4 THE JUDICIARY IN ANTICORRUPTION

In the post-communist environment of some of the SELDI countries, initial constitutional arrangements tried to ensure that the judicial branch occupied a proper balancing position in the division of powers. The judiciary was initially heavily influenced by government and all the early efforts were intended to make it as independent as possible. The basis for this autonomy was thought to be the creation of a self-governing mechanism through elections among magistrates.

The initial **strong emphasis on independence has not been balanced by equally strong requirements for public accountability**. For independence from executive interference to have become the basis of profound reform it needed a critical mass of genuinely reformist electoral body – which was not in existence. Without such body to drive the demand for openness and integrity, the newly created institutions reflected the general situation among magistrates. Even radical measures did not produce the intended effect: in 2009 – 2010, Kosovo and Serbia, for example, attempted a mass evaluation and reappointment procedure for all magistrates, with mixed results at best, and possibly with the "solution being worse than the problem."[89]

Thus, an overemphasis on formal electoral independence became a typical example of the cure turning into the disease – instead of ensuring a balance to the power of the executive, self-governance perpetuated clientele-type relations between magistrates and special interests. A decade or two later, **the judicial branch had been as effectively captured as the other branches**. Once emancipated from both public scrutiny and the political factors that brought about such arrangements, there are today **no checks on the rent-seeking by magistrates.**

The capacity of the judiciary in the SELDI countries to enforce anticorruption legislation, especially as regards political corruption, has been undermined by a number of problems that have exerted their influence cumulatively:

- Constitutional issues, primarily related to **restoring the balance between independence and accountability**;
- The complexity of the criminal prosecution of perpetrators of criminal offenses of corruption, especially at the political level;
- Overall insufficient capacity and the related issues of low professionalism, excessive workload and resulting backlog of cases, case management, facilities, etc.

Although they do not enjoy as much room in the public attention as elected politicians, magistrates hold the key to proper function of any other mechanism of good governance – justice. In the societies of the SELDI countries where corruption has penetrated most social and public institutions, the judiciary is no exception. The judicial branch has been plagued by a number of problems – excessive workload, low professionalism, poor facilities – but corruption is the one that truly compromises the role of the judiciary in an open society. Corruption has this effect because it undermines the key prerequisite for the administration of justice – public trust. While other institutions of government can still perform some of its services in an environment of low trust, the effectiveness of courts is diminished with every drop in civic confidence. Thus, the effectiveness of the administration of justice in Southeast Europe should be assessed not only by the statistics on the enforcement of anticorruption criminal legislation, but also through the broader **trust the public has in the justice system**. The measurement of this trust needs to accompany the evaluation of judicial performance in the region.[90]

The judiciaries in the SELDI countries have been at a disadvantage compared to the other branches of power as they were not as engaged with the most powerful factor driving good governance in the last two decades – the process of integration with the EU. Magistrates have been largely side-lined in this process. Although the judiciaries were both criticised by the European Commission and provided with various kinds of assistance, they lacked the kind constructive engagement with the EU institutions that benefited the executive government.

An important finding of this SELDI round that is relevant to the judicial role in anticorruption is the

[89] (Romanian Center for European Policies, 2011, pp. 186-191).

[90] A set of indicators for measuring trust in the criminal justice system has been developed in (Center for the Study of Democracy, 2011b).

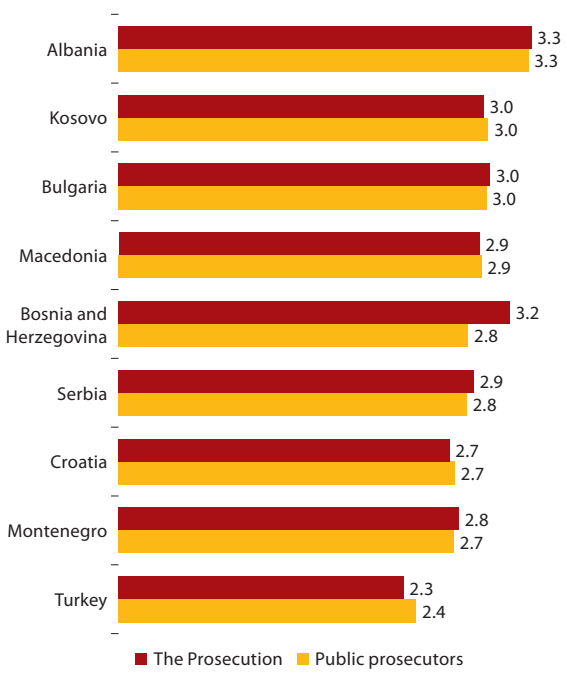
absence of feedback mechanisms that allow the public and policy makers to evaluate both the integrity of the judiciary and its effectiveness in applying criminal anticorruption laws. In none of the SEE countries is there a reliable, systematic and comprehensive mechanism for collecting, processing and making publicly available statistics on the work of the courts and the prosecution, in particular on corruption cases.

4.1. GOVERNANCE OF THE JUDICIARY

Although it has been around two decades since the first constitutional changes in the post-communist countries in Southeast Europe established independent judiciaries, the governance modalities of this branch continue to be unsettled, not least because of the effects of corruption. All countries in the region have chosen to establish autonomous institutions – "Councils" – that serve as self-governing bodies for the judiciary. As mentioned, the initial move was mostly away from the influence of elected politicians and "the procedure for appointment, assignment, remuneration, and removal of magistrates was seen as a significant prerequisite for their independence."[91] Among the chief justifications and assumptions of the newly acquired constitutional autonomy was that it would be a tool against high-level corruption and state capture. Not only did these hopes not materialise, but the **judiciaries now struggle with the illegal capture** of their own self-governing mechanism.

Among the key issues that continue to plague judicial self-governance is the **composition of the Councils**. In general, some of their members are elected by parliaments, while the rest are chosen among magistrates. Two problems remain, however: which of these quotas would have a majority and whether the executive should hold a position on the Councils. is For a government minister – usually of justice – to be an *ex officio* member of the self-governing body of the judiciary, typically as non-voting chair, is a controversial arrangement but still exists in some SELDI countries. In its Opinion No.10 (2007) on the "Council for the Judiciary at the service of society" the European Council for European Judges stresses that members of the Judicial Council should not be active politicians, in particular members of the government. The risks of such an arrangement have become evident in the light of mass dismissal of judges in Turkey.

Figure 45. Estimates of the corruptness of the prosecution and public prosecutors[92]



Source: *SELDI/CSD Corruption Monitoring System, 2014.*

Another aspect of judicial governance in the SELDI area is the lack of separation between the prosecution and the courts. In some of the countries, they are both considered part of the judicial branch of power and thus both judges and prosecutors are represented in the judicial governing body. This issue is unjustifiably neglected as a source of bad practices, although it should be evident that especially with regard to disciplinary procedures, mutual control creates risk for abuses.

In brief, as would be evident from the following evaluation of the individual countries, judiciaries in the Southeast Europe have very similar governance arrangements and problems.

