that should be varied and comprehensive, including both quantitative and qualitative indicators, in order to allow full and in-depth assessment of the professional performance.<sup>151</sup> Consultative Council of European Judges [CCJE] stressed that the reconciliation of the principle of judicial independence with any process of individual evaluation of judges is difficult, but that the correct balance between the two is crucial. Ultimately, judicial independence must be paramount at all times. It is also necessary that the performance evaluation system strikes a proper balance between quantitative and qualitative indicators.<sup>152</sup>

The Laws on Courts in FBiH, RS and BD set the basic rules for the performance evaluation of judges and court presidents, while the Law on the Court of BiH has no explicit legal basis for the evaluation of judges and the court president. The Laws of FBiH, RS and BD specify that the performance evaluation shall be carried out in accordance with the criteria defined by the HJPC.

In 2018, the HJPC adopted a set of new criteria for the evaluation of judges in BiH

<sup>150</sup> Diagnostic Analysis 2015, p. 17-18 [see here footnote 1]

<sup>151</sup> CCJE, Opinion No. 17 [2014] On the evaluation of judges' work, the quality of justice and respect for judicial independence], paras. 46 and 49[6]: "Evaluation must be based on objective criteria. Such criteria should principally consist of qualitative indicators but, in addition, may consist of quantitative [...]. In every case, the indicators used must enable those evaluating to consider all aspects that constitute good judicial performance." Available at: <https://www.csm.it/documents/46647/0/Opinion+No.+17+%282014%29.pdf/f596c4a8-7019-47e1-9b35-14551977b471>; Also, European Network of Councils for the Judiciary [ENCJ], Minimum Standards regarding evaluation of professional performance and irremovability of members of the judiciary, Report 2012-2013, p. 14, available at: [https://www.encj.eu/images/stories/pdf/workinggroups/final\\_report\\_encj\\_project\\_minimum\\_standards\\_iii\\_corrected\\_july\\_2014.pdf](https://www.encj.eu/images/stories/pdf/workinggroups/final_report_encj_project_minimum_standards_iii_corrected_july_2014.pdf)

<sup>152</sup> Ibid, CCJE Opinion No. 17, paras. 6 and 32

(Criteria for judges)<sup>153</sup>, court presidents and presidents of court divisions in BiH, Chief Prosecutors and their Deputies at all levels and of heads of prosecutorial divisions.<sup>154</sup>

Under the new Criteria, there are three criteria for the evaluation of their work: quantity of the work [0-40 points], statistical quality of decisions [0-30 points] and analytical quality of the work and decisions [0-30 points].<sup>155</sup> The quantity of the work will be measured “against the annual orientation normative and the percentage of the oldest cases resolved.”<sup>156</sup> The indicators for statistical quality of work are the following: percentage of reversed decisions compared to the total number of the upheld, modified and reversed decisions by the higher instance court, and percentage of reversed and modified decisions compared to the total number of cases in which the final decision was issued that allows for a legal remedy at a higher court.<sup>157</sup>

The third criterion, the analytical quality of the work and decisions, includes a number of indicators, such as:

- conformity of the preamble, operative part and reasoning with procedural norms;
- quality of reasoning of the judgment particularly in relation to the proper evaluation of evidence and establishment of facts, legal analysis, consistent argumentation, knowledge of the case law of domestic and international courts, etc;
- ability to present orally and in writing;
- way of communication with the parties of the case, other bodies and associates;
- ability to resolve complex cases;
- preparation for the trial;
- efficiency and avoidance of unnecessary delays;
- timely production and dispatch of decisions; etc.

Another indicator under this criterion is the opinion of the division of the higher court, based on continuing examination of all cases of a particular judge, in which the higher court decided on legal remedies.<sup>158</sup>

In addition to these indicators, the court president will use a list of information resources for the analytical evaluation of the quality of the work and decisions of a particular judge. The resources include:

<sup>153</sup> “Official Gazette of BiH” No. 93/18

<sup>154</sup> Texts of newly adopted Criteria for judges, court presidents, prosecutors and all chief prosecutors are available only in BiH official languages at: <https://vstv.pravosudje.ba/vstv/faces/vijesti.jsp?id=76156>

<sup>155</sup> Criteria for the evaluation of work of judges in BiH, Art. 15.

<sup>156</sup> Ibid, Art. 16

<sup>157</sup> Ibid, Art. 18

<sup>158</sup> Ibid, Art. 19. However, this does not apply to the judges of the Appellate Division of the Court of BiH, Supreme Courts of FBiH and RS and the Appellate Court of BD BiH (evaluation of these judges is regulated in Article 20 of the Criteria for judges.)

- the opinion of the president of the court's division based on his/her continuing analysis of the work of a judge;
- report on the examination of at least four case files in which the final decision on merits was made and in which there was no review on legal remedies (the court president chooses two of these files, and the other two are selected by the judge under evaluation);
- notes by the evaluator, president of the division or a judge mentor that were taken at the hearings or review of the audio record from the hearings of the judge under evaluation and others.<sup>159</sup>

The court presidents evaluate the work of judges in a particular court upon receiving a written opinion of the president of the court division where a particular judge performs his function. The opinion should be drafted after the consultations with the president of a particular panel or a judge mentor.<sup>160</sup>

Court presidents evaluate the work of the presidents of court's divisions while presidents of the immediate higher courts evaluate presidents of the first instance courts. The HJCP evaluates the work of presidents of the Court of BiH,<sup>161</sup> Entities' Supreme Courts and the Appellate Court of BD BiH.<sup>162</sup> Evaluation indicators include the collective court's workload, realization of the plan on resolving of old cases, and organization and managing of the court.

There are also two documents regulating the evaluation of prosecutors: Criteria for the evaluation of the Chief Prosecutor of the BiH Prosecution Office, Federal Prosecutor's Office, and RS Prosecutor's Office and BD BiH Prosecutor's Office (Criteria for the State and Entity Chief Prosecutors) and Criteria for the evaluation of Chief Prosecutors, Deputy Chief Prosecutors and heads of divisions in prosecutors' offices in BiH (Criteria for Chief and Deputy Chief Prosecutors).<sup>163</sup> HJPC evaluates the performance of State, Entities' and BD BiH Chief Prosecutors according to the following evaluation indicators: the collective orientation norm of the Prosecutor's Office, the collective quality of prosecutorial decisions and organization and management of the Prosecutor's Office.<sup>164</sup>

The Federation Chief Prosecutor and RS Chief Prosecutor evaluate the performance of District and Cantonal Chief Prosecutors while the latter officials evaluate the performance of Deputy Chief Prosecutors and heads of divisions in District and Cantonal prosecutors' offices. Evaluation indicators are the following: the realization of the

<sup>159</sup> Ibid, Art. 18

<sup>160</sup> Ibid, Art. 5 and 6

<sup>161</sup> Objections to the evaluation of judges of the Court of BiH have been settled by the BiH Constitutional Court in its Decision U-4/19, 5 July 2019, available in official BiH languages at: [http://www.ustavnisud.ba/dokumenti/\\_bs/U-4-19-1191606.pdf](http://www.ustavnisud.ba/dokumenti/_bs/U-4-19-1191606.pdf)

<sup>162</sup> Criteria for the evaluation of courts' presidents and presidents of courts' divisions (Criteria for court presidents), Article 5, available in official BiH languages at: <https://vstv.pravosudje.ba/vstv/faces/vijesti.jsp?id=76156>

<sup>163</sup> Both available in official BiH languages at: <https://vstv.pravosudje.ba/vstv/faces/vijesti.jsp?id=76156>

<sup>164</sup> Ibid, Criteria for the State and Entity Chief Prosecutors, Art. 14.

orientation norm, realization of the Plan on resolving the old cases, analytical grade and statistical quality of decisions.<sup>165</sup> The analytical grade is based on the following elements: the existence of legal elements in the prosecutorial decisions; ability to establish decisive facts that are relevant for the prosecutorial decisions; ability to resolve complex cases; efficiency in the decision-making process and adherence to deadlines prescribed by law; ability to organize and efficiently conduct an investigation in a proactive manner; and professional level of the prosecutorial decision, demonstrated legal knowledge and use of legal remedies.

### 3.5.1. In practice

The previous evaluation system was criticized for significant reliance on quantitative rather than qualitative indicators.<sup>166</sup> The purpose of performance evaluation of judges and prosecutors was linked to the promotion system and appointment to other positions in the judiciary. However, it was questionable to what extent the performance appraisal of judges and prosecutors did contribute to improved performance of judicial officials and institutions of the evaluated officials and, ultimately, to the improved performance of the entire judiciary. As stressed in USAID Diagnostic Analysis, “such contribution cannot be expected unless the evaluation process is functionally linked with the mandatory training procedure, and/or another adequate mechanism which can be applied in case of a poor or unsatisfactory performance appraisal.” It was also noted that “the participants in the survey assessed that ‘ignorance prevailed’ and that actions that had been taken or failures made due to ignorance could be perceived as a manifestation of corruption.” Interlocutors believed that this was “a consequence of sudden and illogical appointments of persons without adequate experience to pretty high and specialized positions in the judiciary.”<sup>167</sup>

The new system is in force since 1 January 2019, so it is too early to analyse how well it works in practice. However, it seems that the quantitative indicators still prevail over the qualitative ones. Namely, the quantity of work and statistical quality (which is, in fact, another quantitative indicator) will still be decisive in the performance evaluation of judges, as they constitute 70% of the appraisal. The most important indicator as to the quality of judges, which is the analytical quality, constitutes the remainder of 30%. It remains to be seen if, in terms of the promotion opportunities, this newly established system will continue to favour judges and prosecutors who have been allocated a higher number of relatively simple cases, over their peers who work on complex cases.

The efficacy of judicial and prosecutorial performance is an important factor in the evaluation process. However, it can still encourage quantity versus quality, as was the case under the previous evaluation system. If the focus in practice remains on quantitative indicators, the effect on the performance of judges and prosecutors and their

<sup>165</sup> Ibid, Criteria for Chief and Deputy Chief Prosecutors, Art. 16.

<sup>166</sup> Diagnostic Analysis, p. 37-39 [see here footnote 1]; also: GRECO Evaluation Report on BiH, 2015, para 99 [see here footnote 122]

<sup>167</sup> USAID Diagnostic Analysis, 2015, p. 39 [see here footnote 1]

independence will be detrimental even under the new system.<sup>168</sup> The performance evaluation of prosecutors in particular, as provided for in the Criteria, seems to be a complex exercise, so it will be crucial to monitor how these elements and indicators will be measured in practice and what the results will be.

Most judges and prosecutors that were interviewed for this survey agree that the evaluation system is complicated and based on quota [workload] rather than quality.

### **From Interviews**

Quota-system [workload] should be completely abandoned, as it currently serves only chief prosecutors and presidents of courts, as well as the ministers of justice, boasting about big numbers and results. [*Perić, Branko. Judge of the BiH Court. Project interview, 22/11/2019*]

The new performance evaluation system that the HJPC established is a very demanding and time consuming procedure. Too many criteria and forms for performance assessment ... - as if the purpose of judicial work is to assess and be assessed, rather than decide on cases. The quota [workload] is set far too high... [*Filipović, Ljiljana. Judge of the Supreme Court of FBiH. Project interview, 24/12/2019*]

Due to "chasing the quota", prosecutors at the cantonal level are under pressure to raise nine times more indictments annually than prosecutors of the PO BiH [e.g. for cases of corruption and economic crime]. [*Project interview, 18/11/2019. The interviewed person requested both personal and institutional anonymity.*]

The criteria of performance evaluation should be amended, as well as the scoring method which is focused on mere statistical data rather than qualitative criteria. It is necessary to put an end to trading in influence, which puts focus on personal relations, ethnical affiliation and regional representation. [*Pašić, Džermin. Prosecutor, BiH Prosecutor's Office. Project interview, 11/12/2019*]

A positive aspect of the new system is that higher courts now provide detailed reasoning of the quality of lower-instance courts' verdicts. Shortcomings include blindly following the quota requirements, which has negative repercussions... [*Zadrić, Marin. Judge of the Cantonal Court in Mostar. Project interview, 11/12/2019*]

<sup>168</sup> Ibid, p. 38-39. The Analysis revealed that 59% of the respondents from prosecutors' offices believed that there had been a pattern of delaying certain cases. The causes include external/internal pressures, lack of responsibility, lack of commitment, professionalism and knowledge. As to judges, 50% of the respondents from courts believed that there had been a pattern of delaying certain cases. The underlying causes of such pattern include lack of responsibility, lack of commitment, and tactics of delay until the statute of limitation expired, lack of professionalism and knowledge.



### 3.6. Job security, conditions and criteria for removal

International standards regulate that judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review, but this does not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.<sup>169</sup>

The Law on HJPC provides for the mandatory and discretionary suspension of a judge or a prosecutor. Mandatory suspension is possible only when a judge or a prosecutor is held in pre-trial detention.<sup>170</sup> Discretionary suspension is possible pending criminal, disciplinary or dismissal proceedings against a judge or a prosecutor and if the performance of official functions is impaired because of judge's or prosecutor's mental, emotional, or physical condition.<sup>171</sup>

The Law also prescribes the procedure and a legal remedy – the review of the decision by the Court of BiH. The mandate of a judge or prosecutor is terminated *inter alia* upon his/her removal by the HJPC as a consequence of disciplinary proceedings. It is also terminated if the medical documentation proves that a judge or a prosecutor has permanently lost the working capacity to perform the judicial or prosecutorial function.<sup>172</sup>

The HJPC has a responsibility to receive complaints against judges and prosecutors, conduct disciplinary proceedings against them, determine disciplinary liability and impose disciplinary measures on judges and prosecutors.<sup>173</sup> The disciplinary measure of dismissal can be used only for serious and severe disciplinary offences due to which the offender is deemed unfit or unworthy to continue to hold his/her office and if a judge/prosecutor has permanently lost the working capacity to perform his/her functions.<sup>174</sup> Decisions on dismissal may be appealed before the Court of BiH, but only in the case of a material violation of procedure and/or erroneous application of the law.<sup>175</sup>

#### 3.6.1. In practice

Provisions on the conditions and criteria for the removal and suspension of judges and prosecutors seem to be in accordance with the international standards. There are, however, certain issues related to disciplinary proceedings that should be revisited and resolved. [More about this issue can be found under Section 4 here, on Accountability].

<sup>169</sup> UN Basic Principles, Principles 18-20 [see here footnote 96]

<sup>170</sup> Law on HJPC, Art. 76[1] – see here footnote 111

<sup>171</sup> Ibid, Art. 77

<sup>172</sup> Ibid, Art. 88 [1][e] and [f]

<sup>173</sup> Ibid, Art. 17[4]

<sup>174</sup> Ibid, Art. 59[2]

<sup>175</sup> Ibid, Art. 60[7]

Unlike in the case of judges and prosecutors, the removal of HJPC members has not been clearly defined in the Law on HJPC. One of the reasons for their removal is a “failure to exercise their duties”, that is exercising duties “improperly, inefficiently or in a biased manner”, and “the commission of an act that would make him or her unworthy to perform duties in the Council”. However, these notions are too vague, and can lead to the arbitrary use of the power to dismiss members of the HJPC. The plenary session of the HJPC decides on the dismissal of a member at the proposal of at least one-third of the members or at the proposal of the disciplinary panel by a two-third majority of votes of all members who are present and vote. However, the procedure to determine if alleged violations of official duties were actually committed is not defined. The participants in the UNDP survey stressed that “so far no one was held accountable under the applicable, as they put it, ‘declarative’ provisions.”

Having in mind the strong criticism of the work of HJPC over the last few years, and allegations on their political connections as well as misconduct of certain members, it would be crucial to clearly define the criteria, conditions and procedure for the removal of HJPC members.<sup>176</sup>

### 3.7. Regulations protecting judges and prosecutors from threats and intimidation

International standards require that judges decide matters independently and impartially, free of, *inter alia*, threats and intimidations, direct or indirect.<sup>177</sup> To that end, States should ensure that the laws provide for sanctions against persons seeking to influence judges “in any such manner”.<sup>178</sup> The same standards apply to prosecutors and members of their families.<sup>179</sup>

<sup>176</sup> See e.g. here footnotes: 129-130 re appointment procedures; note 319 re inappropriate behaviour of the HJPC president [about this issue see also *Part 7. Prevalence of Outside Corruption Pressures* in this study, etc. Also, serious concerns about the HJPC were raised in the so-called „Priebe Report“ [see here footnote 2]. It was stated, *inter alia*: „Over the last years, the HJPC has itself become part of the problem. Serious miscarriages of justice have become apparent due to lack of leadership capacity, allegations of politicisation and conflicts of interest, inefficient organization, insufficient outreach and transparency, and, finally, its failure to implement reforms. Public opinion was particularly shaken by corruption allegations against the HJPC President and alleged manipulations of appointment and disciplinary procedures. [...] the HJPC needs serious reform and a radical change of behaviour. [...] Despite a number of practical improvements adopted on the basis of expert peer review missions supported by the Commission, the HJPC did not manage to assert itself as an institution at the service of the judiciary. [...] this incident remains an issue of deep concern in professional circles and among the broad public of the country. [...] The HJPC is often perceived by citizens and even by members of judicial community as a centre of unaccountable power in the hands of persons serving the interests of a network of political patronage and influence,“ paras. 65-68 and further.

<sup>177</sup> UN Basic Principles, Principle 2 [see here note 96]; The Bangalore Principles, Principle 1.1 [see here footnote 68]; Recommendation No. Rec [94] 12 of the Committee of Ministers [see here footnote 97]

<sup>178</sup> Ibid.

<sup>179</sup> The Council of Europe, Recommendation No. Rec[2000] 19 of the Committee of Ministers [see here footnote 48]

In BiH, Criminal Codes (CC) at State, Entity and BD BiH level list several criminal acts related to threats to judges or prosecutors.<sup>180</sup> Some criminal acts can be committed only against judges and prosecutors while others might be committed against any “official person” which, by legal definitions in all criminal codes, includes judges and prosecutors.

CCBiH stipulates only “Obstruction of justice” as a criminal act directed exclusively against judges and prosecutors.<sup>181</sup> Other criminal acts directed against any official person at State level are Assassination [Art. 167] and Kidnapping [Art. 168] of Representative of Highest Institutions of BiH; Preventing Official Person in the Exercise of Official Duty [Art. 241a]; and Attack against Official Persons on Tasks of Security, Detection and Apprehension of Perpetrators of Criminal Offences [Art. 241b].<sup>182</sup>

CC RS<sup>183</sup> provides for criminal acts against judges or prosecutors such as First Degree Murder [Art. 125 (1.8)] and Attack Against a Judge or Public Prosecutor, which includes obstruction of justice [Art. 339]. This is the only law in BiH that prescribes “Violating the Court’s Reputation” as a criminal act [Art. 340].<sup>184</sup>

FBiH Criminal Code<sup>185</sup> proscribes several criminal acts exclusively against judges or prosecutors – Murder [Art. 166(2.e)], Obstructing an official in the Execution of His Official Duties [Art. 358(3)]; Attacking an Official in the execution of Security Duties [Art. 359(1)]; and Coercion of a Judicial Official [Art. 359a].

