



Meeting the political criteria of the EU accession: Raising Ethical Standards of Judges

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Summary

Public has no confidence in professionalism and impartiality of judges in Bosnia and Herzegovina („BiH“) suspecting them to be very corrupted. The purpose of the paper is to analyze respect of ethical standards by judges and how it can be improved. BiH, as a potential candidate for membership in the European Union, 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 prior appointment is non-existent, while training after appointment is organized in such a way that a judge can expect to have one-day of ethical training every 25 years. Disciplinary mechanism is incapable to effectively handle huge number of complaints, and the parallel and uncoordinated competence of the Ombudsmen institution and the High Judicial and Prosecutorial Council undermines judicial independence. There are 3 policy alternatives to the current situation. The first one is to keep the things as they are, the second one is to replace the existing mechanism, and the third one is to fine-tune the system. Depending on the option chosen, BiH will either get closer to the European Union or will prolong the membership for some other times, perhaps times of our children or grandchildren.

1 Introduction

“Only during the re-appointment process judges in BiH behaved properly. Now, they again treat us as cattle and act like small gods in the courtrooms”.

A prominent lawyer from BiH, December 2009

¹ European Union institutions and member states define the «Western Balkans» as Albania, BiH, Croatia, FYR Macedonia, Montenegro and Serbia.

² It was unequivocally stated in the Declaration adopted and announced after the EU-Western Balkans Summit that took place in Thessalonica, Greece on 21 June 2003.

³ The Office of the High Representative in accordance with the Annex 10 of The General Framework Agreement for Peace in BiH was established to monitor implementation of the peace accord and to co-ordinate activities of agencies involved in implementation of its civil aspects.

⁴ The High Judicial and Prosecutorial Council of BiH was established in 2004.

⁵ Article 3 of the HJPC Law provides: “The Council shall be an independent and autonomous body, with the task of ensuring the maintenance of an independent, impartial and professional judiciary as confirmed in Article 17 of this Law”

⁶ Article 22 of the Law on HJPC which provides: “Judges ... shall be individuals possessing integrity, high moral standing, and demonstrated professional ability”

⁷ Mandatory advanced professional training for judges was introduced following the establishment of the Entity Centers for Judicial and Prosecutorial Training (working under HJPC’s supervision). Pursuant to HJPC law, each judge must undertake at least four days of advanced professional training, but there is no mentioning of training in ethics.

Bosnia and Herzegovina (“**BiH**”) presents a fascinating and unique case for the study of the reforms in a multi-ethnic, post-war society aspiring to join the European Union (“**EU**”). In 2003 the EU declared that the future of the Western Balkan states¹ is within the European Union, but only if they reach EU standards (European Commission, 2003)². Mostly due to this aspiration to become a member of the EU, and under a strong pressure of the international community, significant reforms are taking place in BiH. New institutions are being created, while the existing ones are reformed to provide foundation for a democratic society. One of the most important aspects of the reforms is a judicial reform. The judicial reform until 2004 was to a large extent led by the international community, primarily the Office of the High Representative (“**OHR**”).³ But, involvement of the OHR has weakened since 2004, so the task of continuing with the judicial reform is entrusted to BiH institutions, primarily to the newly created High Judicial and Prosecutorial Council of BiH (“**HJPC**” or “**Council**”).⁴ HJPC’s main mission is to ensure the maintenance of an independent, impartial and professional judiciary,⁵ through *inter alia* appointment of persons of the high moral standings⁶. However, huge numbers of complaints are filed against judges every year, clearly indicating that the issue has been improperly handled.

It is difficult to expect from judges to behave ethically if they are not sufficiently aware and trained in ethical standards.⁷ Persons aspiring to become judges do not receive any formal education in judicial ethics prior to being appointed as judges, as no law faculty in BiH offers it in their curricula, and no mandatory training or course in ethics is required before appointment. During the appointment process the moral standing of candidates is more or less a formality issue, and no real consideration is given to it; while in the promotion process to higher posts ethical records of judges are not decisive so even those disciplinary sanctioned get easily promoted. In addition to that, the appointment and promotion process of judges is not transparent and subject to abuse, while in the same time there are no effective rules that would prevent or remedy conflict of interest of members of panels interviewing and recommending candidates for appointment and promotion. Although the two entity Judicial and Prosecutorial Training Centers (“**JPTC**”) are mandated to provide adequate training to judges after appointment, there is almost no training in ethics. The disciplinary mechanism has its weaknesses, which additionally contributes to unsatisfactory enforcement of ethical standards. Also, 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. All these factors individually and in combination result that ethical standards of judges are not as high as required, which cannot be tolerated any longer. Due to this failing policy the citizens and the society as a whole suffer, as basic human rights are not respected and the foreign investors are discouraged to invest into the BiH economy. Leaving the issue aside may lead to imposition of radical solutions including dissolution of HJPC or taking over most of its competence concerning independence, impartiality and professionalism of judiciary.

The purpose of the paper is to address basic issues related to raising ethical standards of judges by improving appointment and promotion process in the light of the ethical criterion, training in ethics, disciplinary mechanism and coordination with the Ombudsmen institution.



The policy paper is based on combination of: exploration of methodology and content of the training offered to judges with focus on quality and frequency of training in ethics; desktop research of complaints; disciplinary case studies; legal and comparative analysis; relevant reports; media coverage and interviews. Single study cannot address every aspect of the policy problem focused on and limitations may exist related to the type and amount of the data available for analysis in the study.

2 Problem description

Ethical standards are principles promoting values, such as trust, fairness and good behavior. Ethical standards for judges are not merely desirable virtues, but rather binding. They are stringer than in other professions as individual's right to get justice depends to great extent to the judges' diligent adherence to them. Ensuring respect of ethical standards by judges has been an increasingly important issue both in the old democracies such as the USA, Canada, France, Italy, the UK, but also in the former socialist/communist countries that recently joined or are to join the EU.

BiH, as a potential candidate for membership in the EU in accordance with the Treaty on EU,⁸ must satisfy the "1993 political criteria"⁹ including the political one, and that is to achieve stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The requirement to fall in line with the political criteria achieving stability of the institutions forced BiH to conduct major changes in the judiciary including respect of ethical standards by judges. Ethical standards for judges in BiH, as defined in the last decade, include honesty and impartiality in proceedings, without external pressure or influence and without fear of interference from anyone. Judges have a duty to uphold and defend judicial independence, as the constitutionally guaranteed right of everyone to have their disputes heard and decided by impartial judges (HJPC, 2005).¹⁰ Disregard and disrespect of these standards necessarily and unavoidably leads to lack of public confidence and support to judiciary and by that to its instability.

The current judicial system has its roots in the socialist Yugoslav regime in which judges were not accountable to the society, but rather to the only existing communist party (Pružan, 2005). In the previous system, as it was set forth in the Constitution of Socialist Republic of BiH, judicial power was part of a unified system of power and self-management of the working class and the independence of judges was not proclaimed. Courts, as part of a unified system of power, were obliged to follow principles and opinions of the Communist Party in order to protect the socialist revolution and its heritage, socialistic relations in society, and socially owned property. After BiH gained its independence in 1992, the war broke out further deteriorating judges' respect for ethical standards built during the socialist regime, and newly created structure had its foundations on basically three mono-ethnic areas.

Since in the rest of former Yugoslav Republics the judicial reform process hardly started, BiH was, due to the international pressure, a regional leader in the process. That meant that there was no comparative regional experience that could be drawn upon when making decisions how the process of raising ethical standards of judges should be conducted. BiH faced many difficulties in the past decade and major ones were appointments and promotion of judges, proper education and training for judges, disciplinary mechanism and coordination with the ombudsmen institutions. Such pervasive constraints have had a major impact on the design of the ethical standards system.

