

Analysis of Disciplinary Liability of Judicial Officeholders in Bosnia and Herzegovina

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1. Legal framework governing the disciplinary liability of judicial officeholders

Disciplinary liability of judicial officeholders is of great importance in any society, in particular as it relates to ensuring proper application of substantive and procedural legislative norms and, also, eliminating any kind of undue influence on judicial independence as the fundamental prerequisite for the effective operation of this branch of government. In a tripartite system of separation of powers, judicial independence should be seen as an indispensable element in the overall system of democratic checks and balances which are exercised in every democratic society alongside the other two branches of government, namely the legislature and the executive. There are two primary goals that an independent and efficient judiciary should achieve in order to fulfil its general societal role. The first goal is preventive in character and implies keeping the other two branches of government within the bounds of their exclusive ambits as defined by the very essence of separation of powers in a democratic society. The other goal of an independent and efficient judiciary is to provide protection to citizens when their rights are violated by the executive, other citizens and other forms of legal entities.

Given the current economic and political situation in the country, as well as the ever increasing public distrust in the executive and legislative branches, there is an urgent need to strengthen public confidence in the independence and integrity of the judiciary as the main guarantor of protection of citizens' rights. One of the key mechanisms to ensure the *de facto* and *de jure* independence and integrity of the judiciary is the concept of disciplinary proceedings against judicial officeholders.

The concept of disciplinary liability of judicial officeholders in Bosnia and Herzegovina is enshrined in and governed by the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina¹ (hereinafter: HJPC Law), which provides in Article 55² that the High Judicial and Prosecutorial Council (hereinafter: HJPC) shall exercise its disciplinary powers through its disciplinary bodies. The method for establishing disciplinary liability of judicial officeholders is further elaborated in the Rules of Procedure of the High Judicial and Prosecutorial Council

¹ Law on the High Judicial and Prosecutorial Council of BiH ("Official Gazette of BiH", nos. 25/04, 93/05 and 15/08)

² Ibid.

(hereinafter: HJPC Rules of Procedure).³ Articles 56 and 57 of the HJPC Law provide an exhaustive list of disciplinary offences for judges and prosecutors respectively which are subject to disciplinary proceedings⁴. Furthermore, Article 58⁵ provides a list of the disciplinary measures that the HJPC may impose, severally or cumulatively, on judges or prosecutors for official misconduct, in accordance with the principles for determining disciplinary measures as set forth in Article 59⁶ of the same Law. The HJPC Law provides for three-instance disciplinary proceedings by allowing appeals to be lodged against a disciplinary measure imposed by the second-instance disciplinary panel with the full membership of the HJPC⁷. Given that Article 60, paragraph (7) of the HJPC Law provides that a judge or prosecutor who has been removed from office by decision of the HJPC may appeal to the Court of Bosnia and Herzegovina on grounds of procedural irregularities or misapplication of the law, we can say that, in a sense, the system of disciplinary proceedings has four instances, at least when it comes to the imposition of the most serious disciplinary sanction 'removal from office'. The existing system of disciplinary proceedings against judicial officeholders, with its three (or four) instances, makes decision-making and the reaching of final decisions unnecessarily complicated and protracted, especially in view of the fact that a two-instance procedure would fully ensure protection of appellants' rights because Article 6, paragraph (1) (Right to a fair trial) of the European Convention on Human Rights is fully applicable to proceedings against judges⁸ and, by extension, against prosecutors. This is because, according to the autonomous interpretation of the European Court of Human Rights, the disciplinary panel has all the attributes of a **court**, even though it is not one in a formal sense⁹ as required by domestic legislation of a particular country.

2. Transparency of disciplinary proceedings as a prerequisite to enhancing public confidence in judicial independence and integrity

³ Rules of Procedure of the High Judicial and Prosecutorial Council of BiH ("Official Gazette of BiH", nos. 55/13, 96/13, 46/14, 61/14, 78/14, 27/15, 46/15, 93/16, 48/17, 88/17 and 41/18).

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Article 60, paragraphs (1), (2), (3), (4), (5) and (6) of the Law on the High and Prosecutorial Council of BiH ("Official Gazette of BiH", nos. 25/04, 93/05 and 15/08).

⁸ Guide on Article 6 of the European Convention on Human Rights, paragraph 36. 31/08/2018. The European Court of Human Rights. Available at: https://echr.coe.int/Documents/Guide_Art_6_BOS.pdf. Accessed on 19/11/2019

⁹ Judgment in case of *Olujić v. Croatia*, Application 22330/05, paragraph 42. The European Court of Human Rights. Available at: [file:///C:/Users/user/Downloads/CASE%20OF%20OLUJIC%20v.%20CROATIA%20-%20\[Croatian%20Translation\]%20by%20the%20Republic%20of%20Croatia%20\(Office%20of%20the%20Agent\).pdf](file:///C:/Users/user/Downloads/CASE%20OF%20OLUJIC%20v.%20CROATIA%20-%20[Croatian%20Translation]%20by%20the%20Republic%20of%20Croatia%20(Office%20of%20the%20Agent).pdf) Accessed on 21/11/2019