Criminal Code of BD BiH<sup>186</sup> prescribes only criminal acts against “official persons”. These are: Obstructing Official in Executing Official Duty [Art. 352]; Attack on Official Executing Security Duties [Art. 353]; Participating in Group Preventing Officials in Executing Official Duty [Art. 354]; and Murder [Art. 163].

Protection of judicial functions holders and judicial buildings is within the competences of the Court Police under the laws on court police at each respective level.<sup>187</sup>

<sup>180</sup> Criminal Code of BiH, Criminal Code of FBiH, Criminal Code of Republika Srpska and Criminal Code of BD BiH are available in English at: <https://www.legislationline.org/documents/section/criminal-codes/country/40/Bosnia%20and%20Herzegovina/show>

<sup>181</sup> This criminal act is defined as use of physical force, threats or intimidation to interfere with the exercise of official duties by a judge or a prosecutor in relation to criminal proceedings conducted pursuant to the law of BiH [imprisonment between 1 and 10 years].

<sup>182</sup> CCBiH, Official Gazette of Bosnia and Herzegovina, 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15

<sup>183</sup> Official Gazette of RS, 43//03, 108/04, 37/06, 70/06, 73/10, 1/12, 67/13

<sup>184</sup> This Article reads as follows: „Whoever, during the course of proceedings before the court, holds in contempt a court of law or a judge by exposing them to derision and ridicule or whoever does so in a written submission filed to a court, shall be punished by a fine or imprisonment for a term not exceeding one year.“

<sup>185</sup> Official Gazette of FBiH, 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16 and 75/17

<sup>186</sup> Official Gazette of BD BiH, 33/13 – official consolidated version, 26/16 - amendments to the consolidated 33/13 version

<sup>187</sup> Laws on the Court Police of BiH [Official Gazette BiH, 1/03, 21/03 and 18/13], FBiH [Official Gazette FBiH, 19/96 and 37/04], RS [Official Gazette RS, 98/11 and 57/16] and BD BiH [Official Gazette BD BiH, 19/07, 2/08, 31/11 and 18/18]

### 3.7.1. In practice

Threats to holders of judicial functions have been more often in recent years. According to the report of the FBiH Judicial Police, in 2017, 22 judges and one prosecutor received threats. The HJCP confirmed that, in the same period, the Judicial Police physically protected one prosecutor and two judges on their way to work and back home, within the official premises and outside of their place of residence and work. In the first six months of 2018, the Judicial Police noted ten threats to judges and one to a prosecutor. Since 2016, the Direction for the Coordination of Police Bodies BiH has recorded nine cases related to threats to the prosecutors of the Prosecutor's Office of BiH, President of the Court of BiH, president and vice presidents of HJCP, and Chief Prosecutor of the District Prosecutor's Office in Banja Luka and his deputy.<sup>188</sup> Although the relevant law enforcement agencies were duly informed, perpetrators have never been identified or brought to justice in these cases.<sup>189</sup>

Those who were identified and prosecuted for threatening judges or prosecutors received low sentences. Some cases are still pending. In November 2019 an arrested person admitted that he had threatened a judge of the District Court in Banja Luka, who had sentenced him to eight years of imprisonment for organized crime in relation to drug trafficking. He received a sentence of 15 months of imprisonment due to a plea bargain. The prescribed sentence for this criminal act in the Criminal Code of RS is two to twelve years of imprisonment.<sup>190</sup>

In November 2018, a person was arrested and detained for threatening a judge of the District Court in Banja Luka. The judge was presiding over the trial to the arrested person as the first of seven persons indicted for organized crime related to several robberies.<sup>191</sup> The case is still pending.

In July 2019, a person was arrested and detained for death threats to a public prosecutor who had been working on the case involving the detainee as one of the suspects. He admitted to this, but the trial is still pending.<sup>192</sup>

Although there are legislative guarantees against threats and intimidation to judges and prosecutors, there is a rise in these criminal acts of recently. The examples above, and others, indicate that one of the reasons for the rise is ineffective investigations and trials and/or lenient sentences for those who end up being prosecuted. This ineffectiveness in the prosecution of those threatening judges, prosecutors and their families can be one of the triggers for judicial corruption due to fear.

<sup>188</sup> Available in official BiH languages at: <https://www.oslobodjenje.ba/vijesti/bih/sudijama-se-vise-prijeti-nego-tuziocima-386670>

<sup>189</sup> Available in official BiH languages at: <http://detektor.ba/proslogodisnje-prijetnje-smrcu-sudijama-i-tuziocima-jos-uvijek-nerijesene/>

<sup>190</sup> Available in official BiH languages at: <https://srpskainfo.com/prijetio-smrcu-sudiji-i-njenoj-porodici-djokic-sve-priznao-tuziocima-pa-dobio-minimalnu-kaznu/>

<sup>191</sup> Available in official BiH languages at: <https://www.oslobodjenje.ba/vijesti/crna-hronika/strazivuk-ostaje-u-pritvoru-prijetio-sutkinji-snjezani-kudric-407595>

<sup>192</sup> Available in official BiH languages at: <https://www.oslobodjenje.ba/vijesti/bih/muskarac-uhapsen-zbog-prijetnji-tuziteljici-uputio-joj-prijetnje-opasne-po-zivot-472242>

**From interviews**

Only the Criminal Code of BiH defines obstruction of justice as a criminal offense. Entity-level criminal codes should follow that example. [*Filipović, Ljiljana. Judge of the Supreme Court of FBiH. Project interview, 24/12/2019*]

[From personal experience] ... neither the legislation, nor colleagues or supervisors offered any protection. [*Project interview, 18/11/2019. The interviewed person requested both personal and institutional anonymity.*]

The legislation protecting judicial officials against threats and intimidation is well-drafted. Problems lie with its interpretation and implementation. [*Tica, Senad. Judge of the Supreme Court of RS. Project interview, 20/12/2019*]

## 4. ACCOUNTABILITY

When it comes to international standards in the field, the focus for long remained almost exclusively on strengthening judicial independence. In recent years, however, accountability has been recognized as an essential dimension of work of the judiciary and has been receiving more attention. It is widely understood, however, that this relatively new focus on accountability “is not meant to interfere with their independence.”<sup>193</sup> Although these two key dimensions of the work of the judiciary are now increasingly considered to go hand in hand, devising effective accountability mechanisms for the judiciary that would not compromise independence is a considerable challenge in practice. On the one hand, making judges and prosecutors accountable to external bodies may jeopardize their independence; on the other hand, making them accountable to a body within the judiciary raises concerns regarding the transparency, legitimacy, and objectivity in this context.<sup>194</sup>

Accountability, in this context, has several aspects. First, there is the regular mechanism of accountability within the profession – which includes appeal processes in the case of judges, and complaint procedures for prosecutorial decisions. Second, there is the transparency dimension of accountability, whereby members of the judiciary are required to give reasons for their decisions and actions to the interested parties and to explain their overall activities to the powers of the state and the general public [explanatory accountability]. Third, punitive accountability is about members of the judiciary being held accountable in disciplinary proceedings and, if applicable, in criminal proceedings.<sup>195</sup> It is important to emphasize that “in order to protect judicial independence from undue pressure, great care must be exercised in framing judges’ accountability in respect of criminal, civil and disciplinary liability.”<sup>196</sup>

This dimension of work of the judiciary can be analyzed from two different, but closely related perspectives. The first is accountability as a virtue, which entails a set of established standards of good governance to assess whether accountability is ensured in practice. The second perspective is that of accountability as a mechanism, which emphasizes how accountability functions in a given context and what its effects are.<sup>197</sup> In light of this distinction, it is important to note that, even though this analysis mostly explores accountability as a mechanism, accountability as a virtue is inevitably part of considerations and findings that will be presented. More specifically, however, whereas previous sections dealt, among other things, with issues of *decisional* accountabil-

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<sup>193</sup> Consultative Council of European Prosecutors (CCEP), Opinion No. 13[2018]: Independence, accountability and ethics of prosecutors, 23 November 2018, para. 47. Available at: <https://rm.coe.int/opinion-13-ccpe-2018-2e-independence-accountability-and-ethics-of-pros/1680907e9d>

<sup>194</sup> Greg Mayne, “Judicial integrity: the accountability gap and the Bangalore Principles”, in Transparency International, *Global Corruption Report 2007* [Cambridge: Cambridge University Press, 2007] p. 41.

<sup>195</sup> CCJE, Opinion No. 18 [2015], para. 26, available at: <https://rm.coe.int/16807481a1>

<sup>196</sup> *Ibid*, para. 37.

<sup>197</sup> Mark Bovens, “Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism”, 33 *West European Politics* [2010].

ity, which are related to the actual quality and quantity of work of the judiciary,<sup>198</sup> this section focuses on *behavioural* accountability. The focus on behavioural accountability involves looking in particular at the potential or actual misuse of accountability mechanisms (e.g. simulation of judicial accountability, selective judicial accountability exercised in the function of favouritism and clientelism within the profession).<sup>199</sup>

Following the methodological framework for this analysis, accountability is assessed on the basis of the following indicators:

- *Disciplinary proceedings against judges and prosecutors;*
- *Existence and implementation of applicable ethical codes;*
- *Procedures for withdrawal and recusal*, e.g. whether judge's/prosecutor's withdrawal from a case is mandatory in case of reasonable perception of bias, whether a breach of the obligation to withdraw entails sanctions, and whether a procedure for request of recusal by an interested party exists and includes the possibility to appeal the decision;
- *Regulation of external activities and conflict of interest* – whether and, if so, under what conditions, judges and prosecutors are allowed to undertake other paid or unpaid functions; if and when political functions or positions in companies, sports clubs, arbitration, lawyering, teaching are permitted; and whether information about such activities is recorded and made available to the relevant stakeholders and the public in general;<sup>200</sup>
- *Transparency* – understood both in its reactive (responsiveness to individual requests) and proactive (publicizing the relevant information at one's own initiative) dimensions;
- *Relationship with other powers of the state – the legislative and executive branch;*
- *General conditions of work of the judiciary*, with a focus on public trust and professional culture.

<sup>198</sup> David Kosar, "The Least Accountable Branch", 11 *International Journal of Constitutional Law* [2013], pp. 234-246.

<sup>199</sup> *Ibid*, pp. 259-260.

<sup>200</sup> For more on these and other related indicators, see e.g. European Network of Councils for the Judiciary (ENCJ), *Independence and Accountability of the Judiciary and of the Prosecution* [Performance indicators 2015], ENCJ, the Hague, 2015, pp. 96-103.

#### 4.1. Disciplinary proceedings against judges and prosecutors (including accountability mechanisms related to the HJPC members)

Disciplinary proceedings are an “important regulatory mechanism to fight corruption.”<sup>201</sup> International standards in this field suggest that allegations of serious misconduct of judges and prosecutors are to be processed fairly and expeditiously. Decisions need to follow appropriate procedures enabling an objective evaluation in accordance with the law, with established standards on the matter and ethics.<sup>202</sup> In addition, decisions in disciplinary proceedings ought to be subject to appeal to an independent body composed of elected judges at least by half (in the case of proceedings against judges).<sup>203</sup> As CCJE affirms, “disciplinary proceedings should always be carried out essentially by judicial bodies such as a disciplinary commission or court, or a branch of the high judicial council.”<sup>204</sup>

Measures undertaken against judges and prosecutors may vary. They may include taking specific cases away from the person in question, transferring a judge or a prosecutor to other tasks within the judiciary, financial penalties or suspension. Since the independence of judges and their position is to be protected as much as possible, permanent removal from office before retirement may be undertaken only for valid reasons.<sup>205</sup> Of particular importance for this analysis is the understanding that “proved acts of corruption on the part of a member of the judiciary should be considered as meeting this threshold for removal.”<sup>206</sup>

<sup>201</sup> Consultative Council of European Judges [CCJE], Opinion No. 21 [2018], Preventing corruption among judges, CCJE[2018]3E, para. 30, available at: <https://rm.coe.int/ccje-2018-3e-avis-21-ccje-2018-prevent-corruption-amongst-judges/16808fd8dd>

<sup>202</sup> See e.g. Guidelines on the Role of Prosecutors, paras. 21 and 22 [see here footnote 103]; The Universal Charter of the Judge, International Association of Judges, 17 November 1999, Article 11; Council of Europe, Recommendation No. R [94] 12 of the Committee of Ministers [see here footnote 97], Principle 6, para. 3, and Recommendation No. Rec[2000] 19 of the Committee of Ministers [see here footnote 48], para. 5 [e, f].

<sup>203</sup> European Charter on the statute for judges and Explanatory Memorandum, DAJ/DOC [98].

<sup>204</sup> CCJE Opinion No. 21 [2018], para. 30 [see here footnote 201]

<sup>205</sup> Recommendation No. R [94] 12 of the Committee of Ministers, Principle 6 [see here footnote 97]. Typical cases justifying such an extreme measure are the following: “‘incapacity or behavior that renders them unfit to discharge their duties’, ‘serious grounds of misconduct or incompetence’, ‘gross misconduct incompatible with judicial office, or... physical or mental incapacity...’, ‘inability to perform judicial duties’ or ‘serious misconduct’, ‘incapacity, conviction of a crime, or conduct that makes the judge unfit to be the judge’”. International Commission of Jurists, *Judicial Accountability: A Practitioner’s Guide* [Geneva, 2016], pp. 23-24, available at <https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>

<sup>206</sup> UNODC, *The United Nations Convention against Corruption: Implementation Guide and Evaluative Framework for Article 11* [New York, 2015] p. 34. Available at: [https://www.unodc.org/documents/corruption/Publications/2014/Implementation\\_Guide\\_and\\_Evaluative\\_Framework\\_for\\_Article\\_11\\_-\\_English.pdf](https://www.unodc.org/documents/corruption/Publications/2014/Implementation_Guide_and_Evaluative_Framework_for_Article_11_-_English.pdf)



### **Lenient Sanctions for Judges' and Prosecutors' Mistakes**

*Over the last nine years, judges, prosecutors and expert assistants in Bosnia and Herzegovina (BiH) received around 200 disciplinary sanctions, mostly for delays in their work. The delays, namely, caused the suspects to get away unpunished and citizens to wait too long for justice to be administered.*

*Even though punished judges and prosecutors with whom CIN reporters talked think that their colleagues from HJPC were hard on them, an analysis of disciplinary sanctions shows that commissions usually mete out lenient punishments. More than half of sanctions are admonishments or public reprimands intended as punishment for light infractions. Seven judges and prosecutors were removed from office.*

*Light sanctions await those who have been late in their rulings, archived incomplete cases, failed to meet the annual work load, have misbehaved or have worked on cases together with family members.*

*Center for Investigative Reporting, July 2019*

<https://www.cin.ba/en/blage-kazne-za-greske-sudija-i-tuzilaca/>

In BiH, the HJPC is the responsible actor in this field. Its competence includes receiving and acting upon the complaints against judges and prosecutors, conducting disciplinary proceedings, establishing disciplinary liability and enacting disciplinary measures against judges and prosecutors.<sup>207</sup> This competence is mainly exercised through the Office of the Disciplinary Counsel, whose Chief Counsel is also appointed [and removed] by the HJPC.<sup>208</sup>

Significant problems can be noted in the very structure of the disciplinary mechanism for judges and prosecutors in BiH.

First, the influence of the HJPC on the work of the Office of Disciplinary Counsel is rather significant, to the extent that it brings into question its independence. The Office is part of the HJPC and is financially dependent on the Council. The fact that the Chief Counsel is appointed for a renewable four-year term additionally jeopardizes its independence: short, renewable terms of office in principle have a negative influence on independence [unlike longer, non-renewable terms of office].<sup>209</sup> As GRECO notes, “this dependence on the HJPC can lead to self-censorship in sensitive cases.”<sup>210</sup>

The HJPC also plays an instrumental role in the conduct of disciplinary proceedings. The HJPC members are dominant in the First Instance Disciplinary Panel and are exclusive members of the Second Instance Disciplinary Panel. The HJPC as a whole sits and decides in third instance proceedings.<sup>211</sup> The crucial role of the HJPC in disciplinary

<sup>207</sup> Law on HJPC, Article 17[4].

<sup>208</sup> Law on HJPC, Article 64e.

<sup>209</sup> See also European Commission's recommendations based on expert assessments of the disciplinary procedures in the BiH judiciary, recommendation 9.

<sup>210</sup> GRECO Evaluation Report on BiH, 2015, para. 126 [see here footnote 122]

<sup>211</sup> Law on the HJPC, Article 60.

proceedings is further confirmed by the fact that final decisions in disciplinary proceedings, delivered by the HJPC, are as a rule not subject to external review by the court of law, which is not in line with international standards.<sup>212</sup> According to the Law on HJPC, only decisions on dismissal may be appealed to the Court of BiH, and only in case of an alleged violation of disciplinary proceedings or an erroneous application of the law.<sup>213</sup>

This overwhelming dominance of the HJPC in the disciplinary proceedings is not in accordance with international standards. As the CCJE has noted, conflict of interest in this context is best avoided if disciplinary procedures in the first instance are dealt with by a disciplinary commission composed of judges who are not members of the Council for the Judiciary.<sup>214</sup> In this sense, European Commission experts<sup>215</sup> and GRECO<sup>216</sup> have also recommended to BiH to separate disciplinary proceedings from the administration of the judiciary.

Second, there is insufficient clarity as to what constitutes a disciplinary offence. In some countries, an attempt is made to list all possible conduct that may trigger disciplinary proceedings, following the *nullum crimen sine lege* principle. Nonetheless, the relevant international actors, such as the CCJE do not

“... consider that it is necessary ... or even possible to seek to specify in precise or detailed terms at a European level the nature of all misconduct that could lead to disciplinary proceedings and sanctions. The essence of disciplinary proceedings lies in conduct fundamentally contrary to that to be expected of a professional in the position of the person who has allegedly misconducted him or herself.”<sup>217</sup>

The Law on HJPC prescribes 23 disciplinary offences for judges and prosecutors, respectively.<sup>218</sup> This list is rather long and appears to be envisaged more as exhaustive than illustrative, although the list ends with an open-ended clause on “any other behaviour that constitutes a violation of public duty or brings into question the public confidence in the impartiality and credibility of the judiciary”.<sup>219</sup> A problem with these offences is that some of them seem redundant, whereas others are already prescribed by the criminal codes and should not at all be dealt with through disciplinary proceedings. At the same time, as the professionals in the field report, the list of offences, although relatively broad, “does not reflect adequately the ethical chal-

<sup>212</sup> CCJE, Opinion No. 10, para. 64 [see here footnote 37]

<sup>213</sup> Law on HJPC, Article 60 [7].