⁸ Article 49: "Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union..."; Article 6(1): "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law of the Treaty on the European Union.". See The Treaty on European Union, available at: <http://www.eurotreaties.com/maastrichteu.pdf>, retrieved on 17 June 2009.

⁹ Relevant criteria for the membership of the European Union were established by the Copenhagen European Council in 1993 (Copenhagen criteria) and has been strengthened by the Madrid European Council in 1995, requiring a new Member State, before joining the EU, to meet three criteria, or namely: political, economic and acceptance of the Community *acquis*.

¹⁰ See "BiH Code of judicial ethics", November 2005.

2.1 Imaginary ethical criterion in judges' appointment

In this subsection we will explain the key elements and main questions raised by the appointment and promotion process as one of the most important issues of any judicial system and the ethical criterion will be placed in overall context of this issue.

2.1.1 Too fast reappointment process

Most of judges in BiH were appointed during the reappointment process between 2002 and 2004. This reappointment process, under the auspice and strong leadership of the international community and in particular OHR Independent Judicial Commission ("IJC"), started in September 2002 and lasted until March 2004¹¹. The process was a necessity, as many of the then judges were appointed during the war-time under very suspicious circumstances from the ethical point of view. The reappointment process meant that all judges were required to apply for their posts in an open competition. It involved a much more extensive review of the performance of the sitting judges. Altogether, approximately 30% of the incumbent judges were not reappointed. The greater part of those 30% were not appointed because of the issues, one way or another, related to ethics, although it was never officially published or stated. However, the reappointment process did not assure the objective and transparent evaluation of the candidates for judicial positions. As IJC admitted *"Over a such short time and with such a limited number of vacancies any improvement in the overall quality of the judges ... as a result of the new appointment process cannot be measured, but it is unlikely to be significant"* (Independent Judicial Commission, 2004).

¹¹ IJC, as part of OHR, was established at the beginning of 2001 and until March 2004 was the leading agency for judicial reform.

2.1.2 Demanding and faulty appointment procedure

The appointment and promotion of judges, as the core and most discussed competence of HJPC, is highly time and capacity consuming. After the single HJPC was established in 2004¹², it took over competencies for the appointment of judges, including court presidents, lay judges and reserve judges in all courts in BiH, but excluding the Constitutional Courts at the state and entity levels.¹³ In the meantime, in 2006, HJPC competence over appointment was extended to court associates as well, and recently to judges of the newly established Commercial Courts in the RS. Data about the vacancies, interviews and appointment decision in last few years show that appointment of judges will be ongoing process requiring maximum effort and constant improvement of proceedings and practices. E.g., in the course of 2008, HJPC published 11 job advertisements for 325 vacancies for positions in the judicial system. A total of 1.457 candidates applied for these positions. In the same time, members of Council, in their capacity as members of the Interviewing Commissions, interviewed 505 job applicants (High Judicial and Prosecutorial Council, 2009). Therefore, the need for new judicial appointments, but also promotions indicates how important it is to have objective criteria in place, in which the ethical issues are of the utmost importance.

¹² Law on HJPC of BiH was publicized in the Official Gazette of BiH No. 25/04 (Tuesday, June 1, 2004) and it entered into force on the day of its publication.

¹³ Article 17 paragraph 1 items 1 and 2 of the Law on HJPC.

Although HJPC is the collective deciding body (15 members), the prevalent responsibility for the appointment of judges lies with its interviewing panel (usually 3 members). After obligatory public announcement of the vacancies for judicial posts, the appointment process goes through several phases. Providing that candidates fulfill formal conditions and it is their first application for a judicial position, they are interviewed by the interviewing panel which then makes recommendations, in the form of a rank order list, to the sub council. For the most



part, the sub council simply accepts the recommendations and makes their proposals to the full Council. At Council session members cast their votes, and although a proposed candidate might be rejected by Council, it almost never happens. Consequently, the appointment procedures system results in severe shortcomings.

Firstly, the appointment procedure is not transparent, unreasonably leaving the public outside the process. The public has no access to any part of the application material of candidates. Next, public has no access to interviews conducted and the interviews itself are not recorded in its origin. In practice it means that the interviewing panels may ask anything they want including questions about weather, and the candidates may answer in any way, including totally showing ignorance, still the result could be that a candidate is recommended for the appointment. The same non-transparency characterizes the appointment process to its end, meaning to the final appointment of certain candidates to judicial posts, and it equally applies to the promotion process as well. Under these circumstances, the public has little reason to have faith or respect for the appointment and promotion process and the essential elements of public participation and scrutiny are lost.

Secondly, the appointment process is not based on objective criteria nor the ethical criterion in practice plays a significant role. When applicants attend an interview they are asked to state their experience and personal motivation for the vacant position. The questions posted to each candidate are not prepared in advance. Candidates are awarded a score by each of three of the panel members on a scale of 1 - 5 (1 being the highest). This score is subjective, as is the criteria for awarding the score. Individual scores are collected by the interview panel chairperson and collated. The interview panel then discusses all candidates and produces a list of recommendations. However, the criteria for the appointment may differ from post to post and interview panel to interview panel, as these criteria are not set in advance but is a part of the discussion of the interviewing panel. After this interview there are no further tests of the suitability of candidates and procedure of the appointment is more or less automatic, depending on the recommendations of the interviewing panel. In addition to that, although some questions about ethical standards are posted, more or less about theoretical knowledge of existence of the Code of Ethics, according to the former member of HJPC who interviewed hundreds of candidates, no candidate had ever been excluded from the appointment solely due to insufficient knowledge of ethical standards. In addition to that, there is no mechanism in place that would check ethical records of the candidates. The vast majority of recommendations of the interviewing panel are uncritically accepted by full Council and persons are appointed without serious consideration of the ethical criterion. On the other hand, during promotion process, information about possible ethical inadequacy of candidates was usually gathered from the Office of Disciplinary Council ("**ODC**"). However, interviewed Council members, who took part in this research, made it clear that only final decision rendered in the disciplinary proceedings could be lied upon concerning undisputable breach of ethical standards.¹⁴ It meant in practice that even if a judge had dozens of complaints filed against him, still he would be suitable for promotion. In addition to that, even those judges that were disciplined for ethical violations, were still promoted to higher positions. Clearly, the existing appointment and promotion system results in appointing and promoting candidates and judges that are very likely not be the best and of the high moral standing, as required by law.

Finally, the conflict of interest rules for members of the appointing panels do not really exist making a great potential for abuse of the process. The only provision governing the conflict

¹⁴ Interviewed Council members did not agree to have their names disclosed, therefore, they are kept confidential.

¹⁵ Official Gazette of BiH, no. 44/09

of interest is Article 6 of HJPC Rules of Procedure¹⁵ providing HJPC Members obligation to inform the President of any potential conflicts of interest that may arise during the course of their work. The facultative element of the provision provides that Council member should be disqualified *"if circumstances exist that would cast doubts as to the member's impartiality"*. There are no rules or any directions, whatsoever, which would explain what circumstances, can or should cast doubts or, in other words, what can or should be proclaimed as a conflict of interest. It is common that Council members decide about appointment or promotion of their long time colleague from the same court or friend's relative. Sometimes Council members decide about their current or future superiors (court presidents), while currently three Council members are advocates deciding about promotion of the judges in front of which they represent clients. There is no statistics about cases of the disqualification of Council members but as can be seen from Council session minutes it is extremely rare situation. The described situation leads to rumors and discontent among the members of legal community, especially among not-appointed candidates.

