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WHAT DO THE AMENDMENTS TO THE LAW ON THE HIGH JUDICIAL AND PROSECUTORIAL COUNCIL OF BOSNIA AND HERZEGOVINA BRING?[**]

ABSTRACT: Judicial independence represents one of the key prerequisites for the rule of law. However, fostering a "culture" of judicial independence must be accompanied by continuous efforts to improve mechanisms and the "culture" of accountability and integrity of judicial office holders. This necessity is particularly emphasized in post-authoritarian societies, where judicial independence rests on the unstable foundations of an authoritarian past characterized by systematic undermining of judicial autonomy.

In recent decades, the establishment of judicial councils has been recognized as a tool for strengthening judicial independence. Judicial councils, independent bodies predominantly composed of representatives of the judiciary, "are designed to remove the functions of appointment, promotion decisions, and disciplinary actions against judges from partisan political processes while simultaneously ensuring a certain level of accountability" (Garoupa, Ginsberg, 2009). In recent years, however, warnings have

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increasingly emerged that the formation of judicial councils can open new channels for the politicization of the judiciary, bringing the issue of accountability of council members into focus.

This paper analyzes the provisions of the Law on Amendments to the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC BiH), adopted in 2023, concerning the disciplinary liability of judges and council members, as well as the procedures for the removal of HJPC BiH members. The paper will also highlight other provisions of this law aimed at combating corruption in the judiciary and strengthening the integrity of judicial office holders.

Keywords*:* judiciary, judicial independence, judicial accountability, judicial self-government, judicial councils, Bosnia and Herzegovina, High Judicial and Prosecutorial Council, corruption, declaration of assets and interests

JUDICIAL SELF-GOVERNMENT: PANACEA OR PLACEBO (WITH SIDE EFFECTS)

Judicial independence is a critical prerequisite for the rule of law. The rule of law "requires an effective system of horizontal accountability comprised of institutions that hold each other accountable to the law and the public."[1] To affirm itself as a relevant element of horizontal accountability and a strengthening factor for the rule of law, the judiciary "must not be subordinated to other branches of government, the military, or powerful private sector actors."[2] Courts ensure the accountability of officeholders in accordance with democratic rules and play a crucial role in protecting human rights as enshrined in constitutions, conventions, and laws.[3] The independence of the judiciary is a fundamental precondition for performing this role. "Courts are a key element of the rule of law," Waldron warns, but only as "independent institutions functioning in accordance with recognized standards of fair trial."[4]

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[1] Chavez, R. B. (2008). The Rule of Law and Courts in Democratizing Regimes. In: *The Oxford Handbook of Law and Politics*, (eds. Whittington, K. E., Kelemen, R. D., Caldeira, G. A.). Oxford University Press, 65.

[2] *Ibid.,* 65.

[3] Gloppen, S., Gargarella, R., Skaar, E. (2004). Introduction: The Accountability Function of the Courts in New Democracies. In: *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (eds. Gloppen, S., Gargarella, R., Skaar, E.). London – Portland, Oregon: Frank Cass, 1.

[4] Waldron, J. (2023). *Thoughtfulness and the Rule of Law.* Cambridge, Massachusetts – London, England: Harvard University Press, 2.

Judicial independence, however, does not imply absolute autonomy of judicial actions. Strengthening the "culture" of judicial independence must be accompanied by efforts to simultaneously create and improve mechanisms and the "culture" of judicial accountability. This necessity is particularly pronounced in states where judicial independence is constructed on the unstable foundations of an authoritarian past, where judicial autonomy was ignored. One of the greatest challenges for legislators is to ensure an adequate level of accountability for judicial office holders without compromising their independence.

In recent decades, strengthening judicial self-governance institutions has been recognized as a tool for improving judicial independence. Judicial self-governance is often perceived, as some authors caution, as a universal remedy (panacea) for all judiciary governance issues.[5] Over time, judicial councils,[6] independent bodies primarily composed of judiciary representatives, have emerged as the most significant form of judicial self-governance. These councils are designed

> "...to remove the functions of appointment, promotion decisions, and disciplinary actions against judges from partisan political processes while simultaneously ensuring a certain level of accountability."[7]

The primary aim of establishing such bodies is to "ensure external independence of the judiciary, particularly its independence from the executive branch."[8] By weakening or eliminating connections with the executive and legislative branches, judicial councils take a step closer to a consistent separation of powers, following Montesquieu's classical model, ensuring a fuller realization of the principle of judicial independence as a fundamental prerequisite for the rule of law.

However, erecting a protective barrier against political branches of government can undermine so-called internal judicial independence, potentially

[5] Kosař, D. (2018). Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe. *German Law Journal,* 19 (7), 1567.

[6] Some authors suggest adopting a broader definition of judicial self-governance that would not be limited solely to judicial councils. Kosař defines judicial self-governance bodies as those that include at least one judge and whose primary function, based on legal norms, is to: a) decide on matters related to judicial administration and/or judges' careers, and b) advise bodies that decide on such matters (*Ibid,* 1571).

[7] Garoupa, N., Ginsburg, T. (2009). Guarding the guardians: Judicial councils and judicial independence. *The American Journal of Comparative Law,* 57 (1), 106.

[8] Pérez, A.T. (2018). Judicial self-government and judicial independence: The political capture of the general council of the judiciary in Spain. *German Law Journal,* 19 (7), 1770.

creating a "system of dependent judges within an independent judiciary."[9] In recent years, an increasing number of authors have warned that forming judicial councils can open new channels for the politicization of the judiciary and new mechanisms of pressure on judicial office holders (by judicial council members or informal centers of influence). This raises the dilemma of whether judicial councils should be viewed as a panacea, a universal remedy for deficiencies in the judiciary, or as a mere placebo that, aside from being ineffective in curing the root problem (failing to sufficiently depoliticize the judiciary), can produce serious side effects. Reducing external oversight of the judiciary's work, the establishment of judicial councils may pave the way for the erosion of internal independence, which can be as detrimental to the preservation of judicial independence as external threats. The broad powers of judicial councils, combined with diminished or eliminated oversight by political branches, amplify the importance of addressing the accountability of council members, a problem that lies at the core of this paper.

