



Rule of Law in Bosnia and Herzegovina – the Transformation of the High Judicial and Prosecutorial Council

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Policy Recommendations

1. Full institutional and financial independence of the judiciary must be ensured on judicial levels, following the example of the Brčko District.
2. Amending specific aspects and provisions of disciplinary procedures and elaborating ethical codes in order to further develop, clarify and promote the application of highest ethical standards within the judiciary would be a measure particularly important for restoring the public trust in judiciary.
3. The revised Law on the High Judicial and Prosecutorial Council should ensure a comprehensive reform of its functioning given its immense influence – while the independence from external factors should be strengthened, internally it should be restructured to avoid the concentration of power. The Office of the Discipline Council, particularly, needs full institutional, financial and personal independence from the High Judicial and Prosecutorial Council.

Abstract

In its Analytical Report from 2019 and consequent Report on Bosnia and Herzegovina (BiH) 2020, the European Commission has pointed that judiciary in the country, in general, is barely at an early stage, meaning that it has only some level of preparation for the integration in the European Union. In addition, for many years the level of public trust in the judiciary in BiH has been consistently low and further diminishing the independence of judges and prosecutors. Several studies and research projects only confirm the worrying trends (Blagovčanin et al., 2021; *Expert Report on Rule of Law Issues in Bosnia and Herzegovina*, 2019; *USAID Justice Project in BiH*, 2015). Although numerous reforms would be both essential and urgent, this Policy Brief focuses on those that take the precedence, simply because they can help create the

environment or for more demanding structural reforms. The latter namely concern strengthening independence, especially the financial independence of the judiciary; reintroducing ethics and integrity by amending specific aspects and provisions of disciplinary procedures and elaborating ethical codes in order to further develop, clarify and promote the application of highest ethical standards within the judiciary, that would eventually contribute to restoring the public trust in the judiciary; both leading to a comprehensive restructuring of the High Judicial and Prosecutorial Council which would strengthen its independence from external factors, while simultaneously avoiding over-concentration of power in that central body especially in relation to the Office of the Disciplinary Council.



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Introduction

Judiciary is, commonly, considered to be one of the key factors for resilience of democracy, good governance, rule of law and fight against corruption in any society. As such, it has for long been in focus of both attention and efforts of international community in Bosnia and Herzegovina (BiH). Since the judiciary is not explicitly mentioned in the Constitution of Bosnia and Herzegovina (European Commission Staff, 2019, p. 29), and had been regulated only in the entity constitutions and in the Brčko District Statute, the international community in BiH engaged heavily and enabled important progress in establishing and strengthening the judicial system at the state level. The early phase of the engagement, 1998-2006, has been particularly successful and resulted in the establishment of the High Judicial and Prosecutorial Council in 2004, that replaced entity-level judicial and prosecutorial councils, on the basis of a transfer agreement from the entities, confirmed by the Constitutional Court. In addition, the Court of Bosnia and Herzegovina and the Prosecutor's Office have been established in the period 2000-2004 to fulfil the constitutional obligations of the state. The Constitutional Court confirmed their compliance with the Constitution in 2001. The initial success, but also the changes of the "hands-on" approach of the international community and the reliance on the European Union (EU) conditionality in the later phase, slowed down the pace of the reforms significantly. The international presence was reduced and ceased eventually, thus creating a power vacuum that was filled by local political actors whose agenda quickly turned against the still fragile independence of judiciary and established strong and elaborate mechanisms of undue influence.

