

Igor Milinković, LL.D.,
Full Professor,
Faculty of Law, University of Banja Luka,
Republika Srpska, Bosnia and Herzegovina

ОРИГИНАЛНИ НАУЧНИ РАД
10.5937/zrpfm1-40478

UDK: 342.728:[347.96:061.23(497.6)]

Рад примљен: 02.10.2022.

Рад прихваћен: 25.10.2022.

FREEDOM OF ASSOCIATION OF JUDGES IN BOSNIA AND HERZEGOVINA

Abstract: *Freedom of association is one of the fundamental freedoms and is considered one of the necessary elements of a free society. Isolated from other members of the community, an individual would have little chance of successfully resisting the arbitrariness of the ruler, or fighting for social changes that he deems justified. Although judges are also entitled to this right, the very nature of the judicial office may call for establishing certain restrictions on the exercise of this right in order to protect the dignity of the judicial office and public confidence in the independence and impartiality of the judiciary. The first part of the paper focuses on the importance of exercising the freedom of association of judicial office holders. Special attention will be drawn to the role that professional associations of judges play in preserving the independence of the judiciary and improving its position, as well as protecting the rule of law and a democratic order. After referring to relevant provisions of international documents and the case law of the European Court of Human Rights, the author analyzes the restrictions on the freedom of association of judges adopted in various national legislations. Special attention will be given to the justifiability of prohibiting judges from joining political parties, and the dilemmas arising from the membership of judges in secret societies, i.e. other organizations operating on similar grounds. The second part of the paper focuses on the legal framework of the freedom of association of judges in Bosnia and Herzegovina and the justifiability of restrictions imposed on the exercise of this right.*

Keywords: *freedom of association, judges, professional associations, political parties, secret societies.*

* igor.milinkovic@pf.unibl.org

1. Introduction: the democratic relevance of freedom of association

Freedom of association is one of the fundamental freedoms, whose relevance for the establishment and functioning of a democratic system and the rule of law has been strongly emphasized by political and legal thinkers.

According to John Stuart Mill, one of the preconditions of a free society is the liberty of “combination among individuals”, provided that the persons who associate are of full age, and not forced or deceived (Mill, 2009: 23). Alexis de Tocqueville, the famous French 19th-century liberal, viewed freedom of association as one of the fundamental human rights. As he influentially stated in *Democracy in America*: “The most natural privilege of man, next to the right of acting on his own, is that of combining his exertions with those of his fellow-creatures, and of acting together ... The right of association is almost as inalienable as the right of personal liberty” (Tocqueville, 2015: 209). The stability and vitality of a democratic system depend on the existence of democratic habits of its citizens, which must be cultivated and developed. According to Tocqueville, “the qualities of representative democracy depend on the qualities of the society within which it is embedded, especially upon the cultivation of civic virtues via associational ties” (Warren, 2001: 30). Following in Tocqueville’s footsteps, Robert Putnam emphasized the interdependence between successful democratic government and associational life. As Putnam pointed out in his book *Making Democracy Work* (1993), associations “instil in their members habits of cooperation, solidarity, and public-spiritedness” (Putnam, 1993, cited in Warren, 2001: 18). The American political philosopher Michael Walzer described the freedom of association as “a central value, a fundamental requirement of liberal society and democratic politics” (Walzer, 1998: 64). According to Walzer, “only a democratic civil society can sustain a democratic state. The civility that makes democratic politics possible can only be learned in the associational networks ...” (Walzer, 1995: 104). George Kateb claims that being a free person necessarily “includes associating on one’s own terms, which means engaging in voluntary relationships of all sorts” (Kateb, 1998: 37-38). Such an approach to freedom of association indicates the strong link between the existence of this freedom and the value of human dignity, considering that associational freedom is vital to personal self-realization (as an essential element of human dignity). According to Kateb: “Inseparable and indistinguishable from being a self – having a unique identity – is having the relationships that one wants” (Kateb, 1998: 48). The philosopher Michael Oakeshott thought that a free society was integrated by a wide variety of “enterprise associations” formed for the more satisfactory pursuit of individual ends, and he considered freedom of association to be perhaps the single most important of liberal freedoms (Oakeshott, 1991, cited in Boyd, 2008: 235). In *Political Liberalism*, John Rawls considered freedom of association

as one of the indispensable institutional conditions for giving effect to liberty of conscience and political liberties (Rawls, 2005: 309). In a detailed study on the relationship between democracy and freedom of association, Mark Warren identified three general ways in which associations might produce potentially “democratic” effects: 1) they may contribute to the capacities of citizens to participate in collective judgement and decision-making and to develop autonomous judgements that reflect their wants and beliefs (developmental effects of associational life); 2) they may contribute to the formation of public opinion by developing agendas, testing ideas, and providing a voice for various interests; 3) they may contribute to institutional conditions that support, express, and actualize individual and political autonomy as well as transform autonomous judgements into collective decisions (enabling individuals to affect the political system) (Warren, 2001: 61).

However, freedom of association is not absolute, which means that it can be legitimately restricted if certain conditions are met. Many influential political thinkers warned of the possible harmful effects and abuses of associations. Both Jean-Jacques Rousseau and James Madison were highly suspicious of associations as the social basis of political factions (Warren, 2001: 30). Although Madison defended freedom of association, he regarded groups and factions as a perpetual danger to the constitutional order (Boyd, 2008: 249). Tocqueville’s awareness of the possibility of perversions of associational life is visible from his description of “small” parties (as compared to European “great” parties), whose way of functioning he had the opportunity to observe during his stay in America, and which he called factions or parties “without political faith”. According to Tocqueville: “I cannot conceive of a sorer spectacle in the world than that of different coteries (they don’t deserve the name of parties) which today decide the Union. You see operating in broad daylight in their bosoms all the small and shameful passions which are usually hidden with care at the bottom of the human heart” (Tocqueville, cited in Bonneto, 1981: 64). According to John Stuart Mill, freedom of association belongs to the area of application of the “harm principle”. If adults voluntarily associate, freedom of association will be tolerated as long as its exercise does not result in harm to another, regardless of the purposes that associations are trying to achieve (Mill, 2009: 23).