Judicial Councils: Origins and General Characteristics

An increasing number of countries worldwide are opting to establish judicial councils, independent bodies entrusted with decisions on the selection and promotion of judicial office holders, as well as the conduct of disciplinary proceedings against them. The expansion of this institution owes much to international and regional organizations. The "fourth wave" of the spread of judicial councils in European countries, emerging in the second half of the 1990s, is explained in the literature by the influence of institutions such as the Council of Europe and the European Union (EU).[10] In the Agenda 2000, adopted by the European Commission in 1997, judicial independence and self-governance were listed among the requirements for EU candidate countries, with their implementation subject to Commission monitoring.[11] National high judicial councils differ in terms of their composition, the method of member selection, and the powers vested in them, making it impossible to speak of a universal model for this institution.

The establishment of judicial councils in European countries began after the Second World War. The idea of judicial councils as a tool for enhancing

[9] Kosař, D. (2016). *Perils of Judicial Self-Government in Transitional Societies.* Cambridge: Cambridge University Press, 19.

[10] Kosař, D. (2016). *Perils of Judicial Self-Government in Transitional Societies.* Cambridge: Cambridge University Press, 123.

[11] Bobek, M., Kosař, D. (2014). Global Solutions, local damages: a critical study in judicial councils in Central and Eastern Europe. *German Law Journal,* 15 (7), 1275–1276.

judicial independence dates back to the 19th century, initially tied to the problem of protecting judicial office holders from unwarranted dismissal. The first high judicial councils were introduced in France (1946) and Italy (1948) to "shield the judiciary from political interference and ensure that one of the main social institutions could not be manipulated by undemocratic forces."[12] The newly established councils differed in composition and powers. In France, for instance, magistrates elected directly by their peers constituted a minority of the council members, so the goal of reducing the influence of political branches on judicial appointments was only partially achieved.[13] The "second wave" of judicial council formation occurred in the late 1970s, when councils were established in Spain, Portugal, and Greece after the fall of authoritarian regimes. The "third wave" followed about a decade later, spanning two continents. In addition to European countries, it included Latin American states, reflecting similar historical-political contexts (the fall of communism in Europe and the collapse of authoritarian regimes in Latin America). These examples confirm that the establishment of judicial councils is seen as a significant step in strengthening judicial independence, a vital prerequisite for establishing the rule of law and enhancing democratic institutions. By the mid-1990s, with the EU enlargement agenda gaining prominence, the formation of judicial councils became a "transnational issue."[14] The "synergistic effect" of efforts by the Council of Europe and the EU to promote judicial councils became more pronounced after the adoption of the Copenhagen Criteria by the European Council in 1993. Initially flexible regarding judicial organization models, this stance was later abandoned. By the EU's 2004 enlargement, the introduction of judicial councils had become part of the "pre-accession conditionality."[15] Romania and Bulgaria, whose EU accession was delayed until 2007, faced explicit demands from the European Commission to reform their councils in line with European standards.[16]

Bobek and Kozar caution that the pressure to introduce or reorganize these councils is not based on a precisely defined "European model" of judicial

[12] Bell, J. (2006). *Judiciaries within Europe: A comparative review.* Cambridge - New York: Cambridge University Press, 27.

[13] Garoupa, N., Ginsburg, T. (2009). The comparative law and economics of judicial councils. *Berkeley Journal of International Law,* 27 (1), 57.

[14] Kosař, D. (2016). *Perils of Judicial Self-Government in Transitional Societies,* Cambridge: Cambridge University Press, 122–123.

[15] As a result of conditionality, the Judicial Council of the Slovak Republic was established in 2002, and in the same year, a judicial council was established in Estonia, with certain modifications to the "European model" of this institution. Bobek, M., Kosař, D. (2014). Global Solutions, local damages: a critical study in judicial councils in Central and Eastern Europe. *German Law Journal,* 15 (7), 1261.

[16] *Ibid.*

councils. Instead, the demands involve applying an existing normative framework composed largely of "soft law" documents adopted by advisory bodies such as the Consultative Council of European Judges (CCJE), the European Network of Councils for the Judiciary, or the Venice Commission. However, according to these authors, an analysis of relevant documents reveals the key characteristics of a "European model" of judicial councils: 1) Councils should be established by the constitution. 2) At least half of the council members should be judges elected by their peers. 3) Councils should be decision-making bodies, not merely advisory. 4) Councils should have significant authority over all matters concerning judicial careers, including selection, appointment, promotion, transfer, dismissal, and disciplinary proceedings. 5) The council should be chaired by the president of the highest court or a "neutral" head of state. These features can only be conditionally accepted, as Bobek and Kozar acknowledge that their list of criteria is neither exhaustive nor definitive.[17] In the documents containing provisions on the organization and competencies of judicial councils, there are requirements that deviate from the aforementioned characteristics.[18] Certain solutions adopted in national legal systems also diverge from the described "European model."[19]

[17] Bobek, M., Kosař, D. (2014). Global Solutions, local damages: a critical study in judicial councils in Central and Eastern Europe. *German Law Journal,* 15 (7), 1263.

