ALUMNI FOUNDATION COUNCIL OF EUROPE IN BOSNIA AND HERZEGOVINA

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REPORT OF THE BIH PARLIAMENTARY ASSEMBLY HOUSE OF REPRESENTATIVES INTERIM INVESTIGATIVE COMMITTEE FOR INQUIRY INTO THE STATE OF THE JUDICIARY IN BOSNIA AND HERZEGOVINA

This document presents a summary of the Report of the BiH Parliamentary Assembly House of Representatives Interim Investigative Committee[1] for Inquiry into the State of the Judiciary in Bosnia and Herzegovina, which was the most active body in the history of the Parliamentary Assembly of Bosnia and Herzegovina. It was the first committee established under the Law on Parliamentary Oversight and it held 32 sessions in the first year of its work. It comprised eight members from six different political parties and from both entities.

This was the first comprehensive report on the state of the judiciary in Bosnia and Herzegovina produced domestically, and not by international stakeholders. It was also the first report on this topic that resulted from public hearings of a large number of judicial office holders. It runs to 110 pages and has over 1500 pages of annexes, including transcripts of all the hearings. As such, the Report is crucial for judiciary reforms in Bosnia and Herzegovina.

PERCEPTIONS ON AND OF THE JUDICIARY

The perceptions of judges and prosecutors who testified before the Interim Investigative Committee (IIC) about the state of the judiciary are identical to the perceptions of the public at large. The tone – milder or harsher – of the language used by witnesses in describing the state of the judiciary reflects the variations already present in public discourse and is a matter of style rather than any substantial differences of opinion. For that reason, the IIC is convinced that the perceptions of citizens and the media about the state of the judiciary are completely concurrent with the perceptions coming from within the justice system itself, meaning that this Report paints a realistic picture of the judiciary across Bosnia and Herzegovina.

Based on testimony given by numerous witnesses, the IIC concluded that the judiciary in Bosnia and Herzegovina, including its highest body, is ruled by a culture of fear and conformism, and that judicial office holders who place stock in ethical and professional standards often ignore the surrounding context where a corrupt minority is able to impose the adoption of certain decisions. In contrast to

[1] Link to full Report: https://static.parlament.ba/doc/150402_Izvjestaj%20o%20radu%20PIK-a%20L.pdf

members of that corrupt minority, who arrogantly insist that such decisions are justified, the ethical majority within the judiciary, faced with the consequences of such decisions on the state of the judiciary or its perception among the public, expresses discomfort, but also regret for not being more determined in standing up to the minority. At the same time, given a suitable forum, they are prepared to point out these problems. Therefore, it seems that providing these voices with a suitable forum was one of the main reasons for the vehement resistance to the establishment and activities of the IIC that was exhibited by persons from judicial and political circles and is highlighted in this Report.

The IIC concluded that negative perceptions are at least partially the result of very frequent and wholly inappropriate public statements by the most visible and influential figures of the judiciary, including their comments on social media regarding official matters and public squabbles in the media. When prominent officials who are expected by citizens to be sober, moderate, reasonable and restrained, in the interest of fostering a feeling of legal certainty, engage in such inappropriate discussions, this does serious damage to public trust in the justice system.

The IIC was encouraged by the fact that when giving testimony, judicial office holders pointed to these and similar inappropriate actions freely, openly and in detail. Namely, this is an indication that the reason for their failure to report such incidents to competent bodies was not in itself of a corrupt nature, but that the situation was such that they themselves did not see regular mechanisms as a forum where concrete results could be achieved. The fact that they presented their insights freely and in detail before the IIC indicates their awareness of the irregularities they mentioned and their desire to see them stopped. In light of this, reasons for their failure to act should be sought in their understanding of the sufficiency of existing mechanisms. In that respect, there is no doubt that the understanding of existing judicial mechanisms by judicial office holders is identical to the view of these mechanisms held by the public at large; namely, that they are ineffective, that reporting a problem does not lead to it being resolved, but that it may make life more difficult for those who report.

