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BOSNIA JUSTICE SECTOR DEVELOPMENT PROJECT II

Comparative Analysis of Judicial Budgeting

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LIST OF ACRONYMS

EWMI	East-West Management Institute, Inc.
USAID	United States Agency for International Development
JSDP	Justice Sector Development Project
FBiH	Federation of Bosnia and Herzegovina
HJPC	High Judicial and Prosecutorial Council of Bosnia and Herzegovina
CMS	Case Management System
CP	Cantonal Prosecutor's Office
MC	Municipal Court

Introduction

This comparative analysis is a deliverable due under a short-term contract funded by USAID through the Justice Sector Development Project II in Bosnia-Herzegovina.

The main objective is to identify Best Practices in judicial budgeting and provide options and recommendations for how judicial budgeting may be improved in Bosnia-Herzegovina, and for how the High Judicial and Prosecutorial Council (HJPC) may strengthen its role in the judicial budgeting process. The focus will be on its role with regard to the entire court budget, as well as the budget for the judicial council.

The comparative analysis focuses on court budgeting, and not – or only to a very limited extent – budgeting for prosecutor’s offices. This is for two main reasons. First, there is more available research and information about court budgeting. Second, judicial budgeting is a challenge primarily because it involves striking a balance between the principles of judicial independence and judicial accountability. This dilemma may be somewhat more pronounced in relation to courts.

The comparative analysis is partly based on previous analyses carried out by the author, but all information presented here has been updated to reflect the current practices and experiences in the countries under study.

Models of judicial budgeting

It may be argued that there are two basic models of judicial budgeting: One model which grants the authority to manage and allocate the judicial budget to the Ministry of Justice, and another model which grants this authority to an independent judicial council. To distinguish just between these two models is obviously a gross simplification. There are many ways in which the judiciary and the executive powers can cooperate in budgetary matters, as will be evident from the discussion below.

The analysis will cover judicial budgeting in England and Wales, Germany, the Netherlands, Denmark, Belgium, Switzerland, and Poland.

England and Wales and Germany have been selected to represent two of the large European countries which are often seen as models for others. In addition, the two countries contrast a reform-minded approach (England) with a much more traditional approach (Germany) to judicial budgeting. Netherlands and Denmark have been chosen as interesting pioneers in the attempt to rethink how judicial budgeting can reflect judicial independence and judicial accountability at the same time. Belgium and Switzerland represent two countries with a complex constitutional structure, while Poland provides the Eastern European example.

Judicial Councils

The comparative analysis will address how judicial councils are involved in judicial budgeting in the various countries. It should be noted, however, that there is some confusion in the literature over the term “judicial council”. The new bodies of judicial self-governance which come in a huge variety of forms, and the names by which they prefer to refer to themselves differ just as considerably. It is sometimes suggested that we can make a rough distinction between two basic models: one for Southern Europe and one for Northern Europe. According to this, the responsibilities and authority of the judicial councils established according to the Southern European model all have to do with the career decisions of

individual judges (promotion, training and disciplinary action), while the judicial councils established according to the North European model possess authority in the area of court administration, court management and budgeting, and thus tend to view the judiciary as a set of organizations (courts).

While this categorization certainly has its merits, by using it, we risk overlooking several finer distinctions. First, several of the Northern European countries which have established Court Administrations to manage courts have established separate and independent judicial appointment boards that are responsible for taking care of judicial appointments. So while the bodies of court administration in Northern Europe have typically become members of the European organization of judicial councils (ENJC), it is actually the separate judicial appointments board which performs very similar functions to those performed by the (original) Southern European judicial councils. Second, some of the new Eastern European judicial councils transcend the distinction in the sense that they have competencies regarding both judicial appointments and the management and other administrative tasks. Finally, in some countries increased judicial self-governance has been established –not primarily by creating new councils – but by transferring administrative tasks to the Supreme Court.

For these reasons I will in the following consider the involvement of judicial councils AND other organizations representing the judiciary in the budgetary process.

Judicial budgeting in England and Wales

The English judicial system has recently, especially as a result of the Constitutional Reform Act in 2005, been substantially remodeled. For this reason alone, it is interesting to take notice of the specific institutional arrangements adopted in UK, since they in many ways can be said to reflect modern thinking about the proper relationship between judicial and executive powers.

A special characteristic of the way the judiciary is financed in Great Britain (and this was also the case before recent reforms) is that the salaries of all senior members of the judiciary are paid from a consolidated fund. This consolidated fund is financed by tax revenues, and payments from the fund do not require annual parliamentary authorization.¹ For this reason judicial salaries are not part of the court budget discussed below.

In the English judicial system the Lord Chief Justice and the Lord Chancellor are key players with regard to judicial budgeting. The Lord Chief Justice is head of judiciary and President of the Courts of England and Wales. Following the Constitutional reform Act 2005 The Lord Chief Justice is chosen by a specially appointed committee convened by the an independent Judicial Appointments Commission². The Judicial Appointments Commission is sponsored by the Ministry of Justice.

The Lord Chancellor is a member of the Cabinet and thus represents the executive power. By law the Lord Chancellor is responsible for the efficient functioning and independence of the courts. The current (2013) Lord Chancellor is also Secretary of State for Justice (in the

¹ In the 1930's the parliament attempted to cut judicial salaries even though they were paid out of the consolidated fund. The attempted failed, however, and a bill was passed establishing that judicial salaries could not be cut.