Freedom of association is one of the key protective mechanisms against a tyrannical government. Isolated from other community members, an individual would have little chance of successfully opposing the arbitrariness of a tyrannical ruler (an individual tyrant or a tyrannical majority) or fighting for the social changes he considers justified. Freedom of association is a precondition for the adequate exercise of citizens’ rights, whose violation can most easily be prevented or their exercise ensured by the joint action of individuals.

Considering the importance of this freedom, it is not surprising that relevant human rights instruments give a prominent place to the right to free association. According to Article 20 of the Universal Declaration of Human Rights (UDHR): “Everyone has the right to freedom of peaceful assembly and association.” The right of a person not to be coerced to join an association (the negative aspect of the freedom of association)¹ is prescribed in Article 20 para. 2 of the UDHR: “No one may be compelled to belong to an association”. The UDHR also protects the right to form and join unions, as a relevant aspect of the freedom of association (Article 23, para. 4). The right to freedom of association (or certain elements of this right) is also protected in other UN human rights instruments. Article 22 of the International Covenant on Civil and Political Rights (ICCPR) states: “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests”. Article 22 para. 2 of the ICCPR stipulates that no restrictions may be placed on the exercise of freedom of association “other than those which are prescribed by law and which are necessary in a democratic society”, and allows “lawful restrictions on members of the armed forces and of the police in their exercise of this right”. According to Article 8(1a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right of everyone to form a trade union of his choice, subject only to the rules of organisation, has to be ensured.

Freedom of association is also protected by regional human rights instruments. The European Convention of Human Rights (ECHR) guarantees the right to freedom of association in Article 11, which states: “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.” Freedom of association belongs to the group of the so-called “qualified rights”, for which the ECHR envisages legitimate restrictions. The scope of permissible restrictions on freedom of association is defined in Article 11 para. 2 of the ECHR. Such limitations are only acceptable to the extent that they are prescribed by law, are deemed necessary in a democratic society, and pursue a legitimate aim listed in Article 11(2). The list of legitimate aims that can serve as a basis for legitimate restriction on freedom of association includes: the protection of the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms. This enumeration is exhaustive and is to be interpreted narrowly (see: *Sidiropoulos and Others v. Greece, Stankov and the United Macedonian Or-*

1 The negative (passive) side of freedom of association “includes whatever general freedom we have not to associate at all as well as whatever particular freedoms we have not to associate with particular people ... Both the positive freedom and the negative freedom are necessary for us to have a complete freedom of association (which is not a same thing as having an *unlimited* freedom of association)” (Brownlee, 2016: 360).

ganisation Ilinden v. Bulgaria, Galstyan v. Armenia) (Schabas, 2015: 511-512). The last sentence of Article 11(2) states that the imposition of lawful restrictions on the exercise of the freedom of association by members of the armed forces, the police, or the administration of the State is not prohibited. The European Court of Human Rights (ECtHR) acknowledged the special position of judges as civil servants whose duties typify the specific activities of the public service, although “the judiciary is not part of the ordinary civil service” (*Pitkevich v. Russia*) (Dijkstra, 2017: 5). Such status of judges provides a basis for legitimate restrictions on their rights under Articles 9-11 of the ECHR.

The American Convention on Human Rights (ACHR) guarantees the right to freedom of association in Article 16. The African Charter on Human and People’s Rights (1981) provides for freedom of association in Article 10, which states that everyone has the “right to free association provided that he abides by the law” (Swepton, 1998: 174).

The relevance of the right to freedom of association has also been acknowledged in the case-law of regional human rights courts. The ECtHR expressed the view that “the way in which national legislation enshrines [freedom of association] and its practical application by the authorities reveal the state of democracy in the country concerned” (*Sidiropoulos and Others v. Greece*, cited in Schabas, 2015: 499). The right to freedom of association imposes positive as well as negative obligations on the contracting states. The primary duty of the contracting states with respect to freedom of association is a negative one: the duty not to interfere with the exercise of this right. According to the ECtHR case-law, one of the most important objectives of Article 11 of the ECHR is to protect people from arbitrary interference by public authorities in the exercise of their right to freedom of association (see, for example, *Manole and Romanian Farmers Direct v. Romania, Sindicatul Pastoral cel Bun v. Romania*, etc.) (Sakharuk, 2021: 172). In some instances, however, the contracting states also have positive obligations to secure the effective exercise of freedom of association. This primarily includes a duty of a state to allow an association to obtain the status of a legal entity and to provide necessary legal protection during its existence (*Ramazanov and Others v. Azerbaijan*). A state must also ensure that members of an association which pursues legitimate aims are not exposed to any legal sanctions because of their membership (see, for example, *Vogt v. Germany, İzmir Savaş Karşıtları Derneği and Others v. Turkey*, etc.). In addition, a state must protect an association and its members from the illegal actions of third parties (*Ouranio Toxo and others v. Greece*², *97 Members of the Gldani Congregation of Jehovah’s Witnesses & 4 Others*

2 According to the ECtHR: “[A] genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the

v. Georgia), or from discriminatory and arbitrary decisions of the association's governing bodies (*Johansson v. Sweden*), which is considered particularly justified in those cases where national legislations do not provide for sufficient legal remedies in that regard (Golubović, 2013: 760).