In **Albania**, the High Council of Justice apart from being responsible for the appointment, transfer, removal, and education of magistrates, covers also ethical and professional evaluation, as well as controlling and monitoring the activities of the judges of the courts of first instance and courts of appeal. More precisely, the Inspectorate of the Council is

[91] (Center for the Study of Democracy; Center for Investigative Reporting, 2012, p. 35).

[92] For public officials the scale is from 1 to 4, where 1 is "Almost no one is involved" and 4 is "Almost everybody is involved". For institutions the scale is from 1 – "Not proliferated at all" to 4 – "Proliferated to the highest degree".

Figure 46. The map of unholy alliances: separation of judicial and prosecutorial governance

responsible for assessing and verifying complaints against the judiciary, performing disciplinary checks on the judges and evaluating them morally and professionally. There is a second Inspectorate – at the Ministry of Justice – and there is considerable debate on whether the competences and responsibilities of the two inspectorates overlap. Duplication is said to have brought ambiguity in specifying what distinct tasks each institution is supposed to carry out and consequently to have brought about ambiguous and uncoordinated monitoring of the judiciary. This has been partially overcome by memoranda of understanding between the two bodies with the assistance of EURALIUS, the European Assistance Mission to the Albanian Justice System.

"The judiciary is the weakest link in Albania's fragile system of separation of powers. … The effective independence of the judiciary is hampered by political nominations and other forms of political inference. With the election of president from the majority party, [..] appointments are even more open to political influence. High court and constitutional court members, as well as the general prosecutor, are under more political pressure as all presidential appointments need the consent of the parliamentary majority."[93] The need for approval by both Parliament and President for a nomination of any member of the High Court, Constitutional Court, or General Prosecutor has led to many political and institutional conflicts and impasse. Furthermore, although the legal provisions for the transparency in the appointment and evaluation of the judges on merit-based criteria exist, the lack of public information about the process creates an environment in which such inappropriate influences become possible.

[93] (Bertelsmann Stiftung, 2014).

The state level institution governing the judiciary of **Bosnia and Herzegovina** is the High Judicial and Prosecutorial Council, an institution with jurisdiction across the whole country. In addition to appointing judges, court presidents and prosecutors at all levels, it is also the institution responsible for upholding the integrity of the judiciary, including its professionalism and impartiality. As in some of the other SELDI countries (e.g. Bulgaria), the Council members are elected from among judges and prosecutors, as well as (this is specific to Bosnia and Herzegovina) from the entities of the country. Members are required to be non-partisan; they have immunity covering their decisions made in performing their official duties. The Council has a Disciplinary Prosecutor who deals with complaints against judges or prosecutors.

„A commonly cited reason behind the moderate slow-paced progress in reforming the judicial system in BiH is the complex structure of the judiciary, with no single budget."[94] The existence of almost four autonomous judicial systems, weak coordination in the fight against corruption at the state level, slow execution of the court decisions, all undermine the anticorruption effectiveness of the judiciary.

In **Bulgaria**, the Supreme Judicial Council appoints, promotes, demotes, transfers and removes from office all magistrates. The election of this collective body as well as the election of the heads of the higher courts and the Prosecutor General is subject to attempts of behind the scenes negotiations among political power brokers.

"The performance of the […] Supreme Judicial Council and Prosecutor General […] failed to meet the expectations for improvement in the fight against corruption and organised crime. The striving of politicians, business and financial groups to control the appointments of senior magistrates, behind-the-scenes political arrangements, and attempts to influence judicial decisions are still a deep-rooted practice."[95]

Doubts about the legitimacy of the Council were raised from the moment of election of its members from the judicial chapter and, even more so, the parliamentary chapter. Despite the recommendations of the civil society organisations involved in judicial reform, including professional associations of magistrates, for a direct election of the judicial quota based on the "one

[94] (Center for the Study of Democracy; Center for Investigative Reporting, 2012, p. 34).

[95] (Center for the Study of Democracy, 2013(43)).

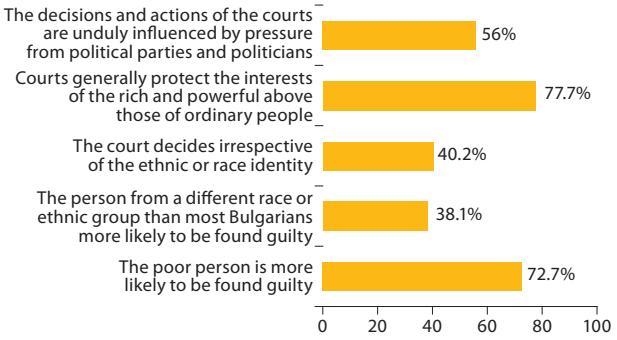
magistrate – one vote" rule and the use of electronic voting, it was never implemented and the latest election was marked by non-transparent selection of delegates heavily influenced by the administrative heads of the respective courts and prosecutor's offices. The election of the parliamentary quota was carried out after the elections of the other quotas, thus exacerbating the suspicion that positions are negotiated behind the scenes among parliamentary parties. The vetting and hearings of the nominated candidates were also formal and did not fulfil their goal to ensure openness and public participation in the procedure.

The inaction of the Council on the allegations accompanying the two unsuccessful procedures for the election by parliament of a constitutional justice cast significant doubts on the work of the Council and especially on its standing committees directly responsible for countering corruption.

During the latest elections to the Council, the voting by representatives of the judiciary in the Council has been marked by non-transparent selection of delegates heavily influenced by the administrative heads of the respective courts and prosecutor's offices. This has been especially visible in the election of the prosecutors' quota, where a large number of the delegates, and most successful candidates, were among the administrative heads of various offices. Legislative provisions aimed at enhancing the transparency of the election of the parliamentary quota were introduced, including an option for a scrutiny of candidates by scholars and civil society, but parliamentarians were put under no obligation to consider this external input. Moreover, an exclusion clause was introduced in the *Law on the Judiciary*, regarding "facts from the private life of persons," which could easily be misused to disregard corruption-related queries. As a result, the hearings of the nominated candidates were formal and did not fulfil their goal to ensure openness and public participation in the procedure.

At the beginning of 2014, the Council received another series of criticisms after the disciplinary dismissal of one of its members, a former high ranking prosecutor. The dismissal led to doubts about the very legality of the Council's actions, since the magistrate was removed by a lesser number of votes than that required by law, following the leak of wiretapped conversations, supposed by law to be destroyed after not being used for the criminal case they were made under and certainly not for grounding the disciplining the magistrates involved.

Figure 47. Assessment by the public of the fairness of courts in Bulgaria



Source: *(Center for the Study of Democracy, 2011b).*

Doubts as to the ethics enforcement capacity of the Council and its ability to oversee the work of the judiciary through its Inspectorate continued in relation to the institutional stalemate as regards the so far failed election by parliament of a Chief Inspector of the Inspectorate of the Council.

Moreover, despite some formal steps being taken (the Committee on Proposals and Evaluation of Judges, Prosecutors and Investigative Magistrates being divided into a sub-committee on judges and a sub-committee on prosecutors and investigative magistrates), judges and prosecutors are still being governed by the same body – the Supreme Judicial Council. The risk of abuses of this arrangement was evident in case in March 2014 when a member of the prosecutorial quota allegedly proposed a harsh disciplinary penalty for a judge in a highly controversial disciplinary proceeding.