Transparency of disciplinary proceedings against judicial officeholders in Bosnia and Herzegovina is highly questionable. While disciplinary proceedings are, in principle, open to the public within the meaning of Article 68, paragraph (1) of the HJPC Law, which provides that “disciplinary procedures shall be governed by fairness and transparency” and “the judge or prosecutor concerned shall have the following rights ... the right to a fair and public hearing within a reasonable time by an independent and impartial panel established by law”¹⁰, i.e. **“the right that judgments shall be pronounced publicly and/or made public in some manner”**¹¹, thus allowing the presence of the public at disciplinary hearings, in practice the HJPC makes the first- and second-instance disciplinary decisions publicly accessible exclusively in anonymized form. Thus, even though the public has the opportunity to be present at disciplinary proceedings against a judicial officeholder, ultimately, when first- and/or second- instance disciplinary decisions are taken, the public is excluded and thus fully prevented from knowing the outcome of the disciplinary proceedings and the appropriateness of the disciplinary sanctions imposed. Also, the public is excluded from HJPC’s decisions on appeals against the decisions of the second-instance panel¹².

On 5 August 2019 Transparency International in Bosnia and Herzegovina (hereinafter: TI BiH) submitted to the HJPC a request for access to information seeking, among other things, access to non-final and final decisions of disciplinary panels relating to all judicial officeholders identified as recidivists in the 2018 Report of the Office of the Disciplinary Counsel¹³. In response to TI BiH’s request, the HJPC decided to refuse access to information relating to non-final decisions and grant access to information relating to final disciplinary decisions but in anonymized form, allegedly in accordance with the provisions of the Law on the Protection of Personal Data¹⁴, the

¹⁰ Article 68, paragraph (1) point b) of the Law on the High Judicial and Prosecutorial Council of BiH (“Official Gazette of BiH”, nos. 25/04, 93/05 and 15/08): “...the judge or prosecutor concerned shall have the following rights that must be guaranteed in the Rules of Procedure for disciplinary proceedings adopted by the Council: ... the right to a fair and public hearing within a reasonable time by an independent and impartial panel established by law. The press and public may be excluded from all or part of the hearing in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the panel in special circumstances where publicity would prejudice the interests of justice...”

¹¹ Article 68, paragraph (1) point b) of the Law on the High Judicial and Prosecutorial Council of BiH (“Official Gazette of BiH”, nos. 25/04, 93/05 and 15/08).

¹² Article 13 of the Rules of Procedure of the High Judicial and Prosecutorial Council of BiH (“Official Gazette of BiH”, nos. 55/13, 96/13, 46/14, 61/14, 78/14, 27/15, 46/15, 93/16, 48/17, 88/17 and 41/18).

¹³ (Recidivism) In criminal law, recidivism is the repeated commission of a criminal offence by a person who has already been convicted of a criminal offence. Dr. Ljubiša Jovanović: *Krivično pravo – Opšti deo [Criminal Law – General Part]*, p. 274, “Naučna knjiga”, Belgrade 1973 (326).

¹⁴ Law on the Protection of Personal Data (“Official Gazette of BiH”, nos. 49/06, 76/11 and 89/11).

HJPC's Decision on the disclosure of information on disciplinary proceedings no. 08-02-6844/09 of 9 September 2009 and no. 04-02-1497-2011 of 20 April 2011¹⁵, and the Freedom of Access to Information Law¹⁶. In opposition to the HJPC's viewpoint expressed in the aforementioned Decision and its interpretation of the Freedom of Access to Information Law, it is primarily important here to be mindful of the purpose of the Law, which is **“to acknowledge that information in the control of public authorities is a valuable public resource and that public access to such information promotes greater transparency and accountability of those authorities, and is essential to the democratic process”**¹⁷. In support of this, the Personal Data Protection Agency in Bosnia and Herzegovina, deciding on a complaint filed by a party relating to the delivery of the judgment by the Bihać Municipal Court to a third party, issued a decision¹⁸ in which it specifically considered the circumstances justifying the disclosure of certain requested information as one of the criteria for the disclosure of personal data **regardless of the fact that such disclosure was subject to exemption**. The decision clearly states that public authorities are under obligation to disclose the requested information in their control regardless of the fact that such disclosures are subject to exemption as may be determined in accordance with Article 6 (Exemptions for Functions of Public Authorities), Article 7 (Exemption for Confidential Commercial Information) and Article 8 (Exemption for the Protection of Personal Privacy) of the Freedom of Access to Information Law, and, in that sense, in determining whether disclosure **is justified in the public interest** one must, in particular, have regard to the following considerations: **“any failure to comply with a legal obligation, the existence of any offence, miscarriage of justice, abuse of authority or neglect in the performance of an official duty, unauthorized use of public funds, or danger to the health or safety of an individual, the public or the environment”**, as provided for under Article 9, paragraph (2) of the Law¹⁹. Although the HJPC in its Decision of 21 August 2019²⁰ and its Decision on TI BiH's appeal of 25 September 2019²¹ only **generally** stated that the public interest test was carried out in accordance with Article 9 of

¹⁵ Decision of the HJPC no. 01-07-10-77-177/2019 of 21/08/2019

¹⁶ Freedom of Access to Information Law in Bosnia and Herzegovina (“Official Gazette of BiH”, nos. 28/00, 45/06, 102/09, 62/11 and 100/13).