²The Commission is made up of 15 members: 2 from the legal profession (1 barrister, 1 solicitor), 5 judges, 1 tribunal member, 1 lay justice (magistrate), 6 lay people, including the chairman.

media, the Lord Chancellor is now commonly referred to as the “Minister for Justice”, although this position does not officially exist in England).

Separate from the Judicial Appointment Commission there is a Judges’ Council for England and Wales. The Judges’ Council acts as a body representing the views and interests of each tier of the judiciary. The Council informs and advises the Lord Chief Justice, has discussions with the Lord Chancellor in relation to the financing of the courts and other issues relating to the judiciary as a whole, and publishes an Annual Report. It is thus more of a forum than an institution of governance³. The Council meets approximately three times a year and has presently only one secretary.

The administration of courts in England and Wales is overseen by Her Majesty’s Courts and Tribunals Service (HMCTS). It is responsible for managing all courts, except the UK Supreme Court. It operates the court facilities, and provides support staff⁴ and the IT system to the courts.

In relation to budgetary matters England and Wales provides a very interesting example of an explicit attempt to reconcile judicial autonomy with judicial accountability. Overall, the Ministry of Justice negotiates the budget with the Treasury; and the Ministry of Justice then makes an allocation to HMCTS. This allocation is part of the overall budget for the Ministry of Justice and therefore may be subject to reduction during the year because of other calls on that budget for extra expenditure elsewhere in the Ministry.

When the Ministry of Justice was established in 2007 senior judges feared this would leave the courts vulnerable to budgetary restrictions. In particular, since prisons were also within the remit of the ministry, judges were concerned the ministry might want to reallocate funds from courts to prisons. A new partnership between the Lord Chancellor and the Lord Chief Justice was negotiated and agreed. In 2008 and renewed in 2011. Under this agreement, the operation of Her Majesty’s Courts and Tribunals Service is no longer controlled by the Ministry of Justice, but is not completely autonomous either. The Lord Chancellor and Lord Chief Justice are partners for the governance, financing and operation of HMCTS: they jointly agree the aims, priorities and funding for HMCTS. Day-to-day governance of the HMCTS is delegated to a board with an independent Chairman.

The 2011-agreement establishes the following institutional framework for judicial budgeting:

The Public Expenditure Allocation	<ul style="list-style-type: none"> • Prior to HM Treasury (HMT) making its allocation to the Ministry, the Lord Chancellor has a duty to keep the Lord Chief Justice informed about his department’s resourcing discussions with HMT. • The Lord Chief Justice may write to the Lord Chancellor representing the views of the judiciary; if he does so the Lord Chancellor will forward that letter to the Chief Secretary to the Treasury. • The Lord Chancellor will convey the final departmental settlement to Her Majesty’s Courts and Tribunals Service Board and to the Lord Chief Justice, along with any response from HMT to the Lord Chief Justice’s letter.
Allocation to Her Majesty’s	<ul style="list-style-type: none"> • The Lord Chancellor will endeavour to reach agreement with the Lord Chief Justice in relation to the allocation to Her Majesty’s Courts and Tribunals Service.

³ It does, however, select three judicial members of the Judicial Appointments Commission

⁴ All staff except judges.

Courts and Tribunals Service	<ul style="list-style-type: none"> • The Lord Chancellor makes the allocation to Her Majesty’s Courts and Tribunals Service in accordance with his duty under section 1 Courts Act 2003, section 39 of the Tribunals, Courts and Enforcement Act 2007 and his oath of office under section 17 Constitutional Reform Act 2005 to ensure the provision of resources for the efficient and effective support of the courts for which he is responsible. • If the Lord Chief Justice has any concerns about a proposed or actual allocation to Her Majesty’s Courts and Tribunals Service the Lord Chief Justice may record his position to the Lord Chancellor and, if he so wishes, to Parliament.
In-year adjustments	<ul style="list-style-type: none"> • The Lord Chancellor will endeavour to reach agreement with the Lord Chief Justice on any significant in-year adjustment in the allocation to Her Majesty’s Courts and Tribunals Service. The Chief Executive will present any in-year changes in the agency budget to the Board. • At every stage of the resource allocation process the Ministry and Her Majesty’s Courts and Tribunals Service staff will act openly and transparently, and ensure that the Board, the Lord Chancellor and the Lord Chief Justice are all equally sighted on all aspects of the plans for resource allocation, both prior to and after allocation by HMT to the Ministry of Justice.

As can be seen from this, the English model puts very strong emphasis on cooperation between the judiciary and the government when it comes to judicial budgeting. The Lord Chancellor is required to keep the Lord Chief Justice informed about negotiations with the Treasury, and he is required to try to reach an agreement about the budget allocation to HCTMS. Furthermore in case of conflict, the Lord Chief Justice has the option to take direct contact to Treasury and the parliament.

The HMCTS is a very large organization employing more than 20,000 staff operating from around 650 locations. HMCTS staff is working at courts, but also at seven regional offices and the headquarter. The HMCTS receives a lump sum budget allocation which does not specify how much is going to be spent at the headquarter etc⁵.