The ECtHR has also emphasized the negative aspect of freedom of association. In its decision in *Sorensen and Rasmussen v. Denmark*³, the Court stated that the notion of personal autonomy, as one of the principles underlying the interpretation of the ECHR guarantees, must "be seen as an essential corollary of the individual's freedom of choice implicit in Article 11 and confirmation of the importance of the negative aspect of that provision". In the ECtHR's opinion, Article 11 "must ... be viewed as encompassing a negative right of association or, put in other words, a right not to be forced to join an association". This dimension of the right to freedom of association has also been stressed by other regional human rights courts. The African Court on Human and Peoples' Rights found, in its decision in *Mtikila & Others v. Tanzania*, that the right to freedom of association incorporates not only the right to associate with others but also the right not to be forced to associate with others as occurs when one is required to join a political party to run for public office (Windridge, 2015: 312). Some of the regional courts' decisions related to the freedom of association of judges will be discussed in more detail below.

The right to freedom of association is also protected in many national constitutions. For example, Article 29 of the Constitution of the Slovak Republic states that: "The right to freely associate is guaranteed. Everyone has the right to associate freely with others in unions, societies, or other associations." According to Article 18.1 of the Constitution of Italy: "Citizens shall have the right to form associations freely without authorization for aims not forbidden to individuals by the criminal law." The existence of explicit constitutional provisions guaranteeing the right to freedom of association confirms the importance attributed to this right in modern societies and legal orders. Although the freedom of association is not explicitly mentioned in the Constitution of the United States (US), the US Supreme Court has long recognized this right as a "penumbral" or "implicit" constitutional right (Stephens, Scheb, 2007: 157).

Convention in general. There may thus be positive obligations to secure the effective enjoyment of the right to freedom of association ... even in the sphere of relations between individuals... Accordingly, it is incumbent upon public authorities to guarantee the proper functioning of an association or political party, even when they annoy or give offence to persons opposed to the lawful ideas or claims that they are seeking to promote. Their members must be able to hold meetings without having to fear that they will be subjected to physical violence by their opponents." (*Ouranio Toxo and others v. Greece*, App. 74989/01, ECtHR [2005])

3 *Sorensen and Rasmussen v. Denmark*, Apps. 52562/99 and 52620/99, ECtHR [2006]

2. Freedom of association of judges: international and national standards

International documents on judicial ethics stipulate that judges also have the right to freedom of association. According to Article 41 of the IBA Minimum Standards of Judicial Independence (1982), adopted by the International Bar Association (IBA): “Judges may be organized in associations designed for judges, for furthering their rights and interests as judges”. Principle 8 of the UN Basic Principles on the Independence of the Judiciary (1985) states: “In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly, provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.” According to Principle 9 of the UN Basic Principles: “Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.” The right of judges to freedom of association is also stressed in the Bangalore Principles of Judicial Conduct (elaborated by the Judicial Integrity Group in 2001 and revised at the 2002 Round Table Meeting of Chief Justices held at the Hague on 25-26 November 2002), a document described as “the Magna Charta of the judicial ethics on the global stage” (Terhechte, 2009: 512). Principle 4 (“Propriety”) of the Bangalore Principles states that a judge, like any other citizen, is entitled to freedom of association. Like the UN Basic Principles, the Bangalore Principles point to a higher standard of conduct that is required of judges when exercising this right. In exercising the right to freedom of association, “a judge shall always conduct himself or herself in such manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary” (Principle 4.6).

The right of judges to form professional associations has also been recognized in several other documents regulating the status of judges and standards of their professional conduct: the Universal Charter of the Judge (Article 12), the European Charter on the Statute of Judges (Article 1.7), the Magna Carta of Judges (Article 12), etc. According to Article 25 of the Recommendation Rec (2010)12: Judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010: “Judges should be free to form and join professional organization whose objectives are to safeguard their independence, protect their interests and promote the rule of law.”

The relevance of exercising the aforementioned right is also recognized in Opinion no. 23 of the Consultative Council of European Judges (CCJE): On the role of associations of judges in supporting judicial independence (2020). As stressed

in the CCJE Opinion, the establishment of professional associations of judges contributes to the protection of judicial independence, i.e. fostering the rule of law within a legal order. The right to associate is not only in the personal interest of a judge, but also in the interest of the judiciary as a whole. According to Opinion no. 23, the following are the objectives of establishing the associations of judges: 1) establishing and defending the independence of the judiciary, and 2) fostering and improving the rule of law. The establishment of professional associations of judges enables judicial office holders to assert themselves as a relevant interlocutor in the process of creating and implementing judicial reforms, or to decide on issues related to their status, and to more effectively oppose attempts to undermine judicial independence, regardless of whether these attempts originate from the representatives of other government branches or from the judiciary itself. Professional associations of judges can also play a relevant role in securing the material status of judicial office holders, conducting their professional training and education, and developing and promoting the ethical standards of judicial conduct (CCJE, 2020).

Freedom of association of judges is not limited exclusively to the founding of professional associations. As emphasized in the provisions of the UN Basic Principles and the Bangalore Principles quoted above, judges enjoy the right to freedom of association like all other citizens, provided that in exercising this right they behave in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary. The question arises at what point a judge's affiliation with a certain organization becomes a threat to his/her ability to make impartial decisions. In performing his/her judicial duties, the judge must be impartial and must be seen by all to be impartial (see, e.g., Art. 5 of the Universal Charter of the Judge; Art. 3 of the Judges' Charter in Europe, etc.). Membership in a certain club or association can question such an impression or create the impression of impropriety. Therefore, it is necessary that judicial office holders show special caution when joining various associations and organizations. If a judge is not aware of the real character of the association at the time of joining, he must leave such association immediately upon learning the facts about its discriminatory actions or goals. As stated in the B&H Act on the High Judicial and Prosecutorial Council (HJPC Act B&H): "A judge ... may not be a member of any organization that discriminates on the basis of race, color, sex, sexual orientation, religious affiliation or ethnic origin or national affiliation, nor may he contract the use of facilities belonging to such organizations, and must withdraw from such organizations immediately after becoming aware of their conduct" (Article 82, para.3 HJPC Act).⁴

