



Giving knowledge a gift of ethics: Raising Ethical Standards of Judges in BiH

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One of the most important aspects of the reforms in BiH is a judicial reform. The rightful justice system is not only interpretation of law and application to facts. Citizens' right to achieve justice greatly depends on ethical commitment of a judge.

Public perception of BiH judiciary has been distrustful suspecting it to be very corrupted, resulting in filing high number of complaints against judges (Transparency International BiH, 2007). A comprehensive research¹ is conducted addressing this issue of insufficiency in judicial ethics in BiH and focusing on the following four issues:

1. During the appointment process the moral standing of candidates is mainly a formality issue, and no real consideration is given to it; while in the promotion process to higher posts, there are no unambiguous rules defining influence of ethical records of judges on possible promotion. Additionally, the appointment and promotion process of judges is not transparent and creates a great potential for abuse of the process. There are no effective rules that would prevent or remedy conflict of interest of members of interviewing panels whom selecting judges.
2. Persons aspiring to become judges do not receive any formal education in judicial ethics at law faculty, and nor are they required to undergo any mandatory education in ethics prior to their appointment. Although Judicial and Prosecutorial Training Centers ("JPTC") are mandated to provide adequate training to judges, there is insignificant training of judges in ethics after being appointed.

The conflict of interest in selection process

The conflict of interest rules for members of judge's selection panels do not exist in clear form, but rather assume that Council member should be disqualified "if circumstances exist that would cast doubts as to the member's impartiality". Such vagueness in rule sometimes allows for Council members to decide about selection of their present or future superiors (court presidents).

3. Disciplinary proceedings against judges in BiH are undisclosed and absent of public and legal community scrutiny. Information about initiated disciplinary proceedings are not published, while hearings are held in High Judicial and Prosecutorial Council ("HJPC") highly secured premises, hardly accessible to public.
4. The parallel and uncoordinated competence of HJPC and the Ombudsmen institutions regarding investigation of complaints against judges jeopardize independence of judiciary, but also waste scarce resources. Each of the three Ombudsmen institutions were given a competence to investigate complaints against judges and to influence proceedings they investigate, and so undermine judicial independence.

Institutional conflicts

The Ombudsman institutions, while investigating complaints against judges, seriously jeopardized judicial independence. For example, FBiH Ombudsmen intervened in hundreds of cases before judges only in 2005; in some cases, the judge did what the Ombudsman considered to be right in the proceedings (Ombudsmen of Human Rights of FBiH, 2006).

All these factors greatly contribute to the situation that ethical standards of judges are not as high as required. Due to this situation the trust of citizens is declining, and the foreign investors are discouraged to invest into the BiH economy.

Regressive options

Probably the most supported option by decision makers is to keep the current situation, but this option is unlikely to raise ethical standards of judges.

The public trust in appointment process, won't rise, due to the belief that the process is misused and given that it is highly susceptible to transparency. Without improvement, speculations will stay and effect the public opinion, especially if no objective criteria continue to exist. This is unacceptable for both public and candidates who are not selected to judicial positions.

Summary

Public has no confidence in professionalism and impartiality of judges in BiH suspecting them to be corrupted. This paper analyzes respect for ethical standards by judges in BiH and how it can be improved. BiH, as a potential candidate for EU membership, made significant efforts to reform its judiciary and professionalism of judges; however, still, many judges have only a vague familiarity with ethical standards. Education in judicial ethics is very weak, selection of judges is not based on ethical criteria, disciplinary mechanism is incapable to effectively handle unethical behavior of judges, and so on. In this paper we analyze three policy alternatives to the current situation.

¹ This policy brief is based on research and policy study "Meeting the political criteria of the EU accession: Raising Ethical Standards of Judges", written by authors with support of Open Society Fund Policy Development Fellowship Program 2009. Full text of policy study is available on www.soros.org.ba.

Ethical standards are evolving, and therefore without change in judge's educational background, we can even expect increase in ethical breaches, as judges will be under influence and pressure of opposing forces, like corruption (Transparency International, 2007).

With current minimal theoretical and no real case study in ethics, judges will certainly not clearly understand implications of ethical misconduct. Avoiding improvements cannot be justified by economic factors, as changes in education program and regulations involve almost no additional resources, so doing nothing is all but efficient.

Public will continue to be dissatisfied with discipline process against unethical judges. The situation is slowly but surely becoming worse, as number of dissatisfied complainants is increasing. Office of disciplinary Counsel ("ODC") will continue to lose reputation in public, as complainants have to wait not only for the justice before the court, but also nearly two years for a response of ODC regarding possible disciplinary proceedings.

Due to insufficient information about disciplinary proceedings, facts are speculatively published leading public to believe that most of judges are corrupt, while the real truth becomes insignificant. Not to mention that prevention purpose of disciplinary system cannot be achieved with this partly transparent system.

