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Is the protection and promotion of the image of justice part of the Councils' duties?

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Is the **promotion and protection** of the image of **justice**
part of the Council's **duties**?

1. Introduction

I would firstly like to limit somewhat the scope of my presentation here today. I have not carried out any empiric research of councils across Europe and, therefore I will limit myself to the question as to whether Councils **should** protect and promote the image of justice as part of their duties rather than whether they actually do.

From my point of view I think there can be no option but to answer this question in the affirmative. In many ways the promotion and protection of justice is what councils are all about and the promotion and protection of the image of justice in a positive manner is the very value or idea which underpins the establishment of judicial councils. It follows, therefore, in my view that councils across Europe need to devote a considerable amount of time and effort to this subject.

I also believe that councils are ideally placed to promote and protect the image of justice because they are independent from the legislative and executive powers and they do not, therefore, represent interests but simply promote values. This independent position allows councils to convey consistent, standardized messages in relation to promoting and protecting the image of justice divorced from prevailing political winds.

2. To WHAT EXTENT should councils promote and protect the image of justice?

When I refer to the “promotion” of the image of justice I am referring to the day-to-day activities which judicial councils regularly and consistently undertake in order to enhance the image of justice amongst citizens. When I refer to the “protection” of the image of justice I am referring to the manner in which the image of justice should be defended and protected when it is subject to active attack and criticism (typically by politicians and the media).

I think that all judicial councils have a duty to promote and protect the image of justice (whether explicit or implicit) regardless of the specific wording of the mandate of the Council. The council in Bosnia and Herzegovina has an indirect mandate under Article 3 of the Law on the HJPC which provides that the HJPC is tasked to ensure:

“the maintenance of an independent, impartial and professional judiciary.....”.

To what **extent** councils should promote and protect the image of justice depends, however, on the mandate which has been assigned to them under the law. Councils cannot be expected (nor should they be expected) to be responsible for the promotion and protection of issues which are outside their control and, in particular, should not be responsible for protecting and promoting the image of justice in general when their area of responsibility covers the judiciary only.

In general terms it should be noted that the chain of justice is long and includes many actors responsible for the various parts of the chain. Councils normally have specific responsibilities for specific parts of the chain. However, the overall (and political) responsibility for the functionality of the justice system as a whole must continue to rest with the executive and legislative authorities and NOT with the judicial councils.

Many councils have quite narrowly defined competences when it comes even to the judiciary. For example, certain councils only have competence with respect to the appointment of judges and prosecutors. If a council's duties are narrowly defined the duties incumbent on the council in terms of the promotion and protection of the image of justice should also be narrowly defined and restricted to its specific duties under the law.

In Bosnia and Herzegovina the HJPC has a broad mandate which covers the following:

- Appointment and disciplining of judges and prosecutors;
- Wide competences in relation to the administration of courts and prosecutors' offices;
- Wide competences in relation to the training of judges and prosecutors in BiH.

This means that the obligation on the HJPC to promote the image of the judiciary is probably more onerous than other councils around Europe.

3. HOW should the image of justice be protected and promoted?

3.1 *Introduction*

Without wishing to state the obvious the council needs to promote and protect the image of justice in accordance with the values which it promotes.

In general terms, the council in BiH protects and promotes the image of justice with respect to the following values:

- Judicial independence;
- Judicial accountability;
- Judicial effectiveness;
- Judicial quality;
- Judicial transparency.

The policy of the council in terms of promoting and protecting the image of justice must be based on the actual carrying out of its mandate (work) in terms of these values. If the council does not **actually** promote and protect these values then it cannot promote an image of so doing.

In promoting these values councils need to be **transparent** at all times. Because of a perceived problem with a lack of accountability as a result of the need for independence from the executive and legislative authorities, it is extremely important that this is compensated for through a wide range of measures aimed at ensuring transparency in the operation of judicial councils.

3.2 Communication tools in promoting/protecting the image of justice

Every council needs a **communications plan** which addresses how it should promote the image of justice.

The plan should be used to communicate the progress of the councils own activities to the public and to the powers of government. It is not sufficient that the work is done – it must be advertised as having been done in an effective and efficient manner. This is particularly important when dealing with judiciaries which were subject to corruption and/or were viewed as inefficient in the past (transitional countries). It is extremely difficult to change the public perception of the judiciary even if significant reforms have been carried out and, in addition, even if the results of these reforms have been objectively verified. Therefore, a communications plan is essential.

The communications plan should also explain to the public that the council, when carrying out its mandate, is not representing the interests of judges and prosecutors as such but rather representing commonly shared **values**. In short, the council is not a union for judges and prosecutors. It can sometimes be quite difficult to communicate this message and quite a sophisticated communications strategy is therefore necessary. One example of this which comes to mind and which illustrates the point rather well is that of judicial salaries. The level and protection of judicial salaries are obviously linked to judicial independence which is a commonly shared value. When judicial councils are discussing judicial salaries (and in particular, the increase of judicial salaries) and/or constitutional protection of such salaries they must represent the interests of the judicial system and not simply individual interests. In BiH, which has a council with a majority of judges and prosecutors, the council was asked to support an effort to reduce salaries and benefits for judges and prosecutors. This led to one of the most difficult discussions in the council thus far. Not only was it difficult for the council members to support the

reduction of their own salaries (which was necessary because they were so out of line with the average salary and were increasing at a rate which was out of control) but it was also difficult for them to defend such support vis-à-vis their colleagues in the judiciary. However, the council members came up to the plate and voted for the reform thus putting the interests of the system ahead of their individual interests. This decision helped significantly with building public trust and with promoting the image of the judiciary in a positive light.