Another characteristic of the English system is its strong focus on use of court performance indicators. The HMCTS framework document states that the Chief Executive of HMCTS will work with the Board, the judiciary, the Ministry and other government department officials to agree on performance measures which relate to Her Majesty’s Courts and Tribunals Service. Performance measures that have an impact upon the judiciary only bind the judiciary when the Lord Chief Justice has expressly agreed that they do so.

Summary information for England and Wales

Constitutional and legal position of the Judicial Council	Her Majesty’s Courts and Tribunals Service (HMCTS) was established in 2011 by merging Her Majesty’s Courts Service (HMCS) with the Tribunals Service (both established in 2005). Although HMCTS is an executive agency, it is unique in having constitutional accountability to judges as well as the Lord Chancellor. The responsibilities and dual accountability are established by the Her Majesty
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⁵ The annual business plan includes an estimate for the internal allocation across regions and the HQ.

	<p>Courts Service Framework Document. Any amendments to or departure from the Framework Document must be agreed by the Lord Chancellor and the Lord Chief Justice, and by an HMT minister. The Lord Chief Justice is entitled to terminate the partnership if he concludes that it is no longer compatible with his constitutional position or the independence of the judiciary.</p>
<p>Selection of president and members of the Judicial Council</p>	<p>The Framework document states that The Lord Chancellor and Lord Chief Justice will not intervene (whether directly or indirectly) in the day-to-day operations of the agency and have placed the responsibility for overseeing the leadership and direction of Her Majesty’s Courts and Tribunals Service in the hands of its Board. The Lord Chancellor and the Lord Chief Justice approve the appointment of all Board members, save those holding ex officio positions. The membership of the Board comprises:</p> <ul style="list-style-type: none"> • An independent non-executive Chair. The appointment of the Chair is based on a recommendation from a selection panel that includes a person nominated by the Permanent Secretary and a senior judge nominated by the Lord Chief Justice. • The Senior Presiding Judge for England and Wales and two further Judicial representatives, one nominated by the Lord Chief Justice and the other by the Senior President of Tribunals. • The agency Chief Executive and three Executive Directors nominated by the Chief Executive. <p>The appointment of the Chief Executive is conducted in line with Cabinet Office guidelines and with a selection panel that includes a senior judge nominated by the Lord Chief Justice.</p>
<p>Selection and appointment of judges</p>	<p>HMCTS is not involved with the selection and appointment of judges. Selection is performed by a separate Judicial Appointments Commission (established in 2006)</p>
<p>Budgetary authority: court budget</p>	<ul style="list-style-type: none"> • The government is required to keep the head of the judiciary, the Lord Chief Justice, informed about resourcing discussions. The Lord Chief Justice may write a letter to the Lord Chancellor Treasury, representing the views of the judiciary. • The Lord Chancellor is required to try to reach an agreement with the Lord Chief Justice on the budget allocation to the HMCTS (establishing the court budget). • The HMCTS which manages the court budget is accountable to both the Lord Chancellor and the Lord Chief Justice.
<p>Budgetary authority: judicial council budget</p>	<ul style="list-style-type: none"> • The HMCTS headquarter is financed out of the court budget. • The Judicial Appointments Council is sponsored by the Ministry of justice • The Judges’s council has very limited staff and budget.
<p>Prosecution Service</p>	<p>The HMCTS is not involved in any way with the prosecution service. The budget for prosecution is managed by another independent agency, the Crowns Prosecution Service.</p>

Judicial budgeting in Germany

In contrast to the situation in England and Wales, the institutions governing judicial administration in Germany have so far been rather immune to the international wave of

reforms in this field. Reform of judicial administration has been debated for decades - especially the associations of judges have called for much more judicial self-administration - but without major impact.

According to the traditional German concept of separation of powers decisions on the status of judges (including judicial selection) and the judicial budget are not considered to be adjudicatory in nature, and therefore not within the competence of the judicial branch. Following this principle, Germany does not have judicial councils as these are known in most other European countries, and the judicial budget is administered by the Ministry of Justice. It might be said that the risk that the executive might indirectly affect adjudication through administrative decisions have been tolerated in the interest of democratic accountability⁶. It has also been argued that, even though many people agree in principle with the idea of more judicial self-administration, the current model has in practice worked quite well in Germany for many years, and for this reason there is no urgency to change it.

Most courts in Germany are managed by the state (Bundesländer) Ministries of justice, and only the federal courts are managed by Federal Ministry of Justice. The budgetary models may differ slightly between the Bundesländer, but the general model is as follows:

- Local and regional courts assess their budgetary needs and report to The Court of Appeal
- The court of appeal reports to the Ministry of Justice
- The Ministry of Justice then drafts a budget and sends it to the Ministry of Finance
- After negotiations with the Ministry of justice the Ministry brings a draft budget into the cabinet.
- The government brings the budget to the parliament.

In some lander the Court of Appeal has the responsibility to administer the budget passed by the parliament for all courts within the district.

In recent years much effort has been put into establishing objective criteria for allocating judicial staff and budgets. This may be one important reason why executive control over court budgeting is not in general perceived as very controversial. If the criteria for establishing and allocating the budgets are more or less objective, it does not matter so much who is drafting and allocating the budget.