Parallel and uncoordinated competence of HJPC and the Ombudsman may have positive aspect of a greater chance that a judicial misconduct will be investigated by at least one of the institutions. But the negative aspects are numerous, from doubling of investigations to legal uncertainty. Judges themselves will be victims as well, since one judge for the same behavior may be found liable by one institution, and not liable by another (Slobodna Bosna, 2004).

Some judges will obey interventions of the Ombudsmen institution, and thus jeopardizing independence, or otherwise risking of finding themselves unfairly presented in special reports.

Making **radical change** would presume transferring competences to new institutions. This option would worsen the ethical standards of judges.

Transferring competence for appointments and promotion to other state institution (e.g. Parliament or Ministry of Justice) would be against relevant international documents and recommendations of the Council of Europe. It would destabilize complex constitutional structure of BiH.

Transferring competence for dealing with complaints against judges and discipline of judges to another institution or mechanism outside Council would seriously worsen the situation. Currently, the Judicial Councils in Europe dominate with the competence, and taking a different approach would mean departing from the European predominant trend and practice, and BiH is a regional leader at the moment in regard of establishment of HJPC.

Radical option not efficient, neither publicly acceptable

Establishing the Center for Judicial Ethics Promotion, as radical alternative, would significantly increase effectiveness of judicial ethics education. But, public support for creating the new specialized institutions is unlikely, from expenditures perspective, but also distrust in existing training centers may not increase trust in establishing new one. Merging two entity JPTCs into one, as another radical option, would improve efficiency and standardize the judicial training system, but there is no political will for such merging (Mujanović, 2008).

Moderate option: because ethics is important

This option is recommended as it ensures raising ethical standards of judges.

Raising transparency of the judicial selection process, both in conducting particular phases, but also in publishing relevant application material would raise ethical standards of judges. If the public is enabled to be present or timely informed about judicial interviews, there would be a greater respect for the process. Transparency should also include evaluation material of the interview panels, where evaluation criteria are no more concealed.

Applying standardized procedure and objective criteria in the selection and promotion of judges, in which the ethical criterion would have the most prominent role, would be a boost to the professional judiciary. Interviewing panels' members should be obliged to fulfill short questionnaire

One day of Ethics training in 25 years

In 2009, both JPTCs jointly included only one day of training in ethics in their programs of professional education of judges. This day of education assumed maximum of 35 participants, which is only about 4% of total number of judges in BiH. If this dynamics continues, it will take 25 years to complete one-day training in ethics to all judges in BiH. In other words, opportunity for one judge to participate in only one day of training in ethics is once in 25 years of his work on judicial bench.



about their relations with the candidate, to reduce possible conflict of interest in this process. The only victims of this improved mechanism would be those that are likely to unduly influence selection and promotion process.

In order to achieve decrease in the number of cases related to misconduct of judges, their training should remove most of ethical dilemmas from their judicial practice. For example, in California, 30% of the annual judicial training is devoted to judicial ethics, while in BiH it's 2%. But, before becoming a judge, the best ethical preparation would be at the Law faculties, where Judicial Ethics subject should be included in the curriculum. JPTC's should perform systematic expert evaluation of the judicial education program, so to provide accurate estimation of training efficiency. Their program should make judicial training in ethics at least 2 days per year mandatory for each judge.

Methodology and quality of training should be improved, introducing real disciplinary case studies. Content of the training should, beside legal analysis, include personal behavior analysis. Judges should have access to selected non-confidential documents in disciplinary cases, so they have the opportunity for self-education by reading such real cases of judicial unethical behavior.

By creating transparent, effective and efficient training program for judges, public confidence in improvement of ethical standards would certainly increase.

Improvement of ethical standards for judges is ultimately depending on disciplinary mechanism, more specifically strengthening ODC. Reaching the number of employees in equivalent institutions, ODC would certainly reach the effectiveness of the same institutions. ODC would be able to carry out other important activities, like random visits to courts, to conduct more interviews, talk to more witnesses and citizens, hear concerns of judges, etc. However, this option requires additional financial resources, but if properly explained, would inevitably get public support.

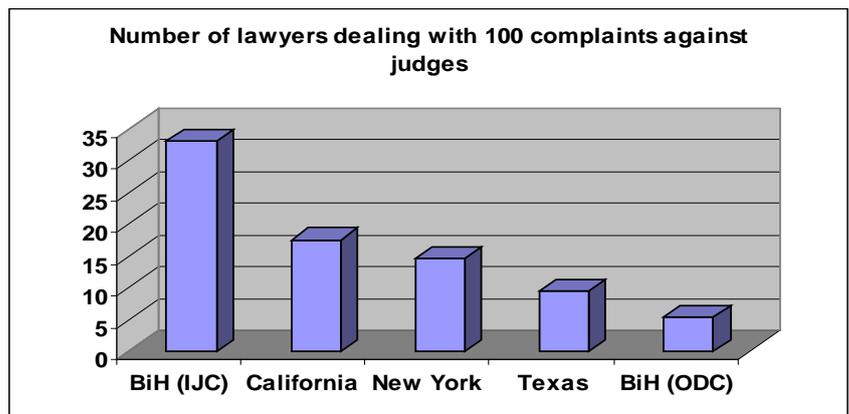
The main purpose of the disciplinary system is prevention, and therefore achieving transparency must be top priority as well. Public should have more and complete information about active disciplinary cases, and their access to disciplinary hearings should not be as hard and not welcomed as it is now.