In its Analytical Report from 2019 (European Commission Staff, 2019, p. 28) and consequent Report on Bosnia and Herzegovina 2020 (European

Commission Staff, 2020, p. 15), the European Commission has stated that judiciary in BiH, in general, is barely at an early stage, meaning that it has only some level of preparation for the EU integration. Both take very detailed accounts of the issues in the area of the judiciary, but they are not the solely documents that point to critical problems. Numerous studies and research projects only confirm the worrying trends. A study by USAID Justice Project on BiH – Diagnostic Analysis of the Integrity of the Judiciary Sector in BiH and Potential Risk of Corruption and Unethical Conduct in the Judiciary from 2015 (*USAID Justice Project in BiH*, 2015), an EU funded expert report on Rule of Law Issues in BiH¹ from 2019 (*Expert Report on Rule of Law Issues in Bosnia and Herzegovina*, 2019) and most recent study published by the Open Society Fund in Bosnia and Herzegovina (OSF) from 2021 titled "*Blindfolding Justice in Bosnia and Herzegovina? State of Capture of Bosnia and Herzegovina's Judiciary and Public Prosecution*" (Blagovčanin et al., 2021) point to dramatic developments in this area.

In addition, for many years the level of public trust in the judiciary in BiH has been consistently low and further diminishing the independence of judges and prosecutors. While the data on the level of public trust reflect worrying trends regionally (*Balkan Public Barometer 2021 Public Opinion*, 2021, p. 130), the judiciary in BiH appears to be one of the least accessible (54% citizens find it poorly accessible) and costliest (67%). Public confidence has taken a steady decline course since 2015 (Blagovčanin et al., 2021, p. 87), culminating with recent media reports on only 19% of public trust in judiciary in BiH (Sandić-Hadžihasanović, 2020). Along with the obvious loss of credibility of judiciary

1) Known also as the so-called "Priebe report" after its key author Reinhard Priebe, European Commission expert.



that these data reflect, it is also important to take into serious consideration the indirect consequences – lack of public trust makes judges and prosecutors more vulnerable to the political pressure, as well as to the pressure within the judicial hierarchy.

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The above problems create a vicious cycle making it hard to prioritise the reforms needed. 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 environment for more demanding structural reforms. The latter namely concern strengthening independence, especially the financial independence of the judiciary, reintroducing ethics and integrity into the appointment and career advancement, as well as giving a serious consideration to the restructuring of the High Judicial and Prosecutorial Council.

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Financial Independence

Independence is the opposite of the current state of capture that many identify in BiH, including the area of judiciary (Blagovčanin et al., 2021, p. 17). Financial independence is a vital aspect of the overall judiciary independence and according to the Opinion No. 10 of the Consultative Council of European Judges (CCJE) from 2007, it can only be truly independent if it is provided with separate budget and administered by a body independent from the executive. CCJE further elaborates that “although the funding of courts is part of the State budget, such funding should not be subject to

political fluctuations. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence. The arrangements for parliamentary adoption of the judicial budget should include a procedure that takes into account the opinions of the judiciary“ (Consultative Council of European Judges, 2007).

In BiH judiciary is financed from 14 different sources mirroring the administrative-territorial organisation of the country. Each level of the judiciary system is financed from the budget of that particular administrative level – state, entity and cantonal budgets. Such extreme fragmentation of the financing system is a problem *per se*.

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The procedures in place are the same for all the budget beneficiaries. While courts and prosecutor offices prepare the budget proposals and submit them to the local ministries of finance or justice, they are approved first by the local governments and then ultimately by the local parliaments². Budgets of courts and prosecutorial offices are an integral part of the budget of their respective level of governments and there are no specific procedures which would allow financial autonomy. In addition to that, in the entity Federation of BiH, the cantonal and municipal courts and prosecutorial offices are funded by cantonal budgets, even though most decisions regarding their budget come from entity or state level. Consequently, the above-mentioned funding mechanisms may influence the judiciary and its work in the same way as of any other budget beneficiaries. Institutions approving the budget are in a position to influence the judiciary. The OSF publication stresses a lack of trust between the

2) The judiciary in Brčko District is an exception as the Judicial Commission of the District proposes budget to the District Assembly. The Mayor or the District's Finance Directorate may not modify the budget proposal submitted by the Judicial Commission.



judiciary and the executive; as a general perception prevails that planning and allocation of budgets are not based on objective criteria but on informal, even personal relations between the responsible persons in the judiciary and the executive (Blagovčanin et al., 2021, p. 23).