¹⁷ Article 1, paragraph (1) point a) of the Freedom of Access to Information Law in Bosnia and Herzegovina (“Official Gazette of BiH”, nos. 28/00, 45/06, 102/09, 62/11 and 100/13).

¹⁸ Decision of the Personal Data Protection Agency in Bosnia and Herzegovina no. UP1 03-1-37-1-181-11/15 of 11/11/2015

¹⁹ Freedom of Access to Information Law in Bosnia and Herzegovina (“Official Gazette of BiH”, nos. 28/00, 45/06, 102/09, 62/11 and 100/13).

²⁰ Decision of HJPC no. 01-07-10-77-177/2019 of 21/08/2019.

²¹ Decision of HJPC no. 08-07-10-2829-2/2019 of 25/09/2019.

the Law²², which *inter alia* provides for the aforementioned considerations justifying disclosure of the requested information notwithstanding the exemption claimed, **it is clear from both decisions that in handling the TI BiH's request for access to information the HJPC did not pay any regard to the aforementioned considerations during the course of the public interest test²³**. Furthermore, what remains particularly problematic is the reasoning of the HJPC's decision on TI BiH's appeal²⁴, which reads: "...it has been determined that the requested information is of personal nature and concerns the personal privacy interests of a third person **and so the public interest aimed at monitoring the performance of the judiciary cannot justify its disclosure**", which was in direct contravention of Article 11, paragraph (4) of the Freedom of Access to Information Law, which stipulates that **"A public authority shall neither require nor ask for any reason or justification for the request (request for access to information)"**. The viewpoint of the Personal Data Protection Agency in BiH expressed in the aforementioned Decision²⁵ further elaborates on the interpretation of this provision and fully supports the foregoing by stating that **"...when a competent authority receives such a request (request for access to information), it must not be guided by the reasons cited in the request, but should assess whether the information is subject to one of the exemptions, and, if it is, determine whether disclosure is justified in the public interest in accordance with Article 9 of the Freedom of Access to Information Law (paying regard to the aforementioned special considerations)"**²⁶.

Ultimately, it is particularly worrying that the HJPC as an appellate body in the process of conducting disciplinary proceedings has full access to all investigative and procedural actions

²² Freedom of Access to Information Law in Bosnia and Herzegovina ("Official Gazette of BiH", nos. 28/00, 45/06, 102/09, 62/11 and 100/13).

²³ The relevant part of the HJPC's decision concerning the TI BiH's request for information, no. 01-07-10-77-177/2019 of 21/08/2019: "In deciding on the request, we conducted a public interest test in accordance with Article 9, paragraph (2) of the Freedom of Access to Information Law and decided that the protection of HJPC's decision-making in disciplinary matters, as well as its continuous and basic competence under Article 17, point 4) of the Law on HJPC BiH, takes precedence over public interest; therefore, the request for information in this part is denied"; The relevant part of the HJPC's decision on TI BiH's appeal no. 08-07-10-2829-2/2019 of 25/09/2019 against Decision no. 01-07-10-77-177/2019 of 21/08/2019: "Taking into account any damage and any benefit that may arise after the submission of the required documents, and having regard to Articles 8 and 9 of the Freedom of Access to Information Law, it has been determined that the requested information is of personal nature and concerns the personal privacy interests of a third person so that the public interest aimed at monitoring the performance of the judiciary cannot justify its disclosure".

²⁴ Decision of HJPC no. 08-07-10-2829-2/2019 of 25/09/2019.

²⁵ Decision of the Agency for Personal Data Protection in Bosnia and Herzegovina no. UP1 03-1-37-1-181-11/15 of 11/11/2015

²⁶ Ibid.

taken by the Office of the Disciplinary Counsel in relation to the complaint filed²⁷. The residual clause provides that all matters relating to disciplinary proceedings which are not regulated by the HJPC Law and the Rules of Procedure of the HJPC shall be subject to the provisions of the Civil Procedure Code as applicable in the place of the commission of a disciplinary offence²⁸. The principle of establishing material truth has been completely abandoned²⁹ in the civil procedure codes and, accordingly, the burden of presenting the facts and proposing evidence falls solely on the parties to the proceedings. Therefore, it remains unclear how the disciplinary panels, which are largely or entirely composed of HJPC members³⁰, **will remain independent in deciding on the facts and evidence presented solely in the course of the proceedings if they have full access to the records of the actions taken by one party to the proceedings, namely the Office of the Disciplinary Counsel, from the moment of filing a disciplinary complaint³¹.**

It is clear from the foregoing that the power of impartial decision-making by the HJPC or its panels in disciplinary proceedings can be greatly compromised given all the information that is available to the HJPC from the investigation taken by the Office of the Disciplinary Counsel following a disciplinary complaint.

3. Excessive discretionary powers of the HJPC and are warnings and reprimands achieving their purpose as disciplinary measures?

²⁷ Law on the High Judicial and Prosecutorial Council of BiH (“Official Gazette of BiH”, nos. 25/04, 93/05 and 15/08), Article 65, paragraph (2): “The records shall be available to the Council. The Office of the Disciplinary Counsel shall be obliged to provide the Council with copies of complaints, investigation reports, or other relevant documentation as requested”, Article 65, paragraph (3): “The Office of the Disciplinary Counsel shall report periodically, in written form, to the Council regarding its activities”.