⁴ Article 82, paragraph 3, [Act](#) on High Judicial and Prosecutorial Council of the Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, 25/2004, 93/2005 and 48/2007

The issue that raises particular controversies is whether judges should be allowed to become members of political organizations (parties). The connection between the right to political party membership and the freedom of association was stressed in certain decisions of national constitutional courts, which evaluated the justifiability of banning party membership for some categories of public servants. In its 1993 decision, the Belgian Court of Arbitration found that the legal provisions prohibiting police officers from becoming political party members, justified by the desire to ensure the political neutrality and open-mindedness of the police, violated the very essence of freedom of association; in the Belgian Court's opinion, the general nature of the ban was clearly disproportional to the goal pursued (CoE, 1994: 49). However, as noted above, the ECHR allows such restrictions under certain conditions.

A comparative analysis shows that the permissibility of political activity/party membership of judges is regulated differently in different national legislations. In many countries, it is expressly prescribed by law that judicial office holders cannot be members of political parties. For example, Article 94(1) of the Courts Act of the Republic of Croatia states: "A judge shall not be a member of a political party, nor engage in political activity." According to Article 195(6) of the Bulgarian Judiciary System Act, a judge may not be a member of political parties, coalitions or organizations with a political goal, nor shall he/she be involved in political activity. In some countries, the ban on membership of judges in political parties is expressly prescribed in the constitution (e.g., Article 100 of the Constitution of North Macedonia). On the other hand, judges in some countries have the right to engage in political activities, including the possibility of becoming a political party member. In the US, judges can be members of political parties; moreover, in some states, where judges are elected by citizens, information about party affiliation is indicated on ballots, along with the names of judicial candidates (Bado, 2013: 39-40).⁵ In Germany, it is also not forbidden for judges to be members of political parties (Bado, 2013: 45). In Switzerland, where judges are elected by legislative bodies, the selection and election of judges is based on an informal agreement between the political parties, depending on the party strength. As a result, party membership or (at least) ideological closeness to the party endorsing the candidate play an important role in the judicial selection process. Only in the smallest Swiss cantons, where judges are elected by plebiscite, do the political parties seem to have little or no influence on the election process (Kiener, 2012: 414-415). Is the ban on the political activity of judges justified? And should this ban be absolute?

⁵ For more on controversies surrounding partisan elections of judges in the US, see: Bado, 2013: 39-42; Larkin, 2020; Kauffman, 1982.

Some authors differentiate between two kinds of political participation of judges: passive and active. Passive political engagement is reduced to the membership of judges in political parties or professional associations connected to them (e.g., trade unions). The second form of participation implies the active (working) participation of judges in the activities of such organizations (Gilles, 1985: 96). In Germany, the leading political parties are linked to professional associations that bring together members of the legal profession. The oldest among them is the Social Democratic working group of lawyers (*Arbeitsgemeinschaft sozial-demokratischer Juristen-ASJ*), founded in 1947, which gathers members of the Social Democratic Party (SPD) coming from all sectors of the legal professions, including judges (Gilles, 1985: 97). It is not uncommon for political parties to form bodies (committees) that deal with matters in the field of justice, whose members may also be non-party figures. The association of judges with political parties can take different forms, which do not necessarily require party membership. Are all the mentioned forms of the political participation of judges unacceptable?

The HJPC Act of B&H explicitly prohibits both active and passive party engagement of judges. Article 82 (para.2) of the HJPC Act stipulates that judges shall not be members of political parties and their bodies, foundations and associations connected to political parties. The legislator went a step further, demanding that judges should refrain from participating in public events that are connected to political parties (thus establishing restrictions on the freedom of expression of the judicial office holders). This means that judges should not participate in public forums organized by political parties, or speak at political party rallies, even if it is emphasized that the judge appears as a non-partisan person.

There are several reasons for prohibiting the party membership (activities) of judges. If political parties can influence the election of judges, the risk of electing politically suitable judges increases and calls into question the impression of the impartiality of the election process (and, consequently, the impression of impartiality of elected judges). Even when judges are elected by high judicial councils, if part of the members of these bodies is chosen by authorities of other branches of government, the impression of favoring (or obstructing) candidates based on their party affiliation may be created. Such a risk is especially present in the so-called “new” democracies, where there is a gap between the formally guaranteed independence of the judiciary and how judicial bodies function in practice (or, at least, how the functioning of judicial bodies is perceived by the public). Party membership of a judge could be a basis for filing a motion for his recusal, whether he is charged with favoritism to a party colleague or animosity toward a party member from an opposing political bloc. Considering the importance of preserving the impression of independence and impartiality of judicial proceedings, the ban on membership in political parties for judicial of-

fice holders can be considered justified. The question remains whether and to what extent the formal prohibition of party membership ensures the political neutrality of the judicial office holders, i.e. prevents the influence of judges' political preferences on decisions they make.

There are also dilemmas regarding the admissibility of the membership of judges in secret societies (or organizations operating on similar grounds). The UN ODC *Commentary on the Bangalore Principles* states that it is not advisable for a judge to join a secret society whose membership includes lawyers representing parties in proceedings heard by the judge because it may entail extending favours to those lawyers "as part of the brotherhood code" (UN ODC, 2007: 91). This comment refers to the provision of the Bangalore Principles that regulates personal relationships of judges and members of the legal profession. The risk of possible favoritism, or giving the impression of favoritism, exists in relation to political parties as well. Although this issue seems to be distant from the daily judicial practice and professional conduct, it raises numerous dilemmas, and was the issue of an ECtHR ruling.