In 1998 the German JUMIKO (Conference of Ministers of Justice) decided to adopt a weighted caseload system for allocating judicial staff. In brief, a weighted caseload model is a formula to determine court staffing needs based on an assessment of the time required for judges and sometimes also auxiliary court staff to process different types of cases. These weights allow for a calculation of the required number of judge (and support staff), which takes into account the number of cases, and the composition of cases, including whether a given court may have a high ratio of cases that require a lot of time and effort to process.

For example, the German weighted caseload model, PEBB§Y, operates with the following weights (judges expected working time) for different types of local court proceedings in civil matters.

⁶Seibert-Fohr (2012)

Examples of case weights to determine staffing needs

- Neighbouringrights	290 minutes
- Disputes with architects and craftsmen concerning house construction or renovation	280 minutes
- Road accidents	220 minutes
- Law oftenancy	170 minutes

Finally it should be noticed that while the German judiciary in general does not have much formal influence over court budgets, there is one important exception: the constitutional court (Bundesverfassungsgericht). As a matter of self-administration the Constitutional Court draws up its own budget which is approved by the Bundesrat, administers its financial resources and appoints all court service personnel.

Judicial budgeting in the Netherlands

Like in England and Wales judicial administration in the Netherlands has undergone significant changes in recent years. With the establishment of the judicial council in 2002 the main responsibility for managing the judicial budget was transferred from the Ministry of Justice to the judicial council. The council has five members, three of whom must be judges. They are appointed as the result of a Cabinet (government) decision based on a list of recommendations made by the Minister of Justice. This list is drawn up by the Minister of Justice “in agreement with the Council and after consultations within the judiciary”. The Dutch Judicial Council primarily has a pivotal role in administering the judicial budget⁷.

To an even stronger degree than in Germany the court budget is in the Netherlands linked to a weighted caseload model. The model, called Lamacie, considers the time (minutes) of judicial and administrative staff required for each judicial activity. The budget is then largely determined by deciding the “price” per minute.

Like in England and Wales judicial budgeting in the Netherlands requires a close cooperation on key issues between the executive power, the ministry, and the judicial power, the council. Furthermore, the budgetary autonomy granted to the judicial council is balanced by measures to ensure public accountability. Each year the Minister of Justice reaches an agreement with the judicial council about the main aspects of the performance of the judiciary in the coming budget year. This concerns especially the number of cases which will be decided, and is therefore referred to as a “production agreement”. With regard to judicial accountability, the Netherlands has also developed the – in a European context - most elaborate system of court performance indicators, the Rechtspraak system

Formally, the court budget is part of the Ministry of Justice’s budget⁸. There is a specific Regulation on the financing of the judiciary with provisions for the ministry’s contribution to the judicial council and for further allocating budgets among courts. The budgetary model is thus two-tiered. The Minister funds the Judiciary as a whole by means of a financial

⁷With regard to judicial appointments, it is in addition, at least formally, involved since it receives a list of recommendations from the management board of the court where the vacancy exists and then forwards this list to the Ministry of Justice

⁸ The Supreme Court in the Netherlands, the Hoge Raad, is mentioned under a separate heading in the budget, because it is not subject to the powers of the Council for the Judiciary.

contribution to the Council. The Council then makes financial contributions to each of the 16 courts, and it keeps part of the allocated sum in order to finance council operations.

The size of the Minister’s contribution to the council for the judiciary largely depends on the decision about the “price per minute”. It has been argued that the judicial council should be allowed to propose a budget which would then be sent to Parliament – without any modifications – by the Minister of Justice. Parliament could then also decide on the “prices per minute” of judicial work, on which the whole system of financing is currently based. As it is now, however, the “prices per minute” are the result of negotiations between the judicial council and the Ministry of Justice. An external auditor assists with assessing prices.

Approximately 95% of the ministry’s contribution to the council is determined by multiplying the expected number of cases by the prices applicable to them. There are ten different case categories and ten prices. The budget is therefore not only depending on prices, but also on the expected number of cases. If, after the end of the year the actual number of cases turns out to be different, the excess or shortfall is settled at a rate of 70% of the price applicable to the case. The “expected” number of case disposals is subject to annual negotiations, while prices per case are fixed for a 3-year term.

The model applied by the council when financing the courts is more detailed than the model applied by the ministry of justice. The council thus operates with 53 different case categories (and prices). The prices are annually set by the council. The government regulation provides that the Judicial Council “administers” the definitions and models which lie at the basis of the division into product groups and categories of cases. The Minister of Justice, however, has to approve any “significant modifications” in that division, as well as in the underlying definitions and models.

The council allocates only 75% of the contribution from the ministry into individual court budgets. The remaining 25% of the judicial budget is primarily used to: 1) reimburse some courts rents paid for court buildings; 2) maintain court ICT systems; and 3) to finance the council for the judiciary and its operations.