<sup>214</sup> CCJE, Opinion No. 10, para. 64 [see here footnote 37]

<sup>215</sup> European Commission’s recommendations based on expert assessments of the disciplinary procedures in the BiH judiciary, recommendation 17.

<sup>216</sup> GRECO Evaluation Report on BiH, 2015, para. 126 [see here footnote 122]

<sup>217</sup> CCJE, Opinion No. 3 [2002] On the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality], 19 November 2002, para. 63, available at <https://rm.coe.int/168070098d>. See also UNODC, The United Nations Convention against Corruption: Implementation Guide and Evaluative Framework for Article 11, p. 32 [see here footnote 206]

<sup>218</sup> Law on HJPC, Articles 56 and 57.

<sup>219</sup> Law on HJPC, Article 56[23].

lenges that judges and prosecutors face.”<sup>220</sup> Thus, there seems to be a considerable gap between what the law can realistically prescribe in this sense and what the Law on HJPC currently prescribes, on the one hand, and on the other - the expectations of the professional community who seem to require even more normative guidance on this crucial issue.

At the same time, some of the offences appear to go beyond *behavioural accountability* and overlap with the evaluation of work of judges and prosecutors, which, as such, should not be a matter of disciplinary liability. Disciplinary liability requires a disciplinary offence. A negative performance, which leads to a negative overall result of the evaluation, can also originate from factors other than a disciplinary offence.<sup>221</sup> Such is the case with the offence of ‘unjustified delay’ in performing the judicial or prosecutorial duties.<sup>222</sup> This problem is even more pertinent considering that a significant number of complaints received by the Office of the Disciplinary Counsel receives every year concern this particular offence.<sup>223</sup>

This sensitive assessment of factors leading to delays in proceedings should always be done carefully. As the Venice Commission notes, non-compliance with deadlines should be measured according to the judge’s experience, workload, number of support staff, quantity and quality of infrastructures [with particular reference to buildings and information technology]. Without this careful assessment, “the disciplinary proceedings may be transformed into instruments of intimidation, which is completely against the independence of judges.”<sup>224</sup> Some of the interlocutors from the BiH judiciary confirm that this danger is real. In the words of a prosecutor from BiH “given the structural problems we face, combined with such broad provisions regarding disciplinary offences, for almost every judge or prosecutor in BiH some basis for disciplinary liability can legitimately be found. This creates an atmosphere of fear and uncertainty among judges and prosecutors.”<sup>225</sup>

<sup>220</sup> USAID Diagnostic Analysis, 2015, p. 63 [see here footnote 1]

<sup>221</sup> Venice Commission, “Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of ‘The Former Yugoslav Republic of Macedonia’”, CDL-AD[2015]042, 21 December 2015, para. 52.

<sup>222</sup> Cf. Venice Commission, “Opinion on the Draft Law on the HJPC BiH”, CDL-AD[2014]008, para. 101 [see here footnote 105]

<sup>223</sup> HJPC, Annual Report for 2018, p. 79.

<sup>224</sup> Venice Commission, “Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of ‘The Former Yugoslav Republic of Macedonia’”, CDL-AD[2015]042, 21 December 2015, para. 18. Cf. Venice Commission, “Opinion on the Draft Law on the HJPC BiH”, CDL-AD[2014]008, para. 83 [see here footnote 105]

<sup>225</sup> Project interview, 18/11/2019. The interviewed person requested both personal and institutional anonymity.

***Lenient Sanctions for the Mistakes of Judges' and Prosecutors'***

*Some judges and prosecutors who have been disciplined do not find the sanctions justified and do not believe in fairness and independence of the prosecutors from the Office of Disciplinary Prosecutor and HJPC's members in general.*

*Milorad Krkeljaš said that he was a scapegoat because of a criminal case in which the statute of limitations had expired and that at the time HJPC used to punish more judges in order to justify the work of its disciplinary bodies: "I'm hurt as a human being because they sanctioned me for some other reasons to protect themselves, to show themselves off as someone who was taking care."*

*Because of misconduct, the former president of the Municipal Court in Kalesija, Ibrahim Omerović, was punished with a 20 percent salary cut over six months. He states that he had not deserved the punishment the HJPC meted out. "In my opinion, this is a machine... that grinds whoever it picks on. For those to whom it shows sympathy it will always find reasons to acquit them," Said Omerović.*

*Center for Investigative Reporting, July 2019*

<https://www.cin.ba/en/blage-kazne-za-greske-sudija-i-tuzilaca/>

Third, disciplinary proceedings are problematic for two important categories of professionals within the judiciary of BiH – the HJPC members, on the one hand, and legal officers and other professional staff in the judiciary on the other. Neither the Law on the HJPC nor the HJPC Rules of Procedure provide for a list of separate disciplinary offences for the members of the HJPC *in their capacity as members of the HJPC* (and not as judges or prosecutors), save for those concerning their removal from office.<sup>226</sup> At the same time, regulation of disciplinary proceedings for legal officers and other professional staff within the judiciary is not systematic and comprehensive. It is divided between different jurisdictions and actors in charge of appointing staff other than judges and prosecutors [See more under Section 2 here, on Organisational Factors].

Fourth, as noted in several reports, the transparency of disciplinary proceedings is mostly insufficient, especially in the initial stage.<sup>227</sup> Given that international standards suggest confidentiality of the initial stage of disciplinary proceedings,<sup>228</sup> transparency in this context refers primarily to the transparent application of criteria for deciding on whether to initiate disciplinary proceedings, so that such decision is well elaborated and justified. This problem is further exacerbated by the fact that the laws and regulations in BiH do not envisage the right to appeal against the decision of the Office of Disciplinary Counsel to dismiss a complaint.

Fifth, the application of disciplinary measures envisaged by the Law on the HJPC – written warning, public reprimand, salary reduction of up to 50% for a maximum pe-

<sup>226</sup> Cf. USAID Diagnostic Analysis, 2015, pp. 66-67 [see here footnote 1]. This is also essentially confirmed in disciplinary proceedings against the HJPC President Milan Tegeltija conducted in 2019 [see *infra* text accompanying footnotes 315-319].

<sup>227</sup> *Ibid.*, p. 61; GRECO Evaluation Report on BiH, 2015, para. 126 [see here footnote 122]

<sup>228</sup> UN Basic Principles, para. 17 [see here footnote 96]

riod of one year, temporary or permanent reassignment to another court, demotion of a court president to an ordinary judge and dismissal<sup>229</sup> – is often not proportionate to the offence and fails to effect dissuasion.<sup>230</sup> According to media reports on individual disciplinary proceedings against judges and prosecutors, disciplinary panels seem to be inclined to order minor disciplinary measures, often relying on the fact that the Law does not prescribe lower threshold for monetary sanctions.<sup>231</sup> At the same time, despite a significant number of rather serious offences – including instances of conflict of interest, inappropriate communication with parties and continuous neglect of duties – the most extreme measure of removal from office was ordered only 12 times in the last 15 years – for eight judges and four prosecutors.<sup>232</sup>

Finally, structural problems within the system jeopardize the efficiency and effectiveness of disciplinary proceedings. The insufficient capacity of the Office of the Disciplinary Counsel, coupled with a high number of complaints received per year (1200 on average), brings into question the adequate processing of cases.<sup>233</sup> In 2018, the Office received 897 complaints and initiated 33 disciplinary proceedings, which means that little more than three per cent of complaints are assessed to be founded.<sup>234</sup> In the same period, around one-third of all disciplinary proceedings were initiated *ex officio*.<sup>235</sup>

The above normative and systemic problems in the overall system of disciplinary accountability within the judiciary in BiH severely undermine its functioning in practice. Available surveys show that most professionals do not consider disciplinary proceedings to be entirely impartial and just.<sup>236</sup>

The lack of consistency in the implications and consequences of disciplinary measures against a judge or prosecutor for his/her career path raises grave concerns over selective accountability. In some cases, disciplinary measures or proceedings have been an obstacle to appointment or promotion; in others, judges or prosecutors have been promoted regardless of the disciplinary proceedings or measures ordered against them. According to the available reports of investigative journalists, and based on numerous examples from practice, the latter situation seems to be the rule

<sup>229</sup> Law on HJPC, Article 58.

<sup>230</sup> USAID Diagnostic Analysis, 2015, pp. 62-63 [see here footnote 1]; GRECO Evaluation report on BiH, 2015, para. 126 [see here footnote 122]

<sup>231</sup> Ervin Mušinović, *Pravosuđe na bh. način.../Judiciary the Bosnian way...*, available in official BiH languages at: <https://www.klix.ba/vijesti/bih/pravosudje-na-bh-nacin-gradjanima-pokazivali-zadnjice-nazivali-ih-kravama-tukli-se-po-kafanama/190624018>; see also CIN, “Lenient sanctions for the mistakes of judges and prosecutors”, available at: <https://www.cin.ba/en/blage-kazne-za-greskesudija-i-tuzilaca/>

<sup>232</sup> M.N., *Za 15 godina u BiH je razriješeno dužnosti osmero sudija i četvero tužilaca/ In 15 years in BiH eight judges and four prosecutors removed from duty*, available in official BiH languages at: <https://www.klix.ba/vijesti/bih/za-15-godina-u-bih-je-razrijeseno-duznosti-osmero-sudija-i-cetvero-tuzilaca/190214070>

<sup>233</sup> Cf. GRECO Evaluation report on BiH, 2015, para. 126 [see here footnote 122]

<sup>234</sup> HJPC, Annual Report for 2018, pp. 79-80.

<sup>235</sup> *Ibid*, p. 82.

<sup>236</sup> USAID Diagnostic Analysis, 2015, p. 59 [see here footnote 1]

rather than an exception.<sup>237</sup> The fact that some of the current members of the HJPC, who also take part in disciplinary panels, were previously held liable for disciplinary offences, is undoubtedly indicative in this regard.<sup>238</sup>

### ***For Years, The HJPC Looked the Other Way on Judge's Poor Performance***

*Judge A. Huseinbašić failed to issue verdicts in eleven cases, some of which had lasted for as long as six years. Among those who have been waiting for years for his verdicts were persons accused of illegal weapons' production, car thievery, and drug sales. Some of them had already had a criminal record.*

*"These offences are absolutely marginal," said Huseinbašić. He added that he intentionally did not want to work on these cases in order to force the court's leadership to talk about "serious issues".*

*Center for Investigative Reporting, July 2019*

<https://www.cin.ba/en/vstv-godinama-tolerisao-nerad-sudije/>

The relatively ineffective system of disciplinary accountability is such due to a number of factors. One interviewee, for example, points out that disciplinary proceedings are characterized by solidarity between judges and prosecutors, which often produces a failure to see the broader perspective and context of the duty to protect the citizens at the society.<sup>239</sup> The reasoning in disciplinary decisions is often non-transparent, and factors leading to specific sanctions are often not elaborated.<sup>240</sup> The fact that the names of those who are subject to disciplinary proceedings are as a rule anonymized in publicly available decisions of the Office of Disciplinary Counsel certainly contributes to such perception. A good, albeit extreme illustration of this problem, and the malfunctioning of the system as a whole, is the case in which the disciplinary authority took eight years to finally remove a judge from office, despite the fact that he had committed as many as 56 offences working in two different courts.<sup>241</sup> Another interviewee underlines that "since there is no effective control over the dismissal of disciplinary complaints, the disciplinary liability of judges and prosecutors is applied selectively."<sup>242</sup>

<sup>237</sup> CIN, "Lenient sanctions for the mistakes of judges and prosecutors", available at <https://www.cin.ba/en/blage-kazne-za-greske-sudija-i-tuzilaca/>; see also CIN, "For Years, HJPC Looked the Other Way on Judge's Poor Performance," <https://www.cin.ba/en/vstv-godinama-tolerisao-nerad-sudije/>; more details can be found in the CIN comprehensive database of disciplinary sanctions, available in BiH official languages at: <https://www.cin.ba/disciplinske-kazne-protiv-sudija-i-tuzilaca/>

<sup>238</sup> Project interview, 05/12/2019. The interviewed person requested both personal and institutional anonymity.

<sup>239</sup> Project interview, 05/12/2019. The interviewed person requested both personal and institutional anonymity.

<sup>240</sup> See USAID Justice Project in Bosnia and Herzegovina, *Judicial Discipline Benchbook of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina* [Sarajevo, 2019] pp. 28-29, available at [https://pravosudje.ba/vstv/faces/pdfservlet;jsessionid=79c93fa042cce48ab584150a80d8f0624a34d7b-3b5ca1f98385bb9aac3c405e6.e34TbxyRbNiRb40Pbx4LaxaNbx50?p\\_id\\_doc=55239](https://pravosudje.ba/vstv/faces/pdfservlet;jsessionid=79c93fa042cce48ab584150a80d8f0624a34d7b-3b5ca1f98385bb9aac3c405e6.e34TbxyRbNiRb40Pbx4LaxaNbx50?p_id_doc=55239)

<sup>241</sup> CIN, "For Years, HJPC Looked the Other Way on Judge's Poor Performance", available at: <https://www.cin.ba/en/vstv-godinama-tolerisao-nerad-sudije/>

<sup>242</sup> Project interview, 27/12/2019. The interviewed person requested both personal and institutional anonymity.

Considering both the law and the practice of disciplinary liability in BiH, the overall system does not appear to serve their main purpose of ensuring accountability and serving as a deterrent in the daily work of judges and prosecutors. Moreover, placing the system at the hands of a small number of members of the HJPC, while at the same time excluding the possibility of appeal to an external body, opens the space for overt and even undue influence of the HJPC leadership in disciplining (or not) the judges and prosecutors in BiH. Practice, in many respects, only simulates the disciplinary responsibility within the judiciary in BiH. On the other hand, unclear regulation and inconsistent practice in this field, coupled with the effective concentration of powers at the hands of the HJPC, may instil in judges and prosecutors the fear of falling victim to selective disciplinary liability at some point in future. The fear, among other things, may further contribute to self-censorship among judges and prosecutors.

#### **4.2. Regulations governing corruption in the judiciary (ethical codes and their implementation)**

Ethical codes for the judiciary are a relatively recent development, as the first of this kind was adopted in Italy in 1994.<sup>243</sup> Ethical codes serve a number of important goals, in terms of enhancing judicial integrity and improving the public perception of the behaviour of judges and prosecutors. At the same time, such codes can also create certain problems insofar as they can give the impression that they contain all the rules, and that anything not explicitly prohibited therein must be admissible. In that sense, ethical codes or codes of conduct often oversimplify situations and ultimately create the impression that standards of conduct are fixed for a certain period, whereas, in fact, they are constantly evolving.<sup>244</sup> Thus, it is important to ensure that such codes serve as general guidelines, and not as an exhaustive list of instances of inappropriate behaviour. It is also crucial to make sure that these documents are regularly updated so that they would reflect the evolving challenges on the ground.

The HJPC has adopted two vital ethical codes in this area – the Ethical Code for Judges and the Ethical Code for Prosecutors, both updated in 2018.<sup>245</sup> In 2018, the HJPC also adopted a Judicial Ethics Handbook, intending to “provide holders of judicial offices with the required information for making the right decisions when faced with different ethical challenges.”<sup>246</sup> A separate, permanent body within the HJPC – the Standing Committee on Judicial and Prosecutorial Ethics, Independence and Incompatibility – is tasked with monitoring the implementation of the two codes and advising the HJPC on ethical issues.

<sup>243</sup> CCJE, Opinion No. 3 [2002], para. 42 [see here footnote 217]

<sup>244</sup> *Ibid.*, para. 46.

<sup>245</sup> Kodeks sudijske etike/Ethical code for judges, [“Official Gazette of BiH” 13/06, 24/19 and 94/18]; Kodeks tužilačke etike/Ethical code for prosecutors, [“Official Gazette of BiH” 13/06, 32/15 and 94/18].

<sup>246</sup> HJPC, Judicial Ethics Handbook [2019], p. XIV. A bilingual document available for download at: [https://www.pravosudje.ba/vstv/faces/pdfservlet?p\\_id\\_doc=51816](https://www.pravosudje.ba/vstv/faces/pdfservlet?p_id_doc=51816)

Even though “ethical standards for court personnel are as important as ethical standards for judges”<sup>247</sup>, there is no systematic and comprehensive ethical code for legal officers and other professional staff within the judiciary. Instead, their work in this context is regulated mostly by the relevant ethical rules concerning public servants at the different levels of government.

As this is often an extremely complex and sensitive area, an effort on the part of all responsible actors is necessary to translate and integrate these provisions into the daily work of judges and prosecutors. Nonetheless, the main problem in this context is that the members of the judiciary have little awareness of the ethical standards of relevance for their work, as is confirmed by several interviews conducted for this analysis. Moreover, standards contained in the two ethical codes are often too broad and too vague to be of use to judges and prosecutors in concrete situations.<sup>248</sup> It needs to be said, however, that this seems to be a common characteristic of these standards in general.

Adopting the Judicial Ethics Handbook is a step in the right direction, as this document elaborates on the ethical codes and offers concrete examples of inappropriate behaviour in specific situations. Nonetheless, given the experience and the rather passive role of the HJPC’s Committee on Judicial and Prosecutorial Ethics in promoting ethical standards within the BiH judiciary,<sup>249</sup> it is hard to expect that ethical codes will become a relevant check on the behaviour of judges and prosecutors in the near future.

Another problem in the field concerns the unclear or mostly non-existent consequences of a breach of ethical code by a judge or a prosecutor. By their very nature, instances of unethical behaviour enumerated in the ethical codes are closely related to disciplinary offences, and some of them (e.g. violations of impartiality) are also prescribed by the Law on HJPC as disciplinary offences. As already noted, codes of ethics are often vague and as such inadequate to serve as a framework for disciplinary proceedings. The Venice Commission has also warned that “in order to avoid the suppression of the independence of a particular judge on the basis of general and sometimes vague provisions of a code of ethics, sanctions have to rely on explicit provisions in the law.” However, they should be “proportionate and applied as a last resort in response to recurring, unethical judicial practice.”<sup>250</sup>

The above functional connection between unethical behaviour and disciplinary offences often does not exist in practice in BiH. This is so because ethical codes for judges and prosecutors are not accorded sufficient legal authority in disciplinary proceedings for members of the judiciary.<sup>251</sup> A possible explanation could be that vio-

<sup>247</sup> UNODC, *The United Nations Convention against Corruption: Implementation Guide and Evaluative Framework for Article 11*, p. 43 [see here footnote 206]

<sup>248</sup> See e.g. USAID Diagnostic Analysis, 2015, pp. 42-43 [see here footnote 1]

<sup>249</sup> *Ibid*, pp. 43-44; GRECO Evaluation report on BiH, 2015, para. 109 [see here footnote 122]

<sup>250</sup> Venice Commission, “Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of ‘The Former Yugoslav Republic of Macedonia’”, CDL-AD[2015]042, 21 December 2015, para. 32.