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The High Judicial and Prosecutorial Council of Bosnia and Herzegovina has an advisory role in the budgeting process and cannot influence the amount of funding approved for the judicial institutions. Also, its overall and financial competences compared to similar judiciary institutions in the region and throughout Europe appear to be most limited (Blagovčanin et al., 2021, p. 22).

While the budget allocated to the judiciary continuously rises (European Commission Staff, 2020, p. 20), a large discrepancy remains between the required budget estimated by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, which would provide the minimum required for the functioning and the actual budget approved.

Anomalies within the High Judicial and Prosecutorial Council of Bosnia and Herzegovina

“Not only that no progress has been achieved in the meantime, but the obstruction of the justice reform from political actors and from within the judiciary further deteriorates the functioning of the judiciary.”

As a self-regulatory body of the judiciary, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC), has a central role in guaranteeing independence, accountability and credibility of the judiciary. The Analytical Report of the European Commission recognises that the constitutional and legal framework governing the judiciary is incomplete and does not provide sufficient

guarantees of independence, accountability and efficiency. The authorities of BiH are tasked with adopting the revised Law on the HJPC in order to better regulate the appointment, appraisal and disciplinary procedures of members of the judiciary, and provide appropriate legal remedies against final decisions of the HJPC, in line with European standards (European Commission Staff, 2020, p. 16). It is also one of the key conditions (the Opinion key priority 6 out of 14) that the country needs to meet in order to acquire an EU membership candidate status (European Commission, 2019, p. 15). Not only that no progress has been achieved in the meantime, but the obstruction of the justice reform from political actors and from within the judiciary further deteriorates the functioning of the judiciary.

One of the most recent expert reviews, the so-called “Priebe Report” clearly identified that the HJPC has itself become part of the problem (*Expert Report on Rule of Law Issues in Bosnia and Herzegovina*, 2019). The Report stressed the blunt miscarriages of justice that have become apparent due to lack of leadership capacity, allegations of politicization and conflicts of interest, inefficient organisation, insufficient outreach and transparency, as well as the institution’s failure to implement reforms. The corruption allegations against the then HJPC President Milan Tegeltija³ and alleged manipulations of appointments and disciplinary procedures were also part of the Report. The seriousness of the allegations, the reactions of the then president as well as the shocking unanimous support for his actions by the HJPC members were recognised as additional damage to the reputation of the institution.

³ The affair called “Potkivanje/The Shoeing” (Greasing) from 2019 was uncovered by the Žurnal which released the video of the conversation Milan Tegeltija had with the suspended police officer Milan Pandža and a businessman from Velika Kladuša Nermin Alešević. They are talking about a court case in Sarajevo and Pandža is heard asking Alešević for money meant for Tegeltija. Tegeltija was treated as witness in this case and the HJPC interpretation of the case resulted in *de facto* impunity for their president.



While the former president of the HJPC Tegeltija⁴ is not the only prominent judiciary member embroiled in numerous affairs, his are illustrative of the many anomalies in the work of the HJPC. Eventually, he resigned under great public and pressure from the international community in BiH in December 2020 after media released a leaked audio-recording which featured Tegeltija discussing tactics of appointment to the post of a judge to a sister of a former HJPC member, also a judge. The affairs continued and anomalies remained.

His telling affairs pointed to numerous legal, as well as ethical and credibility issues, such as the relations between the HJPC and the Office of Disciplinary Counsel (ODC). The significant influence exerted by the HJPC on the work of the ODC calls into question its independence. The role of the HJPC in disciplinary proceedings needs to be reduced, and in the first instance disciplinary proceedings should be executed by reputable jurists who are not members of the HJPC. The ODC needs full institutional, financial and personal independence.