2.2 Inadequate education and training in ethics

Importance of education in the BiH judiciary has been recognized in many strategic documents, ever since beginnings of judicial reform (Mujanović, 2008). As a result of these efforts, Public Judicial and Prosecutorial Training Center (JPTCs) for each entity have been established in 2003. The role of JPTCs is to ensure preparation and implementation of education programs for judges and prosecutors.¹⁶

¹⁶ More info on websites of each JPTC: <http://www.fbih.cest.gov.ba/> and <http://www.rs.cest.gov.ba/>

Work of JPTCs has been generally presented as successful, but there is no reliable information confirming it. Although participants of the trainings internally evaluate particular trainings attended, this is not enough to estimate its true value. An evaluation of education the JPTCs provide as a whole has never been conducted. Evaluation is part of the development process, it should analyze training program as a whole, should be as comprehensive and detailed as possible, and should influence future decisions and activities regarding training (Miglič, 2007). Only after appropriate evaluation it might be claimed if the system is functional, and the results obtained would be a solid basis for making the best decisions.

Regarding education and training in judicial ethics, we will raise two issues here: insufficient ethical education before and after appointment; inadequate methodology and content.

2.2.1 Insufficient ethical education before and after appointment

Some could claim that ethics, including judicial, might be learned through life experience; however, formal education in judicial ethics should be a requirement for persons becoming judges. Currently, only persons finishing law faculty are eligible for judicial appointments; however, the law faculties in BiH do not offer any subject or course in judicial ethics¹⁷ resulting that persons get appointed to judicial positions without any prior education in judicial ethics.

¹⁷ Lists of faculty courses of three biggest law faculties in BiH are available at websites: Pravni fakultet u Sarajevu: www.pfsa.unsa.ba, PF u Mostaru <http://pfmo.ba/> PF u Banja Luci <http://www.pfbl.rs.sr/>

Although importance of judicial ethics training is recognized in strategic documents, significance given to it is minimal. The HJPC Strategic Plan recognizes improvement of training in application of ethics for judicial function holders as a strategic priority (HJPC, 2007); however, in practice, judicial training in ethics is far from being a priority. The JPTCs programs pertain to



8 training areas, and none of these is related to ethics (JPTCs, 2008). Furthermore, in 2009, JPTCs included only one day of training in ethics in their programs of professional education for judges, which is, considering maximum number of participants, only about 4% of total number of judges in BiH. Continuing with this dynamic, a judge in BiH will have one-day training in ethics each 25 years. This falls very short of significance given to it in the strategic and other documents, but also falls very short of the citizen's expectations.

Although the "*modules for novice*" training programs includes training in application of Code of Ethics, significance of judicial ethics is again seriously underestimated. The modules are designed for education of novice in judiciary and "*persons intending to become judges*", and are to be carried out during period of three years. Within these modules, only one subject out of 17 is related to ethics and only within first year of this three-year program, and is titled "*professional and ethical standards*". This means that only 2% of three-year professional judicial training is devoted to ethics. Same trend continues in JPTCs program plan for 2010 (JPTCs, 2009), in which only one-day training is planned for judicial ethics subject. Obviously, there is no improvement in recognizing judicial ethical training as a matter of priority.

2.2.2 Inadequate methodology and content

One of the training problems, including those in judicial ethics, is the methodology, since education of judges is not organized to be professional training but rather more academic and *ex cathedra*. As a consequence of the academic approach, 9 areas of permanent education of judges in JPTCs programs are established,¹⁸ mostly already covered in regular faculty studies. Not only that academic approach is predominantly maintained, but it also fails to give appropriate significance to personal development, more specifically training in ethics. Judges are professionals, all with at least university degrees, so professional training is definitely more appropriate than academic. The court, and judiciary as a whole, is an organization where most principles of human resource management (HRM) apply. These basic HRM principles include professional education and training, and development of certain personal values. The purpose of this development is to achieve an organizational goal, through efficient use of human resources (Agency of Civil Service of Bosnia and Herzegovina, 2006).

In BiH judicial training, there is evident lack of case studies, as an alternative method of education. Case studies are very effective, have significant advantages, and are particularly suitable for complex analysis in real-life context. Education in ethics should be seeking for real-life issues in temptations and challenges, rather than theoretical lectures usually not-memorable or inapplicable on the judicial bench. The best sources for case studies in ethics are disciplinary cases initiated by ODC. If exercised in judicial ethics training, the case studies approach could contribute to improving the overall training methodology of judges.

Current training focusing only on legal perspective of ethics, like Code of Ethics and related laws, is insufficient for raising judges' ethical awareness. A person doesn't get more ethical by being explained the Code of Ethics. It takes a lot more for a judge to improve his personal ethical framework - from involvement of personal values to resolving his ethical dilemmas. Values, assumptions, beliefs, and expectations (George and Jones, 2007) lead judges to make decisions; it is not only mere facts and law's interpretation. To be an excellent judge requires training with more real cases analysis, collective discussion, and personal and emotional involvement.

¹⁸ Nine areas of permanent judicial training, not including ethics, are as follows: criminal, civil, administrative, labor and family, commercial and financial, small violations, mediation, European law and European integrations, and skills.

Such marginalization of judicial ethics education and training, and inappropriate methodology and content of training, is unacceptable for personal and professional improvement of judges, leading to decrease of ethical standards.

2.3 Insufficient disciplinary mechanism

The purpose of this part is to address basic issues related to raising ethical standards of judges by improving disciplinary mechanism. The significance of the judicial ethics disciplinary mechanism in European countries, as it can be seen in more details in the Appendix A, is indicated by the fact that 831 judges were sanctioned in 2006 due to disciplinary violations (CEPEJ, 2008). Current disciplinary mechanism in BiH judiciary was established between 2002 and 2004. ODC has a primary responsibility to investigate complaints filed against judges who allegedly committed disciplinary offences, while HJPC through its disciplinary panels makes a final determination about disciplinary liability.¹⁹ The major difficulties related to BiH disciplinary mechanism are:

1. Overwhelming number of unfounded complaints
2. Insufficient capacity of ODC
3. Lack of transparency in disciplinary proceedings

2.3.1 Overwhelming number of unfounded complaints

Public perception of BiH judiciary has been distrustful suspecting it to be very corrupted, resulting in filing high number of complaints (Transparency International BiH, 2007).²⁰ However, there was no reliable information about rationale behind it. Need for more detailed information on public satisfaction with judiciary and trust in courts is recognized in Europe²¹, which also reveals that BiH is within 39% of CEPEJ member countries²² which do not conduct surveys amongst users or legal professionals to measure public confidence and satisfaction, including detailed reasons for it.

Although in average more than 1.400 complaints were filed yearly against judiciary in last 5 years²³, a few are considered to be founded. Latest available data indicate that in average 2% of the filed complaints were substantiated²⁴, while 98% were rejected. This was commonly explained to be caused by insufficient awareness of ODC competence, but available ODC data also indicate that most of rejected complaints related to alleged procedural errors and delay in proceedings.²⁵ In the same time, typical unethical behavior of BiH judges in substantiated complaints included: behavior inside or outside the court that demeaned the dignity of judge; interfering in the jurisdictional activity of a judge; unjustified delays in issuing decisions; persistent and unjustified violation of procedural rules, etc (HJPC, 2009).

2.3.2 Insufficient capacity of ODC

Strategic documents of BiH justice sector have advocated strengthening of ODC both in terms of human and material resources, but the goal has not been achieved. HJPC Strategic plan recognized that ODC was receiving too large number of complaints, a lot more than it could properly solve (HJPC, 2007). HJPC strategic goal number 9, regarding activities of ODC, identified two priorities, and both underline the need for additional financial resources for achieving these goals.

¹⁹ There are 23 disciplinary violations provided in Article 56 of HJPC Law.