²⁸ Article 79 of the Rules of Procedure of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (“Official Gazette of BiH”, nos. 55/13, 96/13, 46/14, 61/14, 78/14, 27/15, 46/15, 93/16, 48/17, 88/17 and 41/18).

²⁹ Initial training – Module 2, p. 5. 2009. High Judicial and Prosecutorial Council of BiH. Available at: <https://advokat-prnjavorac.com/sudska-praksa/Najvaznije-osnovne-i-opste-odredbe-Zakona-o-parnicnom-postupku.pdf>. Accessed on: 21/11/2019

Article 7, paragraph (2): “The court shall consider and establish only the facts presented by the parties and shall order the taking of only the evidence that is proposed by the parties, unless otherwise specified” (“Official Gazette of BiH”, nos. 53/03, 73/05, 19/06 and 98/15).

³⁰ Article 60 of the Law on the High Judicial and Prosecutorial Council of BiH (“Official Gazette of BiH”, nos. 25/04, 93/05 and 15/08).

³¹ Article 65, paragraphs (2) and (3) of the Law on the High Judicial and Prosecutorial Council of BiH (“Official Gazette of BiH”, nos. 25/04, 93/05 and 15/08).

Analysis of the disciplinary measures under Article 58 of the HJPC Law³², which may be imposed on a judicial officeholder severally or cumulatively, and the fact that the disciplinary panels have wide discretionary powers in establishing the existence of mitigating and aggravating circumstances of each case of disciplinary offence by a judicial officeholder, which directly affects the determination of the severity of disciplinary measure(s) imposed, indicates that the statutory scale of disciplinary measures is not sufficiently adjusted or precisely defined to satisfy the principle of determinability of the repressive and preventive objectives that are to be achieved by imposition of a particular disciplinary measure(s). Firstly, Articles 56 and 57 of the HJPC Law³³ identify **23 possible disciplinary offences** for judicial officeholders (judges and prosecutors), each of which is of a different type and severity. Also, Article 58³⁴ of the same Law provides for the possibility of **imposing one or more of the seven disciplinary measures, whose number stands in glaring disproportion with the number of prescribed disciplinary offences**. Therefore, it is clear that the disciplinary panels have full freedom in deciding which disciplinary measure to impose. In this way, and especially in view of Article 58, paragraph (2)³⁵ of the Law, which provides that **“As a separate measure, instead of or in addition to any of the disciplinary measures set out above, the Council may, if appropriate, order that a judge or prosecutor participate in rehabilitation programmes, counselling, or professional training”**³⁶, the HJPC may impose disciplinary measure(s) at its sole discretion, thus having a direct impact on the purpose of the prevention and repression that the imposed disciplinary measure(s) should achieve in relation to the offender and the severity of the disciplinary offence. In this way, the most important element that every law of preventive and repressive nature should contain – namely a sufficiently predictable and strict sanction for judicial officeholders who commit a disciplinary offence – is indirectly excluded from the competence of the legislator. Also, such discretionary powers of the HJPC exclude from the competence of the legislator the possibility of preventing selectivity and arbitrariness of the disciplinary panel in defining proportionality between the committed disciplinary offence and disciplinary sanctions, and the HJPC is entrusted with full competence in making punitive policies in the form of having too much choice in the imposition of disciplinary measures. Firstly, Article 59 of the HJPC Law³⁷

³² Law on the High Judicial and Prosecutorial Council of BiH (“Official Gazette of BiH”, nos. 25/04, 93/05 and 15/08).

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Article 59 of the Law on the High Judicial and Prosecutorial Council of BiH (“Official Gazette of BiH”, nos. 25/04, 93/05 and 15/08): “(1) Disciplinary measures imposed should be governed by the principle of proportionality. Before

does not provide, either in principle or precisely, the principles of proportionality which the acting disciplinary panel should apply in imposing disciplinary measure(s). Secondly, because of the way these two disciplinary measures (public reprimand³⁸ and a written warning which shall not be made public³⁹) are applied under the Law and because of their nature and substance as well as the HJPC's well established practice of anonymizing final disciplinary decisions⁴⁰, they **do not contain even the minimum elements of prevention or repression that essentially determine the purpose of the existence of any disciplinary measure**. In support of the assertion that the HJPC and its disciplinary panels hold excessive discretionary powers, entrusted to them by the legislator, also goes the fact that the individualization of the duration of disciplinary measures under Article 58, paragraphs (1) and (2) is **entirely left to the discretion of the disciplinary panel, or the HJPC as a whole**⁴¹.

pronouncing the measures for a disciplinary offence, the following aspects shall be taken into consideration by the Disciplinary Panels:

- (a) the number and severity of the disciplinary offence committed and its consequences;
- (b) the degree of responsibility;
- (c) the circumstances under which the disciplinary offence was committed;
- (d) the previous work and behaviour of the offender; and
- (e) any other circumstances that may affect the decision on the severity and type of disciplinary measure, including the degree of remorse and/or cooperation shown by the judge or prosecutor during the disciplinary proceedings.

(2) The disciplinary measure of dismissal shall only be used in cases where a serious disciplinary offence is found and the severity of the offence makes it clear that the offender is unfit or unworthy to continue to hold his or her office.