<sup>251</sup> USAID Diagnostic Analysis, 2015, p. 44 [see here footnote 1]. See also CIN, “Lenient sanctions for the mistakes of judges and prosecutors”, available at <https://www.cin.ba/en/blage-kazne-za-greske-sudija-i-tuzilaca/>



lations of ethical standards occur more frequently than disciplinary offences since the codes of ethics present a wider framework – indeed, a set of values and a code of conduct rather than a fully-fledged framework for judicial accountability. Thus, a violation of the code of ethics does not necessarily result in a disciplinary offence and disciplinary proceedings. This suggests that a fine balance should be struck and careful assessment performed to determine what types of unethical behaviour entail disciplinary liability or other consequences in the professional lives of members of the judiciary. Such understanding on the part of both the disciplinary authority and judges and prosecutors in BiH still seems to be largely absent. It is certainly indicative in this regard that a report of the Office of Disciplinary Counsel for 2018, for example, does not contain a single reference to ethical codes.<sup>252</sup>

### 4.3. Conflict of interest and asset disclosure rules and practices

States have different approaches to the regulation of the behaviour of judges and prosecutors outside of their office. International standards in the field, however, increasingly promote the disclosure of activities outside the judiciary to internal structures in the system, as well as to the general public.<sup>253</sup> Despite the considerable challenge of regulating various relevant activities and situations judges and prosecutors can find themselves in, “in the last analysis, the question must always be asked whether, in the particular social context and in the eyes of a reasonable, informed observer, the judge has engaged in an activity which could objectively compromise his or her independence or impartiality.”<sup>254</sup>

Financial disclosure is an important element of this relatively recent trend. Such disclosure often requires balancing private interests of judges and prosecutors with the public interest. Thus, while noting that “a robust system for declaring assets can contribute to the identification and subsequent avoidance of conflicts of interests if relevant steps are taken”<sup>255</sup>, CCJE at the same time emphasizes that such a system needs to be implemented prudently, in accordance with the principle of proportionality and necessity. As a rule, the ultimate test should be the overall state of corruption in a country, with systemic asset declarations being more acceptable in countries facing a significant level of corruption.<sup>256</sup>

It needs to be emphasized, however, that the trend of financial disclosure is constantly broadening, encompassing an increasing number of states in the world, as well as an increasing number of public officials in those states. According to the available data, in around 60 per cent of states practising asset disclosure, judges and pros-

<sup>252</sup> Office of Disciplinary Counsel, Annual Report for 2018.

<sup>253</sup> CCJE, Opinion No. 21 [2018], para. 36 [see here footnote 201]

<sup>254</sup> CCJE, Opinion No. 3 [2002], para. 28 [see here footnote 217]

<sup>255</sup> CCJE, Opinion No. 21 [2018], para. 38 [see here footnote 201]

<sup>256</sup> *Ibid*, para. 39.

ecutors are also included.<sup>257</sup> Moreover, standards in this field emphasize the need for members of the judiciary to provide information on their affiliations and interests beyond financial interests. Such a broader set of information “may include pre-tenure activities, affiliations with businesses such as board memberships, connections with non-governmental or lobbying organizations and any unpaid or volunteer activities.”<sup>258</sup>

The Law on HJPC, however, adopts a narrow concept of information that members of the judiciary should disclose, focusing on financial statements. Judges and prosecutors (but, again, not legal professionals and associates other than judges and prosecutors) file these statements annually, reporting their income, any activities outside of their regular job and relevant activities of their spouses and children, including possible activities in political parties.<sup>259</sup>

There are three critical problems with the disclosure system for judges and prosecutors in BiH, which, taken together, completely undermine its main purpose and effectiveness: first, as already noted, overt focus on financial statements and not on a broader notion of relevant activities and benefits, as envisaged by evolving standards in the field; second, the fact that the HJPC receives and archives, but does not have the capacity to, and in practice does not review the information submitted (not even through random checks) – despite a clear obligation in that regard;<sup>260</sup> relatedly, sanctions for false reporting or even non-reporting are not envisaged;<sup>261</sup> third, unlike in other countries in the region, for example, these financial statements are not made public, due to the alleged conflict of such practice with privacy rights of judges and prosecutors.<sup>262</sup>

As for conflict of interest in the judiciary, CCJE particularly emphasizes the importance of the practice of recusal, stating that “the truly vital point for the degree of a given country’s judicial integrity is the actual implementation and application of the rules on recusal and self-recusal.”<sup>263</sup> In BiH, this issue is generally regulated in the criminal procedure codes through provisions concerning disqualification or recusal,

<sup>257</sup> Ivana M. Rossi, Laura Pop and Tammar Berger, *Getting the Full Picture on Public Officials: A How-To Guide for Effective Financial Disclosure* (Washington: World Bank, 2017) p. 20.

<sup>258</sup> UNODC, *The United Nations Convention against Corruption: Implementation Guide and Evaluative Framework for Article 11*, p. 21 [see here footnote 206]

<sup>259</sup> Law on the HJPC, Article 86.

<sup>260</sup> High Judicial and Prosecutorial Council, *Rulebook on Filing, Reviewing and Processing of Financial Reports by Judges and Prosecutors* [2018], Article 8.

<sup>261</sup> USAID Diagnostic Analysis, 2015, p. 43 [see here footnote 1]; GRECO Evaluation Report on BiH, 2015, paras. 119-120 [see here footnote 122].

<sup>262</sup> See more e.g. Demirel Delić, “Da li je prikupljanje i obrada podataka o imovini sudija u skladu sa ustavom i zakonom”/Is the collecting and processing of data on the assets of judges in accordance with the constitution and the law, Fondacija Centar za javno pravo, available only in BiH official languages at: [http://www.fcjp.ba/templates/ja\\_avian\\_ii\\_d/images/green/Demirel\\_Delic7.pdf](http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Demirel_Delic7.pdf); see also CIN, “BiH za razliku od susjednih zemalja ne objavljuje imovinu sudija i tužilaca”/Unlike the neighboring countries, BiH does not disclose the assets of judges and prosecutors, available at <https://www.cin.ba/bih-za-razliku-od-susjednih-zemalja-ne-objavljuje-imovinu-sudija-i-tuzilaca/>

<sup>263</sup> CCJE, Opinion No. 21 [2018], para. 44 [see here footnote 201]

which envisage situations where reasonable suspicion exists regarding judges' and prosecutors' impartiality.<sup>264</sup> In addition, disciplinary liability is prescribed for judges and prosecutors for both the general violations of the duty of impartiality and "not disqualifying himself or herself [from prosecuting/hearing the case] when a conflict of interest exists."<sup>265</sup> There is a general ban for judges and prosecutors to engage in activities incompatible with their positions and functions.<sup>266</sup> Ethical codes for BiH judges and prosecutors, respectively, even require them to act in a way to minimize the possibility of situations arising where their recusal would be necessary, which includes conflict of interest.<sup>267</sup> Finally, the issue of conflict of interest in the judiciary is further elaborated in two documents recently adopted by the HJPC: Judicial Ethics Handbook [2019] and Guidelines for the prevention of conflict of interest in the judiciary [2016].

Conflict of interest in the judiciary is comprehensively regulated, as the members of the judiciary have largely confirmed in the interviews for this analysis. However, the effective supervision and enforcement of these rules and regulations remain a challenge.<sup>268</sup> Some interviewees emphasize that legal provisions on recusal could be clarified, particularly when it comes to the optional basis for recusal ["if circumstances exist that raise a reasonable suspicion as to ... impartiality"<sup>269</sup>].<sup>270</sup> Available information suggest that the non-reporting of conflict of interest is not considered a serious disciplinary offence in practice, and it does not seem to trigger sanctions any more severe than minor salary deductions.<sup>271</sup>

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<sup>264</sup> E.g. Criminal Procedure Code of BiH, Articles 29 and 34.

<sup>265</sup> Law on the HJPC, Articles 56 and 57.

<sup>266</sup> Law on the HJPC, Article 82.

<sup>267</sup> Ethical Code for Judges, para 2.2; Ethical Code for Prosecutors, para. 2.2.

<sup>268</sup> GRECO, Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors, Compliance Report, Bosnia and Herzegovina, GRECO RC4[2017] 22, adopted on 23 March 2018, para. 70; available at: <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16808acd50>.

<sup>269</sup> Criminal Procedure Code of BiH, Article 29 [f].

<sup>270</sup> Project interview, 05/12/2019. The interviewed person requested both personal and institutional anonymity.

<sup>271</sup> See a comprehensive database of disciplinary sanctions compiled by CIN, available in official BiH languages at: <https://www.cin.ba/disciplinske-kazne-protiv-sudija-i-tuzilaca/>

**Judges and Prosecutors: Public Office, Classified Assets**

*In 2015, CIN had filed requests for asset disclosures of judges and prosecutors. However, the HJPC refused the request saying that it would mean the breach of privacy and could cause damage. At the time, the Personal Data Protection Agency of BiH called this refusal an abuse of the right to privacy.*

*At the end of September 2018, in accordance with European Commission's recommendations, the HJPC decided to disclose asset declarations. HJPC adopted a Rulebook on how to submit, review and process financial disclosures of judges and prosecutors by comparing them against other databases.*

*This was a major improvement, said the Council's officials, because up to then asset declarations were filled out arbitrarily and with no checks.*

*However, in January 2019, the Association of the Court of BiH Judges complained to the Personal Data Protection Agency that the Rulebook "paves the way for abuse of financial records of judiciary officials and puts their security in jeopardy across BiH." The Association of RS Judges and the Association of BiH Judges backed this complaint.*

*In the wake of these pushbacks the Agency forbade the HJPC to process these records.*

*Center for Investigative Reporting, May 2019*

<https://www.cin.ba/en/sudije-i-tuzioci-funkcija-javna-imovina-tajna/>

#### 4.4. Transparency

Transparency of the judiciary is increasingly promoted as an international standard.<sup>272</sup> Relevant standard-setting bodies for the judiciary at the regional and international level are also increasingly aware of the manifold benefits of transparent work of the judiciary. For example, a recent CCJE opinion "considers that reasons for the existence or non-existence of a significant discrepancy between actual and perceived judicial corruption in a given country lie principally in the (non-)transparency, i.e. (non-)openness or taciturnity of the judicial system."<sup>273</sup>

There are three main aspects of transparency of the judiciary: the openness of court proceedings to the public and the media, public availability of prosecutorial and judicial decisions, and publication of annual reports on the work of judicial institutions. Available information concerning BiH suggest that the first aspect is probably the least problematic, since the public and the media, as a rule, have access to court proceedings. The second aspect of transparency is problematic mostly in its proactive dimension, which is crucial. Even though the HJPC has adopted appropriate guidelines on proactive publication of indictments and judgments on the websites of courts and

<sup>272</sup> For example through Open Government Partnership initiative. See Open Government Standards: Transparency Standards, available at [https://www.access-info.org/wp-content/uploads/Transparency\\_Standards12072013.pdf](https://www.access-info.org/wp-content/uploads/Transparency_Standards12072013.pdf)

<sup>273</sup> CCJE, Opinion No. 21 [2018], para. 55 [see here footnote 201]

prosecutors' offices in BiH,<sup>274</sup> practice shows that such documents are rarely made publicly available in this way.<sup>275</sup> On the other hand, courts and prosecutors' offices have a significantly better record when it comes to reactive transparency – disclosing relevant information based on an individual request submitted in accordance with the laws on access to information. This is not to say, however, that problems have not been identified or indeed experienced in this segment as well. Journalists, for example, report significant problems in the realm of reactive transparency as well, particularly in relation to information on ongoing cases<sup>276</sup> or disciplinary proceedings against judges and prosecutors.<sup>277</sup> Finally, most courts and prosecutors' offices publish annual reports on their work, and the HJPC also regularly publishes annual reports summarizing the results and trends in the work of the judiciary in BiH.<sup>278</sup> Although these reports are regularly formally published, their content does not seem to be fully adequate – nor does it seem to entirely serve the purpose of sharing the relevant information with the public, including the professional community. More specifically, the reports tend to contain much more PR-like information on activities aimed at structural and institutional improvements on the ground and much less objective, realistic and detailed presentation of quantity and quality of work of the judiciary each year.

In sum, it can be said that the judiciary in BiH exhibits significant problems in all aspects of transparency, with relatively good track record only in the area of reactive transparency and respect for the laws on access to information. Given the fact that the relevant information on the work of the judiciary is not readily available, the public, including the professionals, face significant obstacles when it comes to controlling and monitoring the work of the judiciary.

<sup>274</sup> High Judicial and Prosecutorial Council, Smjernice za objavljivanje sudskih i tužilačkih odluka na službenim web stranicama/Guidelines for publishing the judicial and prosecutorial decisions on the official websites, [February 2014].

<sup>275</sup> See e.g. Erna Mačkić, *Transparentnost pravosuđa u Bosni i Hercegovini u domenu procesuiranja koruptivnih krivičnih djela/Transparency of the judiciary in Bosnia and Herzegovina in the area of processing corruption* [Sarajevo: Analitika, 2018], pp. 17-20, available at <https://www.analitika.ba/publications/transparency-judiciary-bosnia-and-herzegovina-processing-corruption-related-criminal>

<sup>276</sup> *Ibid.*, pp. 20-24.

<sup>277</sup> See e.g. Center for Investigative Reporting, CIN Published a Database of Sanctioned Judges and Prosecutors, available at <https://www.cin.ba/en/cin-objavio-bazu-kaznenih-sudija-i-tuzilaca/>.

<sup>278</sup> See also Zastone, Roadmap on good governance for state institutions in Bosnia and Herzegovina [On the basis of the Regional Index of openness of state institutions], December 2018, pp. 31-38, available at <https://zastone.ba/app/uploads/2019/01/ROAD-MAP-for-State-Institutions-in-BiH-Why-Not.pdf>

### ***Disciplinary Sanctions Against Judges and Prosecutors***

*The HJPC publishes disciplinary decisions on its web page. However, the names of sanctioned judges, prosecutors and paralegals, are erased from the said decisions as well as the names of institutions where the offenses were perpetrated.*

*The HJPC refused to give CIN reporters records about sanctioned judges and prosecutors and the names of the judicial institutions where the offences were perpetrated. They justified their decision by obligation to justify the integrity and independence of members of judiciary, as well as with the fact that their personal data was at stake.*

*Reporters have collected documents related to judges and prosecutors and interviewed the officials to glean the name of those who committed infractions in the course of their duty. In this way, reporters identified 122 sanctioned judges, prosecutors and paralegals. Their names and details of offense are published in a database.*

*Disciplinary decisions are not published and it is not possible to get them based on a special request.*

*Center for Investigative Reporting, July 2019*

<https://www.cin.ba/disciplinske-kazne-protiv-sudija-i-tuzilaca/>

## **4.5. Relationship with the executive and parliaments**

Accountability to other powers of the state does not mean that the judiciary is responsible or subordinate to them. Nonetheless, “the judiciary faces the responsibility of demonstrating to the other powers of the state and to society at large the use to which its power, authority and independence have been put.”<sup>279</sup> In this sense, communication and dialogue between different powers of the state on the work of the judiciary are a normal occurrence in a democratic society. Such discussions will be beneficial to all three powers of the state only if “undertaken in an atmosphere of mutual respect and have particular regard to the preservation of the independence and impartiality of any judges participating in such exchanges.”<sup>280</sup>

In this sense, it is important to distinguish between legitimate and respectful criticism and undue pressure on the judiciary. As the CCJE notes, “politicians should not use simplistic or demagogic arguments to make criticisms of the judiciary ... Neither should individual judges be personally attacked. Politicians must never encourage disobedience to judicial decisions let alone violence against judges...”<sup>281</sup> In sum, substantial separation of powers must be ensured in law as in practice, both on the institutional and individual levels. Legislative powers should not be used to threaten, or pressure members of the judiciary and the executive should not interfere with the

<sup>279</sup> CCJE, Opinion No. 18 [2015], para. 21 [see here footnote 195]

<sup>280</sup> Ibid., para. 31.

<sup>281</sup> Ibid., para 52.

judicial resolution of a dispute.<sup>282</sup> Ultimately, a member of the judiciary “shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.”<sup>283</sup>

The above cursory presentation of international standards on this important issue is useful to assess the extent to which the situation in BiH is far from these standards. Politicians, members of the executive and parliaments at different levels of government, have been routinely and maliciously commenting on the work of the judiciary and even individual judges. A large number of such comments and even open attacks have been addressed at judicial institutions at the state level – Court of BiH and the Prosecutor’s Office of BiH. They are coming mostly from Republika Srpska. The actions of these judicial institutions unfavourable to specific political actors or their affiliates have often been termed as politically motivated. War crimes proceedings seem to be a regular occasion for such accusations. Political actors also interfere with and publicly comment on ongoing cases and discuss and denounce final judicial and prosecutorial decisions.<sup>284</sup>

Instances of undue pressure are common on the institutional level as well. Parliaments at different levels routinely discuss annual reports of respective judicial institutions and MPs comment on the work of individual judges and prosecutors, often crossing the boundaries of constructive criticism in a democratic debate, as envisaged by the above standards. It is also common for parliaments at different levels not to adopt or even decisively refuse the annual reports coming from judicial institutions. It was the case recently with the Parliamentary Assembly of BiH refusing to adopt the report of the HJPC, or Sarajevo Canton Assembly refusing the report of the Prosecutors’ Office of Sarajevo Canton. It needs to be said that such practice does not have a basis in the current legal framework in BiH. As the Venice Commission has also emphasized, the purpose of such reports is to inform the public and other powers of the state about the state of affairs in the judiciary. Such mechanism of public accountability should not, however, be transformed into formal accountability of the judiciary to the parliament or the executive.<sup>285</sup> The latter seems to have happened in BiH in practice, particularly over the recent years and may contribute to a harmful public perception that the judiciary is – and that indeed it should be – subjected to the legislature and political actors. Some of our interlocutors have also mentioned that such an atmosphere, with public pressures coming from various strands of society and particularly political circles, presents a serious obstacle in their work.

<sup>282</sup> UNODC, *The United Nations Convention against Corruption: Implementation Guide and Evaluative Framework for Article 11*, pp. 40-41 [see here footnote 206]

<sup>283</sup> Bangalore Principles, para. 1.3 [see here footnote 68]

<sup>284</sup> See e.g. OSCE, *Independence of the Judiciary: Undue Pressure on BiH Judicial Institutions* [2009], available at <https://www.justice-report.com/en/file/show//Documents/Publications/OSCE%20Independent%20Judiciary%20ENG.pdf>; VSTV: *Pritisak na nezavisnost pravosuda u BiH/HJPC: Pressure on the independence of the judiciary in BiH* [November 6, 2016], available in official BiH languages at: <http://balkans.aljazeera.net/vijesti/vstv-pritisak-na-nezavisnost-pravosuda-u-bih>

<sup>285</sup> Venice Commission, *Opinion on the Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*, CDL-AD[2014]008-e, para. 71 [see here footnote 105]

In sum, it appears that open pressures on the judiciary coming from both the executive and the parliaments, and politicians in general, are in fact the mainstream in Bosnia and Herzegovina.