[18] The Recommendation of the Committee of Ministers of the Council of Europe R (2010) 12 allows for the possibility that the establishment of judicial councils may be provided for by law, rather than exclusively by the constitution (Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2010)12: "Judges: independence, efficiency and responsibilities" (Available at: https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d; Accessed on November 21, 2023). Some documents suggest defining broader competencies for this body. (see, e.g., Network of Councils for the Judiciary (ENCJ), Councils for the Judiciary Report 2010–2011, Rome (2011); Available at: https://www.encj.eu/images/stories/pdf/workinggroups/report_project_team_councils_for_the_judiciary_2010_2011.pdf; Accessed on: October 1, 2023).

[19] An illustration can be provided by examining the method of selecting judicial council members in certain European countries. In Spain, the General Council of the Judiciary consists of the President of the Supreme Court of Spain and twenty members, eight of whom are elected by Parliament from among lawyers with at least fifteen years of professional experience (both the Congress and the Senate elect four members each, by a 3/5 majority). Twelve members are judges who, according to Organic Law No. 4 of 2013, are also elected by Parliament, which contradicts the aforementioned "European model." (Pérez, A.T. (2018). Judicial self-government and judicial independence: The political capture of the general council of the judiciary in Spain. *German Law Journal,* 19 (7), 1772–1775) Similarly, in Poland, members of the National Council of the Judiciary from among judges are elected by the Sejm. (Mastracci, M. (2020). Judiciary Saga in Poland: An Affair Torn between European Standards and ECtHR Criteria. *Polish Review of International & European Law,* Vol. 9, No. 2).

Despite the lack of consensus on the criteria for the organization and powers of judicial councils, it is evident that there is a strong preference for their establishment. Advocates argue that introducing this institution most effectively ensures the principle of judicial independence. Enhancing the organizational autonomy of judicial bodies allows the judiciary to operate independently, free from political influence, fulfilling its essential function as a branch of government. As Russell notes, this function involves impartial adjudication of disputes concerning legally prescribed rights and obligations, whether between individuals or between individuals and public authorities.[20] The rule of law, understood as governance limited and controlled by law, requires that "disputes over whether non-judicial branches of government have exercised their powers lawfully must be decided by judges who are not controlled by those branches."[21]

For judicial councils to fulfill this role, they must be organized according to appropriate standards. If judges are a minority among council members, or if legislative and executive branches dominate their selection, or if the council's powers are limited or reduced to advisory functions, its contribution to ensuring judicial independence will be significantly compromised. Judicial independence requires a corresponding level of independence for judicial councils. As emphasized in the judgment of the EU Court of Justice in Joined Cases C-585/18, C-624/18, and C-625/18:

> "...The degree of independence enjoyed by the National Council of the Judiciary (NCJ) from the legislative and executive branches in exercising the powers conferred upon it by national legislation, as the body authorized, under Article 186 of the Constitution, to ensure the independence of courts and the judiciary, may become relevant in determining whether the judges it appoints are capable of meeting the requirements of independence and impartiality deriving from Article 47 of the Charter."[22]

The establishment of judicial councils and ensuring their independence from the political branches of government undoubtedly contribute to strengthening external judicial independence. However, severing ties with the executive and legislative branches implies weakening external control mechanisms,

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[20] Russell, P. H. (2001). Toward a General Theory of Judicial Independence. *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (eds. Russell, P. H., O'Brien, D. M.). Charlottesville and London: University Press of Virginia, 10.

[21] *Ibid.*

[22] The Court of Justice of the European Union, Judgment in Joined Cases C–585/18, C–624/18 and C–625/18 (*A.K. v Krajowa Rada Sądownictwa,* and *CP and DO v Sąd Najwyższy*) (2019). (Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0585)

thereby increasing the risk of undue influence by other judges or centers of power that may form within the judiciary itself. Regarding the composition of judicial councils, one controversial issue concerns the potential "dominance" of judges from the highest courts among council members, which enables their prevailing influence in decision-making on matters within the council's jurisdiction. For example, the 1958 Law on the High Council of the Judiciary of the Republic of Italy stipulated that six members of the Council, elected from among judicial office holders, had to be judges of the Supreme Court. This meant that, when combined with the two *ex officio* members, representatives of the highest judicial authority formed the majority within this category of members. Although the Constitutional Court of the Republic of Italy did not find this solution unconstitutional,[23] it faced criticism, ultimately leading to its abandonment. The example of Italy illustrates yet another way in which the judicial council model can threaten internal judicial independence. Literature points to the potentially harmful influence of "currents" (*correnti* in Italian), organized judicial factions within the National Association of Magistrates (*Associazione Nazionale Magistrati*), during the election of council members. Since the 1960s, the Association saw the formal establishment of "currents" which, while not explicitly linked to political parties, carry ideological and political undertones. In elections for council members, these factions presented their own candidate lists, so election success often depended more on affiliation with a particular "current" than on the qualifications and experience of the individual candidate. Additionally, decision-making within the Council, particularly in the area of judicial appointments, revealed the existence of informal agreements between "currents" on the distribution of vacant positions in judicial bodies. Amendments to the electoral system in 2002 prohibited the submission of lists, which theoretically should improve the chances of "independent" candidates. However, as some authors caution, the prospects for their election without the backing of nationally organized "currents" remain far from promising.[24] This example demonstrates that even in cases where judicial council members are elected exclusively by judges, there is a risk of "politicization" of the process, which inevitably affects the functioning of the council.

Electing council members exclusively from among judges, by their peers, would represent the most complete realization of the concept of judicial self-governance. However, such a solution increases the risk of corporatism, which, in addition to weakening judicial accountability, can lead to the

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[23] In Decision No. 168, dated December 2, 1963, the Court concluded that such a legal solution was legitimate, considering the extensive experience held by Supreme Court judges (cited in: Benvenuti, S., Paris, D. (2018). Judicial Self-Government in Italy: Merits, Limits, and the Reality of an Export Model. *German Law Journal*, 19 (7), 1654).