The judicial governance body of **Croatia** is the State Judicial Council. The Council regulates the conduct of judges, their appointment and career advancement, and appointment of the presidents of the courts, except for the Supreme Court. The State Judicial Council consists of seven judges, two university professors of law and two members of parliament, nominated and elected by the parliament for four-year terms, and serving no more than two terms. Unlike Bosnia and Herzegovina and Bulgaria, there is a separate institution of governance for the prosecution, the structure and election procedure of which mirrors that of the judiciary. The composition of the State Attorney Council is prescribed by the Constitution of the Republic of Croatia. In accordance with the current State Attorney's Office Act, the State Attorney Council has 11 members elected in the following manner. Seven members of the Council are elected from among deputy state attorneys, two members from among members of the Croatian Parliament and

two members from among university professors of law. The bodies conducting the election of members of the State Attorney Council from the ranks of Deputy State Attorneys are the Commission for the Election of Members of the Council, candidature committees and electoral committees. Candidature committees collect candidates for members of the Council and conduct the candidature procedure. Electoral committees directly conduct the voting of State Attorneys and State Attorney's Deputies at State Attorney's Offices, and ensure the regularity and confidentiality of voting. Members of the Council from the ranks of university professors of law, on the proposal of faculty councils, are elected by all the professors of law faculties in the Republic of Croatia. Two members of the Council are appointed by the Croatian Parliament from the ranks of its members, of whom one is from the opposition.

Croatia's political history related to the break-up of the former Yugoslavia has influenced the governance of its judicial branch. "Judges appointed during and after the independence war of the 1990s were often chosen on the basis of adherence to official political ideology, which at that time was overwhelmingly ethno-nationalist in character. The legacy of this bias is still embedded in the system, and while overt ethno-nationalist bias has decreased in recent years, significant political will and judicial expertise will be required to address the decades of legal decisions based on such considerations."[96]

The functions of the **Kosovo** Judicial Council include procedures for recruitment, appointment, re-appointment, transfer, discipline, evaluation, promotion and judges and lay judges, as well as in management and administration of courts, and in the development and oversight of the judicial budget. The majority of its members are elected by parliament, while five members elected directly from among the judiciary; Kosovo's emergence as a state has determined a special feature of its judicial governance – the Council also includes two international members (EULEX judges). According to the Ministry of European Integration, the election of the Council does not meet the international standards, as the majority of members should be elected by their peers within the judiciary, thus conforming to the Venice Commission position.[97] The Ministry also states that court chairpersons should not sit on the Council, and in case he/she is elected, they should decide which function they want to keep.[98]

An Office for Legal and Prosecutorial Evaluation and Verification is responsible for fair implementation process of the evaluation and verification of candidates for magistrates, including an extended evaluation and verification process of information provided by candidates and other sources, technical knowledge, skills, performance, background, financial aspect, in order to facilitate the work of Evaluation Commissions and make merit-based appointments. The Office investigates only during the application of candidates; however, it does not have the responsibility of investigating judges and prosecutors after their appointment. There have been proposals to increase its permanent competences, in order for its investigators to make continual investigations of judges even after their appointment to judicial positions.

An appointment and re-appointment process of judges and prosecutors started in February 2009 while lacking some basic laws. A number of problems arose from the fact that candidates that did not pass the test were allowed to do their job until the completion of re-appointment process; as a result, a significant number of magistrates were not re-appointed.[99]

The Judicial Council of **Macedonia** is the governing body intended to ensure the independence of the judiciary, composed of 15 members with a mandate of 6 years with a possibility of only one re-election. The composition is similar to the other countries (most members elected from among judges, some by parliament and couple of *ex officio* members – e.g. the non-voting Minister of Justice); the difference in Macedonia is that there is a quota for ethnic minorities ("communities that do not constitute a majority in the Republic of Macedonia"); a similar arrangement is in place in Kosovo. Despite fairly elaborate and well-designed procedures, however, "political involvement in the election process for judges is visible. The possibility of electing judges who did not succeed in the Academy for training of judges and prosecutors, is seen by the public as a way to injecting political influence in the election process of judges."[100]

The Council appoints and dismisses judges and jury (lay) judges; determines the end of the juridical function; appoints and dismiss presidents of courts; follows and evaluates the work of judges; decides for removal of immunity of judges and proposes two members of the Constitutional Court from the ranks of judges. Magistrates enjoy protection against removal, immunity

96 (Freedom House, 2013, pp. 187-8).

97 CDL- AD(2007)028.

98 (Ministry of European Intergation of Kosovo, 2012a).

99 (Kosovo Law Institute and Forum for Civic Initiatives, 2011).

100 (Romanian Center for European Policies, 2011, p. 158).

from criminal charges for decisions in verdicts and they may not be transferred to another court without their consent; appointments are competitive. Dismissal grounds ("cancelation of the judicial function") include (in addition to the usual circumstances – retirement, etc.) sentencing to at least 6 months of prison for criminal offence. The Judicial Council may remove a judge for a heavy disciplinary offence and for unprofessional and non-ethical conduct (which includes poor management of judicial proceedings, delays in verdicts, etc.).

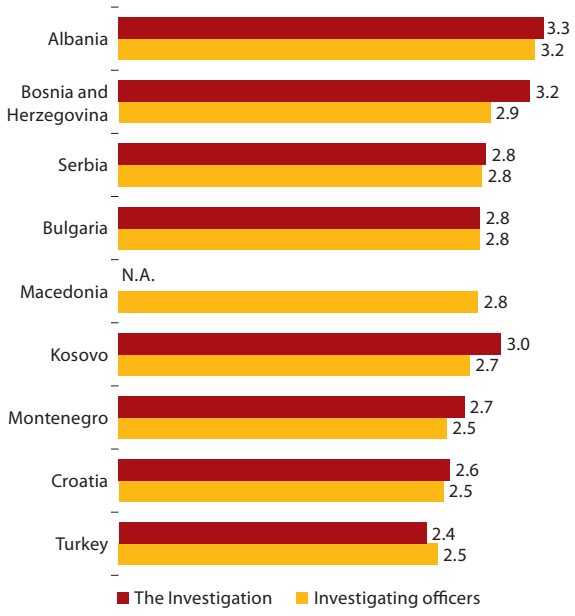
Governance of the prosecution is independent from that of the judiciary. The Public Prosecutor of Macedonia is appointed and removed by parliament while the other prosecutors are elected by the Council of Public Prosecutors without limitation of the mandate. The Minister of Justice is no longer an *ex officio* member of prosecutorial council, a change that should be even more appropriate for the judicial council (a recommendation to that effect is contained in the latest GRECO evaluation).[101] There is an office of the prosecutor for organised crime and corruption established in 2008. The latter covers the whole country and is naturally linked with the department for organised crime and corruption from the Basic Court Skopje1. The head of this office is responsible directly to the Public Prosecutor of Macedonia.