## 5. GENERAL CONDITIONS

Public trust in the judiciary is considerably influencing the independence of judges and prosecutors. The logic behind this is relatively simple: the higher the levels of public trust in the judiciary, the better positioned the judges and prosecutors are to oppose not only the pressures coming from politicians and various interest groups but also pressures within the judicial hierarchy itself.

This factor does not work in favour of the independence of the judiciary in BiH, given that over the years, the level of public trust in the judiciary in BiH has been consistently low. According to the Balkan Barometer survey, public trust in the judiciary has, perhaps surprisingly, increased in 2019 (37 per cent), compared with 25 per cent in 2018 and 26 per cent in 2017.<sup>286</sup> Nonetheless, it can be said that public confidence in the judiciary in Bosnia and Herzegovina is in a steady decline since 2015 when surveys reported more than 40 per cent of respondents having trust in the judiciary.<sup>287</sup> Most recently, for example, media reports suggest that only 19 per cent of citizens trust the judiciary in BiH.<sup>288</sup>

Another important general condition of the work of judges and prosecutors is the professional culture, particularly the level of interaction with political figures and members of economic power groups. Namely, “frequent socializing with local or high-level political figures is almost certain to raise, in the minds of others, the suspicion that the judge is susceptible to undue influence in the discharge of his or her duties.”<sup>289</sup>

Similar caution is advised when it comes to contacts between different professions with the judiciary. In this perspective, “a prosecutor should also take special care in social interactions outside of the professional environment, particularly to the extent that they involve contact with members of the judiciary or the police.”<sup>290</sup>

Ethical codes for judges and prosecutors contain general provisions on incompatibility, refraining from inappropriate connections with the legislature and the executive, also from political engagement or from communicating, directly or indirectly, political preferences and affiliations. Nonetheless, neither the ethical codes nor the Guidelines for the prevention of conflict of interest in the judiciary address this specific issue. In other words, apart from the obvious cases, it remains unclear what “inappropriate connec-

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<sup>286</sup> See e.g. Balkan Public Barometer, available at <https://www.rcc.int/seeds/results/2/balkan-public-barometer>

<sup>287</sup> See e.g. Analitika – Center for Social Research, “Survey Results: The Trend of Citizens’ Distrust in Political Parties and Institutions in Bosnia and Herzegovina Continues” [December 2015], p. 2, available at [https://www.analitika.ba/sites/default/files/publikacije/povjerenja\\_gradana\\_u\\_vlast\\_eng.pdf](https://www.analitika.ba/sites/default/files/publikacije/povjerenja_gradana_u_vlast_eng.pdf)

<sup>288</sup> See e.g. Gordana Sandić-Hadžihasanović, “Bh. pravosudje blizu politike, daleko od pravde”/Judiciary in BiH: close to politics, far from justice, Radio Free Europe, 31 January 2020, available in official BiH languages at: <https://www.slobodnaevropa.org/a/o-reformi-pravosudja-u-bih/30410359.html>

<sup>289</sup> UNODC, The United Nations Convention against Corruption: Implementation Guide and Evaluative Framework for Article 11, p. 24 [see here footnote 206]

<sup>290</sup> *Ibid*, p. 74.

tions” in this context mean and imply. On the other hand, the Judicial Ethics Handbook contains a rather cogent recommendation that “prosecutors shall avoid meeting the political representatives, save for the case when such meeting is held for the purpose of strengthening the independence of the prosecutorial system, and when the meeting in question is scheduled and held in a public space.”<sup>291</sup> When it comes to inappropriate communication with members of the profession, ethical codes only state that a judge or a prosecutor, “in [their] ... personal relations with members of legal profession, avoid situations which could justifiably bring in question [their] ... impartiality.”<sup>292</sup>

This important issue, generally speaking, has received little attention in relevant regulations concerning the judiciary. The parameters of inappropriate contacts beyond the obvious ones are mostly unclear, especially for a comparatively small jurisdiction such as BiH. As a member of the judiciary in BiH put it: “The criteria for defining inappropriate contacts should be stricter in BiH than anywhere else, having in mind poor rating of the country in the area of fight against corruption...”<sup>293</sup> Many interviewees in this analysis confirm that this important concept remains under-elaborated. It is, thus, perhaps not surprising that media reports on inappropriate meetings and contacts between members of the judiciary and politicians and economic elites<sup>294</sup> triggered almost no reaction within the professional community of judges and prosecutors and their professional associations. That is also the case with the most recent example where the president of the High Judicial and Prosecutorial Council of BiH attended a political meeting held on 20 February 2020 and organized, absurdly, with a view of discussing strategies for weakening the authority and influence of the Constitutional Court of Bosnia and Herzegovina.

<sup>291</sup> HJPC, Judicial Ethics Handbook (2019), p. 75; see here footnote 246.

<sup>292</sup> Ethical code for judges, para. 2.3; Ethical code for prosecutors, para. 2.3.

<sup>293</sup> Project interview, 05/12/2019. The interviewed person requested both personal and institutional anonymity.

<sup>294</sup> See e.g. CIN, Injustice at the Justice Square <https://www.cin.ba/en/nepravda-na-trgu-pravde/>; CIN, Neighborly Deal between Judge and Convict <https://www.cin.ba/en/komsijski-dogovor-sudije-i-osudenika/>

***Injustice at the Justice Square***

*Police surreptitiously recorded former Brčko mayor's conversation with Jadranko Grčević, president of the local Basic Court. Mayor Dragan Pajić and the judge conversed about the balance of political powers and outvoting in the Assembly. On the day when the District's Assembly was going to vote about the Mayor's termination, Grčević met with one of the lawmakers and later informed the Mayor about it.*

*He was never sanctioned for what he said and did.*

*As his inappropriate conversations with a former mayor were made public, Grčević received a court-ordered restitution larger than the reparations given to the families for losing their loved ones in the war. For injury to his honour, reputation and dignity, he received a compensation of 36,000 BAM from the Brčko courts. For comparison's sake, an assailant of a 16-year-old girl, also in Brčko, was ordered to pay the girl 3,000 BAM in restitution for mental anguish.*

*Center for Investigative Reporting, May 2017.*

<https://www.cin.ba/en/nepravda-na-trgu-pravde/>

This lack of reactions of the professional community to even the obvious cases of inappropriate contacts can partly be ascribed to the generally weak and passive professional associations of judges and prosecutors.<sup>295</sup> In such a situation, and with very few critical professional voices, however vocal they may be, it is hard to expect that the judiciary in BiH would internalize zero tolerance for inappropriate contacts. As things stand now, such contacts appear to be largely tolerated in the professional culture of legal professionals, and the line between acceptable and inappropriate contacts seems in many ways blurred. The same seems to hold for contacts between judges and prosecutors in BiH. Most legal professionals interviewed for this study agree that such contacts need to be limited. Nevertheless, some of them seem to believe that such request is not realistic in the BiH context – given the situation of limited resources and high workload which often prompt prosecutors to directly contact judges for timely resolution of procedural matters in specific cases.<sup>296</sup> This opinion is certainly telling in this regard.

<sup>295</sup> See e.g. Foundation Public Law Centre, Okrugli sto i javni dijalog: Uloga udruženja sudija i tuzilaca u reformi pravosudja/Roundtable and public dialogue: The role of the associations of judges and prosecutors in the reform of judiciary [Sarajevo, 4 October 2019], available in official BiH languages at: [http://www.fcjp.ba/analize/Rezime\\_stavova\\_i\\_preporuka\\_sa\\_skupa\\_Uloga\\_udruzenja\\_sudija\\_i\\_tuzilaca\\_u\\_reformi\\_pravosudja.pdf](http://www.fcjp.ba/analize/Rezime_stavova_i_preporuka_sa_skupa_Uloga_udruzenja_sudija_i_tuzilaca_u_reformi_pravosudja.pdf)

<sup>296</sup> Project interview, 18/11/2019. The interviewed person requested both personal and institutional anonymity

## 6. PREVALENCE OF SELF-CENSORSHIP

Self-censorship in the context of the judiciary can be defined as avoidance by judicial officeholders to act in the manner prescribed by law, for fear of possible reprisals or in anticipation of certain benefits, without being under direct influence or pressure from the other side. It is more likely to occur in countries where there is a legal culture of subordination of judicial institutions to political power from the dominance of informal rules that to a considerable extent and in various ways shape the actions of formal institutions.<sup>297</sup> The risk of self-censorship is, as a rule, significantly higher in cases where the subjects of prosecution are high public and political office holders or tycoons. Both groups have money, power and influence. Self-censorship in such cases is likely propelled by the fear that money, power and influence could be used for reprisals or expectation that they could be used to provide a reward, be it of material nature or in the form of a promotion to a higher position.

As self-censorship is about the internal attitude of judicial office holders towards the prosecution in certain cases or against specific perpetrators, it is difficult to measure the level of its presence objectively. Hence, the level can be measured only indirectly. One possible way is to rely on measuring the perception, whether that of the general or professional public. Indirectly, it is possible to estimate the presence of self-censorship based on measuring the level of proactive or *ex officio* actions of prosecutors. Another indirect indicator of the presence of self-censorship can be the prosecution of acts of corruption with regard to the status or position of the perpetrator. The consistency in the treatment of cases, or the lack thereof, as well as the length of the proceedings, can also be indicative of the presence of self-censorship.

A perception survey conducted among members of the professional public (judges, prosecutors, court and prosecutorial staff, lawyers and police officers) points to self-censorship as a factor considerably influencing behaviour in the judiciary in general. Nearly 60 per cent of the respondents cited “the policy of avoiding confrontation with financially or politically influential persons who could block further career promotion” as a powerful force shaping their behaviour. Other types of motivation include “avoiding to antagonize the manager of the institution for fear of ‘sanctions’ [adverse performance evaluations, various forms of mobbing, etc.]”, “fear for personal safety and safety of close persons” [around 25 per cent], or “fear of sanctions of any kind” [about 15 per cent].<sup>298</sup>

Presence of self-censorship has been confirmed through interviews with prosecutors and judges carried out for this study. Such self-censorship then has an impact on the work of the judiciary. There is evidence suggesting that criminal proceedings against

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<sup>297</sup> Helmke, Gretchen, and Steven Levitsky. 2004. “Informal Institutions and Comparative Politics: A Research Agenda”. Siri Gloppen, “Courts, Corruption and Judicial Independence”, in *Corruption, Grabbing and Development* Edited by Tina Søreide and Aled Williams, Edward Elgar Publishing, 2014.

<sup>298</sup> USAID’s Diagnostic Analysis, 2015 [see here footnote 1]

politicians and holders of economic power are conducted differently to those against members of the general public.<sup>299</sup>

The analysis of verdicts in corruption cases rendered by the courts in BiH, which was done under the USAID project supporting justice, shed light on how corruption cases were handled depending on the position occupied by the perpetrators.<sup>300</sup> The analysis developed classification according to which defendants were grouped into three categories: high ranking, mid-level and lower-level perpetrators. The analysis showed that the overwhelming majority of prosecuted persons, out of a total of 512 surveyed, were lower-level perpetrators, as many as 86 per cent [439 persons]. In comparison, 14 per cent [73 persons] were mid-level perpetrators. There were no high-ranking perpetrators, i.e. elected or appointed officials with the highest level of responsibility in the organs of legislative, executive or judicial authority at the state or entity level. There were no proceedings against judicial office holders at any level in the analysed sample either.

OSCE report on monitoring of corruption cases draws attention to significant delays in the proceedings against the high- and mid-ranking persons, caused by changes of members of judicial panels, and inability to ensure the presence of the parties.<sup>301</sup>

These findings, albeit indirectly, indicate the problem of self-censorship as very relevant in the context of the functioning of the judiciary in BiH.

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<sup>299</sup> Project interview, 27/12/2019. The interviewed person requested both personal and institutional anonymity

<sup>300</sup> Analysis of Verdicts in Corruption Cases Rendered by Courts in BiH, USAID's Justice Activity Bosnia and Herzegovina, December 2017. The sample of analyzed court decisions includes a total of 614 verdicts in corruption cases that were rendered by courts in BiH over a three-year period [2013, 2014 and 2015]

<sup>301</sup> OSCE BiH: *Assessing Needs of Judicial Response to Corruption through Monitoring of Criminal Cases, Second Assessment, 2018*

### ***Special Prosecutors are Relativizing Major Crime***

*Special Prosecutor's Office of the Republika Srpska (RS) was set up to combat organized crime and major financial crimes. Fifty-nine persons have been prosecuted for financial crimes so far, out of which 39 were sentenced to short terms that altogether add up to 25 years. Six were given parole. Fourteen were acquitted. Although the Prosecutor's Office is supposed to be prosecuting crimes which carry a sentence of at least five years, two-thirds of the defendants received sentences of between three and six months long, while the harshest sentence meted out was two years.*

*Želimir Lepir, president of the Special Department for Organized Crime and Major Financial Crimes, said that prosecutors at first charged defendants with more serious offences, then during the trial had to amend the indictment which was the reason for the shorter sentences to be passed.*

*The Special Prosecutor's Office has so far brought indictments in five major corruption cases, and two ended in acquittals. These cases involve the Department for Privatization, Banja Luka-based Boska retail store and the RS railways. In two other cases, convictions resulted in sentences ranging from three months to two years. The fifth case is currently underway.*

*Center for Investigative Reporting, March 2012*

<https://www.cin.ba/en/specijalni-tuzioci-usitnjavaju-krupni-kriminal/>

## 7. PREVALENCE OF OUTSIDE CORRUPTION PRESSURES

The Committee of Ministers of the Council of Europe set standards of external independence of judges in Rec [2010]12. It clearly stated that the external independence of judges is not a prerogative or privilege granted to judges in their interest but in the interest of the rule of law. It is also in the interest of those seeking and expecting impartial justice.<sup>302</sup> As it was stated in the Explanatory Memorandum to the Rec [2010]12, in an increasingly interdependent society, judicial functions cannot be efficiently performed without meaningful co-operation between the authorities and bodies which have responsibility for the administration and management of the courts and co-operation with professionals whose tasks are related to judicial function. However, in order to preserve judicial independence from external pressures, these relations should be governed by law or written protocols.<sup>303</sup>

The public reporting of trials and judicial decisions is essential in order to create and maintain public confidence in the judiciary. However, in commenting on the judicial decisions, both the legislative and executive authorities should avoid criticism that would undermine the independence of or public confidence in the judiciary. In addition to that, they should avoid all actions that may call in question their willingness to abide by judges' decisions, other than stating the intention to appeal.<sup>304</sup>

Rec [2010]12 confirms that judicial activities are rightfully the subject of legitimate public and media interest, and information about those should be widely disseminated. Judicial proceedings and matters concerning the administration of justice are of public interest.<sup>305</sup> Public debate on any issue of public interest is an essential element of a democratic society. In principle, the decisions and actions of judges and prosecutors are no exception. However, there is a clear line between freedom of expression and legitimate criticism, which can have positive effects, on the one hand, and disrespect and undue pressure on the other. Therefore, politicians, public servants, media and the public in general should not overstep the boundaries of legitimate criticism to exert political or any other external pressure on the judiciary. The limitations are imposed by judicial independence and by restrictions outlined in Article 10[2] of the ECHR – freedom of expression can be restricted for the protection of the authority of judiciary provided it is prescribed by law and is “necessary in a democratic society”.

Independence does not mean that judges should be isolated from society. They should be able to maintain contact with the social and cultural environment that

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<sup>302</sup> Committee of Ministers' Recommendation CM/Rec[2010]12 and explanatory memorandum: Judges: independence, efficiency and responsibilities, 17 November 2010, para. 11, available at: <https://rm.coe.int/16807096c1>

<sup>303</sup> *Ibid*, para. 12

<sup>304</sup> *Ibid*, para. 18

<sup>305</sup> *Ibid*, para. 19

has to be taken into account when deciding on cases. It includes insight into the society's expectations of the judicial system and complaints about its functioning. Rec[2010]12 states that permanent mechanisms to obtain such feedback should be set up by "councils for the judiciary or other independent authorities".<sup>306</sup> However, judges should exercise restraint in their contact with the media. Personal appearance by judges in the media, to justify their decisions, are strongly discouraged.

The findings of the ENCJ state that many judges in EU member states do not feel that their independence is respected.<sup>307</sup> Unbalanced public comments are worrisome because they affect the public perception of the judges and prosecutors and can harm the necessary public trust in them. In some cases, such comments can play a role in encouraging violent attacks against judges.<sup>308</sup>

In the EU – but also across the states gathered in the Council of Europe – judicial councils have become widespread, a veritable best practice for strengthening judicial independence. Judicial councils are entrusted with all decisions affecting the status of judges.

## 7.1. In practice

In practice, there are both hidden and open outside pressures on the judiciary. Hidden pressures are those from political elites that influence all the processes within the judiciary, namely through the HJCP.

Following European best practices, the HJPC was founded to be a mechanism for protecting and strengthening judicial independence in all its aspects, a mechanism that was meant to secure judicial institutions from political and other pressures and interference. However, it proved to be far from that. In 2015 Fourth Evaluation Report, GRECO stated that the issue of respect for judicial independence is a considerable challenge and that its importance has not been given due weight. GRECO noted that this was particularly apparent in the tension between court authority and legislative and executive powers. The report stated the following:

Flaws in the independence and impartiality of the judiciary, notably through political interference and pressure on issues relating to processing certain criminal cases, have already been highlighted by GRECO [...] In its latest report on Bosnia and Herzegovina, the European Commission stresses in particular that there are no formal procedures, carrying penalties, that offer legal or constitutional protection against undue influence or threats

<sup>306</sup> Ibid, para. 20

<sup>307</sup> ENCJ Report on Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, p. 7; available at: [https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj\\_report\\_independence\\_accountability\\_2014\\_2015\\_adopted\\_ga\\_corr\\_2016.pdf](https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_2014_2015_adopted_ga_corr_2016.pdf)

<sup>308</sup> CoE, Challenges for judicial independence and impartiality in the member states of the Council of Europe, Information Documents SG/Inf[2016]3rev, 24 March 2016, paras. 26-27



to judicial independence, resulting in unlawful and politically motivated attacks against the judiciary.<sup>309</sup>

It is suggested that the HJPC did exert some positive influence in strengthening the independence and professionalism of the judiciary. However, the progress made over the years is still fragile, and the HJPC is currently subject to numerous criticisms and concerns from various parts of society as well as some of its members.