Summary information for the Netherlands

Constitutional and legal position of the Judicial Council	The Dutch Judicial Council was established in 2002. Neither the council nor the judicial boards (nominating judges) are mentioned in the Dutch constitution
Selection of the president and members of the Judicial Council	The council has 5 members. 3 of them are judges. The Minister of Justice makes up a list of candidates after consultation with the judiciary and the judicial council. The government cabinet then appoints the members, including non-judges
Selection and appointment of judges	The council receives a list of recommendations (usually consisting of 3 candidates) from the management board of the court where the vacancy exists. It then forwards this list to the Ministry of Justice. There has not been a case in which the recommendation was not followed.
Budgetary authority: The court budget	The judicial council negotiates the court budget (“prices per minute”) with the Ministry of Justice. The Judicial Council administers the court budget.
Budgetary authority: The council’s budget	The council for the judiciary is financed out of the court budget. It keeps part of the overall contribution from the ministry in order to

	finance its own operations.
Prosecution Service	The College of Procurators General (established 1997) administers the budget for the prosecution service.

Judicial budgeting in Denmark

In Denmark, an independent Courts Administration was established in 1999. The Court Administration is governed by a Board. The board of governors consists of 8 court representatives, 1 attorney and 2 members with special management and social insights. The reform of court budgeting in Denmark, principally taking place from 2000 to 2002, had the following main characteristics:

- A weighted caseload model was established. The weights were established as “cost per case” for different types of cases, reflecting time registration by staff and expert assessments.
- The weights are used to calculate court productivity as the weighted number of cases divided by the number of full-time equivalent judges and clerks (separate productivity indicators were established for judges and clerks).
- The productivity indicator is broken down for each court section, allowing courts to use the indicators for internal management.
- Resource allocation between courts is based upon the measure of court productivity. When vacancies arise, the Court Administration takes into account productivity when deciding what to do. If the court has a low productivity, the position will be reallocated to another court with high productivity.
- Courts have been required to establish targets for their productivity, broken down for each section.
- Courts are benchmarked on their productivity, so that they are compared to average court productivity as well as to the productivity of the 10 most productive courts.
- A pilot project was initialized on decentralization of economic management, allowing courts to spend the non-salary part of the budget according to their own judgment. Based on the results of the pilot the principle was eventually expanded to all courts.

With regard to the overall judicial budget, the Fiscal Bill contains one overall budget for all courts, as well as a separate budget for the Courts Administration. The Courts Administration decides how to allocate the court budget between courts.

When negotiating the overall court budget and the budget for the Court Administration, the Court Administration has special access to the parliament, if it feels that the Ministry of justice or the Ministry of Finance do not take proper care of court interests.

The Court Administration is responsible for ensuring a proper and appropriate economic management of the courts. The current president of the Court administration is not a judge. The General Public Auditor audits the accounts of the courts and the Courts Administration. If the General Public Auditor finds an extreme case of economic mismanagement the Minister of Justice may dismiss the board of the Court administration (but this is the only situation when the minister may do so). In this way there is a certain “safeguard” against economic mismanagement by the otherwise independent Court Administration.

Summary information for Denmark

Constitutional and legal position of the Judicial Council	The Court Administration was established in 1999. It is not mentioned in the constitution.
Selection of president and members of the Judicial Council	The Court Administration is headed by a Board comprising 1 Supreme Court judge, 2 High Court judges 2 district court judges, 2 court clerks, 1 lawyer, and 2 members with special managerial experience. The judge members are nominated by the courts and the Association of Judges. The non-judge members are nominated by various organizations, stipulated in the Court Administration Act.
Selection and appointment of judges	Judges are nominated by the Judicial Appointments Board. The board has 6 members. 1 member is nominated by the Supreme Court, 1 by the high courts, and 1 by the association of judges. The Minister of Justice appoints the 3 remaining members, who are nominated by the Barr Association, the Council of Local Governments and an educational association. The board nominates 1 candidate for each vacant position. It has authority over all judgeships with the exception of the presidency of the Supreme Court, which is determined by the judges within the court.
Budgetary authority: the court budget	The Court Administration manages the court budget. It has special access to negotiate the budget directly with the parliament, if it feels that the Ministry of justice or the Ministry of Finance do not take proper care of court interests.
Budgetary authority: judicial council	The Court Administration has a separate budget. It is negotiated together with the court budget, following the same procedure. The Judicial Appointments Board does not have a separate budget. Secretariat services for the board are provided by the Courts Administration.
Prosecution Service	The budget for the prosecution service is managed by a separate is managed by the Director of Public Prosecutions' Office.

Judicial budgeting in Belgium

In Belgium a judicial council was established in 1998 with the principal aim to select judges. The council has, however, no authority with regard to the management of the judicial budget. The budget is managed by the Ministry of Justice.

There is some dissatisfaction among Belgian judges with regard to the level of funding. For example, the Belgian judiciary does not yet have a modern and integrated ICT system. The problem may not only lie with lack of funding, but also with inefficient management. The complex political situation in Belgium may be one of the reasons it has been slow to introduce the kind of initiatives to increase judicial efficiency and accountability seen in many other European countries.

The Belgian judiciary is, however, currently working to establish a weighted caseload model to assess court workload. The autonomy of the High Council has been assured by the manner of its financing. The council is financed by the special “grants budget”, controlled by the

Chamber of Representatives. The judicial council makes a budget proposal to the Chamber of Representatives. The government/ministry of justice is not involved in this process.