Montenegro amended its Constitution in 2013 which introduced some changes in the procedure for the appointment of judges. First, political influence on the appointment of high-level judicial officials was somewhat reduced through merit-based procedures which are also more transparent. Reforms were made in the appointment and dismissal of the President of the Supreme Court (not to be appointed by parliament any longer but by the Judicial Council), the composition and competences of the Judicial Council, the election and dismissal of judges of the Constitutional Court as well as the appointment and dismissal of the Supreme State Prosecutor and prosecutors. These amendments are expected to bring about positive changes in the judicial system as a whole.

The composition of the Judicial Council was also amended. The President of the Supreme Court is now a member of the Council, and the president of the Council is now to be decided amongst the members of the Council, and could not be a judge or minister of justice. There are still four judges appointed or dismissed by the Conference of the Judges, but now the Conference must ensure proportional presence of courts and judges. Another four members of the Council are to be appointed or dismissed by parliament, upon the proposal of its competent body and after a publicly announced invitation. Finally, the minister with the competence in judicial affairs should take place as the ninth member of the Council but may not be its president. Also, the Constitution now provides that all judges and presidents of other courts in Montenegro not mentioned above shall be appointed or dismissed by the Judicial Council.

Thus, on the one hand, having in mind this re-arrangement of the structure of the Judicial Council, it could be expected that appointments and dismissals of judges would be more professionalised and less politicised. On the other, the selection criteria for the appointment of judges are vague and there are no clearly-defined indicators that could help determine whether a certain candidate has been effective and accountable in performance of his/her judicial duty. The criteria for the promotion of judges can also be subject to arbitrary decisions, since there are no clear indicators for each criteria (for example, one of the criteria is relationship with the colleagues and attitude towards citizens, or vocational training, without stating what kind of training would be preferred, etc.).

Figure 48. Estimates by the public of the corruptness of the investigation and investigating officers[102]



Source: *SELDI/CSD Corruption Monitoring System, 2014.*

[101] (GRECO, 2013, p. 24).

[102] For public officials the scale is from 1 to 4, where 1 is "Almost no one is involved" and 4 is "Almost everybody is involved". For institutions the scale is from 1 – "Not proliferated at all" to 4 – "Proliferated to the highest degree."

Serbia's judiciary is governed by two bodies: the High Judicial Council and the State Prosecutorial Council, each having eleven members – three *ex officio* members and the rest are nominated by various institutions and elected by the National Assembly (although it is not obliged to elect the nominated candidates, nor is there a stipulated period of time within which to make the election). The process of nomination is not particularly transparent because information on candidates is not published. A process of reforming the corpus of judges in Serbia began in 2009, when the Judicial Council assessed all magistrates. As a result, a quarter of the judges lost their jobs; the decision of the Council was later contested and the Constitutional Court overturned the Council's decision and ordered that all judges and prosecutors who had appealed their non-reappointment be reinstated. A significant number of these magistrates were prevented from voting in the election of the High Judicial Council (as they were dismissed at the time of election). "The fact that such a large number of judges and prosecutors did not participate in the elections clearly shows that the [two bodies] were not elected by all judges and prosecutors, which casts doubt on the legitimacy of both bodies."[103]

Evaluation of the performance of the judges is done by judges of the higher courts. However, criteria for the evaluation are vague, as the regulation on the criteria has still not been adopted. There is no legal ground for the evaluation of the judges' performance other than on professional grounds. The promotion of the judges to higher level courts is decided by the High Judicial Council in a manner that is not transparent to the public. While formally "a good system of accountability of judges was established," it "did not work because of the delays in the establishing of disciplinary authorities and the failure to adopt criteria and standards, for evaluating the first time elected judges, and the criteria for regular assessment, which would apply in assessing the competence of judges. In such circumstances processing corruption was slow and inefficient."[104]

As elsewhere in the SELDI countries, in **Turkey** magistrates are governed by a constitutionally independent body – the High Council of Judges and Prosecutors. It is the authority responsible for their appointment, promotion and removal. Following the referendum of 2010, the composition of the High Council of Judges and Prosecutors has changed. Currently, the independence of this Council from the executive branch is problematic. The President of the Council is the Minister of Justice and the Undersecretary of the Ministry of Justice is an *ex officio* member of the Council. The Minister has powers such as determining the agenda, the appointment of the Secretary General among three candidates selected by the General Assembly and he/she takes the ultimate decision whether or not an investigation proposed by the Council shall be opened or not. This creates a risk of interference by the executive in the judiciary which could harm the independence of the tenure of magistrates by putting them under political pressure.

From the establishment of the Republic in Turkey, the judiciary has been a tool for political control of society, rather than an independent branch expected to balance executive power. It has been claimed that a group with a certain political and social agenda –the "parallel state" as the AKP government names it – has, with a clear majority, established itself within the judiciary after the changes to the structure of the High Council. Following the December 2013 corruption investigation against the members of the government, more than 2,500 judges and prosecutors have been replaced.[105] It is possible to read these developments as an attempt by the government to eliminate especially the high ranking officials within the judicial system belonging to this alleged group. However, it lays bare the actual core problem within the judiciary in Turkey: the current judicial structure does not consider the administration of justice for individuals and communities as a priority.

The procedure for the selection of national level judges is defined in the *Law on Judges and Prosecutors.* The candidates have to take a written computerised exam measuring general skills, general culture and knowledge on legal field subjects. Those who succeed have to take an oral examination. The Interview Board consists of seven members including the Undersecretary of the Ministry of Justice as the president of the Board, Head of the Inspection Board, Ministry of Justice Director General for Penal Affairs, Ministry of Justice Director General for Civil Affairs and Ministry of Justice Director General for Personnel Affairs and two members who are selected by the Executive Board of the Justice Academy from among its members; thus the majority of the Board are appointed by the Ministry of Justice.

[103] (Government of the Republic of Serbia, Anti-Corruption Council, 2014, p. 2).

[104] (Transparency Serbia, 2013, p. 20).

[105] (Hürriyet Daily News, 2014a).

4.2. INTEGRITY AND ACCOUNTABILITY

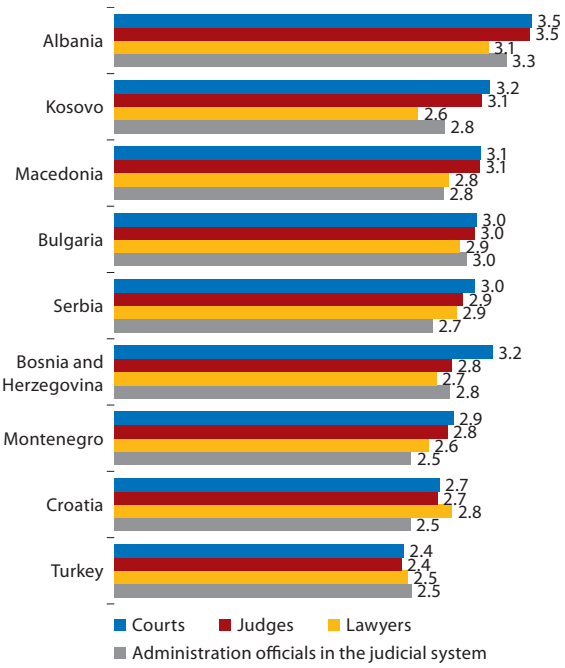
The **hypertrophied autonomy of the judiciary in Southeast Europe at the expense of its accountability** was reinforced by the nature of the judicial profession whose authority is founded on its judgments being unquestionable. While politicians elected by popular vote are not entirely averse to public scrutiny (since it is the price for popularity), the judicial office was thought to require a much lower public profile. The risk, however, that comes with being a **closed, self-administered branch of power** is what the Venice Commission calls "the negative effects of corporatism."[106] It was such risks that justified a composition of judicial councils which includes members elected by outside bodies.