GRECO 2015 Evaluation Report noted concerns over the HJPC's composition, appointment procedures for its members and their accountability, and the HJPC's limited capacity to address complex issues which the judicial system as a whole is confronting, including integrity issues. The HJPC itself has been facing problems related to political pressure and attempts to undermine its independence, including interference of the executive and legislative powers in the appointment of its members in particular. More specifically, its structure has been criticised as it allows the prosecutors and lay members to have a majority vote on the appointment and disciplinary proceedings regarding judges. Concerns were also raised about attorneys being lay members in the Council and regarding the politicisation of the appointment procedures for the members of the HJPC, as both the legislative and executive branches are involved. The report further noted that some "interlocutors expressed the view that the judiciary as a whole is perceived as generally politicized, due on the one hand to personal links of some of its members with politicians and on the other hand, due to the perception that high profile investigations and cases are either lacking or are opened and closed based on political motivations". Moreover, the HJPC members themselves "are not exempt from such suspicions."<sup>310</sup> Therefore, GRECO made several recommendations to help HJPC become a fully functioning protector of judicial independence. One of the key recommendations reads as follows:

determined legislative and operational measures [should] be taken to strengthen the [HJPC's] role in protecting the holders of judicial and prosecutorial offices from undue influences – both real and perceived – including by [i] providing for separate judicial and prosecutorial sub-councils; and [ii] avoiding an over-concentration of powers in the same hands concerning the different functions to be performed by members of the High Judicial and Prosecutorial Council; and [iii] ensuring that decisions of the High Judicial and Prosecutorial Council on the appointment, promotion and disciplinary liability of judges and prosecutors are subject to appeal before a court.<sup>311</sup>

However, 2018 GRECO Compliance Report noted that recommendations related to the chapter on the corruption prevention in respect to judges and prosecutors had been only partially implemented, if at all. For example, the above crucial recommendation has not been implemented. The BiH authorities indicated that the implementation of these recommendations would require amendment of the Law on the HJPC

<sup>309</sup> GRECO, Evaluation Report on BiH, para 84 [see here footnote 122]

<sup>310</sup> Ibid, paras. 86-89

<sup>311</sup> Ibid, para 91

BiH. However, GRECO stressed that “this process has been on-going since 2013, before the adoption of the Evaluation Report” and that some recommended measures, “such as avoiding an over-concentration of powers in the same hands concerning the different functions to be performed by members of HJPC”, could well be implemented without changes to the law.<sup>312</sup>

The HJPC, however, has continued to undermine its own and the reputation of the judiciary as a whole by activities such as the 2017 controversial conclusion on the possibility of dismissing judges and prosecutors on the basis of their alleged war-time activities without conducting disciplinary procedures. Subsequently, the HJPC revoked this conclusion, but mostly due to the strong international pressure. In relation to this, the European Commission noted in its 2018 Report:

This episode revealed the vulnerability of the judiciary to various types of pressure. Judicial independence and prosecutorial autonomy must be further strengthened, including in practice. Politically motivated threats against courts and prosecutor’s offices must be detected on time and properly addressed. The constitutional and legal framework remains weak as to the guarantees of independence, impartiality and autonomy of judges and prosecutors.<sup>313</sup>

Unfortunately, there was no clear standing on this issue from the judiciary itself or judges’ and prosecutors’ associations, which reveals the weakness of these associations in protecting from within the independence of the judiciary.

In 2019 Report, the European Commission repeats that judges and prosecutors “have been subject to politically motivated threats”.<sup>314</sup>

Recent allegations about the HJPC’s President’s inappropriate behaviour and possible corruption and the HJPC’s decision not to investigate them raise serious concerns. The on-line portal *Žurnal.info* published text and video evidence of the inappropriate behaviour of Milan Tegeltija, president of the HJPC, alleging that he is susceptible to corruption.<sup>315</sup> The Office of the Disciplinary Prosecutor (ODP) requested investigation and suspension,<sup>316</sup> but the First Instance Disciplinary Commission of the HJPC rejected

<sup>312</sup> GRECO Compliance Report, Bosnia and Herzegovina [2018], paras. 41-44 [see here footnote 268]

<sup>313</sup> European Commission, Bosnia and Herzegovina 2018 Report, Accompanying the document “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; 2018 Communication on EU Enlargement Policy, Strasbourg, 17/04/2018, {COM[2018] 450 final} available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-bosnia-and-herzegovina-report.pdf>

<sup>314</sup> European Commission, Analytical Report, {COM[2019] 261 final} – see here footnote 129

<sup>315</sup> “PREDSJEDNIK VSTV-A UHVAĆEN U KORUPCIJI: Milan Tegeltija trgovao krivičnim istragama!/HJPC President Caught in a Corruptive Deal: Milan Tegeltija Traded in Criminal Investigation!, 21/05/2019. Available in official BiH languages at: <https://zurnal.info/novost/22105/milan-tegeltija-trgovao-kriv-icnim-istragama>

<sup>316</sup> “ZBOG SLUČAJA POTKIVANJE: Disciplinski tužilac podigao tužbu protiv Milana Tegeltije!"/ Disciplinary Prosecutor Files Charges Against Milan Tegeltija Over the Case of Bribery, 31/05/2019. Available in official BiH languages at: <https://zurnal.info/novost/22141/disciplinski-tuzilac-podigao-tuzbu-protiv-milana-tegeltije>

the request.<sup>317</sup> The BiH High Representative stated that this decision in practice meant impunity for all members of the HJPC. In reaction to this statement, Milan Tegeltija wrote a letter to ambassadors of the Peace Implementation Council [PIC] pointing out that such suggestions – that fall outside of the mandate of the BiH High Representative – could significantly influence the disciplinary proceedings, decision-making process and the decision in the proceedings against him. He added that “Mr Inzko jeopardized [his] right to a fair and impartial procedure and impartial interpretation of the law by an independent and impartial body.”<sup>318</sup> The Ambassadors of the OSCE, USA, UK, Germany, the Netherlands and Spain issued a statement in which they stressed that they were

alarmed following the recent events with regard to the HJPC, in particular, its first instance Disciplinary Commission’s decision concerning the alleged misconduct of the President of the HJPC. No one should be above the law. This holds especially true for the members of the judiciary, whose integrity is a prerequisite for upholding the rule of law. [...] The law on the HJPC does not provide for impunity. On the contrary, it clearly provides many possibilities by which the President of the HJPC should be held accountable, including by disciplinary proceedings. In fact, the function of President of the HJPC requires even stricter adherence to the ethical principles guiding the conduct of judges and prosecutors, as this individual holds great responsibility in upholding judicial impartiality and independence across the entire country. Failure to uphold professional standards, effectively imperils the independence of the judiciary.<sup>319</sup>

ODP’s appeal against the first instance decision was rejected by the second instance Disciplinary Commission of the HJPC. There have been no further activities related to these grave allegations. This example illustrates that the excessive institutional independence of an independent judicial council could be misused to undermine individual responsibility of its members.

In the most recent expert report, popularly known as *Priebe Report*, it is clearly stated that “the HJPC has itself become part of the problem. Serious miscarriages of justice have become apparent due to lack of leadership capacity, allegations of politicisation and conflicts of interest, inefficient organization, insufficient outreach and transparency, and, finally, its failure to implement reforms”. It is emphasized that

Public opinion was particularly shaken by corruption allegations against the HJPC President and alleged manipulations of appointment and disci-

<sup>317</sup> “VSTV: Disciplinska komisija odbila tužbu i zahtjev za suspenziju Tegeltije”/HJPC: Disciplinary Committee Rejects the Complaint Against Tegeltija and Request for his Suspension, 04/06/2019. Available in official BiH languages at: <http://ba.n1info.com/Vijesti/a348406/VSTV-Disciplinska-komisija-odbila-tuzbu-i-zahtjev-za-suspenziju-Tegeltije.html>

<sup>318</sup> „Slučaj “Tegeltija”: OSCE, OHR i pet ambasada zabrinuti zbog disciplinskog postupka”/Tegeltija Case: OSCE, OHR and Five Embassies Concerned over the Disciplinary Proceedings, 07/06/2019. Available in official BiH languages at: <http://detektor.ba/slucaj-tegeltija-osce-ohr-i-pet-ambasada-zabrinuti-zbog-disciplinskog-postupka/>

<sup>319</sup> Ibid.

plinary procedures. Taking into account the seriousness of the allegations the reaction of the President as well as the unanimous support for his actions by the HJPC members does not appear to be appropriate bearing in mind the importance of this institution. No substantive disciplinary investigation has taken place. An important chance to set a precedent of integrity was lost. This created deep reputational damage to the institution.<sup>320</sup>

There are open pressures on the judiciary by politicians and political parties but also by members of the judiciary. The most notable political pressures are those coming from Milorad Dodik, currently one of three members of BiH Presidency, who makes damaging public statements about judiciary whenever he personally disagrees with a court decision. His comments target the work and credibility of the Court of BiH and BiH Prosecutor's office in particular. Thus in 2018 Dodik publicly threatened that he would initiate measures to suspend the work of the Court of BiH and BiH Prosecutor's Office<sup>321</sup> and invited "all Serbs to leave BiH judicial institutions."<sup>322</sup> This happened in reaction to the cases of Naser Orić and Sabahudin Muhić, who had been acquitted of charges for war crimes against Serbs. In addition to this, members of the State Legislature did not hesitate to state in public that they "do not recognise this Court and Prosecutor's Office [of] BiH" and that those were "anti-Dayton institutions."<sup>323</sup>

The most concerning is that the prosecutor in Orić's case, Miroslav Janjić, stated in public that he had refused to be present at the hearing when the judgement was pronounced and said: "In order to be present at the pronouncement there has to be a judgment. In order for a judgment to be pronounced there has to be a court. For the court to be the Court of BiH there have to be Serbs in the courtroom as well." The ODP sanctioned him for this statement with a public warning, but appeals against that decision are still pending.<sup>324</sup>

The media play a significant part in attacks on the judiciary. They happen to be caught in-between political ownership or influence<sup>325</sup> and political pressures, particularly the

<sup>320</sup> Expert Report on Rule of Law issues in BiH, paras. 65-66 [see here footnote 2]

<sup>321</sup> "Prijetnje / Dodik: Predložiti ću mjere suspenzije rada Suda i Tužilaštva BiH u RS-u"/Threats: Dodik Announces - I Shall Propose the Court and PO of BiH to be Suspended in RS, 09/10/2017. Available in official BiH languages at: <https://www.radiosarajevo.ba/vijesti/bosna-i-hercegovina/dodik-predlozit-cu-mjere-suspenzije-rada-suda-i-tuzilastva-bih-u-rs-u/277371>

<sup>322</sup> "Dodik pozvao Srbe da napuste pravosudne institucije BiH"/Dodik Urged the Serbs to Resign Their Posts in BiH Judiciary, 09/10/2017. Available in official BiH languages at: <http://www.politika.rs/sr/clanak/390385/Dodik-pozvao-Srbe-da-napuste-pravosudne-institucije-BiH>

<sup>323</sup> E.g. statement of Staša Košarac, member of the House of Representatives of BiH Parliamentary Assembly, "Košarac: Ne priznajemo ovakav Sud i Tužilaštvo BiH"/Košarac: We Do Not Recognise the Court and PO of BiH of This Kind, 16/07/2018. in: <https://www.nezavisne.com/novosti/bih/Kosarac-Ne-priznajemo-ovakav-Sud-i-Tuzilastvo-BiH/488385>

<sup>324</sup> "Tužilac Miroslav Janjić prijavljen VSTV-u zbog kritika Suda nakon presude Naseru Oriću"/Prosecutor Miroslav Janjić Reported to the HJPC over Criticism of the Court after the Sentence to Naser Orić, 03/12/2018. Available in official BiH languages at: <https://www.klix.ba/vijesti/bih/tuzilac-miroslav-janjic-prijavljen-vstv-u-zbog-kritika-suda-nakon-presude-naseru-oricu/181203097>

<sup>325</sup> "Pristrasnost medija u BiH - problem na putu ka EU"/Media Bias in BiH - An Obstacle on the Path to the EU, 09/11/2016. Available in official BiH languages at: <https://www.dw.com/bs/pristrasnost-medija-u-bih-problem-na-putu-ka-eu/a-36183456>

threats to and attacks on journalists.<sup>326</sup> This leaves little room for independent and objective journalism in BiH. Reporting and commenting on ongoing cases before courts are often done to undermine the court's credibility and independence, in particular, if the party to a case is a prominent political figure. Incompetent commentaries and unprofessional legal analysis of judicial decisions are widely accepted, even popularized in the media.<sup>327</sup> In 2018, the Court of BiH called all media to report fairly, responsibly and transparently, to inform without prejudices and "pejorative allusions" about court cases, respect presumption of innocence of the defendants, dignity of victims and witnesses, as well as the honour, authority and dignity of the court and judges.<sup>328</sup>

Yet even members of the HJPC do not hesitate to make public, malicious statements about other members of the judiciary, serving in that way as the "extended hand" of politics to further pressure judiciary or create a "chilling effect" for those who justifiably criticise the work of HJCP. The Vice-President of HJCP, Ružica Jukić, made public allegations in a press statement about Branko Perić, judge of Court of BiH, and Milan Blagojević, judge of Banja Luka District Court, accusing them of "nepotism, bullying and idleness". Ms Jukić issued this press statement as a response to the public criticism that these judges made about the work of the HJPC.<sup>329</sup>

These are just a few examples of pressures that judicial institutions and members of the judiciary face. It is quite unfortunate that the HJPC is not only unable to be a strong shield from such pressures but also contributes to further undermining and erosion of judicial integrity and independence. In such a situation, whatever safeguards against outside pressures might exist in theory, they are ineffective in practice since the HJPC as the very guardian against those pressures is unable to protect judiciary effectively.

It seems, however, that judges and prosecutors who were interviewed for this study do not share these concerns in relation to intimidation and threats toward judicial officials. Most of them state that the legal framework in place is satisfactory and stress only the negative impact of the media.

<sup>326</sup> "Novinarima se sve češće prijete smrću"/Ever More Frequent Threats to the Journalists, 08/07/2019. Available in official BiH languages at: <https://www.oslobodjenje.ba/vijesti/bih/novinarima-se-sve-cesce-prijeti-smrcu-469366>

<sup>327</sup> "Dileme, zamke i mogućnosti sudskog izvještavača"/Dilemmas, Traps and Potentials for Trial Reporters, 04/04/2007, available in official BiH languages at: <https://www.media.ba/bs/pravda-i-sigurnost-ratni-zlocini/dileme-zamke-i-mogucnosti-sudskog-izvjestaca>

<sup>328</sup> "Sud BiH traži zakon o izvještavanju sa suđenja"/Court of BiH Demands a Law on Trial Reporting, 19/09/2018. Available in official BiH languages at: <https://faktor.ba/vijest/sud-bih-trazi-zakon-o-izvjestavanju-sa-sudenja/3722>

<sup>329</sup> "Kuda ide pravosuđe BiH?"/ Quo Vadis, BiH Judiciary?, 25/06/2019. Available in official BiH languages at: <https://www.slobodnaevropa.org/a/vstv-bih-justice/30019327.html>

***From interviews***

The legal framework regulating the protection of judges against external pressure is providing enough guarantees against external pressure on judicial officials. (*Filipović, Ljiljana. Judge of the Supreme Court of FBiH. Project interview, 24/12/2019*)

External pressure against judicial officials is often a result of hasty criticism from politicians, holders of economic power and the media... the media should avoid irresponsible criticism which is undermining public confidence in the judiciary. Apart from the media, the Executive and the Parliament should also comply with their own ethical standards in their approach towards the judiciary..... The conduct of judicial officials on the social media should also be regulated. (*Project interview, 27/12/2019. The interviewed person requested both personal and institutional anonymity.*)

...the key issue is the prevailing unethical culture in the society, improvement in this area could occur if judicial officials were to be held accountable for violations of ethical codes – an outcome that has not happened to date. (*Project interview, 18/11/2011. The interviewed person requested both personal and institutional anonymity.*)

## 8. PREVALENCE OF INTERNAL CORRUPTION TRANSACTIONS AND UNDUE HIERARCHICAL INFLUENCE

Over the past months, mostly due to the controversies related to its president (elaborated in the previous sections), the HJCP BiH has often been referred to as an “alienated centre of judicial power”. Nonetheless, this is not unique to BiH but rather a broader problem with the European model of judicial self-governance. As Bobek and Kosar explain, “[t]he Euro-model shields the judiciary from external influence, but it pays little attention to improper pressure on individual judges [...] given that the Council’s members may favor their allies and shape the judiciary according to their views.”<sup>330</sup> In other words, while serving the important goal of protecting the judiciary from external influence, judicial self-government poses the problem of possible internal or hierarchical influence.

In addition, hierarchical influence can also be a way for external actors to exert influence over the judiciary or judges and prosecutors in specific cases.

In the context of BiH, undue influence can be observed on different levels of judicial hierarchy. On the one hand, it can be related to the relationship between a chief prosecutor and other prosecutors or between court presidents and other judges, on the other – between members of the HJPC and the judiciary as a whole. In the context of the former dimension of possible hierarchical influence, it needs to be said that, according to the relevant laws in BiH, chief prosecutors and court presidents have an overall duty to manage the prosecutors’ offices and courts. In this sense, they have an important role in terms of, *inter alia*, distribution of cases and evaluation of work of individual judges and prosecutors. The HJPC has vast competences in the administration of the judiciary in BiH – notably the appointment of judges and prosecutors, including court presidents and chief prosecutors, alongside its crucial role in disciplinary proceedings against members of the judiciary. Such competences, however, also entail numerous avenues for and dangers of undue hierarchical influence coming from the HJPC.

Direct evidence of hierarchical influence is hard to find, as is the case with other similar instances of undue influence. Nonetheless, numerous examples from practice in the judiciary in BiH suggest that both dimensions of influence are often materialized. Investigative journalists, for example, report about conspicuous cases involving high profile politicians or business people where obstructions, delays and procedural mistakes, many of them exhibiting a significant degree of hierarchical influence, have

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<sup>330</sup> Michal Bobek and David Kosar, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, College of Europe, Research Paper in Law 07/2013, p. 14, available at <https://core.ac.uk/download/pdf/19557413.pdf>

prevented the effective delivery of justice.<sup>331</sup> As one interviewee explains, there are many subtle and direct ways for chief prosecutors and court presidents to influence the process of passing a verdict. Besides simple visits to judges' offices to enquire on a specific case, more open methods of allocating cases to more favourable judges are also possible.<sup>332</sup>

A good illustration of various types of influence of heads of judicial institutions on ongoing cases is the reported experience of eleven prosecutors from the Cantonal Prosecutor's Office of Sarajevo Canton. As they claimed in their letters to the HJPC from March 2019, the then chief prosecutor had pressured them on various occasions to act in such a way as to favour the business owners or politicians who were under investigation or accused. After they had refused to do so, the chief prosecutor had allegedly threatened to ruin their careers and subsequently gave them low marks in the annual evaluation.<sup>333</sup> Another indication of possible hierarchical links in covering and relativizing undue influence is the fact that the said chief prosecutor was appointed a judge of the Court of BiH, despite the ongoing disciplinary proceedings against her based on the above allegations.