[24] *Ibid.*, 1655–1658.

strengthening of interest groups. One way to mitigate this risk is to prescribe a “mixed” composition of judicial councils. The need for councils to include members from other professions, in addition to judicial office holders, has been emphasized in several documents of the CCJE and the Venice Commission. In Opinion No. 10 of the CCJE on the Council for the Judiciary in the Service of Society, it was stated that a “mixed composition” of the council would bring certain advantages: on the one hand, it would reduce the risk of creating the impression of prioritizing self-interest and cronyism (appointing close collaborators and friends to judicial positions), while on the other hand, it would allow for the maintenance of diverse viewpoints within society, thereby providing the judiciary with an additional source of legitimacy. The importance of a “mixed” composition of judicial councils, as a means to prevent corporatism and politicization within the judiciary, has also been highlighted by the Venice Commission in several of its opinions and reports. In the Urgent Joint Opinion of the Venice Commission and the Directorate for Human Rights and Rule of Law of the Council of Europe on the Draft Law on Amendments to Law No. 947/1996 on the High Council of the Judiciary of Moldova, it was emphasized that, in order to prevent corporatism and politicization, oversight of the judiciary by council members who are not judges must be ensured. The Commission sees the counterbalance to corporatism in the presence of council members from other legal professions or “users” of the judicial system, such as lawyers, prosecutors, notaries, representatives of academia, and civil society, among others.[25]

High Judicial and Prosecutorial Council of Bosnia and Herzegovina: Organization and Competencies

In Bosnia and Herzegovina, decisions regarding the appointment and career of judges, as well as the determination of their disciplinary liability, are entrusted to the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC BiH), a regulatory body established to act as an “independent and autonomous body... ensuring an independent, impartial, and professional judiciary.”[26] The establishment of HJPC BiH was not unexpected, given the

[25] Venice Commission, Opinion No. 976/2019 (2020). Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)001-e, downloaded: October 29, 2023;

[26] Article 3, Paragraph 1 of the Law on HJPC BiH (*Official Gazette of BiH*, Nos. 25/04, 93/05, 48/07, 15/08, and 68/23). The HJPC BiH was established in 2004 with the adoption of the Law on HJPC BiH by the Parliamentary Assembly of BiH. The adoption of the Law was preceded by the signing of the Agreement on the Transfer of Certain Responsibilities of the Entities through the Establishment of HJPC BiH. The Agreement provided

aforementioned preferences of the EU and the Council of Europe for introducing judicial councils. In the Feasibility Study adopted by the European Commission in 2003, the establishment of HJPC BiH was identified as one of the conditions for initiating negotiations on the Stabilization and Association Agreement between the EU and BiH (the establishment of this body was assessed as a significant step toward building the rule of law and improving the efficiency of the judiciary).[27]

The HJPC BiH is composed of fifteen members: eleven judges and prosecutors elected at the state, entity, and Brčko District levels (two members at the BiH level, four from each entity, and one selected by the Brčko District Judicial Commission); two lawyers (one elected by the Bar Association of the Federation of BiH and one by the Bar Association of Republika Srpska); one member elected by the House of Representatives of the Parliamentary Assembly of BiH, who does not hold a judicial office and is not a member of Parliament; and one member elected by the Council of Ministers of BiH, upon the proposal of the Minister of Justice of BiH, who does not hold a judicial office and is not a member of the Council of Ministers of BiH (Article 4, Paragraph 1 of the Law on HJPC BiH). A question arises as to the extent to which the composition of the HJPC aligns with European standards (the model of judicial councils). The condition requiring a majority of members to be judicial office holders is met. However, one criticism concerns the fact that decisions on judicial appointments are made by the Council as a whole, meaning that prosecutors also participate in decision-making. This reduces the influence of judges, given that judicial office holders make up only one-third of the total number of Council members. This deficiency could be addressed by establishing two sub-councils (departments) within the HJPC, one for judges and another for prosecutors, as proposed in earlier drafts of the new Law on HJPC BiH (a model supported by the Venice Commission as a

> "...balanced solution that, on the one hand, prevents excessive interference by one legal profession in the work of the other, while, on the other hand, maintains the existing structure of HJPC as a joint body of judges and prosecutors").[28]

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for the establishment of a unified HJPC BiH, entrusted with ensuring the autonomy, independence, impartiality, expertise, and efficiency of the judiciary, including prosecutors, in the Federation of BiH and Republika Srpska, as well as at the level of Bosnia and Herzegovina. With the establishment of HJPC BiH, the previously existing high judicial and prosecutorial councils of the entities and Bosnia and Herzegovina, which were established in 2002, ceased to function.

[27] https://ec.europa.eu/commission/presscorner/detail/en/IP_03_1563

[28] Venice Commission, Opinion no. 712/2013 on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (paragraph 61) (2014) (Available at:

However, the 2023 Law on Amendments to the Law on HJPC BiH did not alter the structure of the Council (despite prior announcements, the Law did not provide for the formation of sub-councils for judges and prosecutors).[29]