The question of admissibility of judges' membership in Masonic lodges (and whether data on membership in this organization should be made available to the public) has attracted most attention. This dilemma is not new. At the beginning of the 20th century, there were attempts to use the Masonic lodge membership as a means of influencing the Masonic judge. In the well-known *Seddon* case, the defendant, after being sentenced, showed a Masonic sign to the judge. Judge Bucknill (a Freemason himself), expressing regret about passing a sentence on a member of "the same fraternity", sentenced Seddon to death (Samuels, 2005: 2003). Should a judge be put in a position to prove his impartiality in this way?

In court practice, there were cases where parties to proceedings submitted requests for the recusal of a judge because of his membership in a Masonic lodge. There were also reported cases where the accused demanded from the judge to declare his affiliation with a Masonic organization, thus challenging the ability of a Freemason judge to pass an impartial judgement.⁶ The concern that

6 In Scotland, in 2000, the accused demanded from the judge to declare whether he was a member of a Masonic lodge, arguing that the judge's affiliation with a Masonic organization would undermine the impartiality of the proceedings (BBC News, 2000). The request was probably inspired by the rule that was in force in England and Wales at the time. In England, in 1998, the legislator introduced an obligation that a candidate applying for a judicial post should declare whether he is a member of a Masonic organization; the obligation was abolished in 2009. The abolition of this obligation was followed by the successful challenge of similar Italian rules before the ECtHR. In its judgment in *Grande Oriente d'Italia de Palazzo Guistiniani v. Italy*, the ECtHR found that the obligation to declare membership of a non-secret society breached the applicants' right to free association (Shetreet, Turenne, 2013: 218). The controversial 2019 Polish Disciplinary Act (so-called "muzzle law") contains a provision that

the membership of a judge in a Masonic lodge could lead to a conflict of loyalty (loyalty toward the legal order and loyalty toward the Masonic organization) resulted in the introduction of restrictive measures in some European countries.

In Italy, the High Council of Magistracy adopted acts that warned against the problematic membership of judges in a Masonic organization; eventually, the High Council's guidelines of July 1993 explicitly prohibited the membership of judges in Masonic lodges. The imposition of disciplinary measures on judges due to their association with a Masonic organization sparked controversy and led to appeals to the European Court of Human Rights.

In the case of *N.F. v. Italy* (2001)⁷, a judge (appellant) was given a disciplinary sanction for being member of a Masonic lodge that operated under the Grand Orient of Italy; the disciplinary sanction had negative consequences for his professional advancement. The basis for imposing the sanction was Article 18 of Royal Decree no. 511, adopted in 1946, which stipulates that a judge who “fails to fulfil his obligations or behaves, in the performance of his duties or otherwise, in a manner which makes him unworthy of the trust and consideration which he must enjoy or which undermines the prestige of the judiciary” will be subject to disciplinary measures. In March 1990, the Superior Council of the Magistracy of Italy adopted guidelines that determined that judges' membership in “associations imposing a particularly strong hierarchical and mutual bond through the establishment, by solemn oaths, of bonds such as those required by Masonic lodges raises delicate problems as regards the observance of the values enshrined in the Italian Constitution”, but the 1990 guidelines did not expressly prohibit judges from being members of a Masonic lodge. The appellant subsequently took steps to distance himself from the Masonic organization. In November 1992, his membership in the lodge became “inactive”. In July 1993, the Council adopted additional guidelines, which contained the provision: “Performing the function of a judge is incompatible with membership in a Masonic lodge.” After the disciplinary sanction was imposed on him, the judge filed an appeal with the Court of Cassation, which rejected the appeal. In his application to the ECtHR, the judge (applicant) stated that the imposition of the disciplinary sanction violated his right to freedom of association envisaged in Article 11 of the ECHR. The Court found a violation of his right to freedom of association under Article 11 because the regulations in force in the period until July 1993 did not meet the requirements in terms of foreseeability; the judge/applicant could

judges must disclose their membership in associations, functions performed in non-profit foundations and political party membership before they became judges. This provision applies to memberships in all kinds of associations, including associations of judges; thus, it is contrary to the ECHR (Sanders, 2020).

7 *N.F. v. Italy*, App. 37119/97, ECtHR [2001]

not have foreseen the possibility of being subjected to disciplinary proceedings for his membership in a Masonic lodge. In the case *Maestri v. Italy* (2004)⁸, the circumstances were similar and the Court made the same decision as in the case *N.F. v. Italy*.

In these judgments, the ECtHR did not deal with the issue of incompatibility of the judicial function with membership in a Masonic lodge. However, in decisions made in some other cases, the ECtHR took a position regarding the question of whether a judge's affiliation with a Masonic organization necessarily calls into question his impartiality and creates grounds for his recusal (in case one of the parties is a Freemason). In *Salaman v. The United Kingdom* (2000)⁹, the ECtHR found that the membership of a judge in a Masonic lodge of the United Kingdom does not *per se* create doubt as to his impartiality in a case where the witness or a litigant is a Mason as well. Therefore, the judge's membership in the Masonic lodge would withstand the scrutiny of the so-called objective test of judicial impartiality. The mere fact of a judge's membership in a Masonic organization will not mean that his impartiality is necessarily compromised, but it still does not mean that membership in a Masonic lodge cannot be problematic based on the application of the subjective test of impartiality. If the judge's actions give the impression that he favors the members of the Masonic organization, this could constitute a basis for submitting a request for recusal, or challenging the judgment he would pass in the aforesaid case. For example, if a judge greets one of the parties to proceedings in a manner typical of members of a Masonic organization, it would be a reason to doubt his impartiality.