Other sources also confirm the existence of undue hierarchical links and influences that cannot be ignored. For example, a survey conducted in 2015 shows that over 60 per cent of members of the judiciary in BiH believe that corruption within the profession is partly present (50 per cent) or present to a significant extent (11 per cent of respondents). It is certainly indicative in this regard that more than half of respondents believe that "avoiding conflicts with financially and politically influential people to ensure promotion and other benefits" and "dependence on the persons they owe the appointment to [returning a favour]"<sup>334</sup> are some of the main motives for corruption in the judiciary. Interviewees consulted for this study also suggest that vast competences and broad influence of the HJPC in the judiciary, coupled with insufficient guarantees and criteria of professionalism and integrity of its members, present a significant problem in the context of undue hierarchical influence. This is reflected in individual cases. As one of the interlocutors argues, "the HJPC is also well-equipped to interfere with the independence of judicial officials by exerting influence on decisions and length of proceedings, by dealing with investigations etc."<sup>335</sup> Members of the judiciary consulted for this study report that chief prosecutors and presidents of courts in BiH often seriously jeopardize the in-

<sup>331</sup> See e.g. CIN, Fishy Transactions from Russia via Sberbank, available at <https://www.cin.ba/en/sberbanka-za-sumnjive-transakcije-iz-rusije/>; CIN, Evidence Missing from Covic and Lijanovic's Files, available at <https://www.cin.ba/en/nestali-dokazi-iz-predmeta-covic-lijanovici/>; CIN, Covic's Rich Father-in-law, available at <https://www.cin.ba/en/bogati-covicev-punac/>.

<sup>332</sup> Interview, *Perić, Branko. Judge of the BiH Court. Project interview, 22/11/2019.*

<sup>333</sup> See: "Tužiocima se žalilo VSTV-u zbog Dalide Burzić: Utjecala na istrage, tražila da se neki ne hapse"/ Prosecutors complained to the HJPC concerning Dalida Burzic: She influenced the investigations, requested for some individuals not to be arrested, available in official BiH languages at: <https://www.klix.ba/vijesti/bih/tuzioci-se-zalili-vstv-u-zbog-dalide-burzic-utjecala-na-istrage-trazila-da-se-neki-ne-hapse/190619026>

<sup>334</sup> USAID Diagnostic Analysis, 2015, p. 8 [see here footnote 1]

<sup>335</sup> Interview *Perić, Branko. Judge of the BiH Court. Project interview, 22/11/2019.*



dependence of judicial officials by influencing the assignment of cases and passing decisions.<sup>336</sup>

In sum, it may be concluded that most of the dangers and negative effects of judicial self-government have materialized in BiH. According to available sources, undue hierarchical influence is often exerted in a more or less covert way and using more or less subtle mechanisms – from direct contacts, through controlling career prospects through evaluation of work of judges and prosecutors, to the allocation of cases to specific persons more susceptible to such influence.

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<sup>336</sup> *Ibid*; Interview Pašić, Džermin. Prosecutor, BiH Prosecutor's Office. Project interview, 11/12/2019.

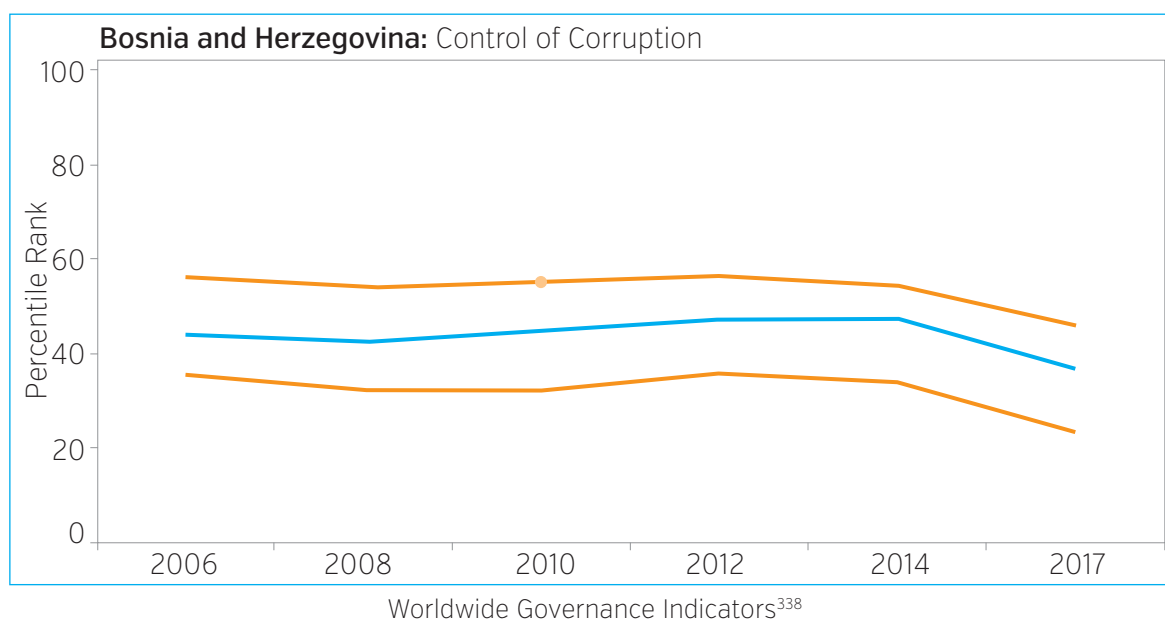
## 9. OVERALL COVERAGE OF THE ABOVE-IDENTIFIED PROBLEMS IN THE JUDICIARY BY ANTI-CORRUPTION MEASURES AND POLICIES

### 9.1. Judiciary – Overview of Anti-Corruption Policies

After more than two decades of intensive reform of the judicial system, BiH is still facing considerable challenges in establishing an independent, efficient and functioning judicial system.

European Commission’s strategic document “A credible enlargement perspective for and enhanced EU engagement with the Western Balkans” emphasizes that “the countries show clear elements of state capture, including links with organised crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests.”<sup>337</sup>

Relevant studies of corruption indicate the absence of progress in the overall fight against corruption in BiH over a prolonged period, namely since 2006. This period of stagnation has coincided with the change in the international community’s approach and role in the country. After a period of robust international intervention, the international presence has changed considerably since 2006. The direct intervention has given way to a conditionality-based approach.



<sup>337</sup> European commission, COM[2018] 65 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A credible enlargement perspective for and enhanced EU engagement with the Western Balkans” Strasbourg, 6/2/2018

<sup>338</sup> Worldwide Governance Indicators, World Bank Institute

Source	2006	2008	2010	2012	2014	2017
Bertelsmann Transformation Index	0.55	0.55	0.50	0.40	0.40	0.40
Business Enterprise Environment..	0.71	0.70	0.70	0.70	0.89	
Economist Intelligence Unit	0.25	0.25	0.25	0.25	0.25	0.25
Freedom House	0.45	0.42	0.42	0.38	0.38	0.33
Gallup World Poll	0.18	0.19	0.14	0.10	0.08	0.12
Global Insight Business Conditio..		0.50	0.50	0.50	0.50	0.33
Global Integrity Index	0.50	0.33	0.35	0.05		
IFAD Rural Sector Performance A..	0.60	0.60	0.60	0.60	0.58	0.58
Institutional Profiles Database				0.42	0.42	0.25
Transparency International Globa..	0.62	0.56	0.56	0.50	0.50	0.68
Varieties of Democracy Project	0.37	0.37	0.37	0.37	0.39	0.43
World Bank Country Policy and I..	0.40	0.40	0.40	0.40	NP	NP
World Economic Forum Global C..	0.46	0.32	0.38	0.54		0.33
World Justice Project				0.47	0.43	0.43

Overview of the relevant indices and surveys used by Worldwide Governance Indicators

Similar developments can be detected in the judiciary. The process of reforming the judiciary in BiH has been going on for more than two decades. In the initial stages of reform, immediately after the war, international actors played a more direct and immediate role. Upon the completion of the first phase of reform, which laid the foundations for the functioning of the overall justice system by establishing judicial institutions at the state level, including the HJPC, and enacting innovative substantive and procedural legislation, since 2006 and the change of approach by international actors the country has seen a slowdown in the pace of reforms, including judicial reform.<sup>339</sup> As in other areas of involvement, international actors have since been increasingly relying on the conditionality approach with significant technical support from a broad range of donor institutions, all within the context of EU integration.

**The Structured Dialogue on Justice** as a mechanism of the European Commission which aims to assist BiH to consolidate an independent, effective, efficient and professional judicial system was launched in 2011. Since 2011 in the framework of the Structured Dialogue on Justice, the European Commission has been facilitating discussions and providing recommendations on the reform of the state-level judiciary, in particular regarding the coordination of criminal jurisdiction between the state level and other levels of government.

After almost a decade-long process, its achievements and contribution to strengthening judicial independence in BiH can be characterized as very limited.<sup>340</sup>

<sup>339</sup> Transformation Index BTI 2018, Bosnia and Herzegovina Country Report, Bertelsmann Stiftung

<sup>340</sup> Soeren Keil, Valery Perry (Eds.) State-Building and Democratization in Bosnia and Herzegovina, Routledge, New York, London 2015

**The Justice Sector Reform Strategy 2014-2018 (JSRS)** constitutes the strategic framework for judicial reform in BiH. Even though the adoption of this strategic document was highly prioritized through the structured dialogue, the Strategy was only adopted in September 2015, and its Action Plan in 2017; the implementation is significantly behind schedule. BiH Ministry of Justice was tasked with establishing five Functional Working Groups (FRG) to monitor the implementation of activities and measures for each of the five strategic areas identified under JSRS and the Action Plan [sectoral working groups] and the Joint Technical Secretariat to coordinate the implementation of the Strategy. Five functional working groups for monitoring the implementation of activities and measures and the Technical Secretariat had not been formed [appointment of members to the Working Groups and Technical Secretariat] until late 2017, and their first meetings were held only in late December 2017. These belated appointments to the Working Groups and Technical Secretariat were the result of a political turmoil in the justice sector, as well as the delays in adopting the sectoral strategic document; JSRS 2014-2018 was adopted only in September 2015, and the Action Plan in March 2017.<sup>341</sup> Thus far, only 3 per cent of the envisaged measures and activities have been implemented.

Due to the lack of time and resources for revising the Strategy once it expired, the Ministerial Conference, as a leading political body providing general policy and strategic guidelines, has decided to extend the validity of the Strategy until 2020, while providing for a revision of its accompanying Action Plan.

The JSRS consists of the five key strategic pillars: judicial system, execution of criminal sanctions, access to justice, support to economic growth and coordinated, well-managed and accountable sector.

**General anti-corruption strategies** are in place at the various levels of government:

- State-level 2015-2019 anti-corruption strategy and action plan;
- RS 2018 – 2022 anti-corruption strategy and action plan;
- FBiH 2016 – 2019 anti-corruption strategy and action plan;

Each canton also has its own strategy for the prevention of corruption, as well as the Brčko District BiH.

## 9.2. Strategic documents and problems in the judiciary

**Organisational factors and financial independence:** The JSRS, under Strategic pillar 1 – Judicial System, envisages strategic programme Improvement of the Financing System of BiH Judicial Institutions. Activities within this programme are focused on improving „coordination and cooperation between executive and legislative authorities and judicial institutions in the budget process“ and training related to the programme budget. The problems with the lack of structural financial independence do

<sup>341</sup> CSOs 2018 Report on Monitoring and Implementation of the JSRS and AP in BiH, 2018, Sarajevo

not seem to be adequately recognised. The lack was addressed to some extent in 2011 when the HJPC adopted the recommendations for improving the financing system, aimed at strengthening the HJPC's role in the budget process and establishing the HJPC as the formal proposer of the budgets for judicial institutions.

The JSRS contains strategic programme aimed at improvement and harmonization of the status of staff in BiH judicial institutions through development and adoption of „long-term plans for development of status, rights, position, training and evaluation of staff in BiH judiciary, who are not judicial office holders from the legal, organizational and financial aspect.“ It seems that such formulation does not cover expert witnesses as important actors for overall work of the judiciary. Report on the implementation of the Strategy contains only the description of the current situation without indications of the status of activities from the Strategy.<sup>342</sup>

The strategy does not recognize problems related to the lack of prosecutorial accountability in terms of almost unlimited discretion entrusted to prosecutors to decide whether or not to bring criminal charges and what charges to bring.

The Strategy for the Fight against Corruption (2015-2019) addresses the overall contribution of the judiciary to the fight against corruption in BiH in more general terms, without detailed consideration of the specific issues within the judiciary itself.

In general, strategies and policies do not recognize structural financial independence as a strategic or policy goal. The situation is similar when it comes to addressing the lack of prosecutorial accountability. Importance of the regulation of the position of legal associates, advisors and expert witnesses comprehensively and consistently is addressed only partially, without proper implementation.

**Independence:** In terms of independence of the judiciary in general, the JSRS envisages several strategic programs under Strategy pillar 1, one of which is “Consolidation of HJPC Functions”<sup>343</sup> two activities: amendments to the Law on HJPC and Analysis of the implemented judicial reforms in BiH since 2003. However, the Law on HJPC has still not been drafted, although the House of Representatives of BiH Parliamentary Assembly requested in 2017 that the Council of Ministers prepares and sent to the legislative procedure amendments of the Law on HJPC no later than 120 days after this decision had been adopted. According to the semi-annual report on the implementation of this strategy, the process of drafting the amendments is still underway within the BiH Ministry of Justice.<sup>344</sup>

<sup>342</sup> Ministry of Justice of BiH, Polugodišnji izvještaj o provođenju Strategije za reformu sektora pravde u Bosni i Hercegovini i Akcionog plana za 2019. godinu/ Semi-annual Report on the Implementation of JSRS in BiH and Its Action Plan 2019, available in official BiH languages at: [http://www.mpr.gov.ba/organizacija\\_nadleznosti/planiranja\\_koordinacija/strateska\\_planiranja/institucionalna/default.aspx?id=9697&langTag=bs-BA](http://www.mpr.gov.ba/organizacija_nadleznosti/planiranja_koordinacija/strateska_planiranja/institucionalna/default.aspx?id=9697&langTag=bs-BA)

<sup>343</sup> Ministry of Justice of BiH, *BiH Justice Sector Reform Strategy 2014-2018* [2015], Strategic sub-area 1.1 – Judicial Independence and Harmonization of Laws and Court Practice in BiH, p. 16, available at [http://www.mpr.gov.ba/organizacija\\_nadleznosti/planiranja\\_koordinacija/strateska\\_planiranja/strategija/13%204%20SRSP%20u%20BiH%20-%20EJ.pdf](http://www.mpr.gov.ba/organizacija_nadleznosti/planiranja_koordinacija/strateska_planiranja/strategija/13%204%20SRSP%20u%20BiH%20-%20EJ.pdf)

<sup>344</sup> Semi-annual report on the implementation of the BiH Justice Sector Reform Strategy and Action plan for 2019, p. 4-5 [see here footnote 342]

The report also noted that in 2017, the HJPC had informed the Ministry of Justice that, in their view, the amendments to the Law on HJPC “should focus on chapters related to the appointment of and disciplinary procedures for judicial officeholders, but the composition of the Council, appointment of its members and eventual reconsideration of the list of its jurisdictions, in this phase, should not be revised, until the HJPC has received appropriate constitutional guarantees.” However, the Priebe 2019 Report clearly stated that “[o]ver the last years, the HJPC has itself become part of the problem. Serious miscarriages of justice have become apparent due to lack of leadership capacity, allegations of politicisation and conflicts of interest, inefficient organization, insufficient outreach and transparency, and, finally, its failure to implement reforms. [...] HJPC needs serious reform and a radical change of behaviour. [...] The procedure for the election of the HJPC members must be revised.”<sup>345</sup> The implementation of the Justice Strategy and related activities, including amendments to the Law on HJPC, should take into account these findings and recommendations.

**Improvement of the System for Monitoring Efficiency and Quality of the Work of Judges, Prosecutors and Expert Associates** is another strategic program relevant to independence of the judiciary in general. Activities in this strategic program have been implemented at the end of 2019, and it is yet to be seen how effective they would be.

**Accountability:** Relevant strategic documents in this regard offer only a cursory treatment of this issue and do not address various problems. Key strategic goal in this field identified in the JSRS 2014-2018 is related to strengthening the independence and accountability of the HJPC. Relevant indicators concern the consolidation of functions of the HJPC, defining the conflict of interest of judges and prosecutors, and improving the disciplinary proceedings for violation of duties of judges and prosecutors. This document contains general principles and addresses independence and accountability as a single category, whereby accountability seems neglected, insofar as the problems of accountability do not seem to be adequately detected and elaborated. For example, the Strategy notes that a “*practice* should be developed which would enable a just and open system” of disciplinary accountability. Such a generalized formulation of the problem and its solution fails to acknowledge the full extent and nature of the procedural, legal and institutional problems in this area.

Specific content and activities aimed at improving the system of disciplinary accountability are not even indicated in the Strategy. It seems that the bulk of the suggested changes would be guided by the relevant recommendations of the EU *peer review process*, which mostly point in the direction of ensuring the independence of the Office of Disciplinary Counsel from the HJPC. These activities are still ongoing, and no visible progress was made on this crucial issue.<sup>346</sup>

**Transparency:** The situation is similar when it comes to transparency as a key element of the public dimension of accountability of the judiciary. The JSRS addresses

<sup>345</sup> Expert Report on Rule of Law issues in BiH [see here footnote 2]

<sup>346</sup> Semi-annual report on the implementation of the BiH Justice Sector Reform Strategy and Action plan for 2019, p. 23 [see here footnote 342]

some elements of proactive transparency of the judiciary, establishing such strategic programs as improving the communication of the judiciary with the media, users of services of courts and prosecutors, and the public, or increasing the availability of information on the work of the judiciary in BiH for experts and the general public. Nonetheless, activities and indicators within these programs are either too general or too weak. For example, one of the indicators is that modern communication methods – websites etc. – are applied, without indicating what kind of information is to be offered on those platforms.<sup>347</sup> Proactive transparency and actual availability of information on the work of the judiciary, including the work on specific cases, is not accorded due attention. This is also evidenced in the periodic assessments of the implementation of the Strategy, which focus on the promotional activities and public relations, rather than the quality and nature of information on the judiciary made available to the public.<sup>348</sup> The pattern is replicated in the strategy for persons who come in contact with prosecutors' offices in BiH, adopted by the HJPC, which also seems to prioritize promotion over public accountability.<sup>349</sup>

The Strategy for the Fight against Corruption (2015-2019) accentuates the efficiency and overall contribution of the judiciary to the fight against corruption in BiH. Corruption within the judiciary and issues of undue influence on the work of judges and prosecutors, however, are not explicitly addressed in this document. These issues are indirectly tackled through one strategic goal – enhancing mechanisms for monitoring of the work of judiciary – and two related strategic programs: creating conditions for monitoring of the judiciary through publicly available statistics on the processing of cases of corruption and enhancing the mechanisms of disciplinary and other forms of accountability of judges and prosecutors for wrongdoings in processing the corruption-related cases.<sup>350</sup> Nonetheless, as it is clear from the very formulation of these programs, they are limited, whereas the activities designed seem partial and inadequate.<sup>351</sup> Overall, the focus is placed on processing the cases of corruption and optimizing the contribution of the judiciary to the fight against corruption. It can be concluded that the strategic document does not adequately address dealing with general, structural problems within the judiciary and various issues related to undue influence and capture of judicial institutions.