In addition to having an effective communications plan for its own work, a council needs to establish objective and transparent reporting procedures with respect to the work of the judiciary itself. The public has a right to know the number of backlog cases which are in the system, the average time it takes or should take to solve cases, the performance of each court, etc. Comprehensive data on these issues is of the utmost importance if the trust of the public is to be gained and if a positive image of the judiciary is to be built.

The annual report of the HJPC to the parliaments of BiH is the most important mechanism for informing the legislative authority about the work of the judiciary. It is presented directly to the BiH parliament and delegates may ask questions of the HJPC president with respect to the contents of the report. In addition, delegates may express criticism and make proposals for improvements that do not interfere with the independence of the council.

The presentation of the annual report is also important in terms of communication to the general public. The media tends to be very interested in the results which are published and quite an amount of coverage is given to these figures.

In promoting the image of the judiciary, it is also important that the council implements a strict disciplinary system so as to adequately balance the independence of the judiciary with the accountability of the judiciary. The council must act in a transparent manner with respect to the operation of the disciplinary system. This can be done by the publication of lists of disciplinary actions on its web page and by addressing disciplinary actions with the media in general terms. There are ongoing discussions in the HJPC with respect to the extent to which one should go public about ongoing and finalized disciplinary procedures. I am firmly of the view that when balancing the competing interests one must prioritize the interests of the system over the interests of individual judges and prosecutors and that, therefore, a great amount of transparency is needed.

3.3 *Communication tools within the relevant political and social context*

When addressing politically sensitive issues it is important for councils to be careful to protect their own core issues but not to be unnecessarily drawn into sensitive political issues. Councils need to protect the minimum standards which they require but not to engage in political debates on optimum solutions which do not directly concern them.

When promoting the image of justice councils also need to pay attention to factors which are relevant to the political and social context in which they operate. In BiH these factors are, as follows:

- Ethnicity;
- Factors associated with the fact that it is a post conflict environment;
- Factors associated with the fact that it is a country with a communist past.

The manner in which councils take these issues into account as general background for their decisions will significantly impact on how successful they are in promoting the image of justice.

In BiH, for example, it would not be sufficient to simply select the best candidate for the position – the “right” ethnicity must also be selected. A fully efficient, independent and accountable (but mono-ethnic) judiciary would not promote the image of justice in the eyes of the BiH public.

Factors which are relevant to the political and social context may also influence the emphasis which is placed on commonly held values. For example, in judiciaries which were previously under the control of other powers of state, it is particularly important to communicate independence as a value and this may be to the detriment of accountability.

4. Particular issues which arise in defending the image of justice

4.1 General comments

Particular sensitivity must be exercised when the work of the council and or the judiciary is being attacked. It is important not to immediately conclude that this is an attack on the core values of the council or on the image of justice.

Constructive (and even to a limited extent non-constructive criticism) must be tolerated and not dismissed as an attack on the independence of the judiciary. Independence of the judiciary is not a shield behind which the council can hide from interactive and intense dialogue with the other powers of state, the media and the public.

However, a council must have a plan as to how to actively defend the image of justice when the council itself, the values which it represents or the judiciary are under unreasonable attack.

According to Article 17 of the law on the HJPC a judge or prosecutor may address the HJPC when he/she is of the view that his/her independence is under attack and ask for support or protection.

In such cases – when the independence of individual judges/prosecutors is under attack – the threshold for reaction should be low and the reaction should be swift.

In other circumstances, when the system or the work of the council is under attack one should be more flexible and accommodating. Deciding whether it is appropriate or not appropriate (or at all necessary) to react to such attacks is often difficult.

My experience is that an answer is often NOT needed and that to ignore the attacker is often just as efficient as engaging in a dialogue. A council should be particularly careful when reacting if the result could easily be that the council becomes embroiled in a political debate dominated by competing **interests** rather than competing **values**.

Attacks from the other powers of state (politicians) require specific sensitivity. Regardless of how unreasonable the attack is it is important to see the issue at hand in a constitutional framework and the response should be framed in this formal context – both with respect to content and style.

Much attention and consideration should be paid to the language and style the council is using when defending the image of justice.

Personally I think the tone should be dry, intellectual and rather dull with every effort made to avoid the sensational. It should be factually oriented, restrained, always correct and accurate. One should try to convince through valid argumentation and substance and not through rhetoric and style. Maybe one should make it a point to communicate differently than the attacker and thereby distance oneself from the political debate also with respect to style. Consistent and **value loaded** argumentation should prevail.

4.2 Responses to attacks by individual judges and prosecutors

It should be possible for everybody to share the core values communicated by the council and these **values** should always be the reference point for its communication – in particular in difficult circumstances.

This is also why individual judges and prosecutors SHOULD NOT – as a rule – engage in defending themselves against attacks on their independence and/or the independence of their court/prosecutor's office and/or the judicial system in general.

I strongly support the opinion of the Consultative Committee of judges given on this issue when the following was stated:

“When a judge or a court is challenged or attacked by the media (or by political or other social actors by way of the media) for reasons connected with the administration of justice, the CCJE considers that, in view of the duty of judicial self restraint the judge involved should refrain from reactions through the same channels. Bearing in mind the fact that the courts can rectify erroneous information diffused in the press, the CCJE believes it would be desirable that the national judiciaries benefit from the support of a person or a body (e.g. the Higher Council for the Judiciary or judges’ associations) able and ready to respond promptly and efficiently to such challenges or attacks in appropriate cases”.

The direct engagement of individual judges interferes with the integrity of judicial office. The respect and authority of a judge is based on many factors – but one important factor is that judges are at distance from their surroundings, they listen and decide but they do not engage in debates. Their decisions are final. They are not up for discussion. A judge does not “change his/her mind” through open interaction. Participation of a judge in the public political debate is therefore fundamentally in contradiction to the role of a judge.