²⁰ According to the study, there is a general perception in the country that the judiciary is corrupt. Corruption in the judiciary does not necessarily have the same characteristics as corruption in other aspects of life (soliciting or offering bribe, privileged position in public procurement, etc.), but it takes a rather sophisticated form of achieving certain benefits in court proceedings. Solving cases before their turn, solving cases in an accelerated procedure, undue prolongation of the decision, or delaying the forwarding of the case to the appellate court may all be characterized as corruption. In addition to that, favoring certain lawyers in cases of mandatory defense in relation to others may also have characteristics of corrupt behavior. Proving corruption in all such cases is almost impossible.

²¹ CEPEJ Report, Edition 2008 (data 2006): Efficiency and quality of justice. European Commission for the Efficiency of Justice (CEPEJ). p.67

²² Report says it is 18 out of 46 countries.

²³ HJPC annual report for 2008, available at www.hjpc.ba

²⁴ Varies from 1% to 4,5% in last 5 year period, and the average is 2%. Source: HJPC annual reports, available at www.hjpc.ba

²⁵ The authors of this paper work in ODC since its foundation and have personal knowledge and access to all issues raised in all complaints filed to ODC, but the particularities of individual complaints cannot be published as this is confidential information and not accessible to public.



ODC staff is inadequate to effectively handle the intake of complaints. ODC couldn't efficiently and effectively perform some of its major activities, like visiting courts, talking to witnesses, due to heavy load of complaints which take most of working time and insufficient resources to handle them. ODC has 10 employees, 7 lawyers and 3 assistants, and in comparison with other similar institutions and their intake of complaints it shows to be insufficient. For example, IJC, which carried the tasks of today's ODC during period April 2001 - March 2004, had in average 20 lawyers, who in average handled 100 complaints a month, and they were even supported by lawyers from other departments.²⁶ Today, ODC has similar average monthly workload of complaints, but has 3 times less lawyers. In addition to that, ODC competence from 2006-2007 has broadened as judges of former minor offence courts and court associates are within its competence. Comparison with foreign equivalent institutions indicates that ODC is still heavily understaffed. The following table compares ODC and its complaints intake with equivalent offices in the USA, indicating that ODC should have 6 more lawyers to be able to adequately handle public concern about judges and judiciary.

²⁶ Final report of IJC, 2004.

State	Number of lawyers	Average monthly number of complaints
BiH (2009)	7	97
Texas	9	95
California	13	80
New York	17	110

Table 1.
Comparative view of number of lawyers and complaints

Source: Information supplied by Judicial Performance Commission of California in 2006 and combined with ODC data for 2009

Due to the too short statute of limitation to handle complaints, which is two years from its inception, ODC lawyers have continuously struggled to complete their investigations. Not only that it was impossible to efficiently investigate all the cases within the time period, it also caused justified dissatisfaction of complainants who found it difficult to understand why it would normally take such a long time. Increase of ODC staff number would increase efficiency, shorten waiting period to minimum, and inevitably raise public trust in disciplinary mechanism as a whole.

2.3.3 Lack of transparency in disciplinary proceedings

Disciplinary proceedings are to be transparent enough to satisfy standards of the European Convention on Human Rights (Convention) and provisions of HJPC Law. Transparency of proceedings, as provided by the Convention, is principally assured through the right to public hearing. HJPC Law (Article 68) recognizes the principle and provide that disciplinary procedures shall be governed by fairness and transparency, adding that the press and public may be excluded under certain conditions. The rational and essence of this provision is that hearing (in this case disciplinary hearing) is always public and exceptions from this rule are strictly limited.

In practice, disciplinary proceedings against judges in BiH are secret and absent of public scrutiny. Although the above provisions guarantee the public character of proceedings, disciplinary hearings are not public. This is not a consequence of some formal decision, but rather a practice. Information about initiated disciplinary proceedings are not published in any way, the hearings are held without informing public about time and place the hearing would take place, hearings are held in HJPC premises situated on the top floor of the highly secured BiH Judicial

Institutions Building unavailable to the public without special permission. The outcome is that, journalist or citizens are never present in hearings, and not even exceptionally. It undermines confidence in HJPC and judiciary, and clearly requires costless changes.

2.4 Parallel and uncoordinated competence of HJPC and Ombudsman offices

In this subsection we will explain how HJPC and Ombudsman offices were given parallel and uncoordinated competence in regard to investigation of complaints filed against judges and how the current system is not helping to improve ethical standards of judges, undermining judicial integrity and independence and unnecessarily wasting scarce resources.

During the socialist period in BiH no independent institution existed that would handle complaints against judges. The first provisions introducing the ombudsman institution were passed while the war was still raging in BiH, in the mid of 1994 when the Constitution of the Federation of BiH was adopted²⁷ creating the Ombudsmen of the Federation of BiH, as an entity ombudsman ("**FBiH Ombudsmen**"). In the end of 1995, when the Dayton Peace Agreement was signed,²⁸ the state Ombudsman institution was created²⁹ ("**BiH Ombudsmen**"). Lastly, the Ombudsman of the Republika Srpska, as the ombudsman of the second entity ("**RS Ombudsmen**"), was established by the Law on RS Ombudsman on 08 February 2000.³⁰

Each of the Ombudsmen institutions were given a competence to investigate complaints against judges and to influence proceedings they investigate. For example, FBiH Ombudsmen was entitled both to intervene in pending proceedings as well as to initiate proceedings in competent courts.³¹ RS Ombudsmen was mandated to investigate cases of poor functioning of judicial system,³² and could refer a case to the Constitutional Court of Republika Srpska³³. BiH Ombudsmen was mandated to investigate complaints of anyone claiming to be the victim of a violation within BiH,³⁴ could require any person, not excluding a judge, to cooperate,³⁵ and could initiate proceedings before the Human Rights Chamber, including intervening in any proceedings before the Chamber.³⁶ Also, BiH Ombudsmen mandate was supplemented by the Law on BiH Ombudsmen, and its mandate to interfere in court proceedings, if deemed necessary, was kept.³⁷ These provisions indicated that all three Ombudsmen institutions were to some extent superior to courts and could influence court proceedings as well as individual cases, making a potential for both intentional and unintentional undermining of judicial independence.

In two entities additional efforts were made in 1999-2000 to improve respect of ethical standards by judges, but resulted in another failure. The Codes of Ethics for judges, for the first time in history of BiH, were adopted in 1999³⁸, and the new judicial service laws were passed requiring judges to respect the standards set forth in the codes at all times subjecting them to disciplinary proceedings.³⁹ However, the codes have been disregarded, and disciplinary procedures have been initiated exceptionally rarely (International Crisis Group, 2002). There was no single instance of a judge being removed or disciplined for unethical behavior (ABA CEELI, 2001).⁴⁰ In the same time most of judges had at best only a vague familiarity with the codes' provisions; some judges were not aware of the codes at all, and some others were unclear whether they had been adopted.⁴¹ There was a clear "*inability of many judges to evaluate legal issues before them without inserting their own ethnic biases*"⁴². In this way, although 15 institutions were handling complaints against judges, it was completely uncoordinated and to a large extent undisclosed, which resulted in significant costs of the established system and minimal results.

²⁷ The Constitution of the Federation of BiH was adopted by the Constitutional Assembly of the Federation of BiH, at the session held on June 24, 1994.

²⁸ The General Framework Agreement for Peace in BiH (Initialed in Dayton on 21 November 1995 and signed in Paris on 14 December 1995). BiH Ombudsmen for Human Rights was established by the Constitution of BiH as provided in the Annex 4 of the General Framework Agreement for Peace in BiH, and is further regulated by the Annex 6 of the Agreement. The Institution started with its operations in 1996 having two offices, one in Sarajevo and one in Banja Luka.