Summary information for Belgium

Constitutional and legal position of the Judicial Council	The Judicial Council (High Council of Justice) was established The role of the judicial council is defined by the Belgian constitution
Selection of president and members of the Judicial Council	The judicial council has 44 members. 22 are elected by magistrates (judges and prosecutors). The senate appoints 22 non-magistrates as members of the council (8 lawyers, 6 university professors and 8 representatives from civil society). The High Council of Justice is composed of a French college and of a Dutch college. Each college exists of an equal number of members and is by way of parity composed, on the one hand, by judges and officers of the public prosecutor.
Selection and appointment of judges	The Minister of Justice (formally the King) appoints judges proposed by the judicial council. The council nominates just 1 candidate for each position. The Minister may refuse the proposal. In that case, the council may decide to propose the same candidate again. The same rules apply for the appointment of court presidents and judges within the Court of Cassation.
Budgetary authority: Court budget	The council has no authority with regard to the management of the judicial budget.
Budgetary authority: Council budget	The council is financed by the special “grants budget”, controlled by the Chamber of Representatives. The judicial council makes a budget proposal to the Chamber of Representatives.
Prosecution Service	The Judicial Council nominates prosecutors, but does not manage the prosecution service budget.

Judicial budgeting in Switzerland

Switzerland has a strong federal structure of the State that does also affect the judiciary, whose structure and features vary significantly from a Canton to another. The Federal State is composed of 26 Cantons, each one with its own Constitution, legal system, government, legislature and courts. In some cantons there is a substantial degree of judicial self-administration, in others not.

In the Confederation and in cantons with self-administration of the judiciary the budget is usually presented to the assembly by a representative of the highest court, whereas in cantons with a stronger involvement of the executive branch the court budget is part of the general state budget and therefore presented to the assembly by the government.

Switzerland is one of the European countries with the highest budget allocations to the courts per inhabitant. And this fact alone may make Switzerland a challenging role model for less affluent countries. Institutional arrangements that function well in situations with abundant resources cannot always successfully be transferred to a different context.

Interestingly, the trend to establish objective indicators for determining and allocating the judicial budget, in the form of weighted caseload models, has in recent years also caught on in Switzerland.

Summary information for Switzerland

Constitutional and legal position of the Judicial Council	At federal level, there is no judicial council and only a few cantons – Fribourg, Geneva, Neuchâtel, Jura and Ticino – have established judicial councils.
Selection of the president and members of the Judicial Council	The judicial councils consist of between 5 (Jura) and 11 (Geneva) members. In general, they are composed of members of the judiciary, the prosecution authority, parliament and the government as well as of external professionals like university professors and lawyers. The parliament, the executive and the judiciary are involved with appointing members to these cantonal Judicial Councils ⁹ .
Selection and appointment of judges	In cantons where there are judicial councils, these bodies are involved in the selection process, but do not have the power to elect judges. Federal Supreme Court judges are elected by the United Federal Assembly (Vereinigte Bundesversammlung), the two chambers of the federal parliament specifically conjoined for this purpose. At cantonal level, judges are elected either by parliament or by plebiscite.

Judicial budgeting in Poland

In Poland the budget for the courts is administered by the Ministry of Justice. This issue has been the subject of controversy for many years. There are pending discussions about the creation of total financial autonomy for the courts. Such a solution was created for the Prosecution Service Authority, which in 2010 was separated from the Ministry of justice.

Even with the current model, however, the judiciary has substantial influence in the budget drafting process. 11 courts of appeal transmit the proposals of lower courts under their jurisdiction to the judicial council, which forwards the formal application to the Ministry of justice. The Ministry weighs the proposal in light of the budgetary capacity of the state budget as a whole. Thus, the Ministry of Justice develops the final version of the budget proposal. The Ministry of Finance is obliged to accept the budget proposal of the Ministry of Justice without being able to change it. After submission to the Parliament, the judicial council is a partner in discussion regarding the budget proposal, without the Ministry of Justice acting as intermediary.

When the separate item on common courts in the state budget has been adopted by the Parliament it is “untouchable”. It may be increased or decreased only by way of legislative act. Furthermore, the money allocated to the judiciary cannot be transferred to some other tasks undertaken by the Ministry of Justice.

Since this current model for judicial budgeting in Poland was adopted, replacing a model with far less judicial influence over the budget, it appears one can observe a significant

⁹ It has not been possible as part of this project to determine exactly how the different cantonal judicial councils are financed.

improvement in the material situation of the judiciary. In general there are no longer significant problems as regards the technical equipment in Polish courts. Courts are to a great extent computerized, which was not the case even a few years ago.

The Constitutional Court dealt in 2005 with the problem of the budget for the Judicial Council. Taking into account the special characteristic of the Judicial Council – an organ at the intersection of three branches of government – the Constitutional Court confirmed that the Judicial Council may not be treated as a part of the judicial branch. Therefore, there was according to the constitutional court no need for the Council to have the same guarantees of independence as the judiciary. The court found that when the Judicial Council came under the budget of the Chancellery of the President this was in compliance with the Constitution. Nevertheless, since 2006 the Judicial Council has had a separate budget and is financed directly from the state budget, without any intermediaries.