(3) The Council may take into account any prior suspension, imposed in the course of the proceedings in question, and may reduce the disciplinary measure accordingly, or may, at its discretion, determine that the prior suspension is itself a sufficient measure for the disciplinary violation or violations found."

³⁸ Article 58, paragraph (1) point b) of the Law on the High Judicial and Prosecutorial Council of BiH ("Official Gazette of BiH", nos. 25/04, 93/05 and 15/08).

³⁹ Article 58, paragraph (1) point a) of the Law on the High Judicial and Prosecutorial Council of BiH ("Official Gazette of BiH", nos. 25/04, 93/05 and 15/08).

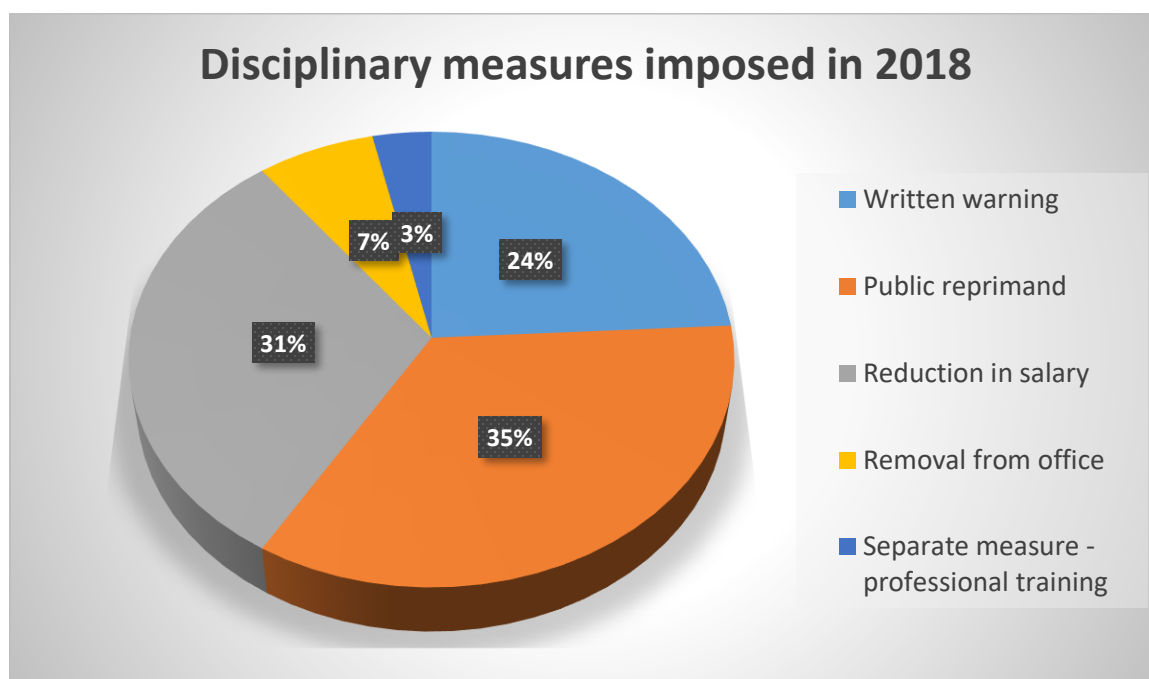
⁴⁰ See, for example, decision of the first-instance disciplinary panel accepting the agreement on the joint approval of the established disciplinary liability, no. 04-07-6-3397-6/2018 dated 10/12/2018, which is completely anonymized with respect to the judge against whom the sanction of "public reprimand" was imposed, as well as with respect to the court in which the judge concerned performs judicial function. Available at: <https://vstv.pravosudje.ba/>. Accessed on 28/11/2019.

⁴¹ Article 58, paragraph (1), point (c) "Reduction in salary amount up to 50 percent for a period of up to one year", and point (d) "Temporary or permanent reassignment to another court or prosecutor's office" and paragraph (2) "As a separate measure, instead of or in addition to any of the disciplinary measures set out above, the Council may, if appropriate, order that a judge or prosecutor participate in rehabilitation programmes, counselling, or professional training" of the Law on the High Judicial and Prosecutorial Council of BiH ("Official Gazette of BiH", no. 25/04, 93/05 and 15/08).

Article 105, paragraph (3) of the Rules of Procedure of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina ("Official Gazette of BiH", nos. 55/13, 96/13, 46/14, 61/14, 78/14, 27/15, 46/15, 93/16, 48/17, 88/17 and 41/18): "The duration of the separate disciplinary measures under Article 58, paragraph (2) of the Law shall be determined by the disciplinary panel on a case-by-case basis".

Lenient sanctioning policy

The 2018 Report of the Office of the Disciplinary Counsel indicates that the **sanctioning policy remains lenient** in terms of the severity of disciplinary measures imposed for disciplinary offences⁴². Specifically, in 2018 there were 27 disciplinary proceedings finding judicial officeholders guilty of disciplinary offences resulting in a total of **29 disciplinary measures, imposed severally or cumulatively, as follows: seven written warnings which shall not be made public, ten public reprimands (made public but in anonymized form), nine reductions in salary up to 50 percent for a period of one year, two removals from office, and one separate measure ordering a judge or prosecutor to participate in rehabilitation programmes, counselling, or professional training**⁴³.



