**Answers** – Questionnaire of the Special Rapporteur on the independence of judges and lawyers

1.

There is one judicial regulator in BiH, the High Judicial and Prosecutorial Council of BiH (the HJPC), which is responsible for both courts and prosecutor's offices. The HJPC was established by the Law on the HJPC (“Official Gazette of BiH”, number 25/04, 93/05, 48/07 and 15/08) as an independent and autonomous authority tasked with ensuring an independent, impartial and professional judiciary. The role of the HJPC is defined by the Law on the HJPC which sets forth that the HJPC, as an independent and autonomous body, has the task to ensure an independent, impartial and professional judiciary (Article 3). Even though the Constitution of BiH does not contain explicit provisions on the HJPC, the establishment and existence of this institution do have a constitutional basis. Such basis is contained in the Agreement on the Transfer of Certain Entity Responsibilities through the Establishment of the High Judicial and Prosecutorial Council of BiH that was signed by the Entities in March 2004, pursuant to Article III.5 (B) of the BiH Constitution. The Agreement granted the HJPC the primary responsibility for the judiciary at all levels in the entire BiH, more specifically, the responsibility for autonomy, independence, impartiality and efficiency of the judiciary, including the prosecution service in FBiH and RS, and at the level of BiH.

**Role/competences of the HJPC**

The role of the HJPC is defined by the Law on the HJPC which sets forth that the HJPC, as an independent and autonomous body, has the task to ensure an independent, impartial and professional judiciary (Article 3), and has the following competencies (Article 17):

* Appointment of judicial office holders;
* determining disciplinary liability of judicial office holders and imposing disciplinary measures;
* Supervising training and continuing professional development of judicial office holders and making decisions in this area;
* Determining minimum professional training requirements for all judges and prosecutors for each year; approving annual reports and work programs of the judicial and prosecutorial training centres, etc.;
* Providing guidelines/recommendations and cooperating with relevant authorities in the process of planning and approval of budgets for courts and prosecutor’s offices, to enable their adequate and uninterrupted funding;
* Participating in drafting and approving books of rules on internal operations of courts and prosecutor’s offices, determining systematisation of judicial and prosecutorial positions in consultation with relevant authorities;
* determining the criteria for the performance evaluations for judges and prosecutors as well as courts and prosecutor's offices, overseeing and advising courts and prosecutor's offices regarding budget, administration and management and initiating training in this regard;
* launching, overseeing and coordinating projects related to the administration of courts and prosecutor’s offices, including seeking funds from domestic and international sources;
* leading, coordinating and overseeing the utilisation of information technology in courts and prosecutor’s offices;
* Providing opinions on draft laws, legislation or issues of importance that may affect the judiciary, initiating the procedure for the adoption of relevant laws and other legislation;
* Issuing codes of ethics for judges and prosecutors; and
* Exercising other competencies set forth under the Law, such as providing opinions on complaints lodged by judges or prosecutors in case that their rights or independence are threatened, deciding upon issues of incompatibility with other functions, deciding upon leaves of absence, temporary transfer, maintaining records concerning judicial office holders.

The above competences of the HJPC refer to all courts, excluding constitutional courts, and all prosecutor's offices.

Also, the HJPC has limited competences with regard to entities’ constitutional courts, limited only to making recommendation to the authorities for appointment of constitutional court judges. The HJPC has no competences whatsoever relating to the Constitutional Court of BiH.

2.

**Composition and organisation of the HJPC**

The HJPC has 15 members, namely:

1. a judge from the Court of Bosnia and Herzegovina, elected by the judges of that Court;
2. a judge from the Supreme Court of FBiH, elected by the judges of that Court;
3. a judge from the Supreme Court of the RS, elected by the judges of that Court;
4. a judge from either a Cantonal or Municipal level court of FBiH elected by the judges of Cantonal and Municipal courts;
5. a judge from a District or Basic level court of the RS, elected by the judges of district and basic courts (this includes the judges of High Commercial and district commercial courts in the RS);
6. a prosecutor from the Prosecutor’s Office of BiH, elected by the prosecutors of that Office;
7. a prosecutor from the Prosecutor’s Office of FBiH, elected by the prosecutors of that Office;
8. a prosecutor from the Prosecutor’s Office of the RS, elected by the prosecutors of that Office;
9. a prosecutor from a Cantonal Prosecutor’s Office of FBiH, elected by cantonal prosecutors;
10. a prosecutor from a District Prosecutor’s Office of the RS, elected by district prosecutors
11. a judge or prosecutor from BD, elected by the BD Judicial Commission;
12. an attorney, elected by the Bar Association of FBiH;
13. an attorney, elected by the Bar Association of the RS;
14. one member who is not a member of the judiciary or a member of the Parliamentary Assembly of Bosnia and Herzegovina, elected by the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina; and
15. one member who is not a member of the judiciary and who is not a member of the Council of Ministers of Bosnia and Herzegovina, elected by the Council of Ministers of Bosnia and Herzegovina upon the proposal of the BiH Justice Minister.