3. Legal framework of Freedom of Association of judges in B&H

In Bosnia and Herzegovina (B&H), freedom of association is protected by the Constitution of Bosnia and Herzegovina, as well as by entity¹⁰ constitutions. According to Article II(3i) of the Constitution of B&H, all persons within the B&H territory shall enjoy the freedom of peaceful assembly and freedom of association with others. Article II, paragraph 2 of the B&H Constitution stipulates that the ECHR and its Protocols shall directly apply in Bosnia and Herzegovina and they shall have priority over all other law. Although the Constitution of Republika Srpska (RepS) does not explicitly mention freedom of association, it provides for the protection of the freedom of political organization (Article 31, para.1) and

8 *Maestri v. Italy*, App. 39748/98, ECtHR [2004]

9 *Salaman v. The United Kingdom*, App. 43505/98, ECtHR [2000]

10 Bosnia and Herzegovina is a state of complex constitutional structure. It comprises two entities: the Republic of Srpska and the Federation of Bosnia and Herzegovina, and the Brcko District as a third territorial unit that enjoys broad legislative autonomy.

the freedom to establish and join trade unions (Article 41). Article 2(1i) of the Constitution of the Federation of Bosnia and Herzegovina (FB&H) safeguards the freedom of association, including the freedom to form and join trade unions and the freedom not to associate. Under Article 14 of the Statute of the Brčko District (BD), everyone has the right to freedom of association, including the right to form political, social and other organizations.

The legislative framework pertaining to the exercise of the right to free association is primarily defined by laws on associations and foundations (adopted at different government levels) which regulate issues relevant to the establishment and functioning of associations (establishment, registration, internal organization, and termination of their work). According to Article 9 of the Associations and Foundations Act of RepS, an association can be founded by at least three natural persons or legal entities. Similar provisions are contained in the Associations and Foundations Act of B&H (Article 9), the Associations and Foundations Act of the FB&H (Article 11), and the Associations and Foundations Act of the BD (Article 12).

The HJCP Act of B&H does not mention the right of judges to freedom of association, or the right to form professional associations. As cited above, the HJCP Act provides for the prohibition of judges' membership in associations of a discriminatory character, as well as their membership in political parties. Some of the laws regulating the organization and operation of courts also provide for this right. Article 41 (para.1) of the Courts Act of the BD stipulates that judges may form professional associations. Article 4.10 of the Code of Judicial Ethics (adopted by the HJCP B&H) states: "A judge can form or be a member of an association of judges, or other organizations that represent the interests of judges." Considering the importance of this right, it should be expressly stipulated by law.

Several professional associations of judges have been established in B&H: the Association of Judges of RepS, the Association of Judges in FB&H, the Association of Judges in B&H, the Association of Women Judges in B&H; the establishment of several associations of judges is partly a consequence of the complex state structure and the organization of the judiciary in B&H. The existence of several professional associations of judges in one country is not unusual; for example, they are present in France and Germany (Bočer, 2018: 16), as well as in Spain (Morn, Toro, 2011: 220) and Poland (Matthes, 2022).

According to Article 1 of the Statute of the Association of Judges of RepS, it is a professional organization gathering judges from the territory of RepS, for the purpose of exercising their common interests and promoting the legal profession and science. Article 7 of the Statute lists some of the Association objectives: establishing the rule of law; respecting legality and justice through different

activities; preserving and strengthening an independent judiciary; improving regulations on the organization and operation of the judiciary; developing and improving legal conscience, judicial ethics and legal culture; developing and improving the professional education and training of judges; developing and strengthening the professional ethics and responsibility of judges; advocating for the improvement of the financial status of judges, etc.

As there are no trade unions of judges in B&H, the last mentioned objective of professional associations of judges is particularly important. In some cases, the Association of Judges of RepS had an active role in protecting the judges' financial status. In 2014, the Association submitted a proposal to the Constitutional Court of RepS to review the constitutionality of certain provisions of the Act on Salaries and Remuneration of Judges and Prosecutors (RepS) which did not guarantee the protection of their acquired rights. In its Decision no. U-86/14¹¹, the Constitutional Court of RepS found that one of the challenged provisions were not in accordance with the RepS Constitution.

4. Conclusion

Judges, like all other citizens, enjoy the right to freedom of association. The right of judges to establish professional associations is a relevant element of this right, highly important for establishing and strengthening the rule of law. On the other hand, in order to protect the independence and impartiality of the judiciary, it is justified to impose certain restrictions on the right to freedom of association of judges; for example, the prohibition of party membership of judges or other forms of their political engagement should be considered justified.

Because of its importance, the right of judges to form professional associations should be expressly protected by law (and, if possible, by the constitution). For that reason, it would be necessary to make changes to the legislation in B&H and emphasize the importance and the role of the judges' associations. As there are no trade unions of judges, the role of the associations of judges in protecting/improving the working conditions and material status of judges is even more important. It is all the more significant that the associations of judges act not only post factum, after a certain rule has been adopted, but also as interlocutors of the responsible authorities when defining legal provisions related to the status of judges.