Article 17, Paragraph 1 of the Law on HJPC BiH stipulates that the Council appoints judges, including court presidents, lay judges, and additional judges, to all courts at the state, entity, cantonal, district, basic, and municipal levels in BiH, including Brčko District BiH, with the exception of entity constitutional courts. To carry out the process of judicial appointments, four sub-councils for candidate selection are established (in accordance with BiH's complex state structure and its adapted judiciary organization): the Sub-Council at the BiH level, the Sub-Council for Brčko District BiH, the Sub-Council for Republika Srpska, and the Sub-Council for the Federation of BiH. The Sub-Council at the BiH level, appointed by the President of the Council, consists of at least three HJPC members, including, if possible, at least one judge or prosecutor from the BiH level, one from Republika Srpska, and one from the Federation of BiH. The Sub-Council conducts interviews with candidates for vacant positions at the BiH level and submits a ranked list of candidates to the Council, which makes the appointment decisions.[30] Entity sub-councils consist of five Council members from the respective entity. These sub-councils appoint committees of three Council members to conduct interviews with candidates and rank them based on their ability, suitability, and expertise.[31] Where possible, the majority of committee members should be members of the relevant entity sub-council, and a committee member who is a judge or prosecutor from the same institution as the candidate being interviewed cannot participate in the composition of the committee.[32] Based on the ranking performed by the committee, the entity sub-council submits a ranked list of candidates to the Council, which makes the final decision on all appointments (Article 38, Paragraph 5 of the Law). The Sub-Council for Brčko District BiH, appointed by the President of the Council, consists of at least three Council members, including, if possible, at least one judge or prosecutor from Brčko District, one

https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2014)008-e; Venice Commission, Opinion no. 648/2011 on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina (para. 93) (2012). (Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2012)039-e)

[29] Law on Amendments to the Law on the Supreme Court of Bosnia and Herzegovina. *Official Gazette of Bosnia and Herzegovina,* no. 68/23.

[30] Article 37 of the Law on HJPC BiH.

[31] Art. 38 of the Law on HJPC BiH; Art. 41, paragraph 1. of the Rules of Procedure of HJPC BiH (Available at: https://vstv.pravosudje.ba/vstvfo/Sc/141/kategorije-vijesti/1172/1180/4570; Accessed on: December 12, 2023).

[32] Art. 41, paragraphs 2 and 3 of the Rules of Procedure of HJPC BiH.

from the BiH level, and one from the entity level. This Sub-Council conducts interviews with candidates for vacant positions in Brčko District, and the final decision on appointments to judicial office, as in the previous cases, is made by the Council (Article 37 of the Law).

The HJPC BiH is also responsible for conducting disciplinary proceedings to determine the liability of judicial office holders. Judicial disciplinary liability is defined as liability "for a violation of judicial duty prescribed by law, for which a specified penalty is imposed through a prescribed procedure."[33] The primary aim of judicial disciplinary liability is

> "...to ensure, through the threat and application of disciplinary sanctions... that judges, in their role as public officials, albeit of a special kind, respect their official duties, i.e., their public-law obligations toward the state and its citizens."[34]

The specificity of judicial disciplinary liability, stemming from the special social significance of the judicial function, lies in the fact that judicial duties, violations of which are classified as disciplinary offenses, are not necessarily limited to behavior in court. Judicial disciplinary liability

> "...often extends to certain vaguely defined forms of behavior outside the courtroom, such as actions that may undermine the reputation of the judiciary or public trust in the judge's independence."[35]

The existence of such disciplinary offenses speaks to the special, higher standards of behavior required of judges, which are not strictly tied to the performance of judicial functions.

The disciplinary procedure is initiated by the Office of the Disciplinary Prosecutor before the First-Instance Disciplinary Commission, by filing a lawsuit (Article 67, Paragraph 1 of the Law on HJPC BiH). The First-Instance Disciplinary Commission consists of three members, at least two of whom are Council members, and if the disciplinary procedure is conducted against a judge, the majority of the Commission members must be judges (Article 60, Paragraphs 3 and 5 of the Law). Appeals against decisions of the First-Instance Disciplinary Commission can always be made to the Second-Instance Disciplinary Commission. Decisions of the Second-Instance Disciplinary Commission imposing measures can be appealed to the Council as a whole, and if the Council does not confirm the measure of dismissal, it may impose

[33] Galiot, M., Čović, S., Juras, D. (2013). Kaznena i stegovna (disciplinska) odgovornost sudaca. *Collected Papers of the Faculty of Law of the University of Rijeka,* 34 (2), 867.

[34] Cappelletti, M. (1983). Who Watches the Watchmen – A Comparative Study on Judicial Responsibility. *American Journal of Comparative Law,* Vol. 31 (1), 46.

[35] *Ibid.*, fn. 223.

another disciplinary measure provided by law (Article 60, Paragraph 6 of the Law). If the Council confirms the measure of dismissal, the judge may appeal to the Court of BiH, alleging either a material violation of procedural rules established by the Law on HJPC BiH or the misapplication of the law by the Council (Article 60, Paragraph 7). Judges subject to disciplinary measures have one more legal remedy available. The Constitution of BiH provides that the Constitutional Court has appellate jurisdiction in matters arising under the Constitution when such matters become contentious due to judgments by any court in BiH (Article VI/3.b). The Constitutional Court of BiH has taken the position that its appellate jurisdiction includes not only decisions of the Court of BiH but also those of HJPC BiH. The Court has stated that

> "...HJPC, although not a court in the traditional sense, can be considered an 'independent and impartial tribunal established by law' within the meaning of Article 6, Paragraph 1 of the European Convention,"

leading to the conclusion that

> "...decisions of such a body, made in disciplinary proceedings, must be considered 'judgments or decisions' within the meaning of Article VI/3.b of the Constitution of Bosnia and Herzegovina and Article 15, Paragraph 3 of the Rules of Procedure of the Constitutional Court, which the Constitutional Court has jurisdiction to review."[36]

BiH is among the countries that prescribe a relatively complex procedure for determining the disciplinary liability of judges. Based on an expert analysis of disciplinary proceedings in BiH,[37] the European Commission recommended simplifying disciplinary procedure and reducing it to just two stages: first instance and appeal (the Recommendation also emphasized the need for judicial oversight of the decisions of the first-instance commission). While reasons related to the protection of judicial independence support a more complex procedure to minimize the risk of misuse of the disciplinary mechanism, effective sanctioning of disciplinary offenses requires a simpler and quicker process. The literature suggests that classifying disciplinary offenses into several categories according to their severity could ensure greater efficiency in determining disciplinary liability for judicial office holders. Support for such a solution, which is not unknown in comparative legislation (e.g., in Spain, Slovakia, Montenegro, Albania), stems from considerations of legal certainty (particularly regarding the possibility of imposing dismissal measures) and

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[36] Decision of the Constitutional Court of Bosnia and Herzegovina, no. AP 633/04, *Official Gazette of BiH,* no. 73/05.