The independence of this institution is also reflected in the composition of the HJPC members and their selection method. Of 15 members, 11 Council members are judges and prosecutors who are elected by their peers, and they make up more than two thirds of the total number. The legislative and executive authorities have no influence on the selection of the HJPC members, with the exception of selection of two members, namely:

* one member elected by the House of Representatives of the Parliamentary Assembly of BiH, who cannot be a member of that legislative body, and
* one member elected by the Council of Ministers of BiH upon the proposal of the Ministry of Justice of BiH, who cannot be a member of the Council of Ministers of BiH.

Pursuant to the law on the HJPC, of the 15 members, only four work in the HJPC on a full time basis – the president and two vice-presidents of the HJPC, and another member selected by the HJPC. Other members participate in the work of the HJPC and at the same time continue to perform their primary duties/tasks.

Members of the HJPC are appointed for a term of four years renewable consecutively, but not more than twice. A person who served in two terms consecutively may not be reappointed as HJPC member until the expiry of four years since the end of the person’s previous term. There is no special procedure in place for renewing the term of office of an HJPC member. A member of the HJPC who wants to be reappointed, applies to be a member and goes through the same election procedure as described above.

In terms of qualifications or criteria for the election of HJPC members, the Law on the HJPC sets forth that the HJPC members should be individuals of high moral standing and professional impartiality, recognised for their efficiency, expertise and professional impartiality. HJPC members are independent and impartial in the performance of their duties. Given that the majority of members are elected from the judicial community, the HJPC is mostly composed of jurists who have passed their bar exams (judges, prosecutors or lawyers).

**Human and financial resources**

The HJPC has its own budget, as well as staff members who perform positions within the Secretariat, Office of the Disciplinary Counsel and the Cabinet. Besides, the HJPC also hires additional staff members for the implementation of donor funded judicial reform projects.

The Secretariat performs professional, financial and administrative tasks of the HJPC and has its Director and Deputy Director, who are responsible to the HJPC.

Office of the Disciplinary Counsel performs the prosecutorial function concerning allegations of misconduct against judges or prosecutors. The Office consists of the Chief Counsel, deputies to the chief counsel, disciplinary counsels and other employees. The Cabinet provides administrative and professional support to the HJPC Presidency. The Structure, organisation and job positions in the Secretariat, Office of the Disciplinary Counsel and the Cabinet are defined by the Book of Rules on internal organisation and job classification.

The HJPC Annual Budget is set up at 5.000.000 KM (2.555.000 Eur).

Pursuant to the Law on the HJPC (Article 2) the HJPC receives funding from the budget for state institutions and international obligations of BiH. Also, the Law (in Article 15) prescribes that the HJPC may receive funds from international donors for the operational budget of the HJPC, as well as for special judicial reform projects outside of the operational budget of the HJPC. Such funds are deposited into the special account opened with the Central Bank of BiH.

Since 2009 austerity measures have been introduced in the state institutions in accordance with the adopted Global Framework for Fiscal Balance and Policies in BiH, due to signing of an Stand-By Arrangement with the IMF. These measures imposed an employment freeze in public sector, causing some job positions in the HJPC to remain vacant (82 filled and 21 vacant position). Accordingly, the HJPC has had insufficient capacities to efficiently implement the activities of judicial administration (efficiency and quality), ICT (efficiency, digitalisation and evaluation) and conduct disciplinary investigations. The current staffing level is not sufficient to maintain, develop and provide services within the HJPC and towards the professional judicial community.

The insufficient capacities of the HJPC, in particular those necessary for the activities of judicial administration and ICT, have been compensated by engaging donor funded project staff. The number of project staff in the HJPC, hired to compensate for the efficiency and effectiveness in the performance of tasks, varies in accordance with the dynamics of implementation of strategic goals of the HJPC, and on average that number is approximately 55 persons.

3.