²⁹ Ibid, Annex 6 - Agreement on Human Rights.

³⁰ Introduction of this institution into the legal system of the Republika Srpska was one of the conditions for admittance of BiH in the Council of Europe. The law was adopted by the National Assembly of Republika Srpska. The first ombudsmen were appointed on 28 April 2000 by the then Human Rights Ombudsman of BiH and started receiving the applicants on 30 November 2000.

³¹ The FBiH Constitution, Article 6.

³² Article 4 paragraph 1 of the Law on the Ombudsmen of the Republika Srpska.

³³ Ibid, Article 4 paragraph 3.

³⁴ Annex 6 - Agreement on Human Rights, Part B, Article V/2.

³⁵ Ibid, Article VI.

³⁶ Ibid, Article V.

³⁷ Article 4 of the Law on BiH Ombudsmen.

³⁸ See „Code of Ethics for Judges in Federation of BiH”, June 1999; and „Judicial and Prosecutorial Code of Ethics in Republika Srpska”, June 1999.

³⁹ The Federation Law on Judicial and Prosecutorial Service in Articles 2 and 24 required judges to respect the standards set forth in the code at all times. See „Federation Law on Judicial and Prosecutorial Service”. Similarly, see „Law on Courts and Judicial Service in Republika Srpska”, Official Gazette of Republika Srpska no 13/2000, Article 5.

⁴⁰ ABA CEELI, „Judicial Reform Index for BiH”, October 2001, page 22.

⁴¹ Ibid, p. 26.

⁴² Ibid, p. 24.



The new strategy of handling complaints against judges was developed, but the strategy again failed to ensure coordination among the competent institutions. In 2002 the High Representative amended the entity Constitutions and imposed three laws creating three HJPCs, two at the entity and one at the state level.⁴³ In June 2004 the new single Law on HJPC of BiH unified the three Councils into one,⁴⁴ taking over most of provisions from previous three laws concerning investigation of complaints and empowering ODC, which is an office within HJPC, to receive and investigate complaints filed against judges.⁴⁵ Again, there was no mentioning of coordination with the three Ombudsmen institutions in regard to investigation of complaints against judges, and no provisions in any relevant law prevented parallel investigation of basically the same complaints if these were filed separately to those institutions.

HJPC superficially tried to improve cooperation with the entity Ombudsman offices, but failed to achieve any significant results. In November 2005 separate Agreements between HJPC and the entity Ombudsmen institutions were signed with alleged goal to strengthen cooperation of HJPC with these institutions. It was foreseen in the agreements that the goal would be accomplished by holding periodic meetings, exchanging reports and working together on issues of the joint competence, and the agreements were inspired by the similar agreement signed in 2001 between the General Judicial Council of Spain and the Catalonia Ombudsman.⁴⁶ However, none of the foreseen activities were carried out in practice, and for example HJPC reached an Opinion in September 2006 that all institutions, without exceptions and including the Ombudsman institutions, were required to ask for a prior approval of HJPC to review information concerning complaints against judges. It was clear that HJPC attempt from 2005 to improve coordination was an unwilling response to an initiative from the equivalent institutions in Spain; however, neither HJPC nor the Ombudsman institutions were serious about improving their coordination.

The institutional and legal framework resulted in filing huge number of complaints against judiciary and judges both to the Ombudsman institutions and HJPC. Recorded information from 2000 to 2002 show that BiH Ombudsmen received in average 1.600 complaints a year (Ombudsmen of Human Rights of Bosnia and Herzegovina, 2003). The following table shows available information about number of complaints filed to RS Ombudsmen, FBiH Ombudsmen and HJPC. Although there is no available information due to rules about confidentiality and secrecy, one may reasonably assume that many of the complaints filed to the Ombudsmen institutions pertained to the same cases investigated by HJPC.

Year	RS Ombudsmen	FBiH Ombudsmen	HJPC
2004	1.536 or 30,3% of total 5.070		1.056 ⁴⁷
2005	2.101 or 33,9% of total 6.197	2.034 or 40% of total 5.061	1.776
2006	2.410 or 31,74% of total 7.592		1.719
2007	1.776 or 31.04% of total 5.722		1.429

Source: Annual Report of RS Ombudsmen for 2004, 2005, 2006 and 2007
Annual Report of FBiH Ombudsmen for 2005
Annual Report of HJPC for 2004, 2005, 2006 and 2007

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 one such case no. X:323/05 after FBiH Ombudsmen intervention,

⁴³ The Law on BiH HJPC; the Law on FBiH; the Law on RS HJPC.

⁴⁴ The Law was passed by the state parliament, which was an encouraging sign that local authorities finally realized that it is in the interest of BiH as such to have such law and such institution that would take care of judiciary.

⁴⁵ Ibid, Article 64.

⁴⁶ HJPC Press release of 30 November 2005, available at: <http://www.hjpc.ba/pr/prelases/1/?cid=2299,2,1>, retrieved on 6 January 2010.

Table 2:
Complaints against judiciary filed to entity Ombudsman institutions and HJPC

⁴⁷ Period to 31 March is not included, as ODC officially started to operate since 1 April 2004.

⁴⁸ Page 71.

⁴⁹ Ibid, page 106.

⁵⁰ Page 27.

⁵¹ Annex II.

⁵² This is translation from the local to English language done by the authors of the paper.

the judge did what the Ombudsman considered to be right in the proceedings (Ombudsmen of Human Rights of FBiH, 2006),⁴⁸ or, FBiH Ombudsmen Field office Travnik accepted 32 complaints filed against judges of the Municipal Court in Travnik and intervened in all 32 cases after which judges acted as the Ombudsmen considered to be right in 28 cases, while in four cases the proceedings were still underway⁴⁹. RS Ombudsmen acted in the same manner.⁵⁰ And BiH Ombudsmen was no exception in undermining judicial independence. Not only that BiH Ombudsmen intervened before judges in pending proceedings in at least 13 cases in 2002, after which judges immediately undertook what the Ombudsmen asked them to do (Ombudsmen of Human Rights of Bosnia and Herzegovina, 2003)⁵¹, BiH Ombudsmen also made the following threat in the Special Report:

„Would the formal complaint be filed to the Ombudsmen, he will ... timely undertake appropriate formal activities including reporting and exposing the subjected judge to the public“⁵².

This practice of the Ombudsmen institutions caused judges to treat parties unequally as those who addressed the Ombudsman institutions were put before those who had not addressed them. Applying this unfortunate practice the Ombudsmen institutions reminded judges on practices from the socialism leaving no doubt that the interventions from sources outside judiciary in pending cases were acceptable. In this way the judicial independence, as it does not only relate to decisions of judges concerning application of the law to facts but also relates to conducting proceedings, was unduly jeopardized and undermined by the Ombudsman institutions. However, this problem has never been seriously considered or raised by competent institutions and no policy has ever been developed to address this very serious issue.

Parallel and uncoordinated jurisdiction of the Ombudsmen institutions and HJPC contributed to unreasonably expensive system that is difficult to sustain. The following table shows that the budgets of the three Ombudsmen institution were measured in millions of Euros.

Table 3:
Costs of the Ombudsmen institutions, 2001 - 2007

Year	BiH	RS	FBiH
2001	2.800.000	1.218.100	356.600
2002	1.900.000	1.752.615	3.128.260
2003	1.911.848	1.687.868	3.108.170
2004	1.939.668	1.735.492	3.006.100
2005	1.774.272	1.043.263	3.501.937
2006	1.775.000	1.078.663	2.906.275
2007	1.750.486	1.106.663	2.367.440

Note: The costs are shown in Convertible Marcs (KM).

Source: BiH - Annual reports of BiH Ombudsmen for Human Rights for period from 1996 to 2007

RS - Annual Reports of RS Ombudsmen for period from 2001 to 2007

FBiH - Law on Proclamation of the Budget of FBiH from 2001 to 2007

In 2003 monthly net salary of FBiH Ombudsmen (and there were three of them) was 4.579 KM, while in RS it was 3.536 KM; Deputies Ombudsmen had 4.040 KM in FBiH and 2.947 KM in RS; and Assistants Ombudsmen had 3.117 KM in FBiH and 2.526 in RS (Ombudsmen of Human Rights of Bosnia and Herzegovina, 2004). At the same time average worker's net salary was 7-9 times lesser in RS or 379 KM, and 6-8 times lesser in FBiH or 524 KM (Agency for Labor and Employment of Bosnia and Herzegovina, 2007). In addition to this unreasonable spending, just recently it has been discovered that six FBiH Assistants Ombudsmen receive both the



salary and the retirement (San, 2009). Clearly, the use of scarce resources was completely unreasonable and required action.

Although a unified Ombudsmen institution at the state level is very important for the national system to protect human rights of individuals, coordination with HJPC has not been addressed again. One of the primary objectives of the 2006 Ombudsman law is to make a structural change and establish a sustainable institution that will be closer to international standards. Other objectives are to promote the rule of law, as well as to ensure proper conduct of public administration at all levels of BiH authorities. However, there is no single mentioning of coordination with HJPC in regard to complaints filed against judges, regardless the fact that these complaints have been always the majority of complaints filed by the public to the Ombudsmen institutions, and again changes of the law failed to address the issue of undue influence by the Ombudsman institutions in court proceedings.

Due to the adopted solutions without real coherent strategies implemented since 1994, the Ombudsman office and HJPC have a parallel jurisdiction concerning investigation of ethical complaints filed against judges, which leads to inconsistent decisions in practice, jeopardizes the judicial independence and unreasonable use scarce resources. These deficiencies contribute to the fact that the public support for the judiciary is very low, and therefore, requires immediate action to improve the existing system.

3 Policy options

Reformers in BiH face a special challenge in having to overcome deep political divisions regarding functionality of institutions that have its roots in the war from 1992-1995. However, as far as the judges' ethics is concerned, without improved appointment and promotion, training, disciplinary mechanism and coordination with the Ombudsmen institution, the public trust and support for the judiciary will continue to be very low.

We paid particular attention to the following evaluation criteria for policy options regarding the appointment and promotion process:

1. Transparency
2. Objectivity
3. Fairness

The process of appointment and promotion of judges must be considered as a backbone of the trustful judicial system. If the process is neither open nor subject to the public input and review, and if the information submitted is not a public record, it can be hardly expected that the process conducted under the iron veil will result in selecting the best persons for judicial positions. If the ethical criterion for appointments and promotions is not equally applied and if the criterion is more or less subjective, then candidates will not have equal opportunities through impartial process based on objective criteria. If there are no effective rules that would prevent conflict of interest in the process, the grounds for "conspiracy theories" are laid and the process is completely compromised.

We have to assess the role and importance of judge's ethics awareness, process to achieve it, and public perception of ethical standards. We found effectiveness of the ethical training

process one of the most crucial criteria, as reaching ethical standards for judges is ultimate and non-negotiable goal. The next one is efficiency of the training system, as this policy is devoted to achieving the best ethical standards with scarce resources. Finally, public support and serving public interest is backbone of fair and independent judiciary, so raising ethical standards needs to satisfy public expectations. These criteria need to be observed through ethical values of Bosnian society seeking democracy and excellent judiciary. Bearing in mind all of the above, following criteria are recognized:

1. Effectiveness of the training system
2. Efficiency of the judicial ethics training
3. Public acceptability of judicial training in ethics

Disciplinary mechanism in BiH judiciary is of vital importance for rising of ethical standards, so certain proposals for improvement will be addressed in this part. The disciplinary mechanism has its weaknesses, as explained in problem description, which need to be focus of the policy change. Central criteria for evaluation of the options are following:

1. Effectiveness of disciplinary mechanism
2. Public acceptability of the system

The issues related to parallel and uncoordinated competence of HJPC and the Ombudsman offices regarding complaints against judges that are covered include:

1. Legal framework
2. Judicial independence
3. Use of resources

Each of the above may be seen as a basic prerequisite to the handling of complaints that best serves the interest of public and not preferred individuals. If the complaints against judges are handled by different institutions without coordination, their handling is more likely to be ineffective resulting also in legal uncertainty. If undue influence of court decisions and proceedings are permitted, judicial independence is in reality jeopardized and undermined. Without independent judges and uninfluenced processes there is no assurance that the public is getting impartial decisions. Furthermore, BiH is not a rich country and cannot afford to waste its scarce resources, and the public is suffering if the competent institutions do not make the best use of its resources.

3.1 Zero Option - Keep it as it is

This option is unlikely to raise ethical standards of judges. *"Ethical standards are evolving"* (Fokus BiH, 2009)⁵³, as Anđelko Marijanović, Chief Disciplinary Counsel, highlighted. Choosing zero option would lead to some serious consequences.

Continuance with the appointment and promotion practices that are not transparent would further contribute to deterioration of judges' ethical standards, including:

- The faulty process would lack transparency, providing fertile ground for speculations and abuse;
- Subjective criteria would dominate; candidates would seek for ways to influence selection panel members; candidates would be selected without ethical consideration.
- Conflict of interest would persist in the process, without clear rules on avoiding influence.

⁵³ Published on 11 November 2009, page 4.



Zero option would certainly freeze deficiencies of training and professional education in judicial ethics, including:

- Ethical misconduct would stay on undesirable level; theoretical knowledge would dominate, while misunderstanding of practical ethical choices would continue;
- Efficiency would not be improved if almost no training resources are devoted to ethics;
- Public would not accept judicial training system that educates judges with insufficient ethical awareness program.

Regarding discipline of judges, this option will not lead to effective, efficient and trustful system of disciplinary proceedings, including:

- ODC would stay on the threshold of crisis in dealing with large number of complaints against judges;
- Public would continue to be dissatisfied with ethical standards and professional performance of judges.

Keeping the current relationship between BiH Ombudsmen and HJPC means keeping the parallel jurisdiction and absence of coordination between the two institutions, causing:

- Parallel investigations of complaints, and unequal treatment of complainants, causing legal uncertainty;
- Jeopardizing and undermining judicial independence by occasional "interventions" from the Ombudsmen;
- Unreasonable use of scarce resources, including resources of complainants and judges involved.

3.2 Radical Option - Transferring competences to new institutions

This would be the least recommendable option, which would worsen the ethical standards of judges.

Appointment and promotion

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 (Council of Europe, 1994 and 1998). For the country aspiring to become the EU member-state and which is under the strong supervision and constant audit of relevant bodies, is of the utmost importance to respect and follow the recommendations. Other reasons against this option are laying in the well known complex constitutional structure of BiH. As many times before, any discussion about competencies and authorities would start bitter discussion about level of the institution which should take over these competencies. Furthermore, as the numerous examples regarding the appointments in constitutional courts prove, it is easy to expect that the legislative and executive powers would appoint judges based not in terms of merits but of political acceptability.

Training

This option would necessitate establishment of specialized Center for Judicial Ethics, which would take over most of judicial ethics training activities and probably significantly increase effectiveness. But, public support for creating the new specialized institutions is unlikely, as it means

⁵⁴ This is emphasized also in: Mujanović, Š, "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".

greater burden on the tax payers. Implementation would require changes of the laws, while the political support is not unquestionable. Radical changes would be needed regarding educators, as it would require psychologists, sociologists, and management experts. Such expenditure would substantially increase costs of training to the unsustainable level. Certain radical measure may improve efficiency, though. Merging two entity JPTCs into one, would improve efficiency and standardize the judicial training system.⁵⁴ However, there is no political will for such merging.

Discipline

HJPC is essential to political stability and independent judiciary. Direct control by an institution independent of executive and legislative branches of government over investigation of complaints, and ultimately removal of judges is one of the most important ways of preserving separation of power and independence of judiciary. If the goal is to have depoliticized courts and increased judicial independence, the competence must be preserved with HJPC. Otherwise, transfer to another institution would not lead to increase of ethical standards of judges and would likely worsen position of citizens in the court proceedings and would significantly contribute to inequality before law.

Although there are voices heard that the judiciary reform has failed, these voices are either negligible as they come from people not really understanding the current trends and processes in the democratic world, or are made in bad faith by politicians wishing to radicalize relations in BiH (OSCE, 2009)⁵⁵. 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. In response to an apparent lack of adequate ethical standards of judges, recently the competence over investigation of complaints and discipline of judges has been transferred to for example Judicial Councils in Serbia, Montenegro and Croatia. In most European countries such as Spain, France, Italy, Holland, etc the situation is the same, meaning the Judicial Councils are responsible for handling complaints against judges. If this competence would be taken over from HJPC, it would be a major step back in the reform of judiciary that could have very serious consequences for aspirations of BiH citizens to be citizens of the EU⁵⁶. Likewise, the future of BiH in many important aspects such as economy would become darker. BiH is a regional leader at the moment in this regard; however, it will easily slip behind if radically changing the current structure.

⁵⁵ „Even more concerning is the fact that some of the statements call into question ... the sustainability of the judicial reforms undertaken in BiH“.

⁵⁶ Ibid, page 5. „Allegations of misconduct by judicial actors should be referred to and dealt with by the High Judicial and Prosecutorial Council (HJPC), as the only responsible organ regulating the conduct of judges and prosecutors in BiH“.

Even with very thorough search it is very hard to find any information about disciplinary proceedings against any official or civil servant in public institutions in BiH. Therefore, it is hard to anticipate that transferring competencies for disciplinary proceedings would increase its transparency. In addition, the misuse of the data gathered through disciplinary inquiries before initiating disciplinary proceedings, which is confidential under HJPC Law (Article 70), is more likely with other institutions than with HJPC which has shown self-discipline in this regard in the past years of practice, as leak of information about confidential issues is insignificant.

Relationship between BiH Ombudsmen and HJPC

Taking over competence from HJPC and giving it to BiH Ombudsman would further undermine and jeopardize judicial independence. Firstly, only HJPC has competent and trained personnel to investigate complaints properly. HJPC in previous 5 years invested a lot in people and processes, so the knowledge of the personnel is unique. HJPC is the member of the American



Judicature Society since 2006 and receives weekly and other reports about disciplinary issues in all 50 states of the USA. Contacts with American and Canadian colleagues dealing with the same issue of ethical standards of judges confirm that the BiH system headed by HJPC is very advanced even in their terms, and they started with these processes and have been doing it since 1961. It means that it would be enormous waste of resources if the competence for handling complaints would be given to another institution or more of them. The BiH Ombudsman in previous 15 years demonstrated its inability to clearly understand essence of the judicial independence with regard to both processes and decisions.

3.3 Moderate option - Improving existing processes

This option guarantees raising judges' ethical standards.

Appointment and promotion

Raising transparency in the process, both in publishing relevant application material and in conducting particular phases, would raise ethical standards of appointed and promoted judges. Publishing relevant application material would enable the public to review and indicate if there is any information that is of concern and that might not be necessarily true, but was a basis for the appointment. If the public is fully informed what happens during the interviews, there would be a greater respect for the process. Enabling physical presence of the public at the interviews would disarm most of conspiracy theories, and HJPC would clearly show to public there is nothing to hide. In addition to that, enabling public to raise issues during interviews from the ethical point of view could significantly contribute to selecting persons of the high moral standing. But, if there are serious difficulties associated with the physical presence of the public in terms of organization, space, security etc, video and/or audio recording would be feasible. These recordings, accompanied with transcripts, and published on the internet site, would be widely accessible. Transparency should also include evaluation material of the panels. The written appointment and promotion decisions should contain the reasoning.

Applying objective criteria in the appointment and promotion process, in which the ethical criterion would have the most prominent role, would be a boost to the professional judiciary. Objective examination of knowledge and understanding of ethical standards may be secured through written exams, as already clearly provided in Article 39 of HJPC Law. Until the written exam is introduced, the Rules of Procedures should be amended to provide that questions asked during interview must cover ethical issues. Enabling potential applicants but also current candidates to be present at interviews of other candidates would help them understand what the expectations are, but also would be a controlling mechanism of evaluations done by panels. Applicable objective criteria would simplify selection of the best candidates as it would not be based predominantly on subjective feelings. Background check of the newcomers in the judiciary should be systematic and extend the scope of the background check activities. These proposals may raise the concern that necessary efficiency of the procedure can be jeopardized, but are made after a careful consideration that the appointment process is supported by the Secretariat department with anticipated positions for 4 lawyers with passed bar exams whose role currently is limited on very technical and administrative tasks. These lawyers could, under the supervision of Council member, take over the most of the tasks mentioned above. Thus, the standardized procedures which are proposed too, would contribute to the effectiveness.

Eliminating or limiting conflict of interest situations would exclude improper appointment and promotion decisions. HJPC members in interviewing panels should be obliged to fulfill short questionnaire about their relations with the candidate and possible conflict of interest. In case of troublesome answers, such members should be exempted from the process, and in case of violating the rules, should be adequately sanctioned. Although Article 6. 1. (d) of HJPC Law provides that the mandate of a member shall terminate if he or she performs his or her duties improperly or in a biased manner, this has never been raised or enforced in practice. The sanctioning mechanism should be transparent enabling public to review it. If public would be allowed to request exemption of particular members, it would additionally secure duly conductance of the process. The only victims of this improved mechanism would be those that are likely to unduly influence the appointment and promotion process.

Training

Improvement of main aspects of judicial ethics training will certainly raise ethical standards of judges. To decreasing instances of judge's misconduct, their training must clarify ethical dilemmas. For example, in California, 30% of the annual judicial training is devoted to judicial ethics. 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. It is worthy to mention that some countries, like Spain, have judicial schools that last a couple of years. BiH should not be too inflexible with future judges, but should at least require proper ethical training to be conducted prior to appointment. Proper introduction in judicial ethics will ensure that future judges have basic ethical knowledge indispensable for their work on bench. JPTCs programs in field of ethics should be improved, to raise the efficiency of judges' ethical improvement. JPTCs should perform systematic expert evaluation, so to provide accurate estimation of training efficiency. Evaluation of the judicial education system needs to be conducted regularly. Judicial ethics should become permanent subject of JPTCs training program. If it becomes permanent subject as existing 9 subjects, frequency of ethical training will increase to 10% of professional education. Besides that, it should be mandatory for each judge to attend training in ethics at least once in two years.

Methodology of training should be improved, introducing: real case studies, tests and simulations. Content of the training should, beside legal analysis, include personal behavior analysis. Educators for judges should be experts in field, regardless if they are also judges or not. Case studies should be included in education, with experienced lecturers who participated in disciplinary proceedings. Judges should have access to selected non-confidential documents in disciplinary cases. This would give them opportunity to personally have self-education through analysis of such cases. These quality developments would radically improve efficiency of judicial ethics training.

Discipline

Improvement of disciplinary mechanism, and ultimately ethical standards of judges, cannot be done without strengthening ODC capacities. Systematization of posts in ODC should be broadening, as theoretically provided in HJPC bylaw⁵⁷, with purpose to achieve optimal effectiveness of ODC. Council support would ensure that ODC efficiently investigate complaints and present disciplinary cases before HJPC⁵⁸. Reaching the number of employees in equivalent institutions, ODC would undoubtedly reach the effectiveness of the same institutions. ODC

⁵⁷ HJPC Book of rules on internal organization and systematization of posts, regulates employment of interns and refers to Labor Law for BiH institutions, articles 54 and 55.

⁵⁸ Rules of Procedure of HJPC BiH (Article 27(1)f)



would be able to carry out other important activities, like random visits to courts, aimed to increase ethical awareness of judges, but also would be able to conduct more interviews, talk to more witnesses and citizens, hear concerns of judges, etc. Stability and continuity of disciplinary system would not be jeopardized by sudden leave of some employees. However, this option requires additional financial resources, but if properly explained, would inevitably get public support. The main purpose of the disciplinary system is the prevention, and to achieve it, must be transparent. Efficient and standardized system of informing the public should include information about: initiated proceedings (including names and reasons for proceedings), different phases of the procedure, date and place of disciplinary hearings. Disciplinary proceedings should not be held in hardly accessible HJPC premises, but in courtrooms open to public.

Relationship between BiH Ombudsmen and HJPC

Improving the current legal framework and practices by eliminating parallelism would ensure that all judicial disciplinary issues are dealt with consistently, fairly and efficiently.⁵⁹ It would mean that parallel competence of HJPC and the Ombudsmen institution would cease to exist. There is a good example for that that could be followed by BiH. In the UK, for example, the Office for Judicial Complaints ("**OJC**")⁶⁰ handle complaints about conduct of all judicial office holders in England and Wales and some judicial office holders sitting in Tribunals in Scotland and Northern Ireland. If a complainant is of opinion that OJC has failed to handle the complaint properly or fairly, the Ombudsman can only investigate the process and handling of the complaint, but cannot review judicial decisions or judicial case management. If a complaint is not made to OJC, then a complainant is not yet in a position to complain to the Ombudsman. The Ombudsman's remit is to investigate the way in which the OJC handled the original complaint. The Ombudsman cannot look at complaints where the review of the complaint is still ongoing with OJC. The only exception to this is if the complainant wishes to complain that it is taking too long in handling a complaint.⁶¹ If the same concept would be applied in BiH, and there is no justifiable reason not to be, this would mean that in BiH there would be no parallel investigations, and that the same standards would be applied to all complaints which would inevitably result in consistency of investigations and decisions. That process would be fairer to both complainants and judges. Legal certainty would be strengthened as well. The ethical standards of judges would be uniformly enforced and by that raised to a higher level.

Judicial independence would be strengthened. There would be no more interventions from the Ombudsmen institutions to the judges which cases are to be dealt as a matter of priority or how the cases are to be resolved to comply with the Ombudsmen expectations. The citizens would be less likely to file complaints in order to influence proceedings understanding that no institution, including HJPC and the Ombudsmen, is authorized to interfere in the particular court proceedings. The judges would be spared of answering to allegations from complaints twice and probably would be spared of answering numerous complaints pertaining to delay in proceedings. The concept of rule of law would be strengthened.

There would be more efficient use of resources. The Ombudsmen personnel could focus on complaints filed against other institutions and could spend about 25-30% more time on investigating other complaints especially those pertaining to governmental institutions which do not have such a strong institution investigating their performance as HJPC does for judges. The citizens would stop filing complaints to both institutions and would be spared of costs of preparing documentation and taking part in both investigations. The judges would be able to

⁵⁹ „Independence of the Judiciary: Undue Pressure on BiH Judicial Institutions“ OSCE, December 2009. page 5. „The independence and *status* of ... the HJPC should be enshrined in the Constitution“.

⁶⁰ The OJC was set up on the 3rd April 2006. <http://www.judicialcomplaints.gov.uk/>.

⁶¹ <http://www.judicialombudsman.gov.uk/>

concentrate more on their work instead on answering to allegations twice. The overall control of governmental institutions would improve with no additional or even reduced costs.

4 Conclusion and Recommendations

This policy study shows that public policy, regulations and practices with respect to ethical standards of judges concerning appointment, promotion, training, discipline and coordination between competent institutions is marked by severe shortcomings. Under circumstances explained in problem description, the public has little reason to have faith or respect for competent institutions dealing with the ethical standards of judges, but also for courts and judges, which in return results in low public support to the partially reformed judiciary.

A further reform in this area should include the following:

a) Appointment and promotion:

1. all or relevant part of application material should be available to public, including evaluation material of the panels, recommendations and written decisions,
2. Objective criteria through anonymous written exam that will include questions about judicial ethics and/or fully structured interviews should be applied,
3. 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,
4. rules should prescribe the equal procedural phases for all candidates in same or similar situation, including the standardized background check procedures,
5. conflict of interest provisions should be more detailed and should include:
 - broader list of the reasons for compulsory disqualification in cases of conflict of interest,
 - introduce obligatory questioner about possible conflict of interest,
 - clear procedure for defining of violation and sanctions for violators.

b) Education and Training:

1. Include Judicial Ethics subject in curriculum of law faculties in BiH to ensure that judicial candidates before becoming judges have basic knowledge of required ethical standards,
2. Judicial ethics subject should become permanent in JPTC training program so that each judge must attend one-day judicial ethics course at least once in two years,
3. Methodology of judge's training should be improved, changing from ex-cathedra lecturing to real case studies. Judges should have better access to all non-confidential documents from disciplinary cases regarding unethical behavior for education purposes,
4. Content of judges' ethical training should include non-legal aspects of judicial ethics, especially from personal behavior and management aspects,
5. JPTC's should perform comprehensive expert evaluation of its training program, so to provide accurate estimation of training efficiency in judicial ethics.

c) Disciplinary mechanism

1. All disciplinary proceedings (except few strictly regulated by law) should be transparent, not just in theory but in practice as well, which can be accomplished by providing regular information and by organizing public and announced hearings in accessible venues,



2. Strengthen ODC capacities,
3. Improve public awareness about ODC mandate and importance of independent judiciary through press conferences, newspaper articles, web page information, etc,
4. Organize regular surveys,
5. 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.

d) Improved coordination between HJPC and the Ombudsmen institution

1. Amend HJPC and the Ombudsmen Law. The provisions should clearly divide responsibility between the two institutions in regard of investigating complaints against judges providing that a complaint against a judge must first be filed to the HJPC, and only after a decision of HJPC it can be appealed to the Ombudsmen institution. The Ombudsmen institution should have no right to interfere in court proceedings in any way,
2. Sign a Memorandum of Understanding,
3. Establish a joint commission,
4. Regularly exchange relevant information pertaining to judicial ethics,
5. Initiate cooperation between the two institutions and equivalent offices in the UK through a twinning project,
6. More studies are needed.

Badly needed improvements regarding raising respect of ethical standards by judges may not be supported or desired by some; or even considered as a serious issue. However, the types of reforms proposed here do not require substantial expenditure, and they provide possibilities for greatly improving these ethical standards, raising public support both to the independent judiciary and HJPC as its paramount leader, and bringing BiH closure to EU, which would in turn improve well-being of majority of citizens.

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A "Policy Development Fellowship Program" has been launched by the Open Society Fund BiH in early 2004 with the aim to improve BiH policy research and dialogue and to contribute to the development of a sound policy-making culture based on informative and empirically grounded policy options. The program provides an opportunity for selected fellows to collaborate with the Open Society Fund in conducting policy research and writing a policy study with the support of mentors and trainers during the whole process. Sixty three fellowships have been granted in three cycles since the starting of the Program.