[37] Recommendation of the European Commission based on expert analysis of disciplinary procedures in Bosnia and Herzegovina. Available at: https://pravosudje.ba/vstvfo/Sc/10001/kategorije-vijesti/10144/115100 (Accessed on: November 23, 2023).

efficiency (as less severe disciplinary offenses could involve a less complex procedure).[38] The aforementioned European Commission Recommendation also suggested more precise definitions of disciplinary offenses committed by judicial office holders. Although the 2023 Law on Amendments to the HJPC BiH amended provisions concerning disciplinary offenses of judges, they did not include a classification by severity.

AMENDMENTS TO THE LAW ON HJPC BIH: A PATH TOWARD GREATER ACCOUNTABILITY AND INTEGRITY?

Accountability of HJPC BiH Members

The extensive powers of the HJPC BiH raise the issue of creating an adequate legal framework for the accountability of its members. It is unrealistic to expect judicial councils to effectively fulfill their role in strengthening accountability and integrity in the judiciary if their own members are not subject to rules that guarantee adherence to these principles. The need for appropriate procedures to determine the accountability of judicial council members is particularly pronounced in countries where public trust in the judiciary, including judicial self-governance bodies, is relatively low, such as Bosnia and Herzegovina. The situation in BiH was further exacerbated by several scandals involving HJPC BiH members, including its president. In 2019, a recording surfaced of a conversation in a restaurant involving then-president of HJPC BiH M. T., where party N. A. inquired about the status of a specific criminal case. The Council president promised to discuss the matter with the Chief Prosecutor of the Sarajevo Canton, D. B. In the continuation of the recorded conversation, which the Council president did not attend, an acquaintance of N. A., an officer of the State Investigation and Protection Agency (SIPA), demanded and accepted money from N.A. for "lubrication" ("potkivanje", a term used to imply bribery). This incident came to be known as the "Potkivanje" affair. The Office of the Disciplinary Prosecutor of HJPC BiH initiated disciplinary proceedings against the Council president for the disciplinary offense of

> "...any other conduct that constitutes a serious violation of official duty or undermines public confidence in the impartiality and credibility of the judiciary" (Article 56, Point 23 of the Law on HJPC BiH).[39]

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[38] For more, see: Milinković, I. (2021). *Ogledi iz pravne etike I: Sudijska etika,* Banja Luka: Faculty of Law, University of Banja Luka, 105–109.

[39] https://www.slobodnaevropa.org/a/29974875.html

However, the First-Instance Disciplinary Commission dismissed the lawsuit, reasoning that the provisions of the Law governing judicial disciplinary offenses did not apply to HJPC members. The decision was upheld by the Second-Instance Disciplinary Commission.[40] Article 54 of the Law on HJPC BiH ("General Provisions on Disciplinary Liability for Disciplinary Offenses"), in force at the time, addressed the disciplinary liability of judges, prosecutors, additional judges, or lay judges (including court presidents, chief prosecutors, and their deputies) for offenses prescribed by the Law but did not explicitly mention the liability of Council members. The Law provided for the removal of Council members upon the proposal of at least one-third of Council members or the Disciplinary Commission, by a two-thirds majority of the members present and voting. Under the then-applicable legal provisions, an HJPC member could be removed if: 1) they did not perform their duties properly, effectively, or impartially; 2) they failed to fulfill obligations arising from their role due to illness or other reasons; or 3) they committed an offense making them unworthy of serving on the Council (Article 6, Points d), e), and f) of the Law). In this instance, HJPC members supported the Council president, rendering the legal mechanism for removal unused. This highlighted the weaknesses of the legal framework, as the process for establishing liability and considering the removal of Council members could only be initiated at the proposal of Council members themselves, allowing the president and members to block any attempt to establish their liability. Since the Council failed to respond, the House of Representatives of the Parliamentary Assembly of BiH formed a Temporary Investigative Commission to assess the state of the judiciary in BiH, tasked with examining the Council's work. Although this decision by the House of Representatives was necessitated by the existing legal framework, the process raised concerns about maintaining HJPC independence from political branches of government, specifically the legislative branch in this case. The HJPC president deemed the formation of the Investigative Commission unconstitutional and unlawful,[41] while the HJPC adopted conclusions labeling the Commission's establishment as an unacceptable interference in the judiciary's work.[42]

The weaknesses of the legal framework for determining the liability of HJPC BiH members were also highlighted in the 2019 Expert Report on Rule of Law Issues in Bosnia and Herzegovina, which emphasized the need to enhance accountability and transparency in HJPC operations, as well as to

[40] https://www.slobodnaevropa.org/a/29999615.html

[41] https://www.rtrs.tv/vijesti/vijest.php?id=389753

[42] https://www.nezavisne.com/novosti/bih/VSTS-osudio-formiranje-istrazne-komisije-nece-ucestvovati-u-njenom-radu/548884

establish appropriate oversight of Council members' conduct and procedures for establishing liability.[43]

The 2023 Law on Amendments to the Law on HJPC BiH devoted significant attention to the issue of Council member liability. Article 5 of the Law on Amendments introduced Article 6a, which regulates the procedure for removing Council members. The new Article 6a ("Removal of Council Members") provides that a member may be removed if they seriously damage the Council's reputation through a violation of the Law or other action, in cases of incompatible functions, and for continuous absence exceeding three months or, in the case of illness, six months. In such cases, the HJPC will form a special commission of five members to establish the relevant facts and propose a decision to the Council. The removal decision requires a two-thirds majority of Council members present.