Given that of a total of 29 disciplinary measures **18 were written warnings, public reprimands made public in anonymized form and separate measures ordering judges or prosecutors to participate in rehabilitation programmes, counselling or professional training**, which

⁴² 2018 Report of the Office of the Disciplinary Counsel.

⁴³ Ibid.

themselves as disciplinary measures **have disadvantages especially in terms of the repressive elements of sanctions**, we can safely say that **of a total of 29 disciplinary measures** imposed in 2018, **only 11 meet the preventive-repressive character of the substance of a disciplinary sanction, without prejudice to the severity and duration of the imposed disciplinary measure “Reduction in salary amount up to 50 percent for a period of up to one year”**, whose individualization depends entirely on the discretion of the HJPC or the disciplinary panel⁴⁴.

Example I: Anonymized public reprimand and recidivists

For example, if we analyze the proportionality between the disciplinary offences committed and the disciplinary measures imposed, or lack thereof, the anonymized decision of the first-instance disciplinary panel accepting the agreement on the joint approval of the established disciplinary liability no. 04-07-6-3397-6/2018, dated 10/12/2018, best illustrates the above statement. Specifically, according to the decision, a judge of a district court in the Republika Srpska was found guilty of the disciplinary offence “neglect or careless exercise of official duties”⁴⁵ because she, contrary to the provisions of the Rules on the Case Management System in Courts⁴⁶, “archived a criminal case that has not been made final, resulting in the case being archived for the following two years of her term in the court, which has **significantly contributed to the subsequent occurrence of the statute of limitations in relation to one of the accused ... whose criminal liability was (ultimately) not decided**”, and because of that disciplinary measure “**public reprimand**” was imposed against her. It follows that the accused whose criminal liability was not decided **was permanently acquitted of the offence he had been charged with**⁴⁷ in the proceedings led by the aforementioned judge, all because of her unlawful conduct, which she admitted in terms of the disciplinary offence that she was charged with by the Disciplinary Counsel. Possible direct consequence of such unlawful conduct by the judge is the fact that the possible victim(s) is/are forever deprived of justice and any fair compensation that they might have been entitled to based on the final decision that could have been taken against the accused. If we were to apply Article 322 (Careless Performance of Official

⁴⁴ Ibid.

⁴⁵ Article 56, paragraph (1), point 8) of the Law on the High Judicial and Prosecutorial Council of BiH (“Official Gazette of BiH”, nos. 25/04, 93/05 and 15/08).

⁴⁶ Rules on the Case Management System (CMS) in Courts (“Official Gazette of BiH”, no. 04/16).

⁴⁷ Article 95, paragraph (1), point 7) of the Criminal Code of the Republika Srpska (“Official Gazette of the Republika Srpska”, no. 64/17).

Duties) of the Criminal Code of the Republika Srpska⁴⁸ to this situation, the judge concerned would be fined up to BAM 50,000 or punished by imprisonment for a term between one and eight years, depending on the severity of the consequences resulting from the offence⁴⁹. **In considering the aggravating circumstances in this case, the first-instance disciplinary panel failed to take into consideration the fact that the judge had already been disciplinarily punished in the past, finding justification in the controversial attitude expressed in one of the former decisions of the disciplinary panel:**

“...The panel (has) concluded that the defendant had carried out certain actions for which she is found responsible in this Decision before the previous disciplinary decision was taken. Therefore, the actions carried out by the defendant and the previous disciplinary decision taken in relation to her, in this panel’ view, cannot be construed as particularly aggravating circumstances when selecting an appropriate disciplinary measure to impose in this case.”⁵⁰

This suggests that in disciplinary proceedings a practice is being established whereby a person who had committed another disciplinary offence before the decision punishing them for the first offence was taken cannot be considered a recidivist, even though this person is a *de facto* repeat offender. By taking such a position, the disciplinary panel gave precedence to the sequence of actions constituting disciplinary violations, **rather than the fact that the same person, in her capacity as judge, had already committed a disciplinary offence for which she was found responsible**. In doing so, the disciplinary panel acted in direct contravention of the rule⁵¹ which clearly stipulates that in imposing disciplinary measures the disciplinary panel **shall, *inter alia*, take into consideration the previous work and behaviour of the offender (in this case a repeat offender)**, i.e. until such time as an appropriate disciplinary measure to be imposed is considered, rather than a sequence of actions that led to the found disciplinary offence.

As opposed to the aforementioned actions of the disciplinary panel, the handbook for conducting disciplinary proceedings of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina⁵² makes it clear that if a judicial officeholder was previously sanctioned for a disciplinary offence only once, **the disciplinary measure should be stricter than the**

⁴⁸ Criminal Code of the Republika Srpska (“Official Gazette of the Republika Srpska”, no. 64/17).

⁴⁹ Ibid.

⁵⁰ Decision no. 04-02-2325-7/2014 of 17/10/2014

⁵¹ Article 59, paragraph (1), point (d) of the HJPC Law.

⁵² Handbook for conducting disciplinary proceedings of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, available at <https://usaidjp.ba/assets/files/publication/1568977621-prirucnik-za-vodenje-disciplinskog-postupka-vstv-bih.pdf>. Accessed on 12/02/2019

previously imposed disciplinary measure, with sole regard being paid to the fact that the offender had already been found responsible for a disciplinary offence, rather than the fact that the actions that led to the new offence occurred before the actions that caused the previous offence as established by the decision of the disciplinary panel.