Summary information for Poland

Constitutional and legal position of the Judicial Council	The National Council for the Judiciary was established in 1989 and it was acting on the basis of amended provisions of the Constitution of 1952 and the statute. The current competences of the NCJ are set out in the Constitution of 1997.
Selection of president and members of the Judicial Council	15 of the 25 members of the Judicial Council are elected by the judges. In addition, the President of the Supreme Court and the President of the Supreme Administrative Court are council members. The Minister of Justice, 4 MPs, and 1 person appointed by the President of the Republic are members of the council.
Selection and appointment of judges	The Judicial Council considers and assesses candidates for the offices of judges of the Supreme Court, Supreme Administrative Court, common courts, “voivodship” administrative courts and military tribunals. It presents the President of the Republic of Poland with the petitions for the appointment of the judges of the Supreme Court, the Supreme Administrative Court, common courts, voivodship administrative courts and military tribunals. The Ministry of Justice appoints the presidents and VPs of courts after receiving an opinion from adequate judicial organs. The presiding President of the Supreme Court is appointed from among the Supreme Court justices by the National Assembly upon the recommendation of the President
Budgetary authority	The Judicial council drafts the court budget and sends it to the Ministry of Justice. The Judicial council may discuss the budget proposal with the parliament.
Prosecution Service	The budget for prosecution service is managed by the Prosecution Service Authority.

Lessons to be learned from the comparative analysis of judicial budgeting

While the justice sector is in many regards special, it is from a budgetary perspective just one of the many sectors that compete for limited financial resources of the government. The budget needs of the judicial sector must be negotiated annually, often within a highly politicized context in which there are many other worthy and competing demands for public

expenditure. If judicial budget demands are not expressed effectively, the sector is unlikely to get the financial recognition it seeks.

Many countries have in recent years refined and improved their methods of budgeting for the operations of the courts and prosecutor's offices. Increasingly sophisticated budget techniques have not only made the allocation of budget resources more accurate and fair, but have strengthened accountability and performance at all levels of courts management.

In general, the improvements in budgeting have been substantial. The traditional (input-based) model which based budgets primarily on previous year's budget allocation has been abandoned. Modern judicial budgeting is based upon detailed assessments of the output and workload of courts. In this way it is possible to allocate budgets and auxiliary personnel according to the level of funding and staffing that is actually needed, on average, to hear, process, or investigate the different types of cases.

A "case flow demand" budgeting model will not only enable funding to be re-allocated annually, or more often, according to shifts in court demands and case workloads, but it also introduces a culture of flexibility in courts management that may flow into a wide range of managerial and resourcing decisions and judicial performance issues. In other words, it may help to break down cultural or systemic rigidities that are themselves an impediment to the success of various reforms within the judicial sector¹⁰.

Furthermore, the fundamental importance of judicial independence puts pressure on whoever has the authority to allocate court budgets. Rumors may easily arise that the budget is used to punish or reward the judiciary for its actions.

On the other hand, there is also a risk that the budget allocator becomes so afraid of causing such rumors that it refrains from altering the judicial budget at all. This is clearly an inefficient solution since judicial activity is rarely constant. If the judicial budget is going to be used efficiently, it is necessary to regularly adjust budget allocations to ensure that the more busy courts receive more funds, while less busy courts may do with fewer resources.

An obvious solution to this dilemma is to base decisions about budgeting and resource allocation upon "objective" indicators for court workload¹¹. As can be seen from the discussion above, this approach has in recent years successfully been adopted by several countries. As the example illustrates the concern for judicial independence and the concern for judicial accountability may go hand in hand. If one increases judicial independence by granting the authority over the judicial body to an independent body this naturally creates a demand for a mechanism to hold the independent body accountable for its economic management. Again, performance indicators and indicators used for allocating the budget efficiently play a crucial role in this regard.

Finally, in those countries having a judicial council (or equivalent), it is important to notice that the budget for judicial council is either an integrated part of the overall court budget (England and Netherlands) or closely linked to the court budget (Denmark and Poland). In both England and the Netherlands the Ministry provides a lump sum allocation to the judicial council which the council then further allocates to the courts, while keeping part of amount to finance its own operations. Since the judicial councils in these countries provide crucial

¹⁰Webber (2006)

¹¹Wittrup (2010)

support functions to the courts, it is natural to perceive the council budget as an integrated part of the court budget.

In sum, the experiences of judicial budgeting in Europe provide the basis for suggesting the following key Best Practices:

- Judicial budgeting should as far as possible be based on transparent and “objective criteria”, as in a “case flow demand” budgeting model. This applies to determining the overall budget, as well as to allocation of the budget among courts.
- Mechanisms should be put in place to encourage the executive and judicial power to reach consensus on criteria for determining and allocating the budget.
- The judiciary should have the ability to represent its views as part of the budgetary process. This may be in the form of direct access to negotiate the budget with the Ministry of Finance or the Parliament.
- The judicial budget can successfully be administered by a body controlled by the judiciary.
- The procedures for establishing a budget for the judicial council should be aligned with the procedures for establishing the court budget.
- Judicial accountability should be strengthened by the use of relevant performance indicators, and possibly “production agreements” between the judiciary and the government in order to ensure that the judiciary delivers value for money.

Implications for judicial budgeting in Bosnia-Herzegovina

The most obvious challenge for Bosnia-Herzegovina with regard to applying the Best Practices outlined above is the current fragmentation of the judicial financing. The decentralized financing implies that not only do the two entities (Republika Srpska and the Federation of Bosnia and Herzegovina) have separate court budgets (and principles for determining and allocating the budgets), but so do each of the 10 cantons in the FBiH.