Previously, HJPC disciplinary bodies had ruled that provisions of the Law on HJPC BiH regarding judicial disciplinary responsibility could not be analogously applied to Council members. Article 13 of the Law on Amendments supplemented the Law with provisions on the disciplinary liability of Council members. The Law on Amendments added Article 57a, which explicitly defines the disciplinary offenses of Council members, structured similarly to judicial disciplinary offenses. Article 57a enumerates specific disciplinary offenses across thirteen points and includes a general provision in Point n), stipulating that

> "...any conduct that damages the reputation and integrity of the Council and the judiciary as a whole, not specifically prescribed as a separate offense by this article,"

shall also be considered a disciplinary offense.

Article 15 of the Law on Amendments added Articles 61a and 61b, which govern the procedure for conducting disciplinary proceedings against Council members. The new provisions specify that disciplinary proceedings are conducted by the First-Instance and Second-Instance Disciplinary Commissions. The Second-Instance Commission decides on appeals against decisions of the First-Instance Commission, while appeals against the Second-Instance Commission's decisions, as final administrative acts, may be filed with the Court of BiH (Article 61a, Paragraph 7).

The First-Instance and Second-Instance Disciplinary Commissions are each composed of three members (Article 61a, Paragraphs 4 and 5). In disciplinary proceedings against a member who is a judge, all commission members will be judges at both instances. In cases involving a prosecutor, all

[43] Available at: https://archive.europa.ba/?p=66927. Accessed on: November 23, 2023.

members will be prosecutors. For proceedings involving a member who is neither a judge nor a prosecutor, the commissions will include one judge, one prosecutor, and one Council member who is not a judge or prosecutor (Article 61a, Paragraph 3).

Based on proposals by courts and prosecutor's offices, the HJPC compiles a list of judges and prosecutors eligible to serve as disciplinary commission members. Members cannot be reappointed (Article 61b, Paragraph 4). Since the effective performance of HJPC BiH requires lawful and professionally responsible conduct by its members, the adoption of provisions on the disciplinary liability of Council members can be deemed justified.

ASSET DECLARATION BY JUDGES, PROSECUTORS, AND HJPC MEMBERS

One of the amendments introduced by the 2023 Law on Amendments to the Law on HJPC BiH concerns the obligation for judges and prosecutors (as well as HJPC BiH members) to declare their assets. This controversial measure raises the issue of balancing the right to privacy of judicial office holders and their family members, on the one hand, and the public interest, which demands measures aimed at combating corruption and strengthening integrity in the judiciary, on the other. The justification for this measure was emphasized in the CCJE Opinion No. 21 on Preventing Corruption among Judges[44] from 2018. The opinion states that

> "...a strong asset declaration system can contribute to identifying and subsequently avoiding conflicts of interest if all relevant steps are taken, thereby increasing transparency in the judiciary and fostering a climate of judicial integrity."

However, the CCJE also stresses the need to respect the principle of proportionality when balancing the obligation to declare assets with the right to privacy of judges and their families. The opinion suggests that access to information covered by the declaration obligation should only be granted upon request and only if the applicant demonstrates a legitimate interest, while the privacy of third parties, such as family members of judges, should receive a higher level of protection.

[44] Consultative Council of European Judges, Opinion no. 21 (2018) on Preventing Corruption among Judges. Available at: https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta (Accessed on: November 23, 2023).

CCJE Opinion No. 21 also refers to recommendations by GRECO (Group of States Against Corruption) made in its Fourth Evaluation Round titled "Preventing Corruption among MPs, Judges, and Prosecutors." In its 2016 Evaluation Report for BiH, GRECO recommended establishing an effective system for monitoring annual financial declarations of judges and prosecutors, including the imposition of appropriate sanctions for non-compliance or false declaration. The Report also suggested considering the publication of and easy access to financial information, while respecting the privacy and safety of judges, prosecutors, and their close relatives.[45]

The obligation to declare assets of judges and their family members is not unknown in comparative law. For example, Article 175b of Bulgaria's Judiciary System Act[46] requires judges, prosecutors, and investigating judges to provide information about financial interests in Bulgaria and abroad, including data on real estate ownership, motor vehicles, other registrable means of transport, monetary amounts, including deposits, bank accounts, and claims, exceeding 10,000 Bulgarian levs (BGN), including foreign currency, etc.

Efforts to introduce mandatory financial declaration for judicial office holders in BiH to combat corruption and scrutinize the origin of assets were recorded even before the adoption of the Law on Amendments. In 2018, HJPC BiH adopted the Rulebook on Submitting, Verifying, and Processing Financial Reports of Judges and Prosecutors (08-02-2-3186/2018), which prescribed rules and procedures for submitting financial reports, as well as their verification, processing, publication, storage, and access. However, the BiH Personal Data Protection Agency issued an official decision prohibiting HJPC BiH from processing the personal data of judges and prosecutors in the manner prescribed by the Rulebook, citing violations of the Law on HJPC BiH, the Law on Unique Identification Numbers, and provisions of the Anti-Corruption Convention.[47] The HJPC BiH filed a lawsuit with the Court of BiH seeking annulment of the decision. The Court dismissed the lawsuit, finding the Agency's decision to be based on properly established facts and the correct application of procedural and substantive law.[48]

[45] GRECO – Group of States against Corruption, Evaluation Report: Bosnia and Herzegovina, 2016, 36.

[46] Judiciary System Act of the Republic of Bulgaria; Available at: https://vss.justice.bg/en/page/view/2073 (Accessed on: November 27, 2023).

[47] Decision of the Agency for the Protection of Personal Data in Bosnia and Herzegovina dated March 5, 2019. Available at: https://www.azlp.ba/rjesenja/Archive.aspx?langTag=sr%E2%80%93SP%E2%80%93Cyrl&template_id=149&pageIndex=4 (Accessed on: November 24, 2023).