This is the very definition of a captured state. The kind of corruption that is present in all democracies has a disproportionate impact on the most vulnerable parts of the population, but, as a rule, it bypasses the well-to-do, educated and otherwise influential persons in society. Looking at the kind of examples descried above, as well as numerous others, the IIC has found that corruption in Bosnia and Herzegovina also has a negative impact on those who are nominally in the highest positions in society, but who are not or refuse to be part of informal clientelism networks. In that respect, the situation in Bosnia and Herzegovina, including the state of its judiciary, neatly corresponds to the World Bank definition of 'state capture', used to describe situations where 'small corrupt groups used their influence over government officials to appropriate government decision-making in order to strengthen their own economic positions'.[2]

POLITICS AND THE JUDICIARY

The IIC has found that the nexus between politics and the judiciary is evident, deeply embedded at the highest levels of the judiciary, and constitutes the biggest obstacle to Bosnia and Herzegovina's aspirations to become a member state of the European Union. The witnesses were unanimous in their assessment that advancing to higher judicial positions, and even into certain justice institutions, is not possible without receiving direct political support or agreeing to service political interests and maintain the status quo. Therefore, as a rule, corruption does not manifest itself in its traditional forms of seeking or receiving bribes, for instance, but through the influence of politics on appointments to the highest judicial offices, inappropriate links between judicial office holders and politicians, including the appointment of close relatives of judges and prosecutors to political positions, and the perpetuation of this state of affairs either through direct influence or by means of conformism.

Political influence on the judiciary starts with the appointment and control of judicial office holders, and is manifested in its operational aspects through concrete instances of abuse, such as not using or manipulating the CMS system for assigning cases, failure to prosecute 'high corruption' cases or persons with political influence over the judiciary, aggressive prosecution of their or their party's political opponents or anyone who dares point out this issue, interfering in cases that could reveal the nexus between politics and the judiciary, including pressures to remove judges who refuse to take part in corruptive activities, prosecuting minor offences such as

[2] John Crabtree and Francisco Durand, Peru: Elite Power and Political Capture. London: Zed Books Ltd. (2017).

'unauthorised recording' in order to conceal the serious criminal offences captured in such recordings, as well as other similar instances of trading in influence, abuse of office, receiving gifts or other benefits, or even blackmail and other forms of corruption.

In connection with this, across almost all the hearings it held, the IIC received confirmation that the influence of 'powerful individuals in society' is achieved within the judiciary also by way of political appointments of close relatives to the highest public offices in governments, ministries and public enterprises, or to other lucrative positions at all levels of government. The witnesses were clear that this constituted a conflict of interest that needs to be prohibited and sanctioned by legislation, and that such appointments make judicial office holders dependent on politicians and other influential persons, or in any event, that they significantly shape perceptions of corruption in the judiciary.

Political appointments of judicial office holders' close relatives give justified cause to suspect that those who decide on such appointments enjoy a privileged position within the judiciary when it comes to any investigations or court proceedings that may be brought against them. What is more, the public perception of all such appointments is that they are manifest examples of corruption and trading in influence that are longstanding and go far beyond family relations.

All the witnesses agreed that prohibiting such appointments should be modelled on restrictions currently imposed on close relatives of elected and appointed officials, and that it should cover all appointments confirmed or approved by the BiH Presidency, Council of Ministers or Parliamentary Assembly, or legislative and executive bodies at the entity and cantonal level, or the governing or supervisory boards appointed by such bodies.

The IIC also concluded that, given the widespread nature of these phenomena, there is justified reason for the Office of the Disciplinary Counsel to investigate possible disciplinary offences by judges and prosecutors whose close relatives were appointed to high offices, where such appointments fall under the control of political parties, and to proceed with further action from within its competences based on the results of its investigations.
The IIC also believes that, in light of the consensus among witnesses on this issue, the BiH Parliamentary Assembly should adopt changes and amendments to the Law on the HJPC BiH specifying conflict of interest in all cases of judicial office holders whose close relatives are appointed to positions in governing or supervisory structures of public enterprises, public institutions, privatisation agencies at any level of government in Bosnia and Herzegovina, or in private enterprises that do business with government authorities at any level in Bosnia and Herzegovina.

CONFORMISM

The IIC is of the opinion that only a small percentage of judges and prosecutors are engaged in active corruption within the judiciary, but that they have a disproportionate influence because a significant majority of the judiciary is reluctant or afraid to publicly speak out about instances of corruption. It is also the opinion of the IIC that the majority does not report corruption mainly because they do not deem existing mechanisms capable of resolving the problem of corruption and see them instead as ineffective.

At the same time, the IIC has observed that witnesses were very open, specific and detailed in their testimonies about these matters, meaning that any fear of speaking out on the part of the non-corrupt members of the judiciary is not so great as to outweigh their desire to help repair the state of the judiciary in Bosnia and Herzegovina, and that they are more than prepared to discuss these matters in a forum they see as being potentially effective, such as the IIC. In that sense, one of the primary effects achieved by the IIC is that it provided a professional and safe forum for a critical mass of judicial office holders to take a stand, one after the other, and speak out against the problems within the judiciary, thereby demonstrating to their own ranks and to others that they were not isolated.