Improving the current legal framework and practices by eliminating parallelism would ensure that all judicial disciplinary issues are dealt consistent-

ly, fairly and efficiently. This implies that parallel competence of HJPC and the Ombudsmen institution would cease to exist. There would be no parallel investigations of complaints against judges in BiH, and there would be no more interventions from Ombudsmen institutions with judges. Such clarifying of competencies would save up to 30% of working resources to Ombudsman institution, but also reduce costs to citizens who wouldn't double complaints. That process would be fairer to both complainants, but also to judges.

We have half of resources needed to deal with unethical behavior

ODC has insufficient capacity to effectively deal with complaints about unethical behavior of judges. ODC has 7 lawyers dealing with an average of more than 1.400 per year in the last 5 years (HJPC annual report, 2009). For comparison, IJC, which consumed ODC mandate until March 2004, had in average 20 lawyers (with additional support of 13 lawyers) with administrative staff, who in average handled the same number of complaints (IJC, 2004). Comparison with foreign equivalent institutions shows no better proportion. The equivalent offices in USA have about 90% more lawyers assigned to deal with same number of complaints. More data and references are in full paper.



Recommendations

Further improvements in BiH judicial ethics should include the following:

Appointment and promotion:

- Objective criteria through anonymous written exam which will include questions about judicial ethics and/or fully structured interviews should be applied;
- The process should be open both to candidates but also public as a whole, subject to public input and review. Public should have full access, either in person or through video/audio records and transcripts, to interviews conducted, and application and evaluation material;
- rules should prescribe the equal procedural phases for all candidates in same or similar position, including the standardized background check procedures;



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- conflict of interest provisions should include: broader list of reasons and clear procedure for compulsory disqualification due to conflict of interest;

Training:

- Introduce judicial ethics as a subject in curriculum of major law faculties in BiH, to ensure that judicial candidates have necessary education in ethics before they become judges.
- Perform comprehensive expert evaluation of JPTC's training program, in order to provide accurate estimation of training efficiency in judicial ethics. Judicial ethics should become permanent subject, and take at least 20% of judges' professional training program.
- Methodology of judge's training should be improved, changing from ex-cathedra lecturing to real case studies. Training contents should include non-legal aspects of judicial ethics, like behavioral and management aspects.

Disciplinary mechanism:

- Strengthen ODC capacities and improve public awareness about ODC mandate and importance of judicial ethics, through press conferences, newspaper articles, website information, etc
- Conduct comprehensive analysis of public satisfaction with judiciary, share and compare results with CEPEJ reports, and use results to understand and resolve problems causing public dissatisfaction. Organize surveys regularly.
- All disciplinary proceedings (except few strictly regulated by law) should be transparent, by providing regular information and organizing public hearings in accessible venues.

HJPC and Ombudsmen institution:

- Amend HJPC and the Ombudsmen Law. The provisions should clearly divide responsibility between the two institutions in regard of investigating complaints against judges. The Ombudsmen institution should have no right to interfere with court proceedings in any way.
- Sign a Memorandum of Understanding and establish a joint commission for dealing with conflict issues.

Bibliography excerpt

Center for Education of Judges and Prosecutors of FBIH. (2008 and 2009). *Program of the Professional Advancement of Judges and Prosecutors in 2009 and 2010*.

European Commission for the Efficiency of Justice. (2008). *Efficiency and quality of justice*. High Judicial and Prosecutorial Council of Bosnia and Herzegovina. (2005, 2006, 2007, 2008 and 2009). *Annual Report for 2004, 2005, 2006, 2007 and 2008*.

Independent Judicial Commission. (2004). *Final Report of Independent Judicial Commission*.

Mujanović, Š. (2008). *Continuing Legal Education of Judges of the Court of B&H and Prosecutors of the B&H Prosecutor's office as an important step toward an efficient judiciary*. Open Society Fund. Ombudsmen of Human Rights of FBIH and RS. (2005, 2006, 2007 and 2008). *Annual Report for 2004, 2005, 2006 and 2007*.

Pružan, M. (2005). *Establishing independent judiciary in BiH – compliance with the European standards*. University of Sarajevo.

Transparency International. (2007). *Global Corruption Report 2007: Corruption in Judicial Systems*.



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