[48] https://www.azlp.ba/saopstenja/?id=2867.

Article 21 of the Law on Amendments, which amended Article 86 of the Law on HJPC BiH, introduced the obligation for judges and prosecutors to submit to the Council

> "...initial and annual asset and interest declarations, including details on the method and timing of acquisition, purchase value, income, interests, liabilities, expenses, and guarantees for themselves, their spouses or partners, parents, children, and other individuals living in the same household" (Article 86, Paragraph 1).

Judges must also declare all income of their spouses, partners, parents, children, and other household members (Article 86, Paragraph 2, Item b). The law further requires judges to declare income from other paid activities, ownership rights over real estate (including acquisition details and purchase value), and ownership rights over vehicles and other movable property worth over 5,000 BAM (Convertible Marks). Additionally, judges must declare financial assets held in banks or financial institutions, including electronic currencies and cash exceeding 5,000 BAM. Special provisions pertain to declaring gifts and donations: judges are required to disclose gifts and donations received in connection with their judicial function valued over 25 BAM, as well as private gifts and donations exceeding 500 BAM individually or 1,000 BAM annually (Article 86, Paragraph 2, Items i and j).

Article 22 of the Law on Amendments added Articles 86a to 86k to regulate access to asset and interest declarations, their verification and analysis, and the establishment of a registry for such declarations. Article 86a, Paragraph 1 provides that asset and interest declarations are published on the HJPC BiH website

> "...to enhance integrity, transparency, and public trust in the judiciary, as well as to prevent conflicts of interest and other undue influences on judicial functions."

Paragraph 2 specifies data that will not be publicly disclosed, including the full names of minors (only initials will be shown), unique identification numbers, residential addresses of judges and prosecutors, as well as other people mentioned in the declaration, specific locations of properties, bank account numbers and other identificaion numbers, individual cash amounts held by judges and prosecutors or their household members, vehicle registration numbers, annual income tax filings, and other attachments submitted with the declaration. The law mandates the establishment of a Department for Processing Declarations within the HJPC Secretariat, which is tasked with independently enforcing the provisions of the Law without receiving instructions or interference in specific cases (Article 86f, Paragraph 1).

Article 86k stipulates that the legal provisions on asset and interest declarations apply equally to all HJPC members. This approach is justified, given that the consequences of corrupt practices by Council members are potentially more damaging to judicial independence than those involving individual judicial office holders.

CONCLUSION

The arguments supporting the protection of judicial independence and the realization of the rule of law advocate for the establishment of judicial councils as bodies of judicial self-governance. Entrusting decisions regarding the selection, promotion, and disciplinary liability of judicial office holders to bodies composed of representatives of the judiciary, elected by judges, undoubtedly enhances the external independence of the judiciary. However, severing ties with the political branches of government may lead to the emergence of new centers of undue influence on judicial office holders, this time within the judiciary itself. To prevent the erosion of internal judicial independence, the introduction of judicial councils must be accompanied by mechanisms that can determine the liability of their members. Therefore, the provisions of the 2023 Law on Amendments to the Law on HJPC BiH, which created a more adequate legal framework for determining the liability of Council members, can be considered justified. The deficiency in the previous legal text, which did not prescribe disciplinary offenses for HJPC BiH members or the procedure for their determination, has been rectified with the adoption of the Law on Amendments.

Efforts to combat corruption in the judiciary and enhance the integrity of judicial office holders also justify the introduction of measures related to the submission of asset and interest declarations. Consequently, the provisions of the Law on Amendments requiring judges, prosecutors, and HJPC members to submit asset and interest declarations can be deemed appropriate (a legitimate solution also noted in CCJE Opinion No. 21). Special attention must be paid to protecting the privacy rights of individuals covered by these declarations, particularly regarding members of the households of judicial office holders.

The Law on Amendments does not address all the open questions concerning the organization and competencies of HJPC BiH or the enhancement of independence, accountability, and integrity of judicial office holders, a fact recognized by the legislator.[49] One proposed solution, previously mentioned

[49] Article 26 of the Law on Amendments to the Law on HJPC BiH provides that within one year from the date this Law enters into force, the Parliamentary Assembly of BiH shall adopt a Law on the High Judicial and Prosecutorial Council aligned with EU

and included in earlier drafts of the new Law on HJPC BiH, relates to the establishment of two departments within HJPC BiH: judicial and prosecutorial. This model of organization was supported by the Venice Commission as a

> "...balanced solution that, on the one hand, prevents excessive interference of one legal profession in the work of the other while, on the other hand, allows the current structure of HJPC, as a joint body of judges and prosecutors, to be maintained."[50]

However, the Law on Amendments did not provide for the creation of such sub-councils. The text of this study also highlighted the justification for classifying disciplinary offenses based on their severity into minor and major offenses, a measure that was not included in the Law on Amendments. Nonetheless, despite these omissions, the amendments have addressed some of the evident shortcomings of the previous legislation. This makes the adoption of the Law on Amendments, even as an incomplete response to the open issues concerning the organization and functioning of the Council, a justified step forward.

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standards, as stipulated in the Opinion of the European Commission on Bosnia and Herzegovina's application for EU membership. The inefficiency demonstrated by the Parliamentary Assembly of BiH during previous attempts to adopt a new Law on HJPC BiH raises doubts about the feasibility of implementing this provision.

[50] Venice Commission, Opinion no. 712/2013 on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, paragraph 61 (2014) (Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2014)008-e; Accessed on: October 26, 2023) B. and Venice Commission, Opinion no. 648/2011 on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, paragraph 93 (2012) (Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2012)039-e; Accessed on: October 26, 2023).

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