A recent report¹², prepared as part of JSDP II, has highlighted some of the many disadvantages with such an extremely decentralized system for court financing. Among the most important disadvantages are:

- Substantially different levels of funding will lead to inequality of justice since poorly financed courts will not be able to deliver the same quality of judicial services as courts with proper funding.
- Lack of common principles for determining budgetary needs and allocating budgets among courts will cause a lack of transparency. This in turn may make it easier for some people to inappropriately use the budgetary mechanism to try to exercise power over judges and courts.
- Good budgeting requires strong analytical capabilities for assessing budgetary needs. The very small agencies now in charge with court budgeting in the cantons will likely not have such capabilities.

¹² “Unifying Judicial Financing for the Federation BiH”, July 2013.

The budgetary fragmentation also implies that the financing of the HJPC (judicial council) is not optimally linked with the financing of the courts, since the budget for the HJPC is provided by the government of Bosnia and Herzegovina. The HJPC provides support to the courts in the form of e.g. ICT. To have the decisions about the financing of such common support to the courts be completely separated from decisions about court budgets does not seem to provide the best framework for strategic planning or the best use of resources. Experience shows that such separated systems can be cause of severe underfunding, because each of the financing authorities may be compelled to try to shift responsibility for financing activities to the others.

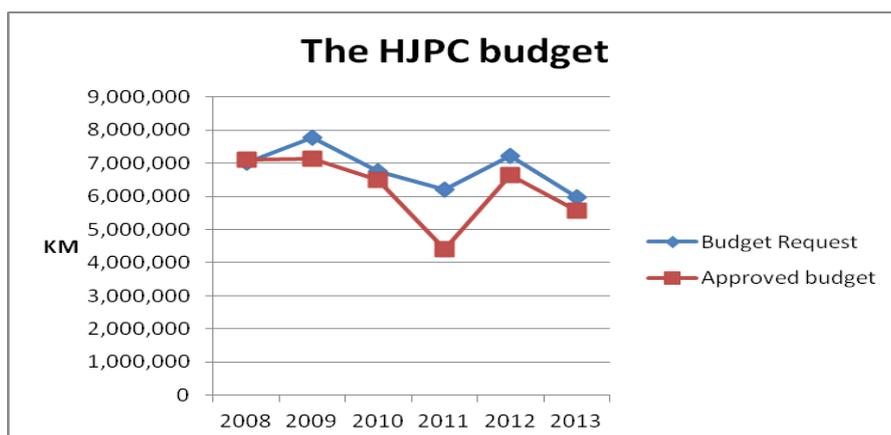
Consolidation of the financing of the judiciary must be considered the most important initiative needed in order to improve judicial budgeting in Bosnia-Herzegovina. The consolidation should be linked to the establishment of more or less objective criteria for determining and allocating the judicial budget. This is even more important in a country with a history of ethnic conflicts in the past and lack of social trust. Transparent and objective criteria for allocating the budget among courts and regions will minimize the risk of unfair or biased allocations.

In principle, the financing could remain decentralized as long as all financing authorities agree to follow the same criteria for determining and allocating court budgets. The important thing is common and objective criteria, and also that there is a central agency for the judiciary with the necessary capabilities to develop, analyze and maintain the criteria for judicial budgeting, including their own budget.

Another key learning from the comparative analysis of judicial budgeting is the importance of cooperation between the executive and judicial authorities. The institutional framework should encourage them to work together and try to avoid conflicts over the budget.

In Bosnia-Herzegovina the level of conflict over judicial budgets appear to be high. The graph below shows the development of the HJPC budget from 2008 to 2013. The approved budget has in this period been reduced with more than 20%, and has fluctuated substantially. On average the approved budget is approximately 10% lower than the request made by the HJPC.

The report “Unifying Judicial Financing for the Federation BiH” also documents that HJPC budgetary recommendations are systematically rejected by the cantonal governments. There does indeed appear to be a need for encouraging a more cooperative approach to judicial budgeting.



Certainly, the establishment of an agreement about objective criteria for budgeting would be a major step towards reducing potential conflict over the budget. In addition, some of the initiatives taken in other countries to strengthen the involvement of the judiciary in the budgetary process should be considered. In particular:

- To require (as in England, Denmark and Poland) that the judicial budget in general has to be approved by the judicial council, and that – if it is not approved – the council has the right to negotiate the judicial budget directly with the parliament.
- To establish (as in England and the Netherlands) multi-year agreements over the judicial budget.
- To allow (as in England, the Netherlands and Denmark) the judicial council to allocate the court budget among individual courts.
- To incorporate (as in England and Netherlands) the budget for the judicial council in the overall court budget.
- To require that in-year adjustments of the budget are either as a rule approved by the judicial council (as in England), or are following pre-determined rules (as in the Netherlands) if the final budget is linked to the number of cases.

Summing up, the analysis leads to following recommendations for judicial budgeting Bosnia-Herzegovina:

- Initiatives should be taken to consolidate the judicial budget. Such consolidation will imply that uniform criteria for determining and allocating budgets are established.
- The judicial budget should be based on transparent and objective criteria. This applies to determining the overall budget, as well as to allocation of the budget among courts.
- Initiatives should be taken to strengthen the role of the judiciary in the budgetary process, as mentioned above.

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