**The selection and appointment of candidates**

The Law on the HJPC (Article 17 items 1 and 2) prescribes the competence of the HJPC for appointing judges to all courts in BiH, including court presidents, reserve judges and lay judges. The same Article also prescribes the competence of the HJPC to appoint prosecutors to all prosecutor’s offices in BiH, including chief prosecutors and deputy chief prosecutors.

Bodies that implement appointment procedure

The HJPC implements the appointment procedure through its bodies, namely the sub-councils for nomination of candidates and the panels for interviewing candidates.

Sub-councils that nominate candidates for appointment are:

* Sub-council at the level of BiH, which conducts interviews and nominates candidates for judicial positions at the level of BiH (the Court and the Prosecutor’s Office of BiH).
* Sub-council for BD, which conducts interviews and nominates candidates for judicial positions in BD.
* Sub-council for the RS, which nominates candidates for the appointment to judicial and prosecutorial offices in the RS.
* Sub-council for the Federation of BiH, which nominates candidates for the appointment to judicial and prosecutorial offices in FBiH.

Pursuant to the HJPC Rules of Procedure, the entity sub-councils for nomination appoint interview panels that comprise at least 3 HJPC members.

The final decision on all appointments is made by the HJPC as a whole.

Procedure and criteria for the appointment

Once a position in courts or prosecutor’s offices is made vacant, the HJPC announces a public vacancy to fill the position.

The public competition includes: entrance exam and written test for the candidates that are required to take entrance exam and written test (Article 4 of the Book of Rules on Entrance Exams and Written Tests for candidates applying for judicial offices in the judiciary of BiH - hereinafter the Book of Rules on Entrance Exams and Written Tests), interview with the candidates, ranking and nomination of the candidates.

The candidates’ competencies are assessed in three ways, depending on their category.

Entrance exam assesses the competence of the candidates who do not hold the office of a judge or prosecutor and whose appointment would constitute “first entry to the judiciary” (the first level).

Written test assesses the competencies of the candidates who do not hold the office of a judge or prosecutor and are applying to higher level positions (mid and highest level).

The competence of the candidates who hold judicial office is assessed based on their performance evaluation for the past three years.

The competence is assessed against the completely objectivised criteria and it carries 80% in the overall assessment of the candidate, which is a significant guarantee that the best candidate for the judicial position will be selected.

Other criteria are tested during a structured interview, which carries 20% of the overall assessment.

**Condition of service and security of tenure**

The Law on the High Judicial and Prosecutorial Council provides for an indefinite term of office for judges and prosecutors.

The appointment can be terminated only in the following cases:

* when a judge or prosecutor reaches mandatory retirement age,
* resigns, or
* is removed from office as a result of disciplinary action, or becomes incapable of performing the duties of the office.

The same rules on the term in office for judges are contained in the entity constitutions (Article 127 of the RS Constitution and Art. IV.C.2.6., V.4.11. And VI.7 of the FBiH Constitution).

Exceptions are additional judges who are appointed temporarily to assist courts in reducing the backlog, or where the prolonged absence of a judge requires additional number of judges in a particular court. Reserve judges must meet the same requirements as judges of the court to which they are to be appointed, and the procedure for their appointment is the same as for regular judges.

The term of office of reserve judges may be extended subject to satisfactory performance, if there is a need for an additional judge in the court and if financial resources are secured.

During the term of office or after its expiry, additional judges may apply to vacancies for regular judge posts and be appointed on permanent tenure through regular competition procedure.

The mandatory retirement age for judges and prosecutors is 70. A retired judge or prosecutor may be appointed as a reserve judge and serve up to 72 years of age.

There is no separate decision granting permanent tenure as judges and prosecutors are initially appointed for a permanent tenure, with no probation period.

**Promotion**

The Law on the HJPC does not specifically provide for a promotion process, and all vacant position are filled by public vacancy announcements. When assessing the candidate who applies for a higher position and whose appointment would constitute a promotion, the HJPC certainly takes into account the performance of the candidate in their position as a judge or prosecutor at a lower level court or prosecutor’s office, as well as the length of service as judge or prosecutor or other relevant legal work experience.

All decisions on appointment of judges and prosecutors are made by the HJPC as a whole and such decisions are final. The Law on the HJPC does not provide for a possibility to appeal or invoke other legal remedy against final decisions on appointment.

Criteria for the evaluation of judges and court presidents

The criteria for evaluating the performance of judges were adopted in 2012 and amended in 2013, 2014 and 2016. The performance evaluation criteria for judges:

1. Framework quota achieved,
2. Quality of decisions achieved,
3. Attitude to work and
4. Special cases of evaluation (judges are awarded points in special cases of evaluation: if a judge worked on two or more case categories in different departments or if a judge acted as trainer and was assessed highly for the quality of training– very good and excellent.)