11 Decision of the Constitutional Court of Republika Srpska no.U-86/14 (Odluka br.U-86/14 Ustavnog suda Republike Srpske, 27.5.2015); <http://www.ustavnisud.org/Odluke.aspx?cat=13&subcat=39&tip=1&lang=cir&odluka=77&odldet=2296&str=1>

References

- Bado, A. (2013). "Fair" Selection of Judges in Modern Democracies. In Bado, A. (ed.), *Fair Trial and Judicial Independence: Hungarian Perspectives* (pp. 27-58). Cham, Heidelberg, New York, Dordrecht, London: Springer.
- Bočar, H.E. (2018). Sindikalno udruživanje sudija u Nemačkoj – ili: od monolitizma do pluralizma. U: *Iskustva strukovnih udruženja sudija u očuvanju nezavisnosti sudstva*. Beograd: Misija OEBS-a u Srbiji.
- Bonetto, G.M. (1981). Alexis de Tocqueville's concept of political parties. *American Studies* 22(2).
- Boyd, R. (2008). The Madisonian paradox of freedom of association. *Social Philosophy and Policy* 25(2).
- Brownlee, K. (2016). Freedom of Association. In Lippert-Rasmussen, K., Brownlee, K., Coady, D. (eds.), *A Companion to Applied Philosophy* (pp. 356-369). Chichester: John Wiley & Sons.
- CoE-Council of Europe (1994). *Freedom of Association: Proceedings of Seminar organised by the Secretariat General of the Council of Europe in collaboration with the Ministry of Justice of Iceland, Reykjavik, 26-28 August 1993*, Strasbourg: Council of Europe Press, 1994.
- Dijkstra, S. (2017). The Freedom of the Judge to Express his Personal Opinions and Convictions under the ECHR. *Utrecht Law Review* 13(1).
- Gilles, P. (1985). Germany: Judicial Independence and the Involvement of Judges in Party Politics and Trade Union Activities. In: Shetreet, S., Deschênes, J. (eds.), *Judicial Independence* (pp. 96-116). Dordrecht – Boston – Lancaster: Martinus Nijhoff Publishers.
- Golubović, D. (2013). Freedom of association in the case law of the European Court of Human Rights. *The International Journal of Human Rights* 17(7-8).
- Kateb, G. (1998). Value of Association. In: Gutmann, A. (ed.), *Freedom of Association* (pp. 35-63). Princeton-Chichester: Princeton University Press.
- Kauffman, B.W. (1982). Judicial Selection in Pennsylvania: A Proposal. *Villanova Law Review*, Vol 27, 1982.
- Kiener, R. (2012). Judicial independence in Switzerland. In: Seibert-Fohr, A. (ed.), *Judicial Independence in Transition* (pp. 403-446). Springer.
- Larkin, E.A. (2020). Judicial selection methods: Judicial independence and popular democracy. *Denver Law Review* 79(1).

- Matthes, C.Y. (2022). Judges as activists: how Polish judges mobilise to defend the rule of law. *East European Politics* Vol. 38(3).
- Mill, J.S. (2009). *On Liberty* (reprint, e-book). The Floating Press.
- Morn, F., Toro, M. (1990). The Legal Culture and Legal System in Post-Franco Spain. *International Journal of Comparative and Applied Criminal Justice* 14(1-2).
- Rawls, J. (2005). *Political Liberalism* (Expanded Edition). New York: Columbia University Press.
- Sakharuk, I. (2021). The Protection of the Worker's Right to Freedom of Association: the ECtHR Case-Law. *Access to Justice in Eastern Europe* 1(9).
- Samuels, A. (2005). Legal comment: Freemasonry. Is Freemasonry lawful in England? Can the Government or other public body or employer prevent or penalise membership of Freemasonry?, *Mountbatten Journal of Legal Studies* 9(1-2).
- Sanders, A. (2020). Muzzling Associations of Judges: The Duty of Judges to Declare Membership in an Association under Poland's so-called "Muzzle Law". *VerfBlog*, 2020/3/05. Available at: <https://verfassungsblog.de/muzzling-associations-of-judges/> (Accessed on 10 September, 2022).
- Shetreet, S., Turenne, S. (2013). *Judges on Trial: The Independence and Accountability of the English Judiciary*. Cambridge – New York: Cambridge University Press.
- Stephens, O.H., Scheb, J.M. (2007). *American Constitutional Law Volume II: Civil Rights and Liberties*. Belmont: Thomson Wadsworth.
- Schabas, W.A. (2015). *The European convention on human rights: a commentary*. Oxford: Oxford University Press.
- Sweepston, L. (1998). Human rights law and freedom of association: Development through ILO supervision. *International Labour Review* 137(2).
- Tocqueville, A. de (2015). *Democracy in America – Vol. 1* (reprint, e-book). Forgotten Books.
- Walzer, M. (1995). The Civil Society Argument. In: Mouffe, C. (ed.), *Dimensions of Radical Democracy* (pp. 89-107). London – New York: Verso.
- Walzer, M. (1998). On Involuntary Association. In: Gutmann, A. (ed.), *Freedom of Association* (pp. 35-63). Princeton-Chichester: Princeton University Press.
- Warren, M.E. (2001). *Democracy and Association*. Princeton and Oxford: Princeton University Press.

Windridge, O. (2015). A watershed moment for African human rights: *Mtikila & Others v Tanzania* at the African Court on Human and Peoples' Rights. *African Human Rights Law Journal* 15(2).

UN ODC (2007). *Commentary on the Bangalore Principles of Judicial Conduct*, United Nations Office on Drugs and Crime, 2007.

Legal sources

The UN Universal Declaration of Human Rights (1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

The European Convention on Human Rights (1950), https://www.ustavnisud.ba/uploads/documents/european-convention_1638455197.pdf

The UN International Covenant on Civil and Political Rights (1966), <https://www.ohchr.org/sites/default/files/ccpr.pdf>

The UN International Covenant on Economic, Social and Cultural Rights (1966), <https://www.ohchr.org/sites/default/files/cescr.pdf>

The IBA Minimum Standards of Judicial Independence (1982), International **Bar Association**, <https://www.ibanet.org/MediaHandler?id=bb019013-52b1-427c-ad25-a6409b49fe29>

The UN Basic Principles on the Independence of the Judiciary (1985), <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary>

The Judges' Charter in Europe (1997), European Association of Judges, <https://www.icj.org/wp-content/uploads/2014/10/Judges-charter-in-europe.pdf>