Example II: Judicial ethics – behaviour inside or outside the court that demeans the dignity of the judicial office

By way of illustration, below are also analyzed some of the decisions that deal with recidivists from the 2018 report of the Office of the Disciplinary Counsel⁵³, which confirmed the **glaring disproportion between the disciplinary offences committed by judicial officeholders and the disciplinary measures imposed**. The decision of the High Judicial and Prosecutorial Council⁵⁴ establishing the disciplinary liability of a judge of a municipal court for the disciplinary offence referred to in Article 56, item 22 (“behaviour inside or outside the court or office that demeans the dignity of the judicial office”) shows, in a very explicit way, the type and excessive severity of the unlawful conduct of the judicial officeholder which can be classified under this disciplinary offence. Namely, after he had already been found responsible for a violation under Article 8 of the Law on Public Peace and Order of the Republika Srpska⁵⁵ by the final decision of a primary court in the Republika Srpska, the judge was also found guilty of the aforementioned disciplinary offence because “on 9 August 2015 at around 12.00 in the village of ..., municipality of, he told Đ.S., Đ.A. and Đ.N. that they were mujahedeen, that they were terrorists, told them to go to Sarajevo, and that this was not their country. He also addressed Đ.S. using the following words: “Why are you looking at me, you fat cow? Look at yourself!” and told Đ.A. that he was a mujahedeen, rapist and member of the Islamic state who had killed 10 Serbs during the war, after which he turned his back to them, took off his sweatpants and underwear and showed them his

⁵³ The numbers of decisions are listed in the HJPC’s Decision no. 01-07-10-77-177/2019 of 21/08/2019 and the Conclusion on correction of the Decision of the President of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina no. 01-07-10-77-230/2019 of 25/10/2019, which were submitted to Transparency International BiH in response to its request for access to information no. 72/19 of 05/08/2029, where, among other things, TI BiH sought delivery of copies of the final decisions of the disciplinary panels from disciplinary proceedings in which final disciplinary measures were re-imposed against judicial officeholders according to the information contained in the 2018 Report of the Office of the Disciplinary Counsel in section 2.3 Recidivism.

⁵⁴ Appeal of the defendant and the Office of the Disciplinary Counsel no. 04-07-6-602-17/2018 of 06/09/2018

⁵⁵ Law on Public Peace and Order of the Republika Srpska (“Official Gazette of the Republika Srpska”, no. 11/15), Article 8 (Insulting): “Whoever causes a feeling of physical threat or distress in citizens by harshly insulting another person on political, religious or ethnic grounds or exhibiting other reckless behaviour, shall be punished by a fine in the amount from BAM 200 to BAM 800”.

behind, thus causing them distress. In summary, the judge addressed other persons using remarks that were very derogatory and offensive on ethnic and religious grounds, thus exhibiting ethnic and religious intolerance and hate speech in a particularly brazen, reckless and unseemly manner, while also showing his intimate parts, i.e. exhibited behaviour unbecoming of his judicial office and, in doing so, sullied his reputation and demeaned the dignity of the judicial office”⁵⁶. The judge was punished by the final decision of the HJPC with a 50-percent reduction in salary for a period of one year. The seriousness and severity of such unlawful conduct by the judge is also defined in Article 359 of the Criminal Code of the Republika Srpska, which defines the responsibility for publicly inciting and instigating violence and hatred in its first paragraph as follows: “Whoever ... publicly provokes, incites or instigates... violence or hatred against a specific person or groups because of their national, racial, religious or ethnic background ... shall be punished by a fine or imprisonment for a term not exceeding three years”.⁵⁷

Even after the aforementioned claims were confirmed by the disciplinary panel and even though after the commission of the disciplinary offence the defendant addressed the same persons with provocative words “Long live Srpska and President Dodik!”, the HJPCV did not find sufficient grounds to impose the most severe sanction against the defendant, namely removal from office. In considering this allegation, the HJPC concluded that the defendant’s conduct had been related to a specific life event that occurred in the past, **thus excluding the possibility of determining potential liability for unlawful acts committed in different time intervals**. Also, in deliberating about the appropriate disciplinary measure to impose, the disciplinary panel completely ignored the provisions of the Code of Judicial Ethics⁵⁸, which are very strict in terms of the high standards expected of judges in regard to their behaviour inside and outside the court, but also in regard to their participation in political discussions.

Example III: Gross violation of regulations as a disciplinary offence

Another interesting case concerns the decision of the second-instance disciplinary panel⁵⁹ finding a municipal court judge in the Federation of Bosnia and Herzegovina guilty of disciplinary offences

⁵⁶ Decision of the High Judicial and Prosecutorial Council no. 04-07-6-602-17/2018 of 06/09/2018

⁵⁷ Criminal Code of the Republika Srpska (“Official Gazette of the Republika Srpska”, no. 64/17).

⁵⁸ Code of Judicial Ethics (“Official Gazette of BiH”, nos. 13/06 and 24/05)

⁵⁹ Decision no. 04-07-7-512-1/2018 of 26/01/2018

relating to gross violation of procedural rules, patent violation of the law and procedural delays⁶⁰ because she failed to serve the complaint on the defendant for response, in contravention of the rules of civil procedure, which ultimately resulted in the judgment for failure to act. In doing so, the judge demonstrated utter disregard for the defendant's basic procedural right to respond to the allegations in a suit concerning property rights. The judge was also found guilty of failing to inform the Constitutional Court about the measures taken as per the order of that court. Furthermore, the second-instance disciplinary panel confirmed the judge's disciplinary liability established by the first-instance disciplinary panel with regard to the fact that in one case she failed to decide on a temporary protection measure within a period of two years, thus rendering the measure pointless in terms of providing effective judicial protection. In another case, as a result of filing a case erroneously she failed to submit an appeal for further action for three years. Furthermore, in yet another case, she exceeded the period of about five months in making a judgment, and over a certain period of time, despite warnings by the president of the municipal court, did not respect the prescribed working hours by coming late and to work, and violated the procedures for mandatory use of identity cards when leaving the courthouse. Therefore, the judge was found guilty of a series of disciplinary offences⁶¹. For the aforementioned disciplinary offences, the disciplinary measure of **30-percent salary cut for a period of eight months was imposed on the judge**⁶². The sheer number and nature of the offences clearly indicate the **utter incompetence on the part of the judge, as well as a glaring disproportion between the disciplinary measure imposed and the number and severity of the disciplinary offences committed**. This is particularly so when considering the criminal offences that could be applied here (Careless Performance of Official Duties and Breach of Law by a Judge⁶³), **whereby the judge could have been punished by a fine or imprisonment for a term not exceeding five years, as well as the fact that a disciplinary action is pending against her**⁶⁴ because she had ignored a request for her recusal, i.e. failed to forward the request to the Court President for further action⁶⁵. This clearly indicates that the previously imposed

⁶⁰ Offences referred to in Article 56, points 9) and 10) of the HJPC Law.

⁶¹ As follows: Article 57, point 8) "neglect or careless exercise of official duties", Article 56, point 9) "issuing decisions in patent violation of the law or persistent and unjustified violation of procedural rules", Article 56, point 22) "behaviour inside or outside the court that demeans the dignity of judge" of the HJPC Law

⁶² Article 58, paragraph (1), point c) of the HJPC Law.

⁶³ Articles 357 and 387 of the Criminal Code of FBiH ("Official Gazette of the Federation of BiH", nos. 36/2003, 21/2004 - corr., 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016 and 75/2017).

⁶⁴ Civil Procedure Code of FBiH ("Official Gazette of FBiH", nos. 53/03, 73/05, 19/06 and 98/15).

⁶⁵ Information about the unlawful conduct of the judge was obtained during the monitoring of disciplinary proceedings conducted by TI BiH, where TI BiH representatives participated in their capacity as the public.

disciplinary measure did not achieve its repressive and preventive purpose with regard to the judge concerned.

The only conclusion to be drawn from the foregoing is that the discretionary powers given to the HJPC in determining appropriate disciplinary measures for judicial officeholders found guilty of disciplinary breaches has greatly compromised the proportionality between the sanction(s) imposed and the severity of the disciplinary offences committed.

Recommendations for improving disciplinary liability of judicial officeholders

Recommendation I:

It is vital to make disciplinary proceedings against judges and prosecutors public in the sense of making it possible for the public to have access to both first-instance and second-instance disciplinary decisions without anonymization.

Recommendation II:

Increase the number of disciplinary measures so that each measure is proportional to the disciplinary breach under the law with a view to minimizing the HJPC's discretionary powers in determining the appropriate disciplinary measure.

Recommendation III:

When deciding on the disciplinary liability of a judge and prosecutor, the disciplinary panels should be guided solely by the applicable legislation and regulations. It is necessary to consider adopting a different procedural model of disciplinary proceedings aimed at reducing the importance and role of HJPC throughout the process.

**Conclusions of the Roundtable
“Disciplinary Liability of Judicial Officeholders”
held on 28 February 2020 in Sarajevo**

1. Improve the transparency of disciplinary proceedings against judicial officeholders, and allow the disclosure of first-instance and second-instance disciplinary decisions without anonymization of names of judges and prosecutors;

2. Increase the independence of the Office of the Disciplinary Counsel from the institution of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina and consider the possibility of a complete institutional separation of the Office of the Disciplinary Counsel from the institution of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina;

3. Strengthen the system of checks and balances within the judiciary in Bosnia and Herzegovina in order to prevent and early identify the systemic flaws that often lead, directly or indirectly, to the initiation of disciplinary proceedings against judicial officeholders.

The round table was attended by representatives of the following institutions, embassies and non-governmental organizations:

1. High Judicial and Prosecutorial Council of Bosnia and Herzegovina
2. Office of the Disciplinary Counsel of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina
3. Court of Bosnia and Herzegovina
4. Personal Data Protection Agency in Bosnia and Herzegovina
5. Delegation of the European Union in Bosnia and Herzegovina
6. Organization for Security and Cooperation in Europe (OSCE) Mission in Bosnia and Herzegovina
7. Embassy of the United Kingdom in Bosnia and Herzegovina
8. Royal Netherlands Embassy in Bosnia and Herzegovina
9. Royal Norwegian Embassy in Bosnia and Herzegovina
10. Faculty of Law, University of Zenica
11. Balkan Investigative Reporting Network
12. Centre for Investigative Reporting