The risks are further exacerbated in the highly corrupt environment of Southeast Europe, where illegal schemes once embedded in a judiciary could then be used with impunity by special interests – unscrupulous business or politicians, organised crime, etc. It was with these considerations that in 2012 the CSD concluded that "legally guaranteeing the independence of the judiciary in transition countries has ceased to be the main focus… Instead, creating mechanisms for and ensuring judicial accountability, has emerged as a most pressing issue, as the newly gained independence of the judiciary was not matched by putting in place an adequate mechanism for accountability. As a result, observers have noted an increase, rather than a decrease, of corruption in transition countries' judiciary in the 1990s, as judges now had a larger say and more discretion within the economy."[107]

The regulations of judicial conduct in the SELDI countries do not mention explicitly corruption or organised crime. Rather, they deal with various misdemeanours as well as unprofessional and unethical behaviour. Formally, judges are accountable to their peers, but there are few incentives for the members of the same profession to vet each other too scrupulously. Thus, there is no endogenous corporate culture in the judiciary to motivate it to be accountable to the public.

Not surprisingly, then, the public does not hold the judiciary in particularly high esteem. The findings of SELDI monitoring are that **magistrates are considered among the most corrupt public officials**; the absence of transparency and accountability is arguably a significant factor in such assessments. In all SELDI countries, there has been a **tangible deterioration of the assessment of the spread of corruption among magistrates.**

Figure 49. Estimates by the public of the corruptness of courts, judges, lawyers and administration officials in the judiciary[108]



Source: *SELDI/CSD Corruption Monitoring System, 2014.*

Thus, a downward spiral is accelerated: since the attitudes of the public in Southeast Europe towards the judiciary are rather negative, this brings additional incentive for judges not to consider the need to be accountable to the public. Trust, however, is not a marginal consideration in the administration of justice; rather, it is arguably a key precondition.[109]

A positive development in **Albania** has been the 2012 constitutional amendment which limited the immunity of judges. Following these changes, the prosecution can start an investigation on judges of Constitutional Courts, High Courts and Courts of First Instance without prior authorisation from the High Council of Justice. The judges are, however, given immunity for their opinions and decisions they take when

[106] Opinion No. 403/2006.

[107] (Center for the Study of Democracy; Center for Investigative Reporting, 2012, p. 36).

[108] For public officials the scale is from 1 to 4, where 1 is "Almost no one is involved" and 4 is "Almost everybody is involved". For institutions the scale is from 1 – "Not proliferated at all" to 4 – "Proliferated to the highest degree".

[109] For further analysis of the role of trust in the justice system, please refer to (Center for the Study of Democracy, 2011b).

Table 1. Number of convicted for crimes against justice in Albania

	2007	2008	2009	2010	2011	2012
Active corruption of magistrates, prosecutors and other officials in the judiciary	0	0	0	1	5	0
Passive corruption of magistrates, prosecutors and other officials in the judiciary	0	0	1	0	1	0

Source: *Albanian Ministry of Justice.*

exercising their judicial functions. Moreover, they cannot be detained or undergo inspections without the authorisation of the High Council of Justice unless they are caught committing a crime or immediately after it. In this case the Prosecutor General notifies the High Council of Justice which can decide upon the removal of this measure.

In order to harmonise these constitutional changes with the criminal procedural legislation, the Ministry of Justice drafted in 2013 an anti-corruption package. In 2014, the parliament approved of these legal changes in the *Criminal Code*. The changes in the Criminal Code were followed by changes in the so called "anti-mafia" law. These two legal interventions aimed at the forfeiture of assets obtained as a result of corruption acts.

The changes are yet to be reflected in the number of indictments which, as evident from Table 1, contrasts with the evaluations of all international stakeholders about the high incidence of corruption in the judiciary.

According to one such evaluation, "many court hearings were held in judges' offices, which contributed to a lack of professionalism and opportunities for corruption."[110] It is these kinds of practices that the *Code of Ethics for Judges* in Albania seeks to addresses, as well as issues such conflicts of interests, the court ex parte communications, and inappropriate political activity. Judges qualify based on the *Code of Ethics* before being officially appointed. The code is enforced by the Executive Council of the National Judicial Conference (the Conference is the association of all judges of courts of first instance and courts of appeal and the Supreme Court). As of July 2014, the Disciplinary Committee of the Conference had not started any review, and no judge had been reprimanded for violations of the code. Furthermore, the Conference is a voluntary association of judges and has no legal authority to punish judges for misconduct, thus it lacks real enforcement power. In addition, any violations identified by the Conference, may be directed to the High Council of Justice for disciplinary action. Until now, only judges who graduated from the School of Magistrates are required to pass a one-semester course on Judicial Ethics before being appointed. Moreover, there is no requirement for the judges in office who have not graduated from the School of Magistrates, to qualify in terms of the *Code of Ethics*.

Table 2. Estimates by the public of corruption among the institutions of governance in Albania[111]

Courts	4.39
Customs	4.33
Prosecution	4.18
Tax administration	4.17
The investigation	4.11
Government	4.01
National audit office	3.97
Police	3.90
Municipal government	3.86
Parliament	3.85
Municipal administration	3.71
Presidency	3.17
Army	2.57

Source: *SELDI/CSD Corruption Monitoring System, 2014.*

Albanian courts have the worst score among the SELDI countries in being believed to be the most corrupt among all other public institutions – a result that has not changed since the previous SELDI monitoring in 2002.

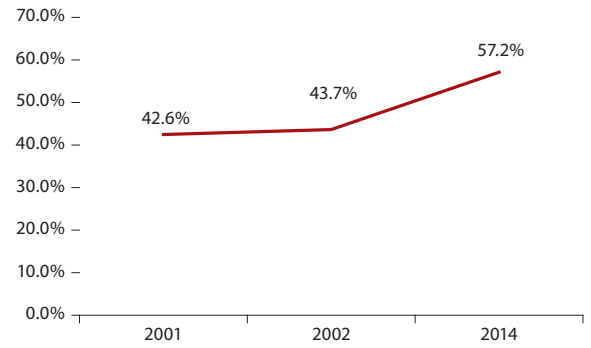
The High Judicial and Prosecutorial Council of **Bosnia and Herzegovina** has adopted *Codes of Ethics* containing principles designed to provide ethical guidance for judges and prosecutors. The Codes provide guidance

[110] (U.S. Department of State, 2013a, p. 8).