The CoE European Charter on the Statute for Judges (1998), Council of Europe, Strasbourg, <https://wcd.coe.int/ViewDoc.jsp?p=&id=1766485&direct=true>

The Universal Charter of the Judge (1999), International Association of Judges, <https://www.icj.org/wp-content/uploads/2014/03/IAJ-Universal-Charter-of-the-Judge-instruments-1989-eng.pdf>

The Bangalore Principles of Judicial Conduct (2002), https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

The Magna Carta of Judges (2010), Consultative Council of European Judges/CCJE, Strasbourg, 17 Nov. 2010, <https://rm.coe.int/16807482c6>

The Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe: Judges: independence, efficiency and responsibilities (2010), Council of Europe, <https://rm.coe.int/16807096c1>

The Consultative Council of European Judges/CCJE (2020): Opinion no. 23 of the Consultative Council of European Judges on the role of judicial associations in supporting the judicial independence, <https://www.coe.int/en/web/ccje/opinion-no.-23-on-the-role-of-judicial-associations-2020->

The Constitution of Bosnia and Herzegovina, English version available at https://www.ustavnisud.ba/uploads/documents/constitution-of-bih_1625734692.pdf

The Constitution of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 1/94, 13/97, 16/02, 22/02, 52/02, 60/02, 18/03, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05, 88/08; <https://www.refworld.org/docid/3ae6b56e4.html>

The Constitution of Republika Srpska, *Official Gazette of Republika Srpska*, no. 6/92, 8/92, 15/92, 19/92, 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02, 69/02, 31/03, 98/03, 115/05, 117/05, 48/11; https://legislationline.org/sites/default/files/documents/6a/BiH_Constitution_Republic_Srpska_am2011_en.pdf

The Constitution of the Italian Republic (1948), Senato della Repubblica, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

The Constitution of the Republic of North Macedonia, https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia

The Constitution of the Slovak Republic (1992), <https://www.prezident.sk/upload-files/46422.pdf>

The Judiciary System Act of the Republic of Bulgaria, *OG No. 64/2007... 93/2011*, https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2012-August-27-29/Responses_NVs_2012/20120419_Bulgaria_English_8.pdf

The Act on Associations and Foundations of Bosnia and Herzegovina (*Zakon o udruženjima i fondacijama Bosne i Hercegovine*), *Official Gazette of Bosnia and Herzegovina*, no. 32/01, 42/03, 63/08, and 76/11; https://www.icnl.org/research/library/bosnia-and-herzegovina_bih/

The Act on Associations and Foundations of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 45/02; <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/99948/119616/F768485582/BIH99948%20Eng.pdf>

The Act on Associations and Foundations of Republika Srpska (Zakon o udruženjima i fondacijama Republike Srpske), *Official Gazette of Republika Srpska*, no. 52/01 and 42/05; <https://www.refworld.org/pdfid/4d2f2d692.pdf>

The Act on Associations and Foundations of the Brčko District, *Sl. glasnik Brčko distrikta BiH*, br. 41/20; https://www.icnl.org/research/library/bosnia-and-herzegovina_brcko/

The Courts Act of the Brčko District (Zakon o sudovima Brčko distrikta, *Sl.glasnik BD BiH*, br.12/20; <https://skupstinabd.ba/3-zakon/ba/Zakon%20o%20sudovima%20Brc--ko%20Distrikta%20BiH/05B18-20%20Zakon%20o%20sudovima%20BD%20BiH%20-%20prec--is--c-eni%20tekst.pdf>

The Act on Courts of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, no. 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20, 21/22, and 60/22; https://rai-see.org/php_sets/uploads/2015/08/COURTS-ACT_2010.pdf

The Act on the High Judicial and Prosecutorial Council B&H, *Official Gazette of Bosnia and Herzegovina*, no. 25/2004, 93/2005, and 48/2007; <https://archive.rai-see.org/wp-content/uploads/2015/08/LAW-ON-HIGH-JUDICIAL-AND-PROSECUTORIAL-COUNCIL-OF-BH.pdf>

The Code of Judicial Ethics of Bosnia and Herzegovina (Kodeks sudijske etike, *Sl. glasnik BiH*, br. 13/2006, 24/2015, i 94/2018; <https://portalfo1.pravosudje.ba/vstvf0-api/vijest/download/86395>

The Statute of the Association of Judges of Republika Srpska (Statut Udruženja sudija Rep. Srpske), <https://udruzenjesudijars.org/images/stories/pravni-akti/status/statut-i-preciscen-tekst-111115.pdf>

The Statute of the Brcko District of Bosnia and Herzegovina (Statut Brčko distrikta, *Sl. glasnik Brčko distrikta*, br.17/08, 39/09, 36/10; <https://skupstinabd.ba/images/dokumenti/hr/statut-brcko-distrikta.pdf>

Case law

Maestri v. Italy, App. 39748/98, European Court of Human Rights [2004]

N.F. v. Italy, App. 37119/97, European Court of Human Rights [2001]

Ouranio Toxo and others v. Greece, App. 74989/01, ECtHR [2005]

Salaman v. The United Kingdom, App.43505/98, European Court of Human Rights [2000]

Sorensen and Rasmussen v. Denmark, Apps. 52562/99 and 52620/99, ECtHR [2006]

Odluka br. U-86/14 Ustavnog suda Republike Srpske (Decision of the Constitutional Court of RepS),

<http://www.ustavisud.org/Odluke.aspx?cat=13&subcat=39&tip=1&lang=cir&odluka=777&odldet=2296&str=1>

Online sources

BBC News (2000). Call to uncover freemason judges, BBC News, 12 October 2000. Available at: http://news.bbc.co.uk/2/hi/uk_news/scotland/969317.stm (accessed on 10 September 2022).