<sup>347</sup> Ministry of Justice of BiH, *BiH Justice Sector Reform Strategy 2014-2018* [2015], p. 27 [see here footnote 343]

<sup>348</sup> Semi-annual report on the implementation of the BiH Justice Sector Reform Strategy and Action plan for 2019 [2019], pp. 25-26 [see here footnote 342]

<sup>349</sup> HJPC, *Strategija za postupanje sa osobama koje dolaze u kontakt sa tužilaštvima u BiH* [2017], available in official BiH languages at: [https://www.pravosudje.ba/vstv/faces/vijesti.jsp?id=72442&vijesti\\_jezik=H](https://www.pravosudje.ba/vstv/faces/vijesti.jsp?id=72442&vijesti_jezik=H)

<sup>350</sup> Agency for the Prevention of Corruption and Coordination of the Fight against Corruption, *Anti-corruption strategy for 2015-2019 and the Action plan for the implementation of the Anti-corruption strategy for 2015-2019* [2014], pp. 39-40, available in official BiH languages at: <http://apik.ba/zakoni-i-drugi-akti/strategije/default.aspx?id=806&langTag=bs-BA>

<sup>351</sup> For example, the problem of inadequate transparency of the judiciary is addressed through publicly available statistics on the processing of corruption cases by courts and prosecutors' offices. *Anti-corruption strategy for 2015-2019*, pp. 39-42.

In sum, strategies and policies inadequately and incompletely identify, elaborate and, consequently, inadequately address numerous problems concerning accountability, transparency and undue hierarchical influence identified in this study.

### 9.3. The (non)implementation of strategic documents

The lack of political will, as well as fragmentation of strategies and action plans, resulted in a close to minimal effect of anti-corruption activities. Data collection is not approached systemically, whereas policy-making in this regard is not evidence-based.<sup>352</sup>

European Commission's strategic document *A credible enlargement perspective for and enhanced EU engagement with the Western Balkans* identified reforms in the area of Rule of Law as the most pressing issues and at the same time the key benchmark against which the prospects of these countries will be assessed by the EU.

In the area of Rule of Law the strategy foresees expanding detailed action plans for alignment with the EU standard to all Western Balkans countries, with enhanced assessment of reform implementation, including new advisory missions.

European Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union includes, *inter alia*, recommendations in the area of rule of law:

- Improve the functioning of the judiciary by adopting new legislation on the High Judicial and Prosecutorial Council and of the Courts of Bosnia and Herzegovina in line with European standards.

No implementation of the recommendations from the Opinion has been observed so far.

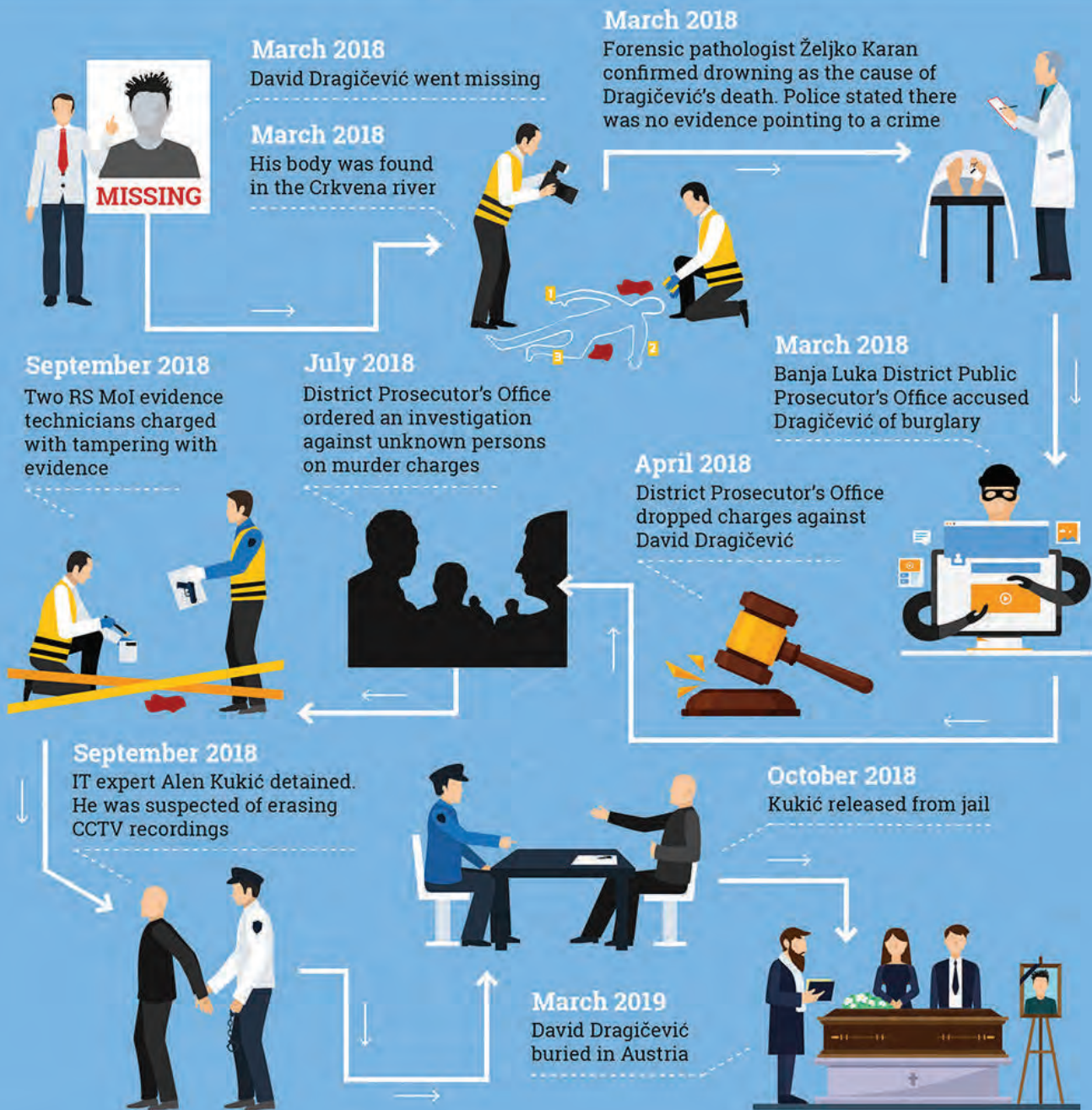
Overall, it could be argued that BiH, with direct support from international actors, made considerable progress in establishing and strengthening the judicial system, especially in the first phase of the reform prior to 2006. Due to the changes in the approach and role of international actors, with increasing reliance on the conditionality approach that is an inherent feature of the EU integration process, the judicial reform started losing momentum. The power vacuum left after the international actors had pulled out of the operational management of the reform was filled by local political actors whose primary interest is to maintain the status quo.<sup>353</sup>

<sup>352</sup> European Commission, Analytical Report, {COM[2019] 261 final} – see here footnote 129.

<sup>353</sup> International Monetary Fund 2017: Reforming the Judiciary: Learning from the Experience of Central, Eastern, and Southeastern Europe



# »» Dragičević Case ««



## Case Status (as of 17 June 2020)

- On 15 March 2019, attorney **Ifet Feraget** complained to the BiH Constitutional Court that:
  - The Banja Luka District Public Prosecutor's Office conducted an inadequate investigation;
  - The RS Prosecutor's Office filed no charges against **Darko Ilić**, the head of the RS Department for Organized and Serious Crime;
  - Prosecutors closed an investigation against forensic pathologist **Željko Karan**.

### The BiH Constitutional Court has not yet ruled on the appeal.

- The Banja Luka District Public Prosecutor's Office continues to conduct the investigation into the alleged murder of **David Dragičević**.
- In a Banja Luka court, a trial against evidence technicians **Zoran Bošnjak** and **Mikica Marijanac** for tampering with evidence is ongoing.

## 10. CONCLUSIONS AND RECOMMENDATIONS

The above dimensions and indicators developed for this analysis show that the judiciary in Bosnia and Herzegovina is in many respects in a state of institutional capture. As noted in the introduction, a key element of the definition of institutional capture concerns the creation of rules and the institutional framework that allow the undue influence of such depth, continuity and intensity that institutions in question are effectively captured. Laws and regulations of relevance for the work of the judiciary in BiH have been in effect for more than a decade, despite [or rather, precisely due to] the fact that they allow for various kinds of undue influence. The findings of this study, as well as insights from other recent reports and works of investigative journalists, confirm that this is not just a hypothetical possibility. The judicial self-government, as applied in Bosnia and Herzegovina, does not appear to have adequate safeguards against undue hierarchical and external influence.

Based on the preceding overview of the organizational aspects of the functioning of the judiciary, one can conclude that a significant number of them are effectively conducive to or enable the exercise of undue influence on the judiciary, whether internally and externally. The highly fragmented financing system does not guarantee the crucial dimension of the overall independence of the judiciary, namely its financial independence. CMS has been established in the courts and POs. However, due to the widespread practice of reassigning cases and no possibility of reviewing the reassigning procedure, it is questionable whether the system fulfils its purpose in practice. Quite the contrary, it opens the door to undue internal influence in the handling and allocation of cases.

A very important question in terms of prosecutorial accountability – or, rather, a lack thereof – and the possibilities of undue influence is that of prosecutorial discretion. Discretion is particularly important insofar as it concerns the issuance of the so-called negative prosecutorial decisions, i.e. orders not to conduct an investigation and to terminate the investigation. The way the review of these decisions is currently regulated does not provide sufficient guarantees to ensure the integrity of the process, especially as the procedure is not regulated by law but by the POs' internal documents. The role and the position of legal associates, advisors and expert witnesses are not regulated comprehensively and consistently, which, given their importance for the overall functioning of the justice system, also harms the functioning of the justice system as a whole.

In sum, considering the cumulative impact of organisational factors in enabling influence on the judiciary, it can be concluded that they enable external actors to control effectively the functioning of the judiciary. Coupled with the internal mechanisms of undue influence, this makes the judiciary extremely susceptible to capture. While in practice it is not always possible to make a clear distinction between undue influence and lack of capacity or inadequate staff of judicial institutions, this does not diminish the problem of susceptibility to capture; quite the reverse – the lack of capacity opens up additional scope for the capture of the judiciary.

When it comes to independence of the judiciary, critical problems are related to the fact that the criteria of merit, ethics and integrity are dominant neither in the initial recruitment process nor in the career advancement of judges and prosecutors. The problems are particularly worrying in the case of chief prosecutors and presidents of courts, who should be the persons of the highest integrity and professional standards. Such practice impacts career advancement and motivation of professionals in this sector. Evaluation of work of judges and prosecutors also faces numerous challenges, despite recent changes aimed at introducing qualitative performance indicators. Given the importance of evaluation in terms of promotion and career path on the one hand, and possible consequences involving disciplinary liability, on the other, clear and coherent criteria, both in rules and in their application in practice, are crucial for limiting uncertainty and undue influence in the judiciary. Furthermore, members of the judiciary are insufficiently protected against intimidation, and outside pressures, and legal protections are often ineffective in practice.

The key challenge in terms of accountability is the fact that legal provisions and structural conditions leave too wide a space for selective accountability and undue hierarchical influence within the profession. Practice shows that this opportunity is often taken.

The first problem is structural. It is related to the fact that the influence of the HJPC on the work of the Office of Disciplinary Counsel is rather significant, which brings into question its independence. Second, there is insufficient clarity as to what constitutes a disciplinary offence. At least potentially, these offences, as defined by the law, go beyond the realm of “behavioural accountability” and overlap with the evaluation of work of judges and prosecutors, which in principle should not be a matter of disciplinary liability. That seems to be the case particularly with the type of offence related to the “unjustified delay” in performing the judicial or prosecutorial duties. Ethical standards in the judiciary would also benefit from further clarification and promotion. In particular, apart from the obvious cases, it is mostly unclear what “inappropriate connections” and contacts in the context of the judiciary mean and imply. Given the limited attention accorded to this important issue in relevant regulations and professional discourse, and unclear parameters of inappropriate contacts, especially in a small jurisdiction such as BiH, it seems that such contacts are mostly tolerated within the professional culture of the judiciary in the country.

Other indicators also point to the largely captured judiciary in Bosnia and Herzegovina. Despite numerous projects and programs aimed at addressing this problem, the transparency of the judiciary is mostly inadequate. Results of the judges’ work are by and large hidden to the public, making the judges virtually unaccountable in this regard. On the other hand, weak results of their work, coupled with scandals and mismanagement in the administration of the judiciary by the HJPC, have also contributed to the continually eroding confidence of the public in the judiciary. Rather evident outside pressures by the political actors have further undermined the public confidence in recent years. Finally, the political branch has been heavily engaged in malicious and destructive criticism, failing to act and address the numerous problems and shortcomings in the system. The fact that most of these problems are by now more or

less obvious further aggravates the whole situation. Indeed, the fact that the status quo persists despite the numerous problems and the malfunctioning of the whole system is another indication of the captured judiciary in Bosnia and Herzegovina.

The above problems create a vicious cycle in which it is very hard to identify and prioritize possible steps forward.

Our analysis points to the following recommendations:

### Structural/general recommendations

1. Relevant strategic documents, particularly the Anti-corruption Strategy and the Justice Sector Reform Strategy, should be revised and updated to address key structural deficiencies in the justice sector and envisage decisive and concrete steps towards unravelling the effectively captured state of the judiciary in BiH.
2. Negative implications of judicial self-government in BiH should be addressed. Alternative models of organisation and functioning of the HJPC (or equivalent authority) should be seriously considered, with a view at maintaining the independence of the judiciary, while at the same time ensuring the necessary checks and balances and preventing the effective concentration of power in the hands of the select few.
3. Considering the negative consequences of inadequate and non-transparent criteria for appointment and promotion of judges and prosecutors in the last two decades, as well as the current state of the capture, a comprehensive independent vetting of judges and prosecutors, following the lessons from Albania, should be performed.

### Priority recommendations

1. ***It is necessary to reduce the role of the HJPC in disciplinary proceedings.*** It is particularly important to ensure that the first instance disciplinary proceedings are dealt with by reputable jurists who are not members of the HJPC.
2. ***It is necessary to ensure full institutional, financial and personal independence of the Office of Disciplinary Counsel,*** and to provide adequate resources for its operation.
3. ***Transparency of the judiciary needs to be significantly enhanced*** in all aspects of their work – from the conduct of disciplinary proceedings to proactive publication of relevant information on both ongoing and completed cases, including judgments in completed cases.
4. ***Disclosure of finances and other relevant activities of judges and prosecutors*** in BiH should be clarified, effectively ensured and made publicly available.
5. ***It is necessary to ensure full financial independence of the judiciary*** in accordance with international standards, by introducing the adequate budg-

eting process, a separate budget for the judiciary, administered by a body independent of the executive.

6. **Prosecutorial accountability needs to be significantly enhanced** particularly in terms of introducing effective review mechanisms and transparency in cases of so-called “negative” decisions by the prosecutors, where prosecutors decided not to indict.
7. **Reporting, transparency and review mechanisms should be established in the process of reassigning of cases.**
8. **It is crucial to adequately amend the Law on HJPC in particular vis-à-vis selection and removal of its members.** The strong criticism of the work of the HJPC in the last few years as well as their alleged political connections and misconduct of its president and members, suggest the need to clearly define the criteria, conditions and procedure for the appointment and removal of the HJPC members.
9. **It is necessary to strengthen further the role of the HJPC in protecting the holders of judicial and prosecutorial offices from undue influence** – both real and perceived, as has already been recommended by the Venice Commission. Strengthening should include legislative and operational measures, for example:
  - (i) providing for separate judicial and prosecutorial sub-councils;
  - (ii) avoiding an over-concentration of powers concerning the different functions to be performed by members of the High Judicial and Prosecutorial Council; and
  - (iii) ensuring that decisions of the High Judicial and Prosecutorial Council on the appointment, promotion and disciplinary liability of judges and prosecutors are subject to appeal before a court.
10. **Objectivity and transparency of the appointment process must be increased and based on merits, ethics and integrity.** Currently, the initial recruitment process does not place much emphasis on questions of merits, ethics and integrity in the candidates’ examination. Ethnicity criterion, however important in the context of BiH, should never override the criterion of merit.
11. **Career advancement of judges and prosecutors must be based on merit, especially for the presidents of courts and chief prosecutors.** An additional problem arises with the HJPC members who come from lower instances. They are not qualified to evaluate the quality and legal knowledge of candidates for higher judicial instances. Therefore higher court judges must be appointed by their colleagues from the same level.

## Other recommendations

1. ***It is necessary to review and clarify the list of disciplinary offences.*** It should be done particularly with a view at reducing the space for the arbitrary application of the relevant provisions in specific cases, as well as separating disciplinary offences from negative performance and negative evaluation. This latter consideration is even more pertinent considering all the deficiencies in the system of evaluation of judges and prosecutors in BiH.
2. ***Penal policy in disciplinary proceedings needs to be revised and improved*** so that the most serious offences are consistently and adequately sanctioned. Career implications of disciplinary sanctions should also be clarified.
3. ***Disciplinary liability of members of the HJPC BiH in their capacity as members of this institution*** (and not merely as judges or prosecutors) should be comprehensively addressed and regulated. ***The same goes for professional associates/legal officers*** in courts and prosecutors' offices.
4. ***Ethical codes for the judiciary should be further developed, clarified and promoted.*** Given its context-specific nature, the notion of "inappropriate connections" both within and outside of the profession should be carefully considered, discussed and defined. Active participation of all professionals and professional associations within the judiciary should be ensured in revising the codes.
5. Efforts should be made by all responsible actors to ***find ways to gradually replace the omnipresent practice of ad hominem attacks on judges and prosecutors and harmful criticism of the judiciary, with open and constructive discussion among the representatives of different powers of the state.***
6. ***It is necessary to regulate comprehensively and consistently the role and the position of legal associates, advisors and expert witnesses based on the principles of merit and competitiveness in recruitment. Appropriate appraisal of their performance should be introduced.***
7. ***It is necessary to closely monitor the application of newly adopted Criteria for the evaluation of judges and prosecutors.*** It is important to ensure that the application of these Criteria allows the qualitative indicators to prevail over the quantitative ones. This is of particular importance for the merit-based appraisal of judges.
8. ***Safeguards against threats and intimidation of judges and prosecutors must become more effective in practice***





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