[111] On a scale of 1 to 5, 1 being the least corrupt.

under five headings – independence, impartiality, equality, competence and diligence, and integrity and propriety. The Office of Disciplinary Prosecutor within the Council is dealing with complaints against representatives of judiciary. This Office had 1,229 complaints in 2012, the majority against judges. They started 30 disciplinary proceedings which is the most since its founding, while 33 proceedings were completed.[112] Acts that judges were mostly punished for are carelessness or negligence in the performance of official duties and unjustified delay in making decisions or other actions in connection with the performance of the duties of a judge.

Figure 50. Estimates by the public of corruption among judges in Bosnia and Herzegovina[113]



Source: *SELDI/CSD Corruption Monitoring System, 2014.*

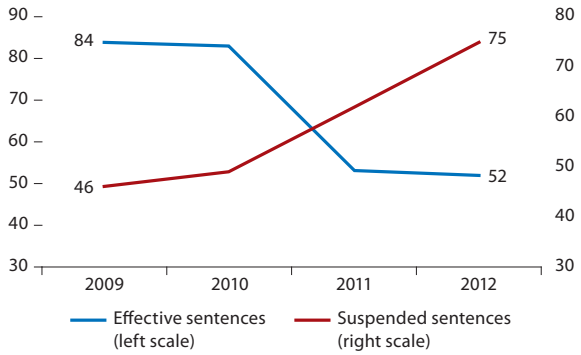
Members of the **Bulgarian** judiciary used to be covered by the same immunity as MPs, the decision for the lifting of which was taken by the Supreme Judicial Council. After two constitutional amendments, in 2003 and 2007, now they enjoy only functional immunity. The Constitution currently postulates that in the execution of their office judges, prosecutors and investigative magistrates do not bear criminal or civil liability for their official actions or decrees, unless the act is an intentional crime of general nature. This is theoretically seen as good basis for strengthening the integrity and accountability of the judiciary. In case of criminal proceedings against a magistrate, s/he is removed from office until the closing of the proceedings.

In the regulation on disciplinary liability of magistrates, there are several grounds on which penalties can be imposed for corruption-related conduct. Those are the violations of the *Code for Ethical Behaviour of Bulgarian Magistrates*, action or inaction, discrediting

[112] Annual report about the work of the Office of Disciplinary Prosecutor in 2012.

[113] Share of answers "Almost everybody is involved" and "Most are involved".

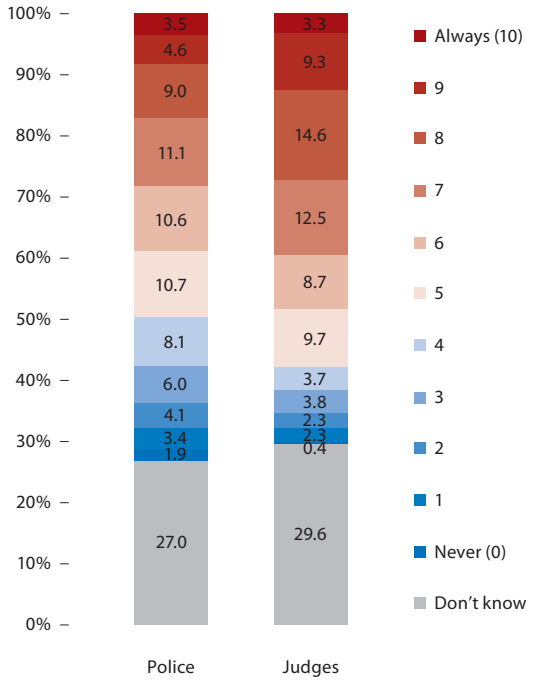
Figure 51. Sentencing in Bulgaria: fewer effective and more suspended sentences



Source: *National Statistical Institute.*

the judicial profession, non-execution of other official duties. The disciplinary penalties are official notice, reprimand (both imposed by the respective office's administrative head) temporary reduction of payment, temporary demotion in rank, disciplinary removal from administrative manager's office, disciplinary removal from office (imposed by the Supreme Judicial Council).

Figure 52. Proliferation of bribery among police and judges in Bulgaria (how often do the police/judges accept bribes, %)



Source: *(Center for the Study of Democracy, 2011b).*

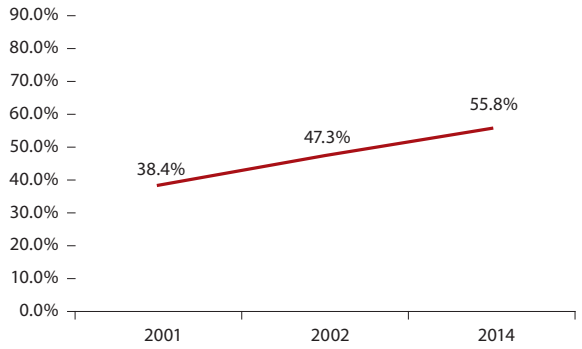
In practice, as seen from the report of the Council's Committee on Disciplinary Proceedings for 2013, the disciplining activity of the Council is still divided

between, on the one hand, some cases of sanctioning violations of the Ethics Code and actions ruining the reputation of the judiciary, and, on the other, more cases of non-compliance with procedural deadlines and actions, unjustifiably protracting proceedings. In the continuing absence, as admitted by the Council's own Review of Disciplinary Case-Law of 2009 – 2013, of a clear vision or generally acclaimed methodology for determining the workload of magistrates putting an emphasis on disciplining magistrates primarily due to slow proceedings still steps on insufficiently clear grounds and can potentially diverge disciplinary efforts away from corruption-related cases. Moreover, lack of disciplinary action in the face of serious corruption allegations allows implicated magistrates to resign without any review or penalty for their suspected actions.

In **Croatia**, judges have immunity from detention and criminal proceedings, while prosecutors do not have immunity from prosecution. The criminal referral against a judge for all criminal offences prosecuted ex officio, should be submitted to USKOK or a competent State Attorney. Only those bodies can ask the State Judicial Council to lift the immunity of a judge in the process of deciding on a criminal charge. In addition to the *Law on Courts* and the *Law on the Judicial Council*, the conduct of judges is regulated by a Code on Judicial Ethics. Even though the conflict of interest and incompatibilities are not in focus of neither of those instruments,[114] the substance of the acts and articles represents instruments for prevention and suppression of conflict of interest and incompatibilities. Interests are not declared in the declaration of assets, therefore the overall segment of the monitoring of the conflict of interest and prevention of conflict of interest is not part of established legal instruments. With the latest changes and amendments to *Law on the Judicial Council* in 2013, declarations of assets for judges were made publicly available. The law prescribes that the State Judicial Council shall provide access to the declarations of assets within eight days of the submission of a written request.