“Apparently, there is insufficient clarity what constitutes a disciplinary offence.”

The Tegeltija affairs also pointed to the important issue of ethics, that has received little attention in relevant regulations concerning the judiciary.

4) Currently, an adviser to the Bosnia and Herzegovina Presidency member Milorad Dodik known for brutal public campaigns against the credibility and threats to the judiciary. Not only that Milan Tegeltija strongly supports Dodik's hateful rhetoric but, according to his tweets, he complements it by elaborating Dodik's statements and offering a quasi-legal interpretations and his own ultra-nationalist and anti-Western views. Both Dodik and Tegeltija extensively use hate speech, deny genocide in Srebrenica, and subscribe to conspiracy theories about international plot against Serbs. In June 2021, Tegeltija expressed his frustration with the implementation of the European Court of Human Rights (ECHR) from 2019 and consequent removal of an Orthodox church built at a garden of a Bosniak returnee to Konjevic Polje, despite the fact that during his mandate as the head of the HJCP he had appeared to be engaged in its implementation. Both Dodik and Tegeltija decried the outlawing of genocide denial introduced by the move of the outgoing High Representative in BiH Valentin Inzko in July 2021.

Apparently, there is insufficient clarity what constitutes a disciplinary offence. While ethical codes for judges and prosecutors contain general provisions on incompatibility and refraining from inappropriate connections, political engagement, political preferences and affiliations, 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. As the parameters of inappropriate contacts beyond the obvious ones remain poorly elaborated, especially for a comparatively small jurisdiction such as BiH, and the professional culture is poorly developed, so it happens that the “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 (Sandić-Hadžihasanović, 2020).” The professional judicial community, on the other hand, hardly ever reacts to media reports on inappropriate meetings and contacts between members of the judiciary and politicians and economic elites; they triggered almost no reaction within the professional community of judges and prosecutors and their professional associations. That was also the case in one of Tegeltija's affairs when he attended a political meeting held on 20 February 2020 and organised, absurdly, with a view to discussing strategies for weakening the authority and influence of the Constitutional Court of Bosnia and Herzegovina⁵.

5) The then President of the HJPC Milan Tegeltija attended a political meeting organised by Serb member of BiH Presidency Milorad Dodik in February 2020. Dodik gathered all high level officials in state-level institutions from Republic Srpska promoting his proposal for a Law on the Election of Judges of the Constitutional Court of BiH, replacing foreign judges with domestic ones. Tegeltija attended the meeting and stated at the press conference held on the occasion that he comes from Republic Srpska and acts primarily as its representative in the HJPC, as do, as he claimed, all other judicial officials from the Republic Srpska. The international community in BiH strongly condemned his behaviour and made clear that all state-level representatives should be held accountable to citizens,



As it is not always easy to distinguish undue influence and a basic lack of capacity or inadequate staff of judicial institutions, the issues of 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 questions of integrity of its members, grow more important.

Conclusion

Considering the cumulative impact of a number of dominantly political factors that influence judiciary, coupled with the internal mechanisms of undue influence, it is obvious that the current state of affairs of the judiciary in BiH cannot be satisfactory neither for the EU that sees the rule of law as one of its fundamentals, nor for the citizens of Bosnia and Herzegovina who perceive the judiciary as poorly accessible, costly and not trust-worthy. The vicious cycle of many related problems makes it very hard to prioritise, as many reports and studies indicate. Regardless of the optics, many of them recommend important steps that could be taken in order to create the appropriate environment for more dramatic reforms – the establishment of a full financial independence of judiciary, reaffirmation of disciplinary and ethical standards that could restore the public trust, could lead to a more comprehensive reform and restructuring of the HJCP itself.

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Blagovčanin, S., Hodžić, E., & Sali-Terzić, S. (2021). The Blindfolding Justice in Bosnia and Herzegovina? State Capture of Bosnia and

not political parties, especially judicial officials who must be independent from political interests.

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