The performance evaluation criteria for court presidents were adopted in 2012 and amended in 2013, 2014 and 2016. The performance evaluation criteria for court presidents:

1. Court president’s work on cases (individually attained framework quota, individual quality of decisions and individual attitude to work),
2. Collectively attained framework quota of the court,
3. Organisation and management of the court operations, and
4. Special cases of evaluation (presidents are awarded points for special cases of evaluation: if he/she worked on cases during the evaluation period despite being relived from working directly on cases due to the size of their court or if the court president was a trainer and highly assessed for the quality of the training – very good or excellent).

**Transfer of judges**

The immovability of judges is guaranteed by the Law on the HJPC, as permanent transfer of judges from one court to another is not envisaged, except as a result of disciplinary action and the imposition of a disciplinary measure of permanent transfer.

Temporary transfer of judges is possible in two cases:

* disciplinary sanction of temporary assignment to another court. The judge against whom the disciplinary sanction is imposed has the possibility to appeal.
* temporary assignment of a judge from one court to another.

The reasons for the temporary assignment, as well as the limitations in terms of duration of temporary assignment are stipulated by the Law on the HJPC (art. 50, 51, and 52 thereof). Temporary assignment may be with or without the consent of a judge.

Judges may be assigned to perform judicial service, with their consent, to another court of the same or lower instance:

* 1. for a period of no longer than six (6) months, for the reason that there is an insufficient number of judges at the court to which they are being temporarily assigned (in further text: “the receiving court”);
  2. for a period of no longer than twelve (12) months, for the reason that there is a temporary reduction in the workload of the court in which he or she regularly performs judicial service;
  3. for a period of no longer than twelve (12) months, in order to assist in the elimination of backlogs in the caseload of the receiving court;
  4. for an indefinite period, for the reason that the judge is assigned to deal with a particular case or cases in the receiving court where the recusal of a judge at that court necessitates the temporary assignment of a judge from another court to deal with such case or cases;
  5. for an indefinite period, for the reason that a judge at the receiving court is on extended leave.

A judge may not be temporarily assigned to another court on more than two consecutive occasions, unless he or she has, in the meantime, been performing judicial service at the court to which he or she was appointed for a period of at least twelve months.

A judge may be assigned to perform judicial function in another court without his or her consent for a period of up to three months, in the event that such assignment is in order to participate in one particular case at the receiving court, or in the event that no other judge has consented to such an assignment.

A judge may not be temporarily assigned to another court without his or her consent if he or she has been the subject of a temporary assignment in the preceding twelve months.

A temporary assignment of judges, with or without consent, is decided by the HJPC.

Judges may not appeal the decision on the temporary assignment.

However, the statutory limitation of the duration of temporary assignment without the consent of a judge (only 3 months), and prescribed limitations in terms of frequency of such assignments, protect judges against assignment without consent.

In practice, so far there has been no temporary assignment of a judge without his/her consent.

**Disciplinary proceedings**

A judge or prosecutor is held liable for any disciplinary offence committed either with intent or negligently.

The Office of the Disciplinary Counsel, as an autonomous office within the HJPC, investigates allegations of misconduct against judges and prosecutors, and initiates and presents cases of disciplinary violations before the disciplinary panels of the HJPC.

Disciplinary proceedings are conducted by the First Instance Disciplinary Panel and the Second Instance Disciplinary Panel. The First Instance Disciplinary Panel is composed of three members, at least two of whom are the members of the HJPC; it determines disciplinary liability and imposes measures. The Second Instance Disciplinary Panel is composed of three members of the HJPC; it decides appeals against decisions of the First Instance Disciplinary Panel. An appeal to the full membership of the Council is possible against a disciplinary measure determined by the Second Instance Disciplinary Panel. Members of the first and second instance panels are eligible to participate in decision-making, unless their disqualification is required for a reason other than their prior participation in adjudication of the same matter.

A judge or prosecutor who has been removed by decision of the HJPC may appeal to the Court of Bosnia and Herzegovina if the HJPC materially violated the procedures set out in the Law on the HJPC or erroneously applied the Law in the course of disciplinary proceedings.

Final decision of the HJPC or of the Court of BiH can be appealed before the Constitutional Court by a judge/ prosecutor, if he/she considers that the disciplinary proceedings violated his/her constitutional rights or freedoms.