The legal and institutional framework that regulates conflict of interest and incompatibilities of public prosecutors in Croatia follows a similar logic. The difference is that prosecutors do not have immunity from prosecution, and that their family members are not covered by the regulations on conflict of

Figure 53. Estimates by the public of corruption among judges in Croatia[115]



Source: *SELDI/CSD Corruption Monitoring System, 2014.*

interest and/or incompatibilities. Legal provisions on the role of the State Prosecutorial Council – the governing body of the public prosecution – deal with declaration of assets for public prosecutors as well as checking of declaration of assets and disciplinary measures related to the conduct of prosecutors. The declaration of assets does not include declaration of interests, and conflict of interest related issues – aside from incompatibilities – are not regulated. In period 2005 – 2013, there was no clear sanctioning of the situation of the conflict of interest or even situation related to the declaration of assets. In 2008, only one case was decided by the State Prosecutor's Office and the case was related to incompatibility with the State Prosecutor's duty. In the same period, the Council has issued 13 disciplinary sanctions to the Prosecutors, which indicates that such body is ineffective in guiding prosecutors in the implementation of the fundamental principles of the State Prosecutor's duty. Data on the cases are not clear and therefore public control of the work of the State Prosecutors cannot be exercised.

In **Kosovo**, both judges and prosecutors, despite being generally governed by separate councils, have the same body dealing with matters of conduct – the Office of the Disciplinary Prosecutor. The responsibilities of the disciplinary prosecutors include the initiation of investigations against judges or lay judges in cases where there are reasonable grounds to believe that inappropriate behaviour might have occurred and to provide recommendations and evidence in support of the disciplinary action to the Disciplinary Commission.

[114] Except in the case of the procedures related to appointment and career advancement of judges.

[115] Share of answers "Almost everybody is involved" and "Most are involved".

Table 3. Estimates by the public of corruption among the institutions of governance in Kosovo[116]

Government	4.36
Municipal government	4.08
Courts	3.95
Customs	3.94
Parliament	3.94
Tax administration	3.84
Prosecution	3.70
The Investigation	3.70
Municipal administration	3.54
Presidency	3.52
Police	3.46
National audit office	3.37
Army	2.24

Source: SELDI/CSD Corruption Monitoring System, 2014.

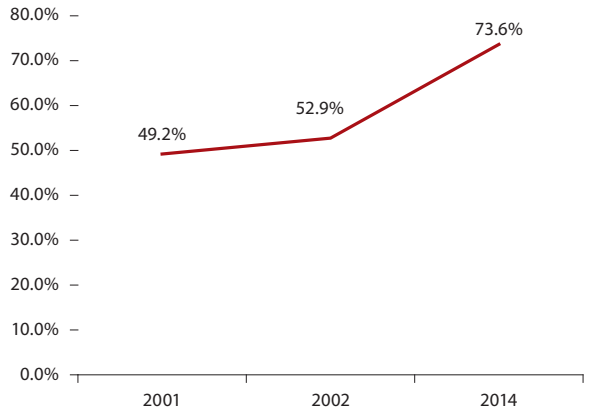
The Kosovo Anti-Corruption Task Force is part of the Special Prosecution and is the main mechanism in the fight against corruption. It is comprised of five local and three international prosecutors, who are supported by thirty police officers and five financial experts. The strength of this institution is that it is the only institution in Kosovo specialised in anti-corruption. The prosecutors who work in this task force are paid more than the state prosecutor. Its main weakness is the very process that created it: as for every other policy initiative, the decision to create the task force was not based on research that would conclude the need for a new anticorruption mechanism. The task force should not operate under the umbrella of the Special Prosecution, as this harms its legal capacity.[117]

In **Macedonia,** the law allows a certain amount of executive control of the judiciary: judges have the obligation to declare the acquisition and changes in their assets, and declare conflict of interest. The declarations, however, are not vetted by the Judicial Council but by the State Commission for the Prevention of Corruption since it has jurisdiction over elected and appointed public officials. In the last available Commission report (2012), it is stated that out of the 402 cases closed, 71 were in the judiciary. Nevertheless, it does not contain any further detail on the number of positive or negative cases, whether it is about corruption or other possible offences, who has launched the proceedings, etc.

[116] On a scale of 1 to 5, 1 being the least corrupt.

[117] (Ministry of European Integration of Kosovo, 2012).

Figure 54. Estimates by the public of corruption among judges in Macedonia[118]



Source: SELDI/CSD Corruption Monitoring System, 2014.

Among the SELDI countries, Macedonia has one of the sharpest rises in the share of the surveyed public identifying judges as being corrupt (Figure 54). This corresponds to international assessments that "political interference, inefficiency, favouritism toward well placed persons, prolonged judicial processes, and corruption characterized the judicial system."[119]

In **Montenegro,** there is a mechanism allowing complaints to be filed by members of the public if they suspect that a certain judge is involved in corruption and have committed a criminal offence in this respect. Statistics on those complaints is not very detailed, although publicly available within the annual reports of the Judicial Council. For example, in 2010, 99 such complaints were submitted, only one of which actually processed but was deemed unfounded. In 2011, 119 complaints were submitted, none were followed up because no grounds were found for starting a procedure; the same was in 2012, with 75 complaints submitted and none processed.

Similarly small is the number of disciplinary proceedings initiated by the Judicial Council on the referral of court chairs (3 referrals in 2010, one rejected as unfounded, one was accepted and disciplinary measure of 20% salary decrease; one referral in 2011). These insignificant numbers contrast with the findings of SELDI monitoring indicating an almost doubling of the share of the public believing corruption to be widespread among judges.

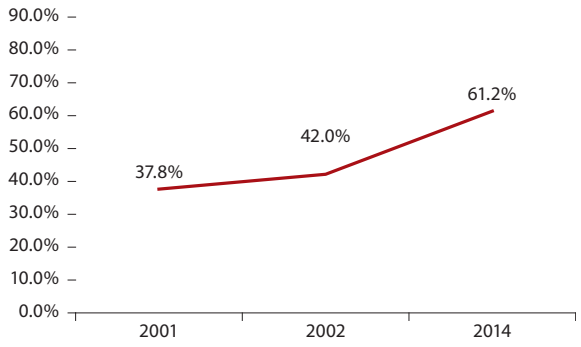
[118] Share of answers "Almost everybody is involved" and "Most are involved".

[119] (U.S. Department of State, 2013c, p. 1).

MANS, a Montenegrin NGO, "researched 333 corruption cases between 2006 and 2012 and found that courts issued inconsistent verdicts for corruption-related crimes. Sentences were generally severe for low- and mid-level employees, while higher government employees and dignitaries received suspended sentences for more serious crimes, such as abuse of office."