The IIC therefore believes that the prevalent conformism among members of the judiciary is not the result of any desire to maintain the corrupt system for the sake of their own benefit, but stems from their belief that individual action within that system cannot make a difference, but can incur harm and other repercussions for those who speak out.

All of the above is further proof that conformism of uncorrupted judicial officials has enabled a corrupt minority to impose their views in order to avoid parliamentary oversight, but that the combination of determination on the part of the IIC to exercise its mandate and the courage exhibited by a select few judges and prosecutors, who made public statements asserting their readiness to cooperate with the IIC at the start of its activities, significantly reduced any room for manoeuvre left to the corrupt minority in trying to avoid cooperation. In addition, the professional and cool-headed approach of the IIC managed not only to gain public trust, but confirmed that the IIC was a body that strictly adheres to an institutional approach instead of the usual and highly ineffective squabbling in the media. This approach yielded two important results: those who had become adept at media squabbles found themselves out of their depth, and those judicial office holders who had been prepared to share their observations but never had an appropriate institutional forum to do so were given encouragement.

Numerous witnesses confirmed that what was at play was a vicious circle where corruption encourages conformism and conformism maintains the state of corruption. One witness stated:

'Of course there are attempts to exert influence, manipulation, the question is how susceptible we are and how prepared to resist them. When all is said and done, it does not just come down to direct influence, but also to self-censorship. So, there is prevalent conformism, prevalent fear, disobedience, career advancement, people just adapt to the regime. For prosecutors themselves to know what is desirable conduct or a desirable decision in a case without pressuring judges. It's not just politicians that exert influence, it can also be people from within the judiciary. It is like trading in positions, career advancement, through performance reviews, or various favours, or bringing disciplinary proceedings against those who are disobedient, and such like.'

At the same time, the HJPC, a body comprising fifteen members appointed by their peers from fifteen different institutions or groups of institutions, has not been designed as a system to enable conformism. The system, however, has completely collapsed, and the effects of this have reverberated throughout the judiciary. The problem is of such a fundamental and systemic nature that it will require focused attention from the IIC, as well as the whole of the BiH Parliamentary Assembly and justice community, including after the adoption of this Report.

POTENTIAL SOLUTIONS

The IIC believes that long-term solutions will require legislative interventions, and has called on the BiH Council of Ministers and Parliamentary Assembly to begin their drafting as a matter of urgency. At the same time, the legal framework in Bosnia and Herzegovina is still advanced compared to many countries of the European Union and other well developed democracies. The problem detected by the IIC is that it is not being implemented, i.e. there is a failure to prosecute and suitably punish instances of corruption, both in disciplinary and criminal matters. The Office of the Disciplinary Counsel (ODC) has considerable tools at its disposal that remain underused, partly because of the ODC's insufficient independence and limited resources, partly because of pressures exerted on the ODC, but also partly because the ODC relies on satisfactory statistical indicators of a quantitative nature at the expense of qualitative results.

The IIC sees the potential role of the ODC, provided that its institutional, financial and professional independence is strengthened, as one of the key solutions for the identified problems. At the same time, the ODC itself needs to take on a much more proactive role, even within the existing system, in order to combat corruption, including its numerous concrete instances highlighted in this Report.

The conformism of judges and prosecutors means that they show no resistance towards the irregularities they notice, and fail to report to the ODC all the numerous irregularities they openly discussed with the IIC. This does not, however, explain the reasons why the ODC did not initiate proceedings *ex officio* regarding these and other instances it would have learned about from the media or other sources, but also those reported by persons outside the justice sector. The IIC was convinced of this itself because it submitted to the ODC dozens of cases for further action, but charges were eventually brought in only two of them.

The IIC found that over two thirds of disciplinary charges brought in 2019 concerned acts of negligence or carelessness, or delays in producing decisions or other acts, while less than one third concerned acts of particular concern such as behaviour demeaning the dignity of a judge or prosecutor, deliberately providing false or misleading information, failure to seek recusal in cases of conflict of interest, issuing decisions in patent violation of the law, etc. This disproportion was even more pronounced in 2020, when over 75% of the charges concerned carelessness and delays, and only 20% the above-mentioned serious offences.

The IIC believes that, as opposed to its findings concerning judges and prosecutors, including HJPC members, where corruption manifested through the politics-judiciary nexus and prevalent conformism is the essence of the problem, the inadequate activity of the ODC stems from a combination of justified fear, lack of institutional and professional independence, inadequate resources, unequal position of ODC staff compared to judicial office holders, and partly from their inadequate professional status prescribed by law.

However, the IIC believes that it was the combination of threats and pressures – from leading figures in the judiciary, launched in parallel against the IIC and the ODC – had the effect of creating a culture of fear in numerous segments of BiH society. Namely, in circumstances where the highest judicial officials, but also their political associates, are openly threatening members of the highest legislative body in the country for applying the law, it is by no means surprising to see civil servants exhibit a particular degree of caution.

These circumstances are thankfully no longer present, and it was the work of the IIC that has demonstrated that no one is or should be untouchable. It was at the insistence of the IIC, described in the Report, that the former chief prosecutor appear before it and answer questions about using the TCMS system that led to her admission that she did not use it, which in turn resulted in disciplinary action and her ultimate removal from office. The ODC should now take similar action in respect of all other judicial office holders where there are grounds to suspect disciplinary offences, especially in cases where the ODC has direct knowledge and evidence of prohibited activities.

The IIC believes that ODC staff qualifications and authority are in need of strengthening, and that criteria need to be strengthened generally. Namely, the criteria for appointment to the office of chief disciplinary counsel should be the same as those for appointment to the highest judicial offices in Bosnia and Herzegovina. However, the 'strength of authority' that the chief disciplinary counsel would gain with such reinforced criteria would be limited in the absence of appropriate strengthening of ODC's independence.

This approach would not only free up the ODC resources to focus more actively on the most serious disciplinary offences – of both ethical and corrupt nature – which would, in combination with other proposed reforms, contribute to strengthening perceptions of the ODC as a powerful and efficient anti-corruption body safeguarding ethics in the judiciary, while matters of negligence and carelessness would be resolved through administrative proceedings where they belong, in line with comparative practice.

USING THE CMS SYSTEM TO ALLOCATE CASES

Not using or abusing the CMS system for allocation of cases is a widespread problem within the judiciary in Bosnia and Herzegovina. The fact that the ODC has no knowledge of whether the system is being used to allocate cases to disciplinary panels means that the HJPC needs to inform the public of these matters in detail, and the Council of Ministers must urgently propose a new law on the HJPC to mandate the use of the system.

During its hearings, the IIC also found out that the BiH Prosecutor's Office never used the CMS system to allocate cases throughout the entire mandate of the former chief prosecutor. She confirmed this herself in her testimony before the IIC, the HJPC confirmed it in an official reply to a query from the IIC, and the President of the Court of BiH also confirmed it.

All of this indicates that this entirely unlawful practice of the BiH Prosecutor's Office was not just a matter of speculation or an 'open secret', but that it was openly discussed in such official environments as interviews of candidates for leading prosecutorial offices, which was confirmed by the HJPC vice-presidents, and that the prosecutors at the BiH Prosecutor's Office justified this unlawful practice, rationalised it, and even openly defended and advocated it. Namely, when a prosecutor at the highest prosecutor's office says that the 'best way' to

do something is in a way that is contrary to what the law prescribes, then this goes far beyond the initial problem of just failing to use the CMS system.

The IIC further underscored the importance of rejecting conformism in the judiciary and believes that insisting on the consistent application of legal and ethical norms, including by reporting and prosecuting any and all violations by any and all judicial office holders, is the basic preconditions for establishing a genuinely independent and professional judiciary in Bosnia and Herzegovina.

Specifically related to the use of the CMS, this is the only approach that can create a culture where it is consistently applied, which not only guarantees the right to a 'natural' judge or prosecutor, reducing any subjectivity to a minimum, but also provides for strict adherence to the law, including the reporting of all violations. This process would be further accelerated and improved if the ODC and competent prosecutors' offices were to consider information on all prior irregularities and instances of abuse related to the CMS system.

CRITERIA FOR APPOINTMENT TO JUDICIAL OFFICE

Most witnesses pointed out that criteria for appointment of judges and prosecutors needed to be improved, especial those pertaining to leading positions and for appointments to the HJPC and ODC. The majority also agreed on two seemingly contradictory, but in fact complementary conclusions: that Bosnia and Herzegovina has more than enough qualified professionals but that, as a rule, they do not end up in high or leading positions, which then gradually leads to a deterioration of quality at all levels.

Currently, the law enables the position of a prosecutor or even the head of any prosecutor's office in Bosnia and Herzegovina to be filled by anyone with the requisite years in service, and not even necessarily as a judge, prosecutor or lawyer, but in any legal position deemed by the HJPC to be 'similar'. Although the criteria for court presidents are somewhat more stringent, because the position is restricted to judges from the court in question, it is possible for a court to be headed by a person who became a judge at that court and has the requisite number of years in service, but again not necessarily in the judiciary.

The IIC agrees, of course, with the general observation that 'we should not assume that someone is better or more experienced simply because they spent more years in service'. We need go no further than the decisions of two disciplinary panels on the matter of charges brought against the former HJPC president to prove this point. Namely, both the panels were made up of judges and prosecutors, each of whom had more than ten years in service in the judiciary, yet both issued legally erroneous and unfounded decisions.
The IIC is of the opinion that criteria for appointment to the HJPC – the institution responsible for appointing all judges and prosecutors – should in particular be made more stringent, and this is elaborated in detail in the Report.

ATTITUDE OF THE JUDICIARY TOWARDS THE MEDIA

It is the IIC's assessment that the attitude of justice institutions towards the media is unsatisfactory, that cooperation is at a low level, that justice authorities do little to nothing based on media reports, including the most rigorous examples of investigative reporting. Also, threats and attacks against reporters often go unpunished, while reports and media companies are continuously subject to pressures in the form of defamation suits, insistence that they reveal their sources, criminal reports, and even threats of criminal prosecution, insistence that they do not publish information they have uncovered, etc.

And these are not just isolated cases. On the contrary, testimonies indicate that these are widespread practices that are manifested in almost identical form across Bosnia and Herzegovina, at all levels of the judiciary. This leaves no doubt that the problem is systemic and that positive examples are merely exceptions, rather than *vice versa*.

Physical attacks and threats of violence directed at reporters are also the most direct and dangerous form of pressure faced by the media. The fact that such pressures do not come from the judiciary itself does not mean it bears no responsibility for their persistence. On the

contrary, the combination of the number and prevalence of such pressures, on the one side, and minimal prosecution of such acts, on the other, indicates that the deterrent effect is minimal or even non-existent, meaning that the judiciary is falling short of one of its main responsibilities.

The IIC concluded that the testimonies it heard were almost identical to the findings of the OSCE Mission that 'the PO BiH's attitude towards the press and the civil society demonstrates aversion towards public scrutiny when it comes to the handling of politically sensitive cases.' The OSCE even described the approach of the BiH Prosecutor's Office as 'hostility towards the press' and added that 'the Court of BiH has also exhibited increasing aversion towards public scrutiny.' What is more, testimony on abuse of criminal reports and threats of criminal prosecution coincide with the open threats referenced by the OSCE, specifically the official press release of the BiH Prosecutor's Office that within the *Potkivanje* operation, it had opened another investigation to enquire about 'the motives and reasons of persons who send such negative messages about the work of the judiciary to the public through the media with the aim of destabilizing the judicial system.'

Going even further than that, when the former chief prosecutor demanded that reporters publish their texts 'only after they are checked' by the police and judicial authorities, this indicates her concern with protecting perpetrators directly from information coming out in the media. These attempts at censorship by the head of an institution that has repressive tools and powers at its disposal are unacceptable in a democratic society and constitute direct pressure on the media, but would also pose a danger to the overall democratic order in any country. What is more, publishing media articles 'only after they have been checked' by the police or judicial authorities is characteristic of authoritarian regimes, so it is almost incomprehensible that the ODC never responded to these irregularities in any way. The IIC believes that the failure of the ODC to respond to the chief prosecutor exerting pressure on the media indicates that this is a systemic problem, and not just an isolated attitude on the part of the former chief prosecutor.

Witnesses were also in agreement regarding the fact that judicial authorities rarely, if ever, act on information from media reports.

Further pressure on reporters and media outlets comes in the form of defamation charges brought by judicial office holders, which are becoming increasingly common. In addition to the evident pressure this puts on reporters, and at least because of the perception of conflict of interest when such procedures are conducted before courts where they themselves hold office, it is additionally concerning that those in the most responsible positions within the judiciary of this country are disregarding clear case-law of the European Court of Human Rights (ECtHR) on defamation charges brought by public figures.

Witnesses also pointed to practical problems faced by reporters in the field, including 'deliberate selection of small courtrooms' and 'inconsistent practices, we do not know if recording is permitted, or they allow recording but not taking photos.' Concrete instructions that 'you can record, but you can't record statements on your Dictaphone, and you can't broadcast what you record in the courtroom, but you can take notes,' indicate that these are capricious, unpredictable and arbitrary rules, that they are not in place for a legitimate aim, and that, in any case, they do not use the least restrictive measures in order to achieve any such aim.

Therefore, the IIC cannot accept as valid any rule that allows reporters to write down words spoken in a courtroom, but does not allow them to type those same words on their laptop computers. The IIC cannot accept as valid the general ban on recording the course of a trial, given that such recordings help reporters prepare their articles. Also, the ban on bringing mobile phones into court buildings is a disproportionate restriction, given the need of reporters to be in touch with their editors, colleagues and other persons in order to be able to do their jobs without hindrance.

The IIC, therefore, holds that the HJPC should introduce uniform rules for all courts in Bosnia and Herzegovina, and should insist on their consistent and universal application, while ensuring that such rules impose the least possible restrictions necessary to ensure legitimate aims (maintaining order in the courtroom, witness protection, etc.). Otherwise, maintaining the current restrictions, which are disproportionate to any legitimate aim, as well as their uneven application, indicates that the primary motivation behind the restrictions is the unreadiness of judicial office holders 'to be open towards the public'.

It is the opinion of the IIC that the HJPC should also establish clear and uniform rules for all judicial institutions in Bosnia and Herzegovina, designed to facilitate access to information, that will encourage a proactive approach on the part of the judicial institutions when it comes to providing information, instead of the current practice where they primarily or exclusively respond to specific queries. In that respect, the IIC would like to offer itself as an example, given that all its sessions were completely open to the public, that no restrictions were put in place regarding recording or dissemination of collected information, that all documents obtained by the IIC were published on its website, along with audio recordings and transcripts from all its sessions.

Finally, the IIC is concerned by witness testimony confirming the existence of unprofessional relations between certain media representatives and political parties. Namely, the participation of individual reporters or entire media outlets in denying, minimising, concealing or justifying the politics-judiciary nexus significantly contributes to its continued existence and makes it more difficult, if not impossible, for other media outlets to expose it effectively. On top of that, media support for corrupt forces within the judiciary, aimed at protecting political interests, threatens to slow down, undermine or even halt their sanctioning. In short, there is no doubt that the politics-judiciary nexus can only grow stronger if it receives such assistance from the media.

PROSECUTION FOR UNAUTHORISED RECORDINGS

The IIC devoted considerable attention to the increasingly prominent problem of criminal prosecution of citizens and reporters for 'unauthorised recordings' across Bosnia and Herzegovina, especially in connection with recordings of manifestly unlawful acts. Moreover, the IIC is aware that in addition to criminal prosecution for making such recordings, some prosecutors' offices have resorted to initiating criminal proceedings against persons who published the recordings. The IIC is of the opinion that any such action that does not thoroughly take into account the public interest for the making or publishing of such recordings, or the public nature of the location where the recording was made, is not only disregarding clear European Court of Human Rights case-law, but is also hindering the discovery of serious criminal offences and encouraging self-censorship among responsible citizens and members of the media.

The current legal framework governing issues of recording and photographing is unacceptably rigid and anachronistic, and contrary to the European Convention, but it is encouraging that all the witnesses clearly expressed their considered view that relevant legal provisions should be changed, while some also pointed out that they should not be applied without regard for ECtHR case-law, i.e., without considering the public interest in detail, as well the location where the recording was made, in each specific case. At the same time, the relatively high number of prosecutions for such acts indicates that many other prosecutors do not share this opinion, suggesting that they should be deprived of the possibility – either by changing or deleting the relevant legal provisions – of prosecuting persons who make or publish recordings of other persons for reasons of public interest or in public spaces.

The IIC notes that court proceedings for recordings of acts of corruption were initiated in both entities, even though in both cases, the conversations and the recordings took place in public, where the participants in the conversations could have no reasonable expectation of privacy, and despite there being a clear public interest for the recordings to be published. At the same time, court proceedings were not initiated against the persons captured engaging in acts of corruption in these recordings.

For these reasons, the legal framework in Bosnia and Herzegovina, meaning both entity criminal codes, should be brought fully in line with European standards on this matter. An example of one such compliant law is the Criminal Code of the Republic of Croatia that explicitly stipulates the following for audio recordings: 'There shall be no criminal offence if the acts are committed in the public interest or another interest prevailing over the interest to protect the privacy of the person being recorded or whose communication is intercepted,' while unauthorised image recording and making such images available to third persons is prohibited only in situations where images are taken of another person 'located in a dwelling or an area especially protected from view'.

An exception thus articulated in relation to not just the public interest, but any other interest prevailing over the interest of privacy of the person being recorded, is indeed very explicit, and its scope has also been developed in detail in ECtHR case-law. Furthermore, prohibiting image recording only in a dwelling or area commonly protected from view is much more appropriate than the overly general formulation of 'in his space' stipulated in the Federation of BiH, and even the milder formulation, that is still open to broad interpretation, in the Republika Srpska, where such recording is prohibited only when it especially violates the privacy of the person being recorded. Until the relevant laws are changed, the IIC supports the approach of the Sarajevo Canton Chief Prosecutor of generally refraining from such prosecutions and setting particularly high standards for any prosecution of so-called 'unauthorised recordings'.

INADEQUACY OF THE INSTITUTION OF THE HUMAN RIGHTS OMBUDSMAN OF BIH

The IIC has concluded that there are no adequate mechanisms in Bosnia and Herzegovina that would otherwise provide an alternative to a corrupt judiciary, such as a genuinely independent Human Rights Ombudsmen. In addition to shying away from using the full range of powers granted to them by law in order to robustly protect the rights of citizens, the Ombudsmen even fail to adequately respond in situations where citizens submit applications. Procedures before the Ombudsman Institution 'are unduly long' and 'their decisions [...] are, as a rule, inadequate to the problems put before them [...] the recommendations they issue avoid addressing the actual human rights violations [and] the reasonings they write are unbalanced in the sense that the facts and various regulations that are quoted take up 4 to 5 pages, but the decision itself is very rigidly condensed into half a page of text.'

What is of particular concern, however, is how this description coincides with what witnesses have stated about the politicisation of the Ombudsman Institution. In view of all of its findings, the IIC is of the opinion that the Law on the Ombudsman of BiH, that has undergone only negligible changes since it was adopted in 2002, should be thoroughly reformed in order to strategically position this institution as a corrective and motivating factor that will make the judicial system itself prioritise sanctioning human rights violations in Bosnia and Herzegovina.

In that respect, the IIC has provided detailed recommendations and requested that the BiH Council of Ministers adopt and submit for parliamentary procedure a new Draft Law on the BiH Ombudsman that will, *inter alia*, stipulate much more stringent criteria, restrict the possibility of political influence on the ombudsmen,

provide for decisive participation of the opposition in appointing ombudsmen, increase transparency within the Ombudsman Institution, including the possibility for its staff to inform BiH Parliamentary Assembly bodies when they suspect political or other forms of influence on the ombudsmen, prohibit any influence on the work of the Ombudsman Institution, including by providing for the removal of an ombudsman in the case of such undue influence, and that will provide the ombudsmen with the same immunity enjoyed by members of the BiH Parliamentary Assembly, i.e. immunity only in respect of actions undertaken as part of their official duty.

PROPOSED REFORMS

Based on the entirety of its findings, the transcripts of witness testimony enclosed with this Report, the replies received from judicial and other institutions, and on detailed explanations contained in this Report, in addition to the urgent adoption of three laws from the list of 14 European Commission key priorities, the IIC has identified the following reforms as having priority:

1. *Vetting* all HJPC members, court presidents and chief prosecutors

A special law needs to be adopted to mandate and enable detailed checks (*vetting*) of all HJPC members, as well as all court presidents and chief prosecutors and their deputies in Bosnia and Herzegovina by various institutions and agencies, including the ODC and law enforcement agencies, but also possibly by a dedicated body that would be established for this purpose. The vetting would include checking:

- The accuracy of all information provided in asset declarations, as well as checking that assets were obtained legally, and mandating removal from office in the event of any discrepancies;
- Whether there is any relation of dependence, mutual benefit, exchange of favours, or other circumstances that create or may create a perception of inappropriate contact between judicial office holders and elected or appointed officials at any level of government in Bosnia and Herzegovina, including members of political party bodies, and mandating removal from office in the event that such circumstances are found;
- The existence of any relationships or contacts between these judicial office holders and persons convicted of or associated with organised crime, and mandating removal from office in the event that such circumstances are found.

Given that this process would include less than one hundred judicial office holders (as opposed to the over 800 judicial office holders who were vetted in Albania), it would not be demanding in terms of time or financial resources.

2. Make judicial office holders and their close relatives subject to the legal concept of conflict of interest

By analogy with the Law on Conflict of Interest in the Institutions of BiH, stipulate that it is incompatible for judicial office holders, or their close relatives, to serve on 'a management board, supervisory board, assembly, administration or management, or act in the capacity of an authorised person in a public enterprise' or to serve on 'the management board or directorate, or as director, of a privatisation agency', and also that it is incompatible with judicial office for judicial office holders or their close relatives to serve 'as members of the assembly, supervisory board, executive board or management' or 'act in the capacity of an authorised person for any private enterprise that contracts, or otherwise does business, with institutions financed from the budget at any level.'

3. Significantly raise the criteria for appointment to judicial office and to the HJPC

Raise the criteria for all judicial office and HJPC appointments. This entails significantly increasing the requisite years in service for appointment to the HJPC and the highest judicial and prosecutorial office, and requiring that more than half of the years in service pertain to judicial or prosecutorial office, as well as a detailed assessment of the moral qualities of candidates and the measurable results of their work as judges and prosecutors when applying for higher positions.

4. Ensure that HJPC members are recused in case of appointments at the same level

Stipulate an absolute ban on participating in the appointment of persons who are or could be adversaries. Specifically, judges in the HJPC should not participate in appointments of prosecutors who appear before their courts and *vice versa*.

5. Remove lawyers from the HJPC

Lawyers should not be members of the HJPC. The two places currently reserved for lawyers should be filled by full professors, one from a public law faculty in a canton in the Federation of Bosnia and Herzegovina and one from a public law faculty in the Republika Srpska.

6. Significantly improve the status and powers of the ODC

The status of the ODC needs to be aligned with the recommendations given in Chapter III.4, including:

- Establishing complete institutional and budgetary independence of the ODC
- Ensuring physical separation of the ODC from the HJPC
- Improving the professional status of the chief disciplinary counsel and her deputy by making them equal to the status of the highest judicial office holders, using the Ombudsmen status as a model
- Significantly strengthening the human, financial and all other resources of the ODC
- Introducing the possibility of inspections by the ODC
- Transferring competences for less serious offences to heads of courts, and to prosecutors' offices in relation to performance reviews

7. Significantly strengthen investigations for disciplinary offences of ethical or corruptive nature

The ODC should shift its focus onto disciplinary offences of ethical or corruptive nature It should particularly insist on upholding the highest ethical standards and on suppressing behaviour that damages the dignity of judicial or prosecutorial office, or behaviour that compromises public confidence in the impartiality or credibility of the judiciary, by broadly interpreting and applying the relevant provisions of the Law on the HJPC. This includes prosecuting judges and prosecutors who fraternise or have other inappropriate contacts with politicians, or any contacts that are not notified except in cases of accidental encounters at public events or when conducting official business on the premises of public institutions.

8. Establish a separate mechanism for decisions on disciplinary offences of HJPC members

The HJPC should not decide on disciplinary offences of its members, and it is necessary to establish a mechanisms that will act in such situations. This means separate first- and second-instance panels whose members may be appointed by the HJPC. In order to protect the integrity of the process, these panels should exist as permanent but non-active bodies that would be activated only in situations when the ODC initiates proceedings against an HJPC member.

9. Disable advancement following a disciplinary measure for a period dependent on the seriousness of the disciplinary offence

The current sanctions are not an adequate preventive mechanism, especially for lesser and medium offences that are commonly sanctioned by salary reductions. It should be stipulated that advancement will be impossible following a disciplinary measure for a period that will depend on the nature of the disciplinary offence.

10. Shift the focus of performance assessment/evaluation of judges and prosecutors from reaching the norm to the percentage of overturned judgements and failed indictments

The current system whereby the performance of judges and prosecutors is assessed based on the norm they achieve encourages the proliferation of less demanding indictments for more benign criminal offences, as well as severance of proceedings, and removes motivation for judges to make a special effort when it comes to reasoning their judgements. The focus needs to be shifted from the quantitative criteria to qualitative criteria, specifically to the percentage of overturned judgements and failed indictments.

11. Ensure consistent use of the CMS system to allocate cases in the HJPC and all prosecutors' offices and courts in Bosnia and Herzegovina

Currently, the CMS system is used unevenly and is subject to abuse, while in some cases it is not used at all. Sanctions should be made significantly harsher for any refusal to use the CMS system to allocate cases, including any exception that is not fully documented in line with strict and clear rules. Criminal investigations should also be strengthened in all situations where there are grounds for suspicion of any abuse of the system.

12. (Re-)establish the legal concept of the injured party as a subsidiary prosecutor

Establish the possibility of the injured party to act as a subsidiary prosecutor in the criminal procedure codes in Bosnia and Herzegovina, of both entities and the Brčko District, or provide for the injured party to act as a prosecutor, following the example of the previous system and international best practice in this matter.

13. Ensure the full independence and effectiveness of the Ombudsman Institution

Adopt a new Law on the Ombudsman that will, inter alia, significantly strengthen the independence of this Institution and the ombudsmen themselves, depoliticise it and improve its efficiency.

14. Significantly narrow the definition of unauthorised photographing and recording

Completely decriminalise any photographing and recording in a public space, as well as in private spaces that are visible from public spaces, i.e. when the person can have no expectation of privacy, and in all situations when the public interest prevails over privacy protection interests. In addition to abandoning criminal prosecution of persons who record situations of public or other interest, prosecutors' offices across Bosnia and Herzegovina should start actively prosecuting persons whose acts of corruption or other wrongdoings were recorded.

15. Significantly improve transparency and cooperation with the media

Significantly improve the transparency of the judiciary and the cooperation of judicial institutions with the media.

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