US State Department Human Rights Report 2013

Figure 55. Estimates by the public of corruption among judges in Montenegro

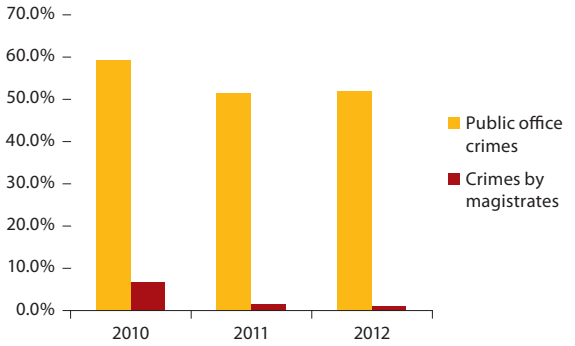


Source: *SELDI/CSD Corruption Monitoring System, 2014.*

A similar situation exists with respect to the enforcement of the *Judicial Code of Ethics*. The Commission established to decide upon complaints filed in relation to the breaches of the Code, received two complaints in 2011 (deciding that the Code was not violated) and no complaints in 2012. During 2013, three complaints were filed, one of them resulting in confirmation that the judge actually acted against the Code, but there is no information available on further actions in this regard.

In **Serbia**, public confidence in the judiciary is undermined by a number of clear cases of the lack of competence, much more than the perception of corruption in judiciary. According to statistics collected at the Supreme Court of Cassation, on average 20% of the verdicts of the first-instance courts are overturned. In a vicious circle, since the public opinion of the judiciary is rather negative, this brings additional incentive for judges not think about the public as someone that they are accountable to. According to official judiciary statistics, 48% of the cases are not decided 24 months from their commencement – a testimony to the consequences of no accountability.

Figure 56. Conviction rates for general public office crimes and crimes by magistrates in Serbia



Source: *Calculations based on "Adult Culprits of Criminal Offences in the Republic of Serbia in 2012", Bilten SK-12, Statistical Office of the Republic of Serbia, 2013.*

In the Serbian Criminal Code there is a specific crime "violation of the law by judge, prosecutor or deputy prosecutor". As evident from Figure 56, the conviction rate for this specific crime is far below the conviction rates for all corruption crimes. Although not all the crimes recorded by the indictments, based on this article of the Code, are cases of corruption, the numbers are indicative of the overall enforcement of integrity provisions among magistrates.

In **Turkey,** courts enjoy a much higher degree of public confidence in their integrity than in the other SELDI countries.

Table 4. Estimates by the public of corruption among the institutions of governance in Turkey[120]

Customs	3.44
Municipal government	3.39
Tax administration	3.39
Municipal administration	3.36
Government	3.31
Police	3.28
Parliament	3.12
Courts	3.04
The Investigation	2.98
National audit office	2.97
Prosecution	2.89
Army	2.49
Presidency	2.25

Source: *SELDI/CSD Corruption Monitoring System, 2014.*

[120] On a scale of 1 to 5, 1 being the least corrupt.

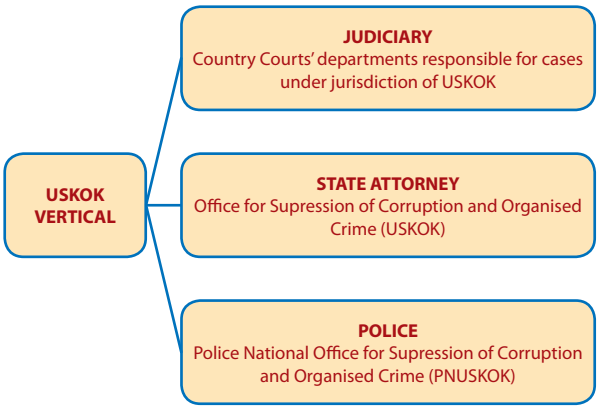
Although there is no general written code of ethics for members of the judiciary in Turkey, and magistrates do not come under the jurisdiction of the Council of Ethics for Public Service (a body within the structure of the Prime Ministry), the disciplinary provisions under the *Law on Judges and Prosecutors* specify acts or behaviours judges should evade. These include inappropriate and rude behaviour to colleagues, behaviours harming the trustworthiness and impartiality, failure to declare assets, engaging in commercial activities incompatible with the profession, receiving gifts and bribery. According to the statistics published by High Council of Judges and Prosecutors, in 2012 12 judges were removed from the profession. In 2011 and 2010, the numbers were 6 and 2. However, there are no separate statistics on the number of disciplinary proceedings on corruption grounds.

4.3. SPECIALISED ANTICORRUPTION COURTS

Most SELDI countries have found no reason for creating specialised courts dealing with corruption; they apply the general criminal procedure to it. Some have specialised prosecutions and courts for organised crime, which handle corruption cases; in Serbia, for example, the Specialised Prosecutor for Organised Crime investigates and indicts corruption cases in which the total material gain is over RSD 200 million (around €1.7 million); the Kosovo prosecution has an Anti-Corruption Task Force.

The only country that has set up a combination of law enforcement and judicial structures specialised in dealing with corruption and relate crimes is Croatia. The Office for Suppression of Corruption and Organized Crime (USKOK) was established in 2001, within the State Attorney's organisation of the Republic of Croatia. Special USKOK courts (at county level) were established in four regions (around the cities of Zagreb, Split, Rijeka and Osijek). The mandate of these USKOK special court departments, created to deal with corruption and organised crime, was to promptly rule in cases under the jurisdiction of USKOK. Later on, the last of the special anticorruption institutions – PNUSKOK (Police USKOK), a special police department for the suppression of organised crime and corruption – was established. With the establishment of PNUSKOK, the cycle of institution-building to combat corruption in Croatia was complete – the so called "USKOK Vertical" was put in place.

Figure 57. Organisational chart of the Croatian criminal justice structure "USKOK Vertical"



4.4. RECOMMENDATIONS

1. Countries where the majority of the judicial self-governing bodies are not elected among magistrates should adopt reforms increasing their voting power. Countries that have not, should adopt the "one magistrate – one vote" principle.
2. Ensure that the election of the judicial quota is as representative as possible, including judges from first instance courts. Carefully review, and if needed reconsider, the compatibility of the position of court chairperson with membership of the judicial self-governing bodies.
3. Ensure that the procedures for the appointment, promotion and dismissal of magistrates are as transparent to the public as the similar procedures for elected politicians.
4. The number of magistrates required to nominate a member of the judicial governing body needs to be increased.
5. Abolish or reduce to a minimum the role of government ministers (typically of justice) in judicial self-governing bodies, especially as regards decisions on disciplinary procedures.
6. In countries where both the prosecution and the courts are governed by the same body, two colleges – for the prosecutors and for judges – need to be separated within this body. Prosecutors and judges, respectively, would only be elected to these colleges.
7. Countries that do not have a code of ethics for magistrates should adopt one.

8. The independence and capacity of judicial inspectorates should be strengthened to allow them to step up inspections.
9. Magistrates should be prioritised in the mechanism for verification of asset declarations.
10. Introduce feedback mechanisms for the enforcement of anticorruption policies, including with respect to magistrates. These mechanisms are substantially deficient or practically missing in all SELDI countries; their absence sabotages the repression aspect of anticorruption policies and renders further incrimination of corruption useless. A possible best practice to be replicated – although it is still underdeveloped – is Kosovo's Platform of Anticorruption Statistics, designed by an NGO. Such a mechanism should include regular information about: disciplinary and administrative and criminal measures in the public service and the judiciary; the various aspects of criminal prosecution, including indictments and convictions/acquittals, sentences